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NIGHTMARE AND DREAM: ANTilynching IN CONGRESS, 1917-1922

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NIGHTMARE AND DREAM:
ANTILYNCHING IN CONGRESS, 1917-1922

by

CLAUDINE L. FERRELL

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE DOCTOR OF PHILOSOPHY

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Abstract

NIGHTMARE AND DREAM:
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CLAUDINE L. FERRELL

During and immediately following World War I, the National Association for the Advancement of Colored People broadened its antilynching program to include a demand for a federal antilynching statute. Seeking the organization's support, several congressmen--most notably Republican Leonidas C. Dyer of Missouri--also sought to push through Congress an antilynching bill based on the Fourteenth Amendment's equal protection clause. However, amidst concern that such a law might have a harmful, long-term impact on the racial order and on a federal system based on shared sovereignty and state rights, Congress and the NAACP initially concentrated on a war-powers bill. The end of the war and the continuation of lynching, however, soon caused the NAACP and its advisers, including NAACP president Moorfield Storey, former attorney general George Wickersham, and reformer Albert Pillsbury, to seek a broader based bill that did not conflict with the Fourteenth Amendment's operational meaning as defined by the Supreme Court. By 1921, when Dyer introduced his third
antilynching bill, the Association also sought in Congress sufficient support to overcome racist and state rights theories that supported southern lynching of black "offenders" and northern apathy toward the South's "Negro problem."

In its congressional battle, the NAACP used constitutional, humanitarian, and political arguments. In response, the House Judiciary Committee favorably reported Dyer's H. R. 13 in October 1921 and the full House passed it on January 26, 1922. After failing to convince Republican William E. Borah of his duty to champion H. R. 13's constitutionality, the NAACP succeeded in averting an unfavorable vote by the Senate Judiciary Committee in the summer of 1922. And although unable to push the Senate to a vote prior to the 1922 elections, the organization attempted during a special two-week session in late November to persuade Republican Senators to fulfill their party's antilynching "pledge." The effort failed. Without access to the political weapons it used before the elections, the NAACP impotently watched as a determined Southern Democratic filibuster ended in the Republicans' official abandonment of H. R. 13 on December 4, 1922.
INTRODUCTION

Future generations may learn with amazement that half a century after the freeing of the negroes there were enough illegal executions of colored men and women to warrant the tabulation of statistics. These future generations may have to exercise the historical imagination to realize that we felt genuinely encouraged when we read that lynchings of both white and colored persons had, in 1916 as compared to 1915, dropped from 67 to 54, those of negroes from 54 to 50. They may wonder at the dispassionate way the head of Tuskegee classified murders by States, as if he were enumerating nothing more than the number of picture galleries . . . .

If, as the Nation predicted in 1917, "future generations" now look with amazement at lynching statistics, seventy-five years of lynchings, not two, are the cause of their bewilderment and surprise. From the 1880s through the 1950s, the years for which Tuskegee Institute and other compilers kept official records, lynch mobs killed almost five thousand people, the greater percentage of them Negro. A "historical imagination" becomes necessary not only to digest the numbers but to understand why the national and state governments seemingly did little to end lynching in the United States.

In 1961 Martin Luther King, Jr., asserted that "the law may not be able to make a man love me, but it can keep him from lynching me." At the time he spoke, "the law"--in particular, the national government through the Justice Department--was trying to prevent racial violence as it sought to punish wrong-doers and discourage others from following the lyncher's example. Forty years earlier, "the law" did not even try to make men
stop lynching. On the state level, "the law" claimed the power to end lynching, but it made virtually no effort to exercise that power. On the national level, "the law" made no effort because it claimed no power.

As a result, the numbers of lynchings steadily climbed. They reached one thousand in 1888, two thousand by 1895, three thousand by 1904. In the first fifty years after the Civil War and emancipation, the South not only found, however slowly, a way to deal with its large population of free and "equal" blacks, but it won the permission of an apathetic, sometimes sympathetic North to do as it pleased. The South framed its defense of segregation, disfranchisement, economic repression, and lynching on federalism; for the Negro, the country refined and redefined constitutional protections and reasserted the benefits of state-rights federalism. As black spokesman Kelly Miller lamented to the idealist, Woodrow Wilson, who unquestioningly accepted that reworking:

The black man asks for justice and is given the theory of government. He asks for protection and is confronted with a scheme of governmental checks and balances.

In 1917 and 1918 while three thousand black soldiers served their country, a tenth of them in Europe, lynch mobs killed over a hundred Negro men, women, and children. The contradiction between American idealism and the daily reality of lynching created in many Americans a growing determination to find a law that would actually end lynching. The National Association for the Advancement of Colored People, its friends
and allies, and a handful of northern congressmen rejected the complacency with which their fellow Americans viewed the lynching evil that racism and federalism allowed to flourish. Adjusting their earlier antilynching goals in the face of recalcitrant states and localities and rejecting the unspoken but strongly held belief that justice for the Negro and constitutional federalism were mutually exclusive, the antilynchers began a thrity-year crusade in Congress. Although the crusaders did not achieve their primary goal of a federal antilynching law, the complacency slowly disappeared, as did the crime that the antilynchers sought congressional aid in eliminating. In 1952 the United States enjoyed its first lynching-free year in seventy-five years of record keeping. By the 1950s lynching was no longer a national issue; doctrines of racism and federalism no longer barred the national government from doing what the states had long refused to do, try to protect the black man from the white lynchers.

What credit the early congressional antilynching crusaders deserve for the end of complacency and the steady reduction in lynching is one of Clio's mysteries, but one that can be explored in more depth and breadth than it has been to this point. Historians have studied the early antilynchers' organizations, lobbying efforts, and publicity campaigns. But scholars have not given equal time to a study of the symbiotic relationship between racism and federalism as it affected the antilynching effort in Congress. The lynching figures, which showed that almost 73 percent of all lynching victims from
1882 to 1952 were Negro,⁶ should make it impossible to forget or ignore the racial element. So too should the primary and critical role played by the NAACP in the antilynching campaign on both the state and federal level. Robert L. Zangrando settled all doubts about the size of that role with his 1980 study of the Association's forty-year crusade.⁷ However, the modern federal system, in which the national government fails to touch or control few if any aspects of American life, makes consideration of the second symbiont easier to misjudge, ignore, or dismiss.

The 1920s were created by the Civil War, emancipation, the industrial revolution, and urbanization, among other nineteenth-century factors, not by the Depression, New Deal, cold war, and civil rights movement. Ignoring that difference means ignoring the effects of and the questions raised by the sudden freeing of an "inferior" multitude, the apparent expansion of national powers during the Civil War and Reconstruction, and a changing economic and social order. If states would not stop lynching because their citizens did not demand a stop, by what safe constitutional theory—one that did not have dangerous implications for the local rule that federalism and state rights protected—could the national government assume the state's traditional responsibility over law enforcement? Did it matter if the citizens who needed protection were black?

Asking questions about the antilynching effort in Congress from 1917 through 1922 provides a valuable insight into the early decades of the twentieth century as well as into the
lengthy crusade that enjoyed little success in achieving specific remedies. For example, why did the antilynchers propose the jurisdictions and penalties that their bills included? How did the Great War's contradictions and management affect the legislative effort? Why did congressmen raise some constitutional issues while totally ignoring others? What shadow did the Supreme Court, which potentially held the fate of a federal antilynching law in its hands, cast on the congressional struggle? The answers to these questions, which determined not only success and failure in 1922 but also how the antilynchers sought victory in the future, all lay in conceptions of the federal system and relationships within that system, between state and national government, between government and citizen, and among citizens.

Although the relationship between white and black citizens created lynching as twentieth-century Americans knew it, other relationships permitted and even protected mob violence so that congressmen could refer in their arguments to what amounted to an "inalienable right" to lynch. With racism, these relationships redefined "equal protection" and "due process of the law." They indicate that Americans saw a conflict, perhaps inevitable and unsolvable, between biracial America and egalitarian America. They help explain why emancipation did not bring equality and there was, according to reformer Archibald Grimké, a "national contradiction between profession and practice, promise and performance."

In December 1921, only days before the House of Repre-
sentatives turned its attention to the Dyer antilynching bill, the Greensboro (N. C.) Daily News explained that the measure was

... another invasion of State's rights by the Federal Government; but the Federal Government is justified in this instance, because none of the States has made an honest effort to prevent lynchings by making examples of those who indulge in them.10

The Nashville (Tenn.) Banner agreed only that the bill posed a threat.

... this anti-lynching law would overthrow a very important prerogative reserved for the states, and would be a dangerous encroachment on the right of local self-government—the principle of federation, the groundwork on which the Union is built.11

The Dallas Morning News had already taken a stand that necessity outweighed the danger.

If we must choose between State rights and mob violence as against Federal action and order, we can not as patriotic citizens hesitate for an instant... As long as State law is competent and effective, then let us have it. But when Federal law is the logical and only resort, then we must call on that...12

As the representatives began their discussion of the bill in early 1922, the Reverend C. O. Booth of Chattanooga warned that

State Rights are good as far [as] they work Justice, Mercy and the Fear of God. Where these are ignored, State Rights is a failure and sin.13

Two months later, the bill successfully through the House and languishing in a Senate subcommittee, Governor Robert D. Carey of Wyoming cautioned in the other direction.

If the Federal Government has power to legislate to prevent lynchings, it probably has power to le-
gistrate on any matter in which Congress does not happen to be in accord with the State Governments. 14

When 1922 ended with the death of the antilynching bill, the New York Telegraph explained why.

Congress is composed largely of lawyers, and lawyers found it hard to enthuse over a measure the tendency of which was to strip a State of the sole power of maintaining order--of conserving the peace. . . . [T]he time has not yet arrived when interior communities will submit to interference with the police laws. 15

On the floor of Congress, legislators who cited these and similar views or who provided their own quotable theories dominated the debate on the antilynching proposal. Democrat Clarence Lea of Santa Rosa, California, said that the unconstitutional measure would make the federal government "a colossus with a club over the State," asserting "the superior virtue of a superman" and dictating "standards of virtue." Republican Edward C. Little of Kansas City countered that the constitutional measure would deprive the states only of "the alleged power . . . of allowing their citizens to burn people occasionally without any interference by the Federal Government." 16

With varying degrees of emotionalism and objectivity, the participants in the federal antilynching struggle from 1917 through 1922 discussed questions of constitutional federalism. Their verdicts grew out of personal experiences and interpretations of the Bill of Rights and the Tenth and Fourteenth Amendments, and their conclusions reflected both acceptance and rejection of a half century of judicial law-
making and executive and legislative policymaking that neither a changing nation nor the NAACP could alter in a brief five-year period. The evidence provided by courts evoked the contradictory responses. Case law, law books, treatises, texts, and the law as citizens perceived it were seldom without a distinguishing qualifier, dissenting opinion, and nonbinding dictum. In addition to these variants, there were gaps: no definitions given by the bench when the nation and its bar demanded none, no explanations provided when no questions had been asked, no solutions to problems that had not existed or had not yet been perceived. These variants and gaps meant that regardless of the formalist declarations of judicial infallibility and the assertions by contented Court watchers that the judiciary would never reverse a half century of interpretations there were flaws in the sculptured stone that encouraged antilynchers to refuse to admit defeat.

As noted above, historians who have studied the antilynching movement and shifting federal civil rights policies have largely ignored the antilynching-federalism dilemma with which Congress struggled during the early twentieth century. Zangrando briefly mentions the complex constitutional questions, but they are subsidiary to his study of the NAACP's lobbying and publicity efforts. William B. Hixson devotes an excellent chapter in his study of reformer, attorney, and NAACP president Moorfield Storey to the constitutional issues. But his focus is Storey, not the overall, changing but changeless constitutional federalism debate. NAACP leaders James Weldon
Johnson and Walter White each note in their autobiographies only the basic ingredients in the dilemma of federalism that the antilynching legislators confronted. They concentrate on the people they knew and with whom they worked and on the steps they took in building a public demand for antilynching action. In his biography of Johnson, Eugene Levy threads the problem of federalism throughout his chapters on the antilynching phase of Johnson's life, but his primary subject is the man, so the thread is a thin one. B. Joyce Ross's biography of Joel Spingarn, sponsor of an early federal bill and another NAACP official, virtually ignores both constitutional concerns and Spingarn's involvement with the legislative struggle.17

The first volume of Charles F. Kellogg's history of the NAACP reaches only 1920 and scarcely mentions legal or constitutional issues when it covers the organization's earliest antilynching interests. Donald L. Grant's study of the antilynching movement to the 1930s is valuable as an overview of organizational efforts only. Mary Frances Berry's look at constitutional racism uses illuminating government records to provide at best a superficial chronology of events and ideas that shaped the federal government's civil rights policy. On the other hand, Jesse Reeder's 1952 dissertation, written when interest in a federal antilynching bill was still strong but waning, provides the deepest and broadest constitutional study; however, surveying the entire congressional antilynching history, Reeder reaches conclusions on law rather rather
than history.¹⁸

Valuable and instructive primary studies on Congress's power to attack lynching appeared in law journals and other publications as early as the late 1800s and frequently during the 1930s and 1940s.¹⁹ By the latter decade secondary studies that related to that power appeared in response to the Justice Department's increasing use of existing civil rights statutes and the federal courts' increasing acceptance of that use. Although lynching plays a major role in many of these works, the authors do not emphasize, as a general rule, how early antilynchers dealt with governmental power allocation prior to the national government's decision to use Reconstruction era laws against both officials and private individuals who physically attacked blacks.²⁰

The complex questions of federalism and racism that these studies fail to analyze in regard to lynching were often unanswerable in 1917-1922, but some people answered them nonetheless.²¹ One answer came from those who forebodingly foresaw a future without states if a federal antilynching bill should become law; another came from those who envisioned a future different from their present only in that it lacked lynching. Both prophecies--nightmare and dream--had a single source, federal antilynching power. And together both predictions, by their very concern with this power, revealed how Americans felt about their constitutional federal system and the relationships it created between government and citizen.
Because the roots of the congressional antilynching campaign of the early 1900s were deep, this study begins with a three chapter summary and analysis of factors that influenced both congressmen and lobbyists: (1) the Supreme Court's handling of the complicated issues raised by the ratification of the Fourteenth Amendment, the attempt by blacks to benefit from the amendment's "guarantees," and, in general, the federal judiciary's defense of the federal system; (2) the interpretation of that federal system and of its judicial defense that legal scholars provided the nation's lawmakers; and (3) the national racism that complemented the devotion to federalism and, in doing so, prevented the national government from attacking the violence of southern racism. Chapter Four moves from these general topics to the specifics of the congressional proposals of 1918 and 1920, proposals that blended to form the Dyer antilynching bill of 1921-1922. The final four chapters follow the antilynchers' struggle to refine the Dyer bill and their arguments, to win the approval of the House and Senate Judiciary Committees, and to overcome the opposition and apathy in Congress.
NOTES

1 Nation, January 11, 1917, 35.


3 Lynching statistics are available in various sources. For a brief list that provides statistics on states and race, see Harry A. Ploski and Ernest Kaiser, comps. and eds., The Negro Almanac (New York: Bellwether Company, 1971), 267-69.


5 The decline was steady. From 1920 to 1930, there were 336 lynchings; 1931-1940, 114; 1941-1950, 30; 1951-1962, 7. Ploski and Kaiser, comps. and eds., Negro Almanac, 268.

6 Of 4736 victims, 1294 were white and 3442 were black. During the 1880s, white victims outnumbered black, 669 to 534; however, 1885 was the last year blacks were less frequently lynched. The first year a white was not lynched was 1924, a year in which sixteen Negroes were lynched. Ibid.


8 Representative Anthony Griffin on H. R. 13, Congres- sional Record, 67 Cong., 2 Sess., 1717 (January 25, 1922). See similar comment on southern views made by Representative Edward C. Little, ibid., 1732-33 (January 25).


11. Nashville (Tenn.) Banner, December 31, 1921, in Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Group I, Series C, Box 248; hereafter cited as NAACP Records.


14. Carey to James Weldon Johnson, March 17, 1822, NAACP Records, Group I, Series C, Box 244.


21Walter White indicates that at least during the 1930s the NAACP wrestled with the dilemma of federalism and lynching. Although the organization increasingly believed that remedies for disfranchisement, segregation, and lynching would have to come from Congress, "many of us did not want to see centralization of too much power in Washington nor in the hands of any man or group." White explains that the existence of a "Southern oligarchy" convinced the NAACP that it had "to choose the lesser of two evils--to work for federal action against lynching, disfranchisement, ... [etc.], and thereby concentrate more authority in Washington, or to let such dangerous practices continue an dspread to the rest of the nation." White, A Man Called White, 120.
CHAPTER ONE

"THROWN INTO THE BACKGROUND":

CONSTITUTIONAL DEFINITIONS, 1865-1920

'What the?' the European may ask. 'Is the National government without power and the duty of correcting the social and political evils which it may find to exist in a particular State, and which a vast majority of the nation may condemn. Suppose a widespread brigandage to exist in one of the States, endangering life and property. . . . Suppose the police to be in league with the assassins. Suppose the most mischievous laws to be enacted, laws, for instance, which . . . leave homicide unpunished . . . . Is the nation obliged to stand by with folded arms while it sees a meritorious minority oppressed, the prosperity of the State ruined, a pernicious example set to the States? Is it to be debatted from using its supreme authority to rectify these mischiefs?'

The answer is, Yes. Unless the legislation or administration of such a State transgresses some provision of the Federal Constitution . . . ., the National government not only ought not to interfere but cannot interfere. The State must go its own way, with whatever injury to private rights and common interests its folly or perversity may cause. 1

So English attorney, lecturer, and government official James Bryce in 1889 informed his American Commonwealth readers. What he described for them was Congress's early-twentieth-century view of its authority to act against state and private violators of the right to life. This view was linked to decades of conservative Supreme Court definitions of "state," "deny," and "appropriate legislation," as well as to the congressmen's own ideas about race and politics. Congress's perception meant that an antilynching bill based on the Fourteenth Amendment faced virtually inevitable defeat in Congress
and nullification by the Supreme Court if it somehow survived legislative consideration.²

The roots of this "federalism" roadblock were in colonial assemblies, British rule, and constitutional improvisations that upheld local rule and assigned a nonintrusive role to the national government. Its significance for a congressman considering a 1921 antilynching bill dated from the 1873 Slaughterhouse Cases, cases that dealt not with blacks, mob violence, and federal statutes, but with white butchers, monopolies, and state laws. Slaughterhouse also dealt with the Fourteenth Amendment, and thus it began the process of creating the opinion generally held by legal authorities of the early 1900s that the Supreme Court would hold that federal antilynching legislation based on the Fourteenth Amendment was unconstitutional.³

The evolution of such a policy did not begin immediately after the amendment's addition to the Constitution in 1868, as Slaughterhouse's 1873 date indicates. For several years Congress's implementation of "appropriate legislation" to enforce the three Reconstruction amendments resulted in federal protection of black civil and political rights, protection that the courts accepted. That legislative implementation, its early successful enforcement, and its later judicial negation are critical in understanding the nation's dedication in the 1920s to legal discrimination and constitutional inequality. They also help explain what Congress in those years saw as theories upon which it could not base federal authority over
lynchers.

The enforcement sections of the three Reconstruction amendments added powers to the national government for the first time since 1789 and thus altered the federal system. Congress indicated how much alteration when it enacted the Enforcement Acts of 1870 and 1871 to assure compliance with the Fourteenth and Fifteenth Amendments. In attempting to establish and protect the fundamental rights of a minority by wiping out all legal supports for racial distinctions, congressmen sought to reach both positive state action and state neglect and private lawlessness. In doing so Congress gave statutory form to the theory that state failure to protect constitutionally guaranteed rights was equivalent to state action that required congressional interference.\textsuperscript{4} Intervention could then take the form of prohibitions against acts committed by private individuals. The statutes were the result of two assumptions: Congress could act against individuals to protect citizens when states could or would not, and fundamental rights and guarantees such as those in the Declaration of Independence and Bill of Rights were under the national government's protection. Their statutory embodiment was necessary to assure that freedmen became free men and did not exist in a twilight zone between slavery and freedom, neither citizen nor slave. The federal government, particularly the federal judiciary, would guard him. There would be no massive congressional intrusion into intrastate affairs. If state courts could not provide the
guarantee of equal protection, federal ones could, thereby assuring blacks not the law's special favors but the law's equal protection.\textsuperscript{5}

The February, 1871, enforcement act concentrated exclusively on suffrage protections.\textsuperscript{6} The measures that preceded and followed it were of a broader nature. The May 31, 1870, act\textsuperscript{7} regulated congressional elections and provided the federal machinery for protecting suffrage threatened or denied because of race, but its reach went further. While reenacting the 1866 civil rights act under the authority of the Fourteenth Amendment, the 1870 law also provided specifically that all persons had the right to contract, sue, testify, enjoy the protection of the law, and bear the same punishments, taxes, and duties that white citizens did. It proclaimed that persons could not "under color of any law, statute, ordinance, regulation, or custom" deny any inhabitant these rights and duties because of their alienage, race, or color. In an attempt to suppress klanism, the law brought under federal jurisdiction conspiracies of two or more persons who went "in disguise upon the public highway, or upon the premises of another" in order to deprive citizens of "any right or privilege" secured by the Constitution or federal law.

Although these provisions against state and private denial of constitutional rights made the First Enforcement Act a general civil rights statute, what followed on April 20, 1871, demonstrated that Congress's interests went further.\textsuperscript{8} The Ku Klux or Force Act provided both civil and criminal
remedies for violations of civil rights. It provided civil liability for those who "under color of any law" deprived persons of their rights under the Constitution or federal statute. Section Two prohibited conspiracies of two or more persons to overthrow the government or interfere with the execution of the law. It also prohibited going in disguise "upon the public highway or upon the premises of another" to deny persons the equal protection of the law, to prevent the state from providing that equality, or to deny citizens their suffrage rights. Such private action was subject to both criminal and civil action in federal district or circuit court. Section Three authorized the president to employ the militia, army, and navy against "insurrection, domestic violence, unlawful combinations, or conspiracies" that denied citizens their federal rights and privileges by preventing the enforcement of state and national laws. He could also use force when the states would or could not control private wrongdoers who denied their victims the equal protection of state laws. Section Four defined such combinations as rebellion against the United States when they were powerful enough to defy or threaten "the constituted authorities" or when they had the support of state authorities. To counter them the president could suspend the writ of habeas of corpus in affected areas. Finally, the 1871 act excluded from jury service in cases arising under the act all persons who supported in any way such combinations, and it provided civil liability for persons who knew of planned violence and did not do all possible to stop it.⁹
This "drastic" statute reflected the theory that the Fourteenth Amendment imposed on the states an affirmative duty to provide equal protection and that state failure to prevent private wrongs against civil rights was a constitutional wrong. In theory and in practice the state permitting the wrong through its failure to act was in violation of the Constitution, which had created congressional authority over the individual. Such state failure seemed unquestionable in the KKK-dominated southeastern states, the immediate inspiration for and the target of the Force Act. How the act would apply in states without such organized, institutionalized private campaigns of violence against blacks and their white allies was a question for future policy makers.¹⁰

Just as enforcement by the Freedman's Bureau and the federal courts had followed the 1866 Civil Rights Act, in the early 1870s the Enforcement Acts were followed by suspensions of habeas corpus, the restoration of order by federal troops in the Carolinas, prosecutions by the new Department of Justice, and the federal judiciary's acceptance of new jurisdiction. Early court challenges in both periods of federal activity ended with general judicial acceptance of federal authority under the new amendments, although there were no Supreme Court rulings on the 1866 provision and some state courts had ruled against its constitutionality. As in In re Turner, United States v. Rhodes, and state court decisions that supported congressional views of the Thirteenth Amendment, lower federal courts prior to 1873 upheld Congress's statutory im-
plementation of its power under the Fourteenth Amendment. Federal circuit courts in Alabama, Ohio, and Delaware supported the national legislature's view that "appropriate legislation" included power to deal with individuals, either because states could deny equal protection through nonaction or because the amendment's state interference with civil rights could come from any source. Judge William Woods of the Fifth Circuit Court explained in 1871 that under the Fourteenth Amendment Congress could act against "unfriendly or insufficient state legislation" since the amendment prohibits "not only . . . the making or enforcing of laws which shall abridge the privileges of citizens, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws . . . [which] includes the omission to protect, as well as the omission to pass laws for protection." In other words, the Fourteenth Amendment and its enforcement acts prohibited state nonaction as well as positive state action. Two years later from the Third Circuit Court bench, Justice William Strong noted that it was an "exploded heresy that the national government cannot reach all individuals in the states." He had "no doubt that Congress may make the nonperformance of duties [imposed by the state and affecting constitutionally protected rights] an offense against the United States . . . ." 

The same year, 1873, Fourteenth Amendment questions finally reached the Supreme Court. The Slaughterhouse Cases offered the Court a chance to vindicate traditional dual feder-
alism, and it wasted little time in taking advantage of its opportunity. Handling both Thirteenth and Fourteenth Amend-
ment questions, the five-man majority looked at the obvious intent of the amendments--"freedom of the slave race, the se-
curity and firm establishment of that freedom, and the protec-
tion of the newly-made freeman and citizen from . . . oppression . . ."--and found that the new articles had not wrecked the federal system by taking from the states their power to regulate internal police matters. Specifically, Louisiana had not unconstitutionally denied the complaining butchers of their "property"--their right to an occupation--by granting a monopoly to the Crescent City Stock Landing and Slaughter-House Company. The licensing decision was a legitimate exercise of state police power behind which the Court would not look and against which the Fourteenth's prohibitions did not apply. In addition, the Thirteenth Amendment was inapplicable; it was a "grand yet simple declaration of personal freedom" which said nothing about "servitude, which may have been attached to property . . . ."14

Most important for those concerned with the applicabili-
ty and coverage of the Fourteenth Amendment was the majority's treatment of the citizenship and the privileges and immunities clauses of Section One. The appellants claimed that the state had denied them a privilege and immunity of national citizen-
ship, their "right to labor . . . and to the product of one's faculties . . . ." The majority disagreed. Rejecting the plaintiff's view of the Fourteenth's restrictions on state
police power, the Justices defined "privileges and immunities of citizens of the United States" as a limited few. Justice Samuel Miller declared that the "characteristics or circumstances" of national and state citizenship were different and distinct and that the privileges and immunities clause covered only those of national citizenship. "Fundamental" rights belonging to all citizens of free governments, including "nearly every civil right for the establishment and protection of which organized government is institute," belonged to state citizens. Congress had not intended the Fourteenth Amendment to "fetter and degrade the State government by subjecting them to the control of Congress, in the exercise of powers theretofore universally conceded to them of the most ordinary and fundamental character." The states retained their traditional power to define and protect these rights. The amendment had not "radically [changed] the whole theory of the relations of the State and Federal government to each other and of both of these governments to the people . . . ."

The Slaughterhouse Court recognized a primacy of state citizenship and the significant role of state police power in America. It also eliminated the privileges and immunities clause as a potential support for blacks, even while the majority said Negroes were intended to be the amendment's primary beneficiaries. From 1873 on it would be impossible, if it had ever been Congress's intent to make it so, merely to list federal immunities—to enumerate the intricacies and nuances of life, liberty, and property—and to deny the states
constitutional authority to deny them to blacks. Significantly for the antilynching congressmen of the 1920s, the rights that states could define and defend were judicially described as being notably broader and of greater importance than federally protected rights. This definition meant federal civil rights statutes based on the Fourteenth Amendment had to be based on either state or private denial of one of the few rights of national citizenship or on state denial of equal protection or due process rights. The versatility and usefulness of each possibility depended on Court definitions. *Slaughterhouse* left much without definition. Answers came during the two decades following Miller's 1873 decision. Their restrictive, conservative, and sometimes inconsistent nature provided a strong defense for federalism. The answers also meant weak instruments for black plaintiffs and loopholes of everchanging dimensions to which state and federal legislators had to adjust.

As national apathy toward Reconstruction's racial goals grew during the 1870s, the extent to which the Fourteenth Amendment prohibited the actions of private individuals became one of the most important concerns of the Court. The federal statutes still carried the statutory manifestations of the post-Civil War Republicans' concern for black civil rights. Although, as noted above, the federal courts initially backed the laws' vigorous enforcement against discriminatory and violent actions of individuals, the Supreme Court soon found problems in the Reconstruction statutes' application of national
power to the actions of private individuals. A nation with little interest in the Negro could find in direct congressional authority over individuals on behalf of the Negro the ultimate threat to federalism. By the mid-1880s the Court had dealt that threat a near fatal blow. The Enforcement Acts became anachronistic period pieces, "out of joint with the times," "curiosities in our political history." ¹⁷

Critical in this regard were United States v. Cruikshank, United States v. Harris, and the Civil Rights Cases. ¹⁸ The Court held that the Fourteenth Amendment did not in general cover discriminatory acts of individuals unless the acts were positively supported or sanctioned by the state. Without the tie to the state, individual violation of rights not federally or constitutionally created was a state wrong punishable only by the state. In Harris, for example, the Supreme Court acknowledged that Congress had the power to act against a state denial committed by private individuals. The Justices rejected, however, claims that such authority existed regardless of "how well the State may have performed its duty." A federal law could not change the fact that it was only a concern of Tennessee that twenty of its citizens took four blacks from the custody of a state officer, murdered one and beat the other three. Such violence was not a concern of the national government despite an indictment's charge that the mob had prevented a deputy sheriff from protecting the right of Negroes to "due process of equal protection of the laws." Private violation of state law could lead
only to state punishments. The fatal flaw of any act would be its being "directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers . . . ."

The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges and immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State as enacted by the legislative and construed by its judicial and administered by its executive departments recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress. 19

The Fourteenth Amendment prohibited denials that were positive, and Congress could act against them whether they took the form of unequal laws or unequal administration by a state's agents. Wrongs committed by private persons were not constitutional wrongs. The Court indicated that federal prohibitions against them were not an "appropriate" method of enforcing the amendment's prohibitions against the states.

These requirements, however, did not explain what degree of state failure or state negligence would be necessary to permit federal action against private discrimination. In the years after the initial court acceptance of the Enforcement Acts' reach to individual denial, the federal judiciary moved steadily toward an explanation. The Supreme Court indicated that there had to be clear state intent to deny rights through its action and the actions of its citizens. An obvious utili-
zation of this theory came in 1909 when Congress revised the federal statutes. The denial "under color" of law which Section 5508 prohibited had to be done "willfully"; official denial of the rights of any person had to be deliberate, not inadvertent. 20

Separating and distinguishing denial by the state, denial by the state through its agents, and private denial not sanctioned by the state was a complex exercise which would have taxed the wisdom of Solomon and which did tax the sincerity of the nation's pledge to equality. In his circuit court opinion in the Cruikshank case, Justice Joseph Bradley looked at part of the problem and explained the need for a middle ground solution. Without it, the nation would be

. . . driven to one of two extremes--either that congress can never interfere where the state laws are unobjectionable; however remiss the state authorities may be in executing them, and however much a proscribed race may be oppressed; or that congress may pass an entire body of municipal law for the protection of person and property within the states, to operate concurrently with the state laws, for the protection and benefit of a particular class of the community. 21

Such a compromise policy would have supported well-framed, precise federal statutes based on a theory of state denial through neglect or failure. 22 The Enforcement Acts of 1870 and 1871 had been attempts to provide that, but after initial success their history was marked by failure. National attitudes and their reflection in the courts contributed to that lack of success. So did legislators who naively presumed that the nation would accept without question or fear
the statutes' inherent limitations and noble goals or who were unable to deal with the fine but hazy line between individual acts and discrimination the states permitted. Thinned out and scattered throughout the statute books by various statutory revisions during the last quarter of the nineteenth century and the early twentieth century—but only after attempts to repeal them en masse failed—the protections that remained went largely unenforced by the Justice Department. When federal attorneys did take action under them, it was primarily to handle northern election frauds, even though the statute revisers of 1873-1878 and 1894 omitted most of the sections specifically designed as suffrage protections. The remnants gathering dust likely appeared to potential civil rights advocates as emasculated or unusable uncertainties which had value only when they provided tools against urban election frauds or when they became tools for vested interests. The statutes could be used against the railroad workers during the 1894 Pullman Strike but not against "unlawful combinations" that usurped the state's power to dispense justice to blacks.

The statutes' obscured meaning could provide little help for the congressmen of 1920 who knew of their existence and who pondered their usefulness. Judicial "quibbling" over state denial through private acts did not by itself kill the statutes, but together with the dissolution of the laws' major target, the collective violence of the Ku Klux Klan, judicial interpretation largely ended their enforcement. Aided by the steady ebbing of Reconstruction's fervor, the courts' inter-
pretation also prevented the growth of interest in a renewed crusade for equality of citizenship. The country strolled arm in arm with Jim Crow; Department of Justice officials and black leaders alike saw little in the scattered pieces of civil rights statutes with which to support federal action to protect black rights.27

The Supreme Court's negative evaluation of federal power over individuals significantly limited potential federal action against mobs. But the jurists' tying of a broad definition of positive state action—legislative, judicial, and executive—to a constitutional wrong was a crucial reaffirmation of earlier Court opinions on the nature of the state subject to Fourteenth Amendment jurisdiction. Most notable of the earliest rulings were three 1880s cases in which the Court dealt with different varieties of judicial state action and reached the conclusion that the Fourteenth Amendment dealt with "State action exclusively" and that, as Justice William Strong explained in Ex parte Virginia,

. . . the political body denominated a State [and addressed by the Fourteenth Amendment] . . . acts by its legislative, executive, or its judicial authorities. It can act in no other way. . . . Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process . . . violates the [Fourteenth Amendment] . . . , 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.

The Fourteenth Amendment's "state" was a composition of the people's "agents."28 State denial meant state legislation,
but it also meant a discriminatory administration and an execution that violated overtly neutral or even clearly equitable state legislation. What the Court did not decide, however, was the line between action by agents that was an outgrowth of their "public position" and action that was of a lawbreaker who happened to hold public office. In addition, in Virginia v. Rives, the Court explained that blacks discriminated against in jury selection must seek all state remedies before they could pursue federal remedies. This requirement greatly reduced the size of the Negro victory in 1880. Ahead lay costly and time-consuming legal battles. Another requirement, added in 1896, further dulled the glow of victory. Speaking for the majority in two Mississippi cases, Justice John Harlan explained that jury discrimination required "proof of exclusion because of their color." This added barrier appeared in the 1890s. The Supreme Court of the 1880s dealt with the possibility that Congress might create under the Fourteenth Amendment a "code of municipal law for the regulation of private acts." Having decided which "state" Congress could oversee, the Justices in the Civil Rights Cases of 1883 continued in the direction they had started in United States v. Harris. In five cases that reached the Supreme Court in 1882 and 1883 from Kansas, California, Missouri, New York, and Tennessee, the Court considered the sections of the 1875 Civil Rights Act that prohibited racial discrimination in public accommoda-
tions. Rejecting the argument that racial discriminatory acts were "badges of slavery" and the assumption that the black could continue to be the "special favorite of the laws," the eight-man majority employed state action theories and held the provisions to be unconstitutional.32

Speaking for the majority, Justice Bradley explained that the Fourteenth Amendment prohibited "state action of a particular character," action such as "the operation of State laws, and the action of State officers executive or judicial . . . ." Congress could enact legislation in advance of state violations, but such action had to be "predicated upon such supposed State laws or State proceedings," that is, some "State action through its officers or agents." The legislation also had to be "corrective" and not "general" and aimed at the state and not private individuals "unsupported" by the state. Losing sight of this distinction would take the national government into a realm reserved for the states by the Tenth Amendment. Upholding the 1875 Civil Rights Act would mean opening the floodgates to unlimited congressional intrusion into intrastate affairs. "Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?"33

John Harlan's thirty-seven page answer to Bradley's seventeen-page question rejected the majority's theory of state action as well as its theory on federal municipal law.
Harlan argued that the Fourteenth Amendment applied to federal protection of civil liberties threatened by racial discrimination, not to such pedestrian concerns as theft of property; Congress sought to protect through the 1875 law "legal, not social rights." The states had the same powers they had always had, but Congress could enforce the newly created right of national citizenship, freedom from racially based discrimination in regard to civil rights.\footnote{Discrimination by individuals protected or permitted by the state violated the Fourteenth Amendment, and through the amendment's enforcement section Congress had the authority to decide what "appropriate" action it would take, be it corrective or direct. Congress, in other words, could set the rules for the game it created: freedom based on nondiscrimination.}

Acceptance of this more literal reading of the Fourteenth Amendment and of Harlan's view of the "spirit" behind it would have prevented the article from becoming a "splendid bauble" that glittered beyond the reach of the antilynchers of the 1920s. But Harlan's antilynching "disciples" had only a minority view to bolster their theories. Nevertheless, despite the apparent heartlessness of Bradley's verbal and judicial abandonment of the Negro, the \textit{Civil Rights Cases} did not close the window that earlier decisions had left partially open. The decision had implications that guaranteed blacks considerable federal protection of their rights. "No State shall . . . deny" could provide significant protection for the
Negro. Continuing with the definition of "state" provided in earlier rulings, Bradley offered Congress an opportunity to frame appropriate corrective legislation to remedy private discrimination.

It is proper to state that civil rights such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by the state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual unsupported by any such state authority, is simply a private wrong, or a crime of that individual; an intrusion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. 35

The link was there if Congress and the Court could determine, as their next feat of interpretative magic, what "sanctioned in some way by the State" and "under State authority" meant.

Much of the work on this magical elucidation of the law came during the turbulent 1880s and 1890s. As the nation dealt with financial panics, farmers' revolts, labor strikes, urban and corporate growth, and the uncertainties of an increasingly jingoist foreign policy, the Court made its own internal adjustments. By 1890 only Bradley and Stephen Field remained from the Slaughterhouse Court, but the change in membership meant little change in the status of the black. His daily condition was barely affected by, for example, the rapid succession of William Woods by Lucius Q. C. Lamar, Lamar by Howell E. Jackson, and Jackson by Rufus Peckham. The Negro found the Court giving its endorsement to what it had once
allowed to exist without formal judicial approval. The new Court permitted "similar" to be a substitute for equal and allowed "separate" to blunt even that requirement. Separate but equal became equality's accepted definition in law, but as the black knew, in practice separate and unequal had become his reality. \(^{36}\) When it came to the rights of racial minorities, the Justices generally refused to go behind the words of legislation and to see the intent that determined the inevitably discriminatory impact. \(^{37}\) The Court accepted Bradley's view of the black's self-reliance, even if it did not accept the Justice's view of state support and even while it looked behind tax laws and police regulations to protect the theoretically self-reliant property owner and the "independent" working man. Property was constitutionally protected from state action that overregulated under pretext of a legitimate exercise of police and taxing powers. The "liberty" of a laborer to contract for a life of low wages, long hours, injurious machines, inflated company-store prices, and suffocating tenements was dulled only when the Court detected an "evil" that merited state regulation. The Court was, it seemed, ready to mount the Fourteenth Amendment, blow the bugle, and ride to the rescue of encircled contract and property rights. \(^{38}\)

The judicial cavalry seldom rode to the Black Belt or to black pockets in the urban North. The nation's concern for federalism and its lack of concern for Negroes settled into the fabric of national life in more permanent form as the decades passed. \textit{Plessy v. Ferguson} (1896) wove the threads to-
_gether.

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. . . . The object of the Amendment was undoubtedly to enforce the absolute equality of the races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or the commingling of the two races upon terms unsatisfactory to them. Laws permitting, or even requiring, their separation in places . . . have been generally, if not universally, recognized as within the competency of State legislatures in the exercise of their police power.39

Therefore, as the nation abandoned the black to state and private discrimination, Chief Justice Melville W. Fuller repeatedly reassuringly that "the object of the Fourteenth Amendment" was not "to radically change the whole theory of the relations of the state and Federal governments to each other and of both governments to the people." As the Fifth Circuit Court proclaimed in 1904,

All who value the blessings of justice administered without respect of persons, and who love liberty regulated by law, will share in the regret that [discriminatory] acts . . . can happen in our midst, and that apprehension solely upon . . . [state] laws . . . will not be vindicated and enforced in the [state] tribunals . . . . Whether these apprehensions be well or ill founded, it would be a less evil to society to leave the wrong unredressed than to usurp jurisdiction to punish the offenders [in federal court]. . . .40

Accordingly, the Fuller Court, the Edward White Court that followed it in 1910, and the lower federal courts, which either took their lead from the Supreme Court or ventured in-
dependently in search of legal promised lands, blended with
the national mood and made certain that the Fourteenth Amend-
ment would not become a racial tool for individual to use
against individual or for the nation to use against apathetic
and permissive states. The blend worked. Of the slight-
ly more than six hundred Fourteenth Amendment cases that
reached the Supreme Court between 1868 and 1911, twenty-
eight involved black interests and only six were decided in
favor of the blacks. And, as the Rives decision indicated,
some of those victories were moral ones at best. In a very
real sense, bench and bar had accomplished what the southern
secessionists and their army could not.\textsuperscript{41}

One aspect of this victory—federal action against ra-
cially discriminatory states but not individuals—necessitated
distinguishing between the private lawbreaker who faced the
wrath of the state and the official wrongdoer who faced, theo-
etically at least, the combined fury of nation and state.
Which jurisdiction should act against the state official who
violated a state law in order to deny persons a federally pro-
tected right? What of racially discriminatory local ordi-
nances that violated state constitutions and laws? And, most
significantly for the antilynchers who later confronted the
inactive, indifferent, or hostile state, what of officers who
failed to enforce or selectively enforced the law? The Court's
efforts from the 1880s to the 1920s to refine its definitions
of "state," "deny," state action, and state support would pro-
vide federal antilynchers with few answers they wanted to hear.
The federal judiciary retained its view that Congress could legislate against private individuals who violated rights "secured . . . by the Constitution or laws of the United States," the basis of Sections 5508 and 5510, leftovers from Reconstruction's Enforcement Acts. For example, while a federal district court in 1904 was studying labor's right to organize and determining that this right was not a federally created or protected one, it carefully explained that the principle of federal action against private violation of federal rights still held:

If . . . the citizen is obstructed or intimidated by the lawless acts of individuals in the 'free exercise or enjoyment of any right or privilege secured to him by the Constitution and laws of the United States,' Congress may make such acts crimes against the United States, and punish them in its courts. Section 5508 of the Revised Statutes . . . is a lawful exercise of the authority of Congress to that end.42

The federal courts, however, had already so narrowed the scope of federal rights that by 1904 individuals seldom needed to consider whether their acts violated a federal statute or a right of national citizenship. In 1920, even as congressional antilynchers consolidated their efforts for a 1921 push for federal legislation, the Court continued its limited view of federal rights. In considering the unlawful forced removal by private individuals of over two hundred union members from Arizona to New Mexico, the Supreme Court found no federal right at issue and no state action involved. Since protection of the fundamental right to travel was a responsibility of the states, the responsibility for any action against the Arizona antilabor
mob belonged to the two states involved. This case, United States v. Wheeler, provided the antilynchers fresh reminder of the rules of the game they were playing. 43

With federal rights so limited as to be largely unusable as a justification for national action against private discrimination, Fourteenth Amendment users interested in aiding blacks had to look toward a broader state action doctrine or toward an expanded "liberty" in the due process clause. Use of that "liberty," however, was not a viable choice. The courts refused to see that word as a constitutional shorthand for the Bill of Rights, 44 and when the Supreme Court did expand its definition of "liberty" it did so in a way that offered few benefits for blacks. In a disquieting way, the 1897 definition of "liberty" in Allgeyer v. Louisiana, a state insurance regulation case, was a reminder of the nation's dual system of rights, protections, and duties. The 1866 Civil Rights Act had attempted to define the freedom secured by the Thirteenth Amendment by noting some of the major civil rights of national citizenship that blacks upon emancipation shared with whites: making and enforcing contracts, being a party to lawsuits, owning, inheriting, and transferring property, and having the benefit of the law's equal protection for person and property—"as in enjoyed by white citizens." Allgeyer's list of some of the "liberties" enjoyed by Americans and protected by their national government would seem at first glance to be an elaboration of these same rights that Americans, black and white, shared. The Court in Allgeyer
noted that a citizen enjoyed

... the right ... to be free from ... mere physical restraint[;] ... the right ... to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned.\(^45\)

But the timing of this judicial enumeration, together with its immediate nonuse in black cases, contributed an implicitly qualifying note to the overall significance of the list. Just one year before, in 1896, the Supreme Court in Plessy had accepted separate but equal citizenship for Negroes; therefore, that ruling provided a prophetic qualifier to the Allgeyer liberties, not to mention to the equal protection clause of the Fourteenth Amendment and to the Civil Rights Act's explanation of the Thirteenth Amendment's freedom. While whites were apparently secure from state infringement of their right to contract, work, and receive compensation, blacks were constitutionally secure only in their right to a Jim Crow citizenship. For example, just nine years after Allgeyer the Court viewed an instance of mob violence aimed at denying blacks the right to contract and work and found no justification for federal action against the mob. Only the minority of John Harlan and William Day was able to recall Allgeyer's liberties and the 1866 act's civil rights and to tie them to the remnants of the Enforcement Acts. The Court's majority was able to draw the fine line that separated coddling
of blacks and protecting white liberties.\textsuperscript{46}

This draftsmanlike precision apparently left only one possible Fourteenth Amendment source of authority for federal action against individuals—a broad definition of "state."
Undermining the development of such a usable, broad, and flexible interpretation, however, were the established practice of employing a narrow definition and the intricacies involved in linking the passive to the active state. The Supreme Court under Fuller and White never specifically ruled on state non-action, but it did deal with the question of active state agents representing or misrepresenting an inactive state. In doing so the high court considered with varying degrees of specificity the extent to which the state was responsible for its agents when, in using or misusing their delegated state powers, they violated federal constitutional commands. As the twentieth century opened, several courts hinted at how to handle these considerations, but many of the hints came from the lower federal courts and thus carried little value as precedents. Others, coming from the Supreme Court, provided conflicting and inconsistent precedents.

Complicating this tangle of precedent for the congressional antilynchers of 1920 was the scarcity of decisions dealing specifically with the relationship between states and mobs. Outside of \textit{Cruikshank} and \textit{Harris}, in which the Court rejected general federal jurisdiction over mobs, there were few judicial guides. In 1892 in \textit{United States v. Logan} the Court approved federal action against a Texas mob because its victim
had been in federal custody; there was "a co-extensive duty on the part of the United States to protect against violence persons . . . within their custody, control, protection and peace, and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States." The established judicial doctrine was that mobs which prevented a state from carrying out its duty of providing protection committed state wrongs and had to face the wrath of the state, just as the Logan mob had to face the fury of the national government after interfering with federal duties.

Beyond these three decisions there were few federal cases involving life-threatening or fatal mob action. Of these few only one carried strong arguments in favor of federal authority over mobs whose victims were in state custody; however, this 1904 circuit court decision, Ex parte Riggins, would have little precedent value for the antilynchers of the 1920s. The facts in Riggins were simple. A black, charged by Alabama with the murder of a white, had been in the custody of the county sheriff and under the protection of the state guard when he was kidnapped by a white mob and hanged. The federal charge against the whites under Section 5508 hinged on the claim that in lynching the Negro they had intended to deny him the rights, privileges, and immunities of national citizenship. This charge, elaborated in a six-count indictment, involved the black's right to a trial by due process and to protection by the state from private discrimination until such a trial
was completed.49

After concluding that the mob's acts had been racially motivated and intended to deprive the Negro of his civil rights, Judge Thomas G. Jones quickly turned his attention to the Fourteenth Amendment questions involved in the case. He considered the question of state action and the claim that Alabama had not been responsible for the lynching but rather had been "overwhelmed" as it attempted to protect its prisoner. "The fact that the state was without fault and endeavoring to do its duty . . . does not take away all power of Congress to legislate under that amendment . . . ." A constitutional order to a state not to deny due process was "ipso facto . . . nothing more or less than a positive command that the States shall afford due process to all persons, and certainly to all citizens." The same amendment that gave the states their due process order required two things of Congress: (1) to "interfere with state law or state power" when the state refused to provide due process, thus "displac[ing] or alter[ing] state laws, or interfer[ing] with state officers" in specific instances to cure specific ills; and (2) to "aid the state, in the performance of its duty, by removing obstruction or resistance, by private lawlessness, to the successful performance of the duty." Judge Jones explained that lynching was not "ordinary" lawlessness since it was an attempt by private individuals to usurp state powers and to prevent the state from carrying out its constitutional duty to provide due process. Congress, therefore, could act, as it had in Section 5508, against
this individual usurpation. On the other hand, Congress could not take similar action against ordinary murder since it was not a due process violation. Ordinary murder remained a state wrong.

It is ... resistance to the efforts of the state's officers to perform their duty, preventing them from doing the things which the law requires them to do, which defeats the state's discharge of rendering due process of law, and thereby assaults the enjoyment of the privilege or immunity of the citizen to have due process at the hands of the state. The right of the citizen to have the duty performed, which Congress is given the power to enforce, necessarily carries with it the right to have protection against lawless acts of outsiders which prevent the state from giving them the benefit of due process of law.51

In a concluding eight-page mini-treatise, Jones presented a single-minded defense of congressional authority over private individuals based on due process obligations.

Is it reasonable to suppose, when the protection of the right of the citizen to have due process at the hands of the state was deemed of such paramount importance as to require the adoption of an amendment to the Constitution of the United States, imposing upon Congress the delicate duty of supervising the discharge of the duty by the state, what the framers of the amendment, and the people who adopted it, intended, when the amendment empowered Congress "to enforce" it, that Congress should have no power to punish individuals for doing acts which, if done by state officers, it was within its authority and duty to punish.52

This due process theory appealed to later congressional antilynchers, and they made use of various elements of it, although they ignored Jones's theory that only state legislation could deny equal protection.53 Yet as a judicial base for a federal antilynching bill Ex parte Riggins was useful only as a "what should have been" argument. A multitude of rulings
rejected or ignored Jones's theories on federal "direct interest" due process powers over private individuals. In addition, the Supreme Court implicitly rejected the Jones doctrines in its handling of Riggins--rejecting jurisdiction in 1905--and in Hodges v. United States in 1906 and United States v. Powell in 1909.  

Hodges grew out of a black-white labor dispute in Arkansas. At least fourteen whites used violence to force eight blacks to break labor contracts and give up their jobs at a lumber mill. The federal district court for eastern Arkansas convicted three members of the mob for violations of Section 5508. Their crime was conspiring to deny blacks the constitutional right to work and receive compensation for the work. In considering the mob's appeal, Justice David J. Brewer used a strict theory of state action. He held that there was no authority under the Fourteenth Amendment for federal action against the Arkansas mob. Then, switching his attention to the Thirteenth Amendment Brewer sought in the slavery prohibition some support for a "badge of slavery" justification for the federal prosecution. Unlike Justice Harlan in his dissent, Brewer found no such authority. "[T] was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in . . . slavery . . . ." In tones reminiscent of Bradley in the Civil Rights Cases, Brewer concluded with a reference to Congress's policy decision to give blacks citizenship and constitutional protections rather than make them "wards of the
Nation." As citizens they had to take "their chances with other citizens in the States where they... make their homes."^55

United States v. Powell grew out of the same mob murder of a state prisoner as Riggins. In its ruling the Court cited Hodges and, by implication, its theory of individual denial of rights not federally protected as its sole authority. In doing so it merely affirmed without opinion the trial court's demurrer of a mob's indictment under Section 5508. The affirmation was without elaboration; Judge Jones's circuit court ruling in favor of Powell, which the Supreme Court let stand, was based on the 1906 mob ruling.^56

Although neither Hodges nor Powell specifically rejected the Riggins theory, they implicitly rejected it by ignoring the case and by reaching decisions based on narrow state action and federal rights doctrines. Combined with Harris, Cruikshank, and Logan, the rejection meant that Congress's power under Section 5508 or any potential federal statute against mobs was so limited as to be virtually worthless. Congress's only clear power was to punish mobs that took prisoners from federal custody; however, the frequent problem of mob domination of a judicial proceeding—a type of "legal lynching"^57—would seem to have offered the federal courts an ideal opportunity to incorporate a limited version of Jones's theory of due process. Years before the Riggins decision numerous state courts had already seen the link between mob influence and a denial of judicial due process. Considering mob actions in a rape case, a
Texas appeals court in 1892 noted that ". . . the court being environed and dominated by such a mob, breathing out such threats to the life of the appellant, it is solemn mockery to talk, think, or imagine a fair trial . . . . [It] would be travesty on decency, law, common sense, and justice . . . ." 58 Twenty years later, a South Carolina appellate court found that "a large and hostile crowd" that had intended to "terrify the defendants, to confuse their counsel, to intimidate the witnesses, and to overawe the jury" had done just that, thus denying the defendants "a fair and impartial trial." 59

The first chance for the Supreme Court to consider the link between mobs and due process came in 1906, but the opportunity ended with the Justices dealing with contempt of court. After a Tennessee court convicted a black man for raping a white woman and sentenced him to death, he petitioned the federal circuit court for a writ of habeas corpus, citing a variety of grounds, including mob influence over his trial and the trial court's refusal to grant a change of venue. That petition rejected, he then sought aid from the Supreme Court. Justice Harlan granted a stay pending formal appeal and so notified the sheriff holding the petitioner. After the Chattanooga News explained Harlan's decision to its readers, a mob formed and the sheriff withdrew the jail guard, leaving only a lone night jailer to protect the prisoner. A twelve-man mob then broke into the jail, took the prisoner, and, joined by sixty other men, hanged him. When word of the violation of the court order reached Washington, the Supreme Court held the
sheriff in contempt. He had not been part of the mob, but he had refused to call in a militia drilling nearby, had left the jail virtually unguarded, and had in general been "in sympathy with the mob while pretending to perform" his duty of protecting his prisoner. 60

Thus a mob prevented the Court from studying the link between mobs and due process. The contempt of a Supreme Court order rather than the state's denial of due process through the actions of its agent was the Court's focus. The Court recognized the sheriff's illegal acts; it did not, however, have to consider whether they were also the acts of the state under the Fourteenth Amendment. The limited question before it allowed the Court to avoid another question which was causing it increasing concern in spite of the catch-all answer presented decades earlier in the 1880 jury-discrimination cases: were the discriminatory acts of a state agent the unconstitutional acts of the state itself?

In Frank v. Mangum eight years later the Justices did focus on the mob domination of a murder trial and procedural due process. Leo Frank, a Jew sentenced to death for the 1913 Fulton County, Georgia, murder of a young white girl who worked in his factory, three times appealed unsuccessfully to Georgia appellate courts on grounds that he had not received a fair and impartial trial. In all, over one hundred different grounds supporting his claim were rejected by the state courts before Frank applied, again unsuccessfully, to the federal district court for a writ of habeas corpus. By the time the ap-
peals had finished their journey through the state and federal judicial systems and had reached the Supreme Court, Frank's major contention was that his waiver of the right to appear at the reading of the verdict, a right granted by Georgia law, had not been voluntary; it had been proffered and accepted because of the danger of mob violence if Frank appeared. The Supreme Court rejected Frank's argument, explaining that his attempt to remove his appeal to the federal courts upon a claim of a deprivation of federal rights demanded conservative action since it "touch[ed] closely upon the relations between the state and the Federal governments." Looking "through the form and into the very heart and substance of the matter" of due process and admitting that juries and judges intimidated by mobs interfered with justice and denied due process, the Court pointed out that corrective measures had been available to and used by Frank. He could not claim that his hearing was insufficient under the Fourteenth Amendment's due process requirement; he could not assert that one trial without due process ended all state jurisdiction and allowed the federal courts to interfere with the abortive state process.

To establish this doctrine would, in a very special sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court or as rendering the proceedings coram non judice, in any such sense as to bar further proceedings.
Trials intimidated by mobs in state courts were therefore not federal concerns, but still a question remained. What of the state official who took part in a mob's illegal acts? Did he lose his identify as representative of the state when he joined the mob or was mere officeholding the key determinant, the basic ingredient that overshadowed all else? Over the years the Supreme Court said yes—and no. Although it held in the 1880 jury cases that the state acted through its legislative, executive, and judicial officers, the Supreme Court had not set the boundaries of these acts despite repeated suggestions that it do so. As a result, the boundaries constantly shifted over the forty years after Ex parte Virginia and the other jury decisions. They shifted as the Court attempted to draw a logical picture, or at least a usable diagram, of state action, one that allowed both punishment of the lawbreaker and preservation of the state. The judiciary had, for example, to consider such logical analogies as that presented by David Dudley Field, the Cruikshank attorney.

Because a Judge of Election refuses my right to vote, is that a reason why he should be indicted in the Federal Court, any more than the Judge of a Police Court, who refuses my claim for redress against a ruffian who has assaulted me in the street?63

Also complicating its boundary determinations were the remedy arguments presented in Virginia v. Rives, Frank v. Mangum, and Manhattan Railway Company v. Mayor of New York, an 1883 tax case. According to the Second Circuit Court in the last, it was a state court's "peculiar province to construe
and administer judicially the laws of the state, and to decide whether or not they sanction the action of the local authorities . . . ." If New York's taxing commissioners, "under color of law, [were] proceeding illegally their action cannot be imputed to the state, and the constitutional provision need not be invoked and does not operate; . . . the complainants can obtain ample redress under the laws of the state."64

The doctrine that state agents did not represent the state when they violated state law or went beyond the powers given them by their states was "adopted" only haphazardly and inconsistently by the Supreme Court. In a line of decisions dating back to Ex parte Virginia, the Court generally found agents' maladministration to be state action. However, by the third decade of the twentieth century, competing tendencies marred the precedent value of the early decisions and left "under color" of law in limbo.

The confusion of theories began early. In two 1883 cases, Barbier v. Connolly and Soon Hing v. Crowley, the Court, following its Slaughterhouse rationale, upheld as legitimate use of San Francisco's police power the city's regulation of launderers and laundries. The ordinances in question were overtly neutral, and there was no indication in the record that a racially discriminatory intent underlay their enactment. Allowing the lawmakers' efforts a presumption of reasonableness, the Justices held that only discriminatory enforcement could lead to a voiding of the measures as violations of the Fourteenth Amendment's equal protection clause. In other words,
maladministration by state agents could justify federal action.\(^6^5\)

In *Vick Wo v. Hopkins*, decided in 1885, the Court explained how such unequal and discriminatory administration of neutral and nondiscriminatory laws could be constitutionally unacceptable. In doing so the White Court provided later congressional antilynchers with a major resource.

\[\ldots\] whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured \[\ldots\] by the \ldots Fourteenth Amendment \[\ldots\]. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.\(^6^6\)

The *Soon Hing* Court had noted that the equal protection clause did not prohibit states from categorizing and regulating different classes differently. "Persons engaged in the same business" simply could not be "subjected to different privileges under the same conditions." In *Vick Wo* the challenged ordinance did not violate this distinction, but its actual operation, easily left to the influence of "an evil eye and an unequal hand," violated the principle of equal protection through equal administration. As Justice Brewer would explain twenty years later in a 1903 jury-discrimination case, *Tarrance v. Florida*,
... actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not presumed. It must be proved or admitted.67

However, seldom after Vick Wo would the Supreme Court read between the lines as Brewer suggested to find the intent that had not been verbalized but had effected an outcome of massive unequal impact. For example, in the 1898 voting discrimination case Williams v. Mississippi, Justice Joseph McKenna explained that laws were not discriminatory if "it has not been shown that their actual discrimination was evil, only that evil was possible under them."68

Although the Vick Wo and Tarrance courts carefully explained the seriousness of active discriminatory enforcement, they said nothing about nonenforcement. In Vick Wo the issue was a law enforced only in regard to a minority and to that minority's disadvantage. But what of a law not enforced in regard to a minority, again to its disadvantage? Or what of a law which could aid minorities but which was not enforced while all other laws that benefited both majority and minority were consistently enforced? Did the evil eye and unequal hand in these cases link the state to the arbitrary enforcement regardless of state officers' attempts to provide equal justice? The federal district court for eastern Kentucky asked its own question in the 1915 tax case, Louisville & N. R. Co. v. Bosworth, "... what is it, then, to deny the equal protection of ... laws?" Its answer covered some of the problems of distinguishing between the subtle types of actions by states and
their agents.

It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing: And it may be said to include an intention in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken there was an intention to treat differently or to discriminate. . . . The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the state in the exercise of its particular function, and its effect is to empower and to make incumbent on the courts, state and federal, to prevent discrimination and to secure equal treatment.69

This answer left questions that courts only decades later would resolve; they were questions for which the antilynchers would need clear answers and for which they would find none. What they usually found were inconsistencies that allowed their opponents to ignore the states' selective enforcement of murder, assault, and kidnapping laws and the almost total nonenforcement of antilynching laws.

In an 1897 due process case involving state condemnation of railroad property, Justice Harlan repeated the "easy" definition of state first provided in Ex parte Virginia a quarter of a century earlier. A state judge who followed state law and as a result deprived a person of his constitutional rights violated the Fourteenth Amendment, as did the state's highest court when it affirmed the judge's actions. All who "by virtue of public position" violated another's rights "'acts in the name and for the state, and . . . his
act is that of the state.'" If it were otherwise, "'the state has clothed one of its agents with power to annul or evade it.'"70

Harlan's fellow Justices often felt otherwise, however, when they attempted to blend Harlan's view with Field's Cruikshank logic on the issue of derelict officials. Their theory was most obvious in a line of cases that followed Barney v. City of New York. This 1904 case involved a decision by the Board of Rapid Transit Commissioners, acting without the required authorization, to build a subway closer to the property of Charles T. Barney than city officials and affected property owners had previously authorized. The Court through Chief Justice Fuller distinguished between the authorized acts of public officials and acts committed without legal authority and held that if an official's acts were "not only in violation of provisions of the state law, but in opposition to plain prohibitions they were not those of the state."71

A problem growing out of Fuller's logic related to the wide range of possible state action from which the ruling would free the state of responsibility. Taxing boards, regulatory agencies, city commissioners, and others who, as a result of going beyond the authorization of the state, deprived persons of life, liberty, or property would not by law be acting "under color" of law even though the cloak of the state which they wore put them in the position and gave them the power to commit the act in the first place. As the federal circuit court in Risley v. City of Utica explained in 1909, the author-
ized exercise of power was one thing, the unauthorized use was quite another.

If the officers of the state or city act, not by virtue of and under the authority of the statute and in pursuance thereof, but in opposition thereto and in violation thereof, they are violating the law of the state, and it cannot be said that the state has made a law authorizing such acts, or that the state has deprived any person of property without due process of law, or denied to any person the equal protection of the laws; and, even if the acts done violate the rights of the complainants, it cannot be said that the state has authorized them by its legislative, executive, or judicial instrumentalities. Clearly the Legislature of the state has not authorized the acts for they are committed in violation of its authority.\footnote{72}

This reasoning found its base not in theories of "under color" of law and state sanctions but in the clear delegation of expressed authority for each act performed by an officeholder. Under this rationale federal court action was possible only if the discriminatory act was carried out under some clear or statutory authorization, virtually a retreat to the idea that state action was strictly state legislative action. Informal and unofficial state permission to administer the law unequally would not bring federal reprisals. The logic of Ex parte Virginia, of Louisville & N. R. Co., and of Justice Harlan lay tattered under this simple refinement. Not only were private individuals not covered by the amendment but officials who stepped beyond any clear and official delegation of authority were not the "state." In one stroke their discriminatory act took both them and their states outside the reach of the amendment.
This result led to numerous qualifications of the Barney decision. One came in 1907. Raymond v. Chicago Union Traction involved a board of equalization decision that appellants charged violated their right to property as protected by the Fourteenth Amendment. In considering federal jurisdiction, Justice Rufus Peckham explained that the provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts.

An official who deprived a person of his rights under the amendment violated the Constitution since "as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State." In addition, pursuing state remedies was unreasonable when such pursuit demanded "a multiplicity of suits" against a variety of state agencies. However, noting Barney in his dissent, Oliver Wendell Holmes argued that a ruling by a lowly state agency could hardly be state action until "sanctioned directly" by the state through its highest court. "I should have thought that the action of the State was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution . . . has said that it sanctioned the alleged wrong." 73

The clearest qualification and, in fact, the virtual negation of the Barney rule came in a 1913 case. In Home Telephone and Telegraph v. City of Los Angeles, the issue
was confiscatory telephone rates set by a 1911 Los Angeles city ordinance. The city argued that although the state empowered it to set phone rates the California constitution prohibiting denial of property without due process. Thus while levied under delegated authority, the confiscatory rates violated the state constitution, preventing Home Telephone and Telegraph, which provided the city's telephone service, from seeking federal remedy under the Fourteenth Amendment. 74

Justice White's evaluation of the city's position and of the Barney rule was an explicit return to and explanation of the Ex parte Virginia view of state and official responsibility. The Barney rule, the Court explained, meant "an artificial construction" of the Fourteenth Amendment which prevented the coverage that a reasonable interpretation of the article would provide and that denied protection of "the great body of rights that it was intended . . . [to] safeguard . . . ." Noting the "long since settled" theory that "acts done under the authority of a municipal ordinance passed in virtue of power conferred by a State are embraced by the Fourteenth Amendment," White concentrated on a methodical attack on the very foundation of Barney. 75

. . . the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, [and] are addressed . . . to the States, but also to every person whether natural or judicial who is the repository of state power.

. . . the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency.
... the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer ... .

... a State officer can not on the one hand, as a means of doing a wrong forbidden by the amendment, proceed upon the assumption of the possession of state power and at the same time, for the purpose of avoiding the application of the amendment, deny the power and thus accomplish the wrong. ... [T]he subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform, but for the possession of some state authority.

White's theory, however, did not take care of every problem involving state action, as Justice Louis Brandeis indicated in just one respect with his 1919 decision for the Court in Standard Computing Scale Company v. Farrell. Admitting that the Fourteenth Amendment applied to "whatever ... form ... the legislative power of the State is exerted," Brandeis could not see legislation being anything except "in the nature of a law or regulation"; it could not be an official's "'specification,'" which served only as a "guide for the action of those interested" and which could not be a tool for state denial of property without due process.

This narrow rationale only six years after Home Telephone and Telegraph presented congressmen in 1921-1922 with a lingering choice between largely contradictory precedents and provided ample foundation for attorney Charles Collins's
assertion that ". . . in the line of decisions under the Fourteenth Amendment uncertainty has been the rule." The difficulty in deciding when to tie the action of derelict officers and discriminatory officials to the state under the amendment remained. It would, in fact, outlive the legislators. While a federal court in 1915 could dismiss *Barney* entirely by noting that it was "no longer in force," the courts' continuing grappling with this state action question—often coupled with the protection afforded state officers by the Eleventh Amendment's prohibitions against suits against states—revealed the persistent fascination with the security offered by the limited definition in *Barney* and the need for the flexible definition in *Home Telephone and Telegraph*.

* * * *

What the Fourteenth Amendment was intended to accomplish was irrelevant to the real world of 1917-1922. Operational meanings and judicial applications defined the national government's power to deal with race relations and law enforcement and that definition, as both sides of the anti-lynching struggle knew, was an extremely narrow one.
NOTES


2 See Moorfield Storey's views in John R. Shillady to Leonidas Dyer, August 5, 1918, Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (Washington, D.C.), Group I, Series C, Box 242; hereinafter cited as NAACP Records.


4 Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," Supreme Court Review (1978), 52; Everette Swinney, "Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments" (Ph.D. diss., University of Texas, 1966), 325; Milton R. Konvitz and Theodore Leskes, A Century of Civil Rights: With a Study of State Law Against Discrimination (New York and London: Cornell University Press, 1965), 60-64; Alfred Avins, "The Ku Klux Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment," St. Louis University Law Journal, 11 (Spring 1967), 331-81; Avins, The Reconstruction Amendments' Debates: The Legislative and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments (Richmond: Virginia Commission on Constitutional Government, 1967), ii-xxxii. In the words of Congressman David Lowe of Kansas, "If a State has no law upon its statute book obnoxious to objection under the [fourteenth] article . . ., but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?" Congressional Globe, 42 Cong., 1 Sess., 375 (March 31, 1871). Senator John Pool, who sponsored Sections Five through Seven of the Enforcement Act, expressed his belief during the debates that the United States had the right and the duty "to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the
Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this union." Ibid., 41 Cong., 2 Sess., 3611-13 (May 19, 1870).

Although Republicans had traditionally relied on state courts, that reliance was greatly reduced by the time Reconstruction began—perhaps because of the barriers which state courts erected during the war, their hostility to blacks after the conflict, or their vulnerability to local pressures. Regardless, the judiciary was an "inexpensive, nonbureaucratic, and traditionally conservative" agency for enforcement of the congressional Republicans' limited aims. During Reconstruction there was, in fact, a general and significant expansion of federal judicial jurisdiction as a result of the 1866 Civil Rights Act, the Enforcement Acts of 1870 and 1871, and the 1867 Habeas Corpus Act. The expanded removal rights and the extension of habeas corpus power to lower federal courts to challenge state court judgments were all prompted by the Republicans' concern for the freedmen and the quality of state justice. William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1876," American Journal of Legal History, (October 1969), 333-59; Stanley L. Kutler, Judicial Power and Reconstruction Politics (Chicago and London: University of Chicago Press, 1968), 114-60; "Section 1893 and Federalism," Harvard Law Review, 90 (April 1977), 1147-52; Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (Boston: Houghton Mifflin Company, 1975), 540-42; William F. Duker, A Constitutional History of Habeas Corpus (Westport, Conn., and London: Greenwood Press, 1980); Congressional Globe, 39 Cong., 1 Sess., 602-3 (Lane, February 2, 1865).

The Act of February 28, 1871 (ch. 99, 16 Stat. 433), passed to amend the May 31, 1870 act, provided penalties for registration fraud in federal elections and for registrars' knowing neglect or refusal to perform their duties. It also established procedures for the appointment by circuit court judges of federal election supervisors—and of special deputies by federal marshals—in towns of over twenty thousand population. In addition, the statute detailed the procedure for removing from state courts actions against federal officers for carrying out their responsibilities under the law.

7 Ch. 14, 16 Stat. 140.

8 See Swinney, "Suppressing the Ku Klux Klan," 57.

9 Ch. 22, 17 Stat. 13.

Hyman, *A More Perfect Union*, 482-86; Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionality in the Civil War Era* (New York and London: W. W. Norton, 1978), 130-40; Robert John Kaczorowski, "The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883" (Ph.D. diss., University of Minnesota, 1971), 245-46; United States v. Rhodes, 27 Fed. 785 (1866). See United States v. Given, 25 Fed. Cas. 1324 (No. 15,210) (C.C.S.D., Del. 1873). Bluyv v. United States, 8 U.S. 581 (1872) involved two whites indicted for murdering a black woman as well as a state law which barred black witnesses in murder trials of whites. Federal jurisdiction over the case was based on Section Three, the removal provision, of the 1866 Civil Rights Act which allowed "persons who are denied or cannot enforce" in state courts "any of the rights secured to them" by the statute access to the federal judicial system. In this case the Court held that the "affected" woman was dead and "beyond being affected by the cause itself"; thus removal was not justified.

United States v. Hall, 26 Fed. Cas. 79 (No. 15,282) (C.C.S.D., Ala. 1871)


293. "Police powers," which include state power to regulate for health, welfare, morals, and safety, are based on Article Ten of the Bill of Rights. The Court, for example, explained in 1911 that the states had the power to "regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health." House v. Mays, 219 U.S. 270 (1911). Legitimate exercise of state police power was an essential ingredient in cases as diverse as Munn v. Illinois, 94 U. S. 113 (1877), on railroad regulation, and Plessy v. Ferguson, 163 U. S. 537 (1896), on racial segregation. Another police power case in which the Court accepted the state's action as "reasonable" and not a violation of constitutional rights came the day after Slaughterhouse when the Court in Bradwell v. Illinois, 16 Wass. 130 (1873) held that the state could bar women from practicing law. In this case the state's action was proper since, as seen by the Court through the lens of mid-nineteenth-century attitudes and standards, it was consistent with "the divine law of the Creator," women's place being in service to husband and children.

15 16 Wall. 68, 49-50, 55, 74-78. In Corfield v. Coryell, 4 Fed. 3230 (1823), cited in Slaughterhouse, the Supreme Court explained that the privileges and immunities of state citizens were "fundamental" ones "which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States . . . . What these fundamental principles are . . . [would be hard to list in their entirety but include] protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject . . . to such restraints as the government may prescribe for the general good of the whole." In his majority opinion, Justice Miller included among his list of federal privileges and immunities: access to subtreasuries, land offices, seaports; protection on the high seas; right to assemble peacefully, petition the government, and use navigable waters; right of habeas corpus; rights granted by treaties and provided by the Thirteenth and Fourteenth Amendments. In his additions to this list, Justice Bradley added, among others: right to obtain and own property, pursue happiness and safety, pass through and live in another state for business reasons, have equal taxation, free speech and press, and assembly; freedom from unreasonable search and seizure and denial of due process; government protection; and trial by jury.

16 16 Wall. 36, 82; John R. Schmidhauser, The Supreme Court as Final Arbiter in Federal-State Relations, 1789-1957 (Chapel Hill: University of North Carolina Press, 1958). Robert Cushman offers that the Fourteenth's framers "no doubt" meant privileges and immunities to cover the Bill of Rights'
protected freedoms. *Leading Constitutional Decisions* (New York: F. S. Crofts and Company, 1946), 41. See *Maxwell v. Dow*, 176 U. S. 581 (1900): "[I]f all these rights [of life and personal liberty] are included in the phrase 'privileges and immunities' of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the Slaughter-house Cases and United States v. Cruikshank are all wrong, and should be overruled." (592).


19. *United States v. Harris*, 106 U. S. 629, 639, 643, 631, 641, 637. Courts did not always note the same distinction. Compare, *LeGrand v. United States*, 12 Fed. 577 (1882) with *United States v. Patrick*, 54 Fed. 338 (1893), and see Justice Oliver Wendell Holmes's assurance that "it is not open to question that . . . [Section 5508] is constitutional" since it applied to protection of federally secured rights." *United States v. Mosley*, 238 U. S. 383 (1915). See also a note in *Nation* that the soon-to-be-passed 1871 Enforcement Act's "central idea developed itself into a plan by which the United States courts may exercise full criminal and civil jurisdiction over any and all acts of violence to the persons and property of private citizens; by which, in short, Congress and the National tribunals may assume and wield a complete police power throughout the States." "The Force Bill," *Nation*, April 20, 1871, 269.


22. See Benedict, "Preserving Federalism," 75, for the federal antilynching law foundations in Bradley's circuit court *Cruikshank* decision (25 Fed. 715) on the scope of federal power against individuals under the Thirteenth Amendment.

23. In the Revised Statutes enacted in 1874 and published in 1875, the original civil rights acts were broken up and distributed under various topics, such as Congress, Judiciary, Civil Rights, Citizenship, Elective Franchise, Immigration, and Crimes. None were placed under Title 27, the Freedmen.

From 1875 to 1889, the Democrats controlled at least one house of Congress, and congressional concern was toward repeal of the enforcement acts. Congress cut army appropriations, refused money for deputy marshals, and prevented the use of the army as a posse comitatus. In 1889-1890 the Republicans controlled both houses and, with the support of President Benjamin Harrison, attempted but failed to enact the Lodge voting protection ("Force") bill. The Democrats' 1892 election successes were in part due to their opposition to this measure; they followed it up with the 1894 weeding of the statutes. As for the presidents' role in retaining or eliminating the statutes, "Generally speaking the Republican Presidents of the period, desirous of conciliating the South and cultivating Republicanism there, avoided bothersome prosecutions calculated to keep alive the more unpleasant memories of Reconstruction," and they allowed Congress to decide the fate of the measures." Swinney, "Suppressing the Ku Klux Klan," 324-29; Rhodes, History of the United States, VI, 333-34.

24 From 1870 to 1897 there were 7400 criminal prosecutions under the statutes, 5200 in the South alone. Most (3550) took place between 1871 and 1875. By far the greatest number during those years--almost 2800--were in South Carolina and Mississippi. Davis, "Federal Enforcement Acts," 223-24; Morroe Berger, Equality by Statute: Legal Controls Over Group Discrimination (New York: Columbia University Press, 1950), 8-9. The Justice Department was created in 1870, before passage of the 1870 Enforcement Act. Not until 1939, when Attorney General Frank Murphy created the Civil Liberties Unit (later renamed the Civil Rights Section), was there a well-planned and focused effort to enforce the civil rights statutes. Before, responsibility for prosecution rested


26 The government used Section 5299 which had as its target "insurrections violating civil rights" and which was a product of the April 20, 1871 Enforcement Act (Section 3). See Almont Lindsey, The Pullman Strike: The Story of a Unique Experiment and of a Great Upheaval (Chicago: University of Chicago Press, 1942), 171-72.

27 As will be discussed in greater detail in Chapters Three and Four, the attorneys general rejected claims that the Justice Department had jurisdiction through the Enforcement Acts of 1870 and 1871 over race riots that assumed the character of state-permitted denial of black rights. If the states did not request federal aid, the Department offered none. For a brief overview of the Justice Department's policy, see Mary Frances Berry, Black Resistance/White Law: A History of Constitutional Racism in America (New York: Appleton-Century-Crofts, 1971), 140, 151-53; Elliott Rudwick, Race Riot in East St. Louis: July 2, 1917 (Carbondale, Ill.: Southern Illinois University Press, 1963). Concerning lynching and federal jurisdiction, see Assistant Attorney General William Fitts to NAACP, February 19, 1918, in Crisis, 15 (April 1918), 281, for a representative view: "Under the decisions of the Supreme Court of the United States, the Federal Government has absolutely no jurisdiction over matters of this kind . . . ." See also Crisis, 19 (January 1920), 106. For two of the few references to an enforcement act provision that indicated recognition of its potential usefulness, see Walter White, "Election by Terror,"
in Florida," New Republic, January 12, 1921, 197; Chicago Defender, September 24, 1921, 1.

28 Virginia v. Rives, 100 U. S. 318; Ex parte Virginia, 100 U. S. 339, 344, 347; Strauder v. West Virginia, 100 U. S. 303.

29 Virginia v. Rives, 100 U. S. 313. This theory still held in 1919 as demonstrated in White v. Keown, 261 Fed. 814, 816, citing Kentucky v. Powers, 201 U. S. 1 (1906). If an officer's alleged discrimination or illegal act is not authorized by state law, the case is not immediately removable to federal court. Remedy must be first sought through the state court system "to the highest court of the state." State remedies had to be exhausted before recourse could be had to the federal courts.

The removal statute was an outgrowth of sections in the 1866 Civil Rights Act and the May 31, 1870 Enforcement Act. In the 1873-1875 revision of the statutes, the removal section became Section 641 under Title 13. It permitted removal of civil and criminal suits from state courts "for any cause whatsoever" if "any person . . . is denied or cannot enforce . . . any rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States . . . ." The provision also provided removal protection for U. S. civilian and military officers who committed state wrongs "by virtue of or under color of authority derived from any law providing for equal rights . . . or for refusing to do any act on the ground that it would be inconsistent with such law . . . ." The removal procedure required a petitioner to file a statement of facts before his trial or hearing. Upon filing the petition in the state court, further proceedings in the court were prohibited.

30 Gibson v. Mississippi, 162 U. S. 565, 580 (emphasis added); Smith v. Mississippi, 162 U. S. 592. See also Murray v. Louisiana, 163 U. S. 101 (1895); Brownfield v. South Carolina, 189 U. S. 426 (1902); Martin v. Texas, 200 U. S. 316 (1905); Thomas v. White, 212 U. S. 278 (1908) for jury discrimination "intent" cases which went against blacks by holding to a strict intent rule. Compare, Neal v. Delaware, 103 U. S. 370 (1880), where the state constitution's link to a jury statute provided the "intent" and Carter v. Texas,

31 See Arkansas v. Kansas and Texas Coal Company and San Francisco Railroad, 183 U. S. 185, 189 (1901), Under the Fourteenth Amendment, Congress had not "power to legislate upon subjects which are within the domain of state legislation."

33 109 U. S. 3, 14-15, 19, 14, 26-27, 37-39, 50, 56. Bradley did not deal with congressional authority under the interstate commerce clause because it was not a question presented to the Court; Harlan, however, suggested its possible use. (60-61) Earlier, in 1870, the court had considered Congress's use of its commerce power to prohibit the sale of the naphtha under certain conditions. Balancing the commerce power with the state's police power and considering the purpose of the regulation, the Justices for the first time rejected a statute based on the commerce clause. United States v. Dewitt, 9 Wall. 41. It would not be until United States v. Danby, 312 U. S. 100 (1941) that the court would announce that Congress's interstate commerce power was "complete in itself . . . and recognized no limitations other than are prescribed in the Constitution." See also the 1964 Civil Rights Act and the Court's ruling in Heart of Atlanta Motel v. United States, 379 U. S. 341 (1964). A unanimous Court upheld the public accommodations section of the law, Title II, which was based on the commerce power.


37 In 1904 B. Frank Dake pointed out that there was an "apparent disinclination of the Supreme Court to look beneath the words . . . and discover [laws'] real spirit . . . ," the result being state laws "apparently fair on their face, with no reference to the race or color of any persons, but the purpose and practical effect of which have been to deprive negroes of all semblance of political rights, and to reduce their civil rights to a minimum . . . ." Dake, "Negro Before the Supreme Court," 247.

38 See Lochner v. New York, 198 U. S. 45, 90 (1905): "Statutes of the nature of that under review, limiting the hour in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed." And see Truax v. Corrigan, 257 U. S. 312 (1921). The Court invalidated an Arizona law prohibiting injunctions against unions. The law, it said, violated the struck company's right to have its property protected equally by the law.


For voting at federal elections and voting free of racial discrimination at any election, see United States v. Reese, 92 U. S. 214 (1876); United States v. Mosley, 238 U. S. 383 (1915); Ex parte Yarbrough, 110 U. S. 651 (1884); In re Coy, 127 U. S. 731 (1888); Wiley v. Sinkler, 179 U. S. 371 (1890). See also the child labor cases, Hammer v. Dagenhart, 247 U. S. 251 (1918); Bailey v. Drexel Furniture Company, 259 U. S. 20 (1922). For mobs taking federal prisoners, see Logan v. United States, 144 U. S. 263 (1892). For the right to remain on land to meet Homestead Act requirements, see United States v. Waddell, 112 U. S. 76 (1884). For the right to give information about the violation of federal laws, see In re Quarles and Butler and In re McEntire and Goble, 158 U. S. 532 (1895); United States v. Wheeler, 254 U. S. 281 (1920), for labor mob activity.

See, for example, Walker v. Sauvinet, 92 U. S. 90 (1876) (jury trial); Missouri v. Lewis, 101 U. S. 22 (1879) (appellate procedure); Maxwell v. Dow, 176 U. S. 581 (1900) (grand jury indictment); Hurtado v. California, 110 U. S. 516 (1884) (grand jury indictment); O'Neil v. Vermont, 144 U. S. 361 (1891) (cruel and unusual punishment); Hodgson v. Vermont, 168 U. S. 262 (1897) (grand jury indictment); Ex parte Converse, 137 U. S. 624 (1891) (double jeopardy); Twining v. New Jersey, 211 U. S. 78 (1908) (self-incrimination); Jordan v. Massachusetts, 225 U. S. 167 (1912) (jury trial).

Alleggee v. Louisiana, 165 U. S. 578 (1897).

Hodges v. United States, 203 U. S. 1 (1906). In the 1923 case of Meyer v. Nebraska, 262 U. S. 390, the Court noted that it had yet to "define with exactness the liberty" protected by the Fourteenth Amendment but it briefly listed certain "liberties" involved in earlier cases: freedom from "bodily restraint," to contract, pursue an occupation, worship freely, "acquire useful knowledge," marry, have a home and rear children, and "generally to enjoy those privileges long recognized by free men." James Bryce reflected the idea that blacks had all the equality they needed when he noted that "legal equality, including . . . the equal possession of civil private rights" and "public equality, the equal possession by all of rights to share in the government" "exist[ed] in America, in the amplest measure, and may be dismissed from the present discussion." Bryce, American Commonwealth, II, 54. Despite this neglect, antilynchers could point to United States v. Blackburn, 24 Fed. Cas. 1158, which noted the jury instructions of a trial judge: "'By the equal protection of the laws . . . is meant that the ordinary means and appliances which the law has provided shall be used
and put in operation alike in all cases of violation of law. Hence, if the outrages and crimes shown to have been committed in the case before you were well known to the community at large, and that community and the officers of the law willfully failed to employ the means provided by law to ferret out and bring to trial the offenders, because of the victims being colored, it is depriving them of the equal protection of the law."

47 144 U. S. 263, 285.

48 The problem of noncustodial lynching and state responsibility was beyond the boundaries of turn-of-the-century Fourteenth Amendment considerations.

49 134 Fed. 404, 408 (1904).

50 Ibid., 408, 409, 410-13 (emphasis added). Compare, "Federal Cognizance of the Acts of Lynchers," Columbia Law Review, 5 (May 1905), 465-66. "Not only the origin of the provision for due process but its form indicates its nature. It is not a command to the states to give due process but a command not to take life, liberty, or property unless due process is given; not a command to act but to refrain from acting." (465)


52 Ibid., 420.

53 For Jones the equal protection clause was inapplicable to any private wrongs. It did not reach private action since it required something only a state legislature could deny: equal laws. For jurists and legislators considering federal action under the Fourteenth Amendment, the applicable clause, according to Jones, was the due process clause. Jones's was not a unique view of the equal protection clause. See, for example, John Norton Pomeroy, An Introduction to the Constitutional Law of the United States, Especially Designed for Students, General and Professional, 9th rev. ed. (Boston and New York: Houghton, Mifflin, and Company, 1886), 176, who explains that the equal protection clause is "aimed exclusively at state statutes which were one-sided and oppressive in their effect upon the emancipated blacks." The concept of equal protection, however, went through a change before Jones dealt with in his limited way.

54 Riggins reached the Supreme Court but the Justices denied a writ of habeas corpus since there was remedy by writ of error or appeal. Riggins v. United States, 199 U. S. 547 (1905).
55203 U. S. 1, 19, 20.
56212 U. S. 564.
57"Legal lynching" generally involved kangaroo courts in which the verdict and sentence were foregone conclusions or implied bargains between the law and lynchers that the judicial process would end in an execution. Not uncommon were arrests, trials, and executions which all occurred within hours of each other. See Nation, September 21, 1918, 309; Crisis, 17 (June 1920), 95; To Secure These Rights: The Report of the President's Committee on Civil Rights (New York: Simon and Schuster, 1947), 24.
58Massey v. State, 20 S. W. 758 (1892).
59State v. Weldon, 74 S. E. 43 (1912). See also People v. Heming, 136 Pac. 291 (1913); Myers v. State, 25 S. E. 252 (1895); Collier v. State, 42 S. E. 226 (1902); Sanders v. State, 85 Ind. 318; Ellerbe v. State, 75 Miss. 522.
62Ibid., 329, 332, 337.
64Manhattan Railway Company v. Mayor of New York, 18 Fed. 193 (1883).
65Barbier v. Connolly, 113 U. S. 27 (1883); Soon Hing v. Crowley, 113 U. S. 703 (1883). In Barbier, Justice Field explained: "[N]either the amendment--broad and comprehensive as it is--nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. . . . Special burdens are often necessary for general benefits . . . . [T]hey do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." He added that if "cumbersome, dilatory and expensive" "inconveniences" arose in
the enforcement and administration of police regulations, "they are not obnoxious to any constitutional objection." "The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State." (31-32)


68 170 U. S. 213 (1898). See also Quong Wing v. Kirkendall, 223 U. S. 59 (1912). A notable exception was the Oklahoma grandfather clause case, Guinn v. United States, 238 U. S. 347 (1915).


70 Chicago, Burlington and Quincy Railroad Company v. Chicago, 166 U. S. 226, 233, 234.


73 207 U. S. 20 (1907), 37, 40, 41. See another "qualifying case," one which was complicated by Eleventh Amendment issues, Ex parte Young, 209 U. S. 123 (1907). In his dissent in Young, Justice Harlan saw the Court's rationale as the beginning of "a new era in the American judicial system . . . [which] would enable the subordinate Federal courts to supervise and control the official action of the States as if they were 'dependencies' or provinces." He was baffled "that an order requiring the Attorney General of a State is a suit against the State, while an order forbidding him, as
Attorney General, not to perform an official function on behalf of the State is not a suit against the State . . . ." (175-76, 185-86)

74 227 U. S. 278.
75 Ibid., 286, 294.
76 Ibid., 286, 287, 288-89.
77 249 U. S. 571 (1919), 574, 577.
78 Collins, Fourteenth Amendment and the States, 119.
79 Louisville & N. R. Company v. Bosworth, 230 Fed. 191, 206 (1915). For later conflicting views, see Hayman v. City of Galveston, 273 U. S. 414 (1927); Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 (1931). In the latter case, Justice Louis Brandeis distinguished the still breathing Barney decision and relied on Home Telephone and Telegraph. "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated even if the state officer not only exceeded his authority but disregarded special commands of the State." (246).
CHAPTER TWO

"IN THEIR COOLER MOMENTS":
LEGAL SCHOLARS AND CONSTITUTIONAL FEDERALISM, 1865-1920

.... no permanent evil has resulted from this extension of national power. .... The States remain as indestructible as the Union.¹

Did Congressman Theodore Burton of Ohio actually "think as a practical proposition that the Supreme Court of the United States will ever consent to overturn the scores of its own decisions based upon the Slaughterhouse case and the thousands of decisions in the State courts and in the Federal courts. .... predicated upon the doctrines of that case?" South Carolina Representative John McSwain, in a disbelief enlarged by the requirements of congressional oratory, reprimanded his fellow legislator for his errant view of the Constitution, the judiciary, and federal authority under the Fourteenth Amendment. Neither the Supreme Court of 1922 nor of any future year would change its opinion of the federal government's reach into state racial policies.²

Yet, as discussed in Chapter One, the fifty years of judicial rulemaking had not closed every constitutional door for the antilynchers of 1917-1922. According to the Charleston News-Courier in 1922, although a federal antilynching bill was

.... alien to the interpretation of the Constitution which prevailed until the recent past[,] ....
the Constitution has been stretched so often in the last five or six years, and so far, that the boldest now hesitate to assert or assume that a measure will be rejected because it requires the Federal agencies to perform functions which have hitherto been reserved exclusively for the States. The barrier against Federal encroachment is not the formidable thing it was.³

Legal texts and constitutional surveys had long provided both the bold and the conservative student and lawmaker—the Burtons and the McSwains—with authoritative analyses of the flexible but formidable barriers the News-Courier recognized. And these analyses impressed upon their readers the importance of operational meanings and of the "shared sovereignty" from which federal antilynching power would have to derive.⁴

* * * *

Neither the law school nor the office practitioner-teacher at the turn of the century offered a standard method of instruction or a standard course of study despite the introduction by Harvard Law School in the 1870s of the Socratic method, case study, and three-year program of course work.⁵ In addition, as the American Bar Association pointed out in 1895, law students studied property, contracts, and procedure but consistently ignored or at least neglected the study of federal law and "National Jurisprudence." Students worried about state law even though federal law involved such increasingly important elements of national life as:

The interstate commerce law, the doctrine of the police power, the contract labor law, the removal of causes, the controversies developed as to appor-
tioning the powers of taxation and eminent domain between the Federal and State organizations, the immense intangible forms of property in patents, copyrights and trade marks, the increased jurisdiction of the Court of Claims, and the incipient development of arbitration. . . . 6

But while the legal education of the antilynchers and their opponents slighted these critical new areas of law, it did not neglect totally the field of constitutional law and the subtleties of "shared sovereignty." The works of a handful of experts instructed would-be attorneys on constitutional authorizations, delegations, and limitations, the Fourteenth Amendment receiving its share of attention.

Thomas MacIntyre Cooley provided the major constitutional law texts. His General Principles of Constitutional Law, which law schools from Alabama to Oregon use, appeared in four editions from 1880 to 1931. His Constitutional Limitations went through eight editions between 1868 and 1927, the last two appearing after Cooley's death in 1897. Cooley, a Michigan supreme court reporter who later became that court's chief justice, enjoyed a close working relationship with the judiciary, providing much of the authority for its decisions and acting as publicist for its rulings. Widely cited by other constitutional law experts, Cooley explained to his audience--both bench and bar and the students who eventually replaced them--how the Constitution created two independent, sovereign powers whose spheres of responsibilities and powers continued little changed after the addition of the Fourteenth Amendment to the Constitution in 1868. 7
In 1873 when he edited the fourth edition of Joseph Story's *Commentaries on the Constitution of the United States*, still used by law students during the 1890s, Cooley noted that the amendment was not meant to increase "the sphere of the powers of the general government, or of taking from the States any of these just powers of government ..." reserved to the states. Since only in 1873 did the Supreme Court in the *Slaughterhouse* case render its first Fourteenth Amendment decision, Cooley had little more than his own expertise upon which to base an opinion that the new article did not disturb "the existing division of sovereignty." He explained that

... the exercise of the local sovereignty is left with the States ... This article has not been agreed upon in order to centralize power, but to preclude such a possible abuse of power as might result from prejudice or other unworthy motive. The States, in adopting it, have not struck blindly and fatally at their reserved powers, they have rather given security that in certain important particulars they will not pervert or abuse them.¹

As the future head of the Interstate Commerce Commission explained in the preface to the 1873 Story edition, he sought only to provide "a brief commentary on ... provisions and purposes ... aiming, as far as possible, to keep in harmony with the opinions and sentiments under the inspiration of which they were accepted and ratified in the several States." If, as events showed, "opinions and sentiments" changed, so would Cooley's evaluation in his own works.²

While trying not to anticipate "the judgment of the country," Cooley attempted to present a brief description of
the new constitutional amendment. He explained that the Fourteenth Amendment was a more permanent form of the 1866 Civil Rights Act; he defined the privileges and immunities that the amendment sought to protect from state legislation as those rights enumerated in the 1866 statute, a view with which the Slaughterhouse Court would disagree. Cooley found little novel in the amendment's general prohibition of state denial since "unquestionably every person--all being freedmen--is entitled to the equal protection of the laws without any such express declaration." Section Five, which authorized Congress to take "appropriate" action to enforce the prohibition, provided the novelty. The Thirteenth Amendment had a similar provision, but its prohibition was "self-executing" and did not require use of its enforcement provision. Section Five of the Fourteenth Amendment necessitated defining "equal protection" and "a denial thereof." Although deciding that the definitions involved only arbitrary classifications, the treatise writer saw in the "very stringent" 1871 Force (Ku Klux) Act proof that Congress believed equal protection could be denied "in other ways than by the direct denial of the State." This understanding of the intent of the Reconstructionists led Cooley to a conclusion about the amendment's impact that he soon modified.

... now that it has become a settled rule of constitutional law that color or race is no badge of inferiority and no test of capacity to participate in the government, we doubt if any distinction whatever, either in right or in privilege, which has color or race for its sole ba-
sis, can either be established in the law or
enforced where it had been previously estab-
lished. 10

When the Supreme Court presented its interpretation
of the Fourteenth Amendment in Slaughterhouse and later
cases and whites increasingly used the amendment, Cooley re-
vised his initial analysis. By the early 1890s he clearly
reflected the Court's view and vice versa. The extended
footnote in the 1883 fourth edition of Constitutional Limi-
tations indicated the growing importance of the Fourteenth
Amendment. Later editions as well as his Constitutional Law
text indicated how important the amendment quickly became
for state and federal lawmakers. 11

Aimed at protecting all Americans, as well as aliens
and corporations, the Fourteenth Amendment's target was dis-
criminatory state action, particularly legislation. A "very
full examination" by the Supreme Court had settle that point.
As Justice Field noted in his 1882 circuit court opinion in
County of San Mateo v. Southern Pacific Railroad, the Four-
teenth Amendment "undoubtedly" sought to protect blacks from
state legislation, but "the generality of the language used
necessarily extends its provisions to all persons." 12

In the 1927 edition of Constitutional Limitations, Coo-
ley, through the editing of Maryland attorney Walter Carrington,
reiterated to a new generation of law students that the
equal protection requirement was a limited restriction, one
that applied only to state action. "It is aimed at undue
favor and individual or class privilege . . . and at hostile
discrimination or the oppression of inequality . . . ." As he had long explained and as the Supreme Court repeated in *Truax v. Corrigan* (1921), class legislation was not inherently unconstitutional. States could classify when it was "important to the general welfare that special privileges . . . be granted in some cases . . . ." The Fourteenth Amendment required only that ". . . all persons in the same class are treated alike under like circumstances and conditions . . . ."  

When Cooley broadened his perspective and considered the Fourteenth Amendment's effect on the governmental system, his readers found reassurance. In 1891 he carefully explained that while secession had indicated the strength of the states the outcome of the resulting civil war had revealed the strength of the nation. In addition, secession and war had demonstrated the necessity not only for ending "the immediate occasion of the civil war," slavery, but also for limiting state power "to deal unjustly and partially with classes of the people against whom there might be jealousies, prejudices, or antipathies . . . ." This need led to constitutional adjustments. The Bill of Rights continued to keep the national government under "due limits," but the new amendments to the Constitution limited "state sovereignty" without depriving states of "power which any free government should employ." With classic understatement Cooley explained that

> If the thirteenth, fourteenth, and fifteenth amendments are subject to any just criticism, it must concern not what the States are required to surrender so much as the incidental expansion of federal legislative and judicial power.
Because the Fourteenth Amendment covered "state action only, not . . . the action of individuals," it worked no magical transfer of power to the "general government for any purpose of police government within the States."

... the proper boundary between national and state powers ... has been found so satisfactory that we have willingly endured a war in its defence. The cost of that war has been in vain if at its conclusion we propose to treat that boundary as a shadow line which none need regard. 15

The view of federal power in the later editions of Constitutional Limitations did not change. Despite "incidental expansion of federal ... power," the Fourteenth Amendment did not

... concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall [deny due process and equal protection] ... and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual. 16

In addition, federal action under the Fourteenth Amendment had to be "correcting and overriding action by the State, and not . . . primary, direct legislation as to the subject matter. Slaughterhouse, the Civil Rights Cases, Cruikshank, and Story's fourth edition were the sources from which to derive this proper interpretation of the limited reach of Congress under the Fourteenth Amendment, Cooley explained. 17

Cooley also reassured his readers that the police power belonged to the states; "... the national government [could not] through any of its departments or officers, assume any supervision of the police regulations of the States." The Four-
teenth Amendment had not replaced the states' police power with a federal one. As the Michigan jurist and teacher explained in 1883,

All that the federal authority can do is see that the States do not under cover of this power, invade the spheres of national sovereignty, obstruct or impede the exercise of . . . [federal power] or deprive any citizen of rights guaranteed by the federal constitution.18

As John Marshall explained in *Martin v. Hunter's Lessee* and as Salmon P. Chase repeated in *United States v. DeWitt*, Congress exercised no "'mere police regulations within the States.'" The presence of the Tenth Amendment, Cooley noted in 1891, should have eliminated all doubts about the potential power of a national government limited to the exercise of expressed powers. In addition, the Bill of Rights restrained the national government but left the states free, even upon ratification of the Fourteenth Amendment, to define due process as they chose. And since, as the Court in *Corfield v. Coryell* (1823) explained, the privileges and immunities of state citizenship were "fundamental," even after the 1868 ratification "... sovereignty for the protection of life and personal liberty within the respective States rests alone with the States . . . ."19

Other treatise writers joined Cooley in attempting to describe a strong national government that the Fourteenth Amendment had not made too strong. Cooley, the courts, and a changing economy aided in their quest. The judiciary limited the privileges and immunities and the citizenship clauses, and
the nation quickly retreated from racial controversies and moved toward economic ones. The result was a deemphasis of Reconstruction issues and a concentration on how the Fourteenth Amendment affected states that used their police powers to regulate the economy. The implication provided by constitutional scholars was that one question had been settled while another had not. But through it all, the system of shared sovereignty thrive.

For example, in studying police power in the 1880s, Cooley's fellow treatise writer, Christopher G. Tiedeman, found the constitutional system safe from any immediate traumatic change. Having concluded that federalism and the dual citizenship that was an outgrowth of it were the country's "chief fundamental principle[s]," Tiedeman noted in the 1890s how they provided a carefully balanced federal and constitutional system that allowed the states to act—but not so far or so freely as to infringe the rights of individuals. Constitutional protections limited state police powers but not through a broad and far-reaching Fourteenth Amendment. The Missouri law professor explained that the Republican Reconstructions had set out to protect the freedman's political and social rights. Without intending to, however, they created guarantees which, if taken literally, would have been the end "to local self-government in the American sense." Rescue from this disastrous fate was engineered by a vigilant Supreme Court that had kept its collective head and had weighed objectively the potential effects of the emotional postwar con-
stitutional modifications. Ignoring both "the letter" of the amendment and "popular will," the Justices had prevented the Negro from becoming the nation's ward. Preventing "evil consequences by keeping the operation of the amendment within the limits which [the Court] felt assured would have been imposed by the people, if their judgment had not been blinded by passion, and which in their cooler moments they would ratify," the judiciary provided decisions which served "as a bulwark to the States in their struggle for autonomy and self-government." 20

Although the Supreme Court prevented undue federal intervention in the states, the Fourteenth Amendment still restrained the states. Both Tiedeman and John F. Dillon, another treatise writer whose focus was the municipal corporation, praised the amendment for preventing states from restricting the "rights and liberties of the individual" and for protecting "the conservative classes" from the "absolutism of a democratic majority" and the "radical experimentation of social reformers . . . ." Concerned about "the despotism of the many,--of the majority," Dillon, whose career took him from the Iowa Supreme Court to a federal judgeship, praised the Fourteenth Amendment's prohibition of "any and every form and mode of State action" under the guise of police power that sought to deny individuals and corporations their constitutionally protected rights. 21

New York attorney, lecturer, and author John Norton Pomeroy also found a reason to applaud the addition of the
Fourteenth Amendment to the Constitution. In the numerous editions of his *Introduction to the Constitutional Law of the United States*, first published in 1868 when he was on the New York University law faculty, Pomeroy explained that there had been considerable "injustice" and the possibility of state "oppression" prior to the ratification of the amendment. Before 1868 the federal courts had no authority over states that violated the civil rights of their black citizens. A state could ignore its own bill of rights and legislate that Negroes give up all weapons and be limited to certain types of employment. With the enactment of the Fourteenth Amendment, the nation gained "complete power to protect its citizens against local injustice and oppression." This added jurisdiction, however, would not "interfere with any of the rights, privileges, and functions" of the states.\(^22\)

In his 1874 notes to the second edition of Theodore Sedgwick's constitutional study, Pomeroy explained further his perception of the Fourteenth Amendment. The amendment's broad language and "the facts of history" meant protection not just for Negroes. Able to rely only on *Slaughterhouse* and *Bradwell v. Illinois*, another 1873 equal protection case, Pomeroy concluded that ". . . it would seem that the amendment has not increased, altered, or added to the rights, privileges and immunities of citizens, but has only given protection . . . to those already existing." The 1873 cases, he felt, also provided an "authoritative" interpretation of national privileges and immunities.\(^23\)
Hermann Eduard Von Holst agreed. In his 1887 work, *The Constitutional Law of the United States of America*, the German historian, who later taught at the University of Chicago, explained that although the equal protection and due process clauses of the Fourteenth Amendment initially sought to protect black rights they were not limited to the protection of former slaves and Negroes. The need to avoid potential racial oppression had led the framers of the Fourteenth Amendment to secure what had "always [been] a fundamental principle of the constitution of every state."²⁴

Disagreeing in part with Cooley's explanation of state and national citizenship, Von Holst explained that the Fourteenth Amendment separated the two and dealt with national privileges and immunities as distinguished from state ones. In addition, he believed, as did Pomeroy, that the potential for the amendment's interference with state lawmaking and police powers was limited. Concluding his brief optimistic look at the amendment, Von Holst added that the courts' treatment of it was of "great value" to the South. Southerners did not have to endure blacks "forced upon them daily and hourly" because "... the law does not require the fact to be ignored, that they are another race, whose complete social amalgamation with the whites run counter to nature, and therefore in the interest of both races should not be sought."²⁵

In *The American Commonwealth*, his 1889 two-volume study, Englishman James Bryce confirmed the genius of the American governmental system that the Fourteenth Amendment had not
wrecked.

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere . . . . Both hold a like title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority.

The Oxford University law professor revealed that the Fourteenth Amendment had left the states in control of "law and order, i.e., the punishment of crimes and the enforcement of civil rights . . . ." 26

The following year, 1890, constitutional scholar and political scientist John W. Burgess presented a more detailed and distinctly more complicated picture of the Fourteenth Amendment's implications and effects. The minority in Slaughterhouse had held the correct view of the amendment; both the Thirteenth Amendment and the Fourteenth had given jurisdiction of civil rights and liberties to the national government.

. . . when the Nation triumphed in the great appeal to arms . . . . it gave its first attention to the nationalization in constitutional law of the domain of civil liberty. There is no doubt that those who framed the thirteenth and fourteenth amendments intended to occupy the whole ground and thought they had done so. The opposition charged that these amendments would nationalize the whole sphere of civil liberty; the majority accepted the view; and the legislation of the Congress for their elaboration and enforcement proceeded upon that view. 27
The Fourteenth Amendment nationalized the Bill of Rights, but, Burgess indicated, only to protect citizens from the actions of states which had for seventy years demonstrated their inability to guarantee individual liberty. Under the authority of the Thirteenth Amendment, the 1866 Civil Rights Act had expanded national power to cover civil rights which both states and individuals violated. Then the Fourteenth Amendment "elaborate[d] the principles" of the Thirteenth and secured that expansion more directly but only in regard to state violations. A strong believer in the United States as a national state with "commonwealth" subdivisions, Burgess believed that "subsequent events" showed the "wisdom of the precaution, and . . . in large degree, the shortsightedness of the wisest." The Supreme Court's "entirely erroneous" and surprising Slaughterhouse decision had discarded "the great gain in the domain of civil liberty won by the [Civil War's] terrible exertions . . . ." In particular, the five-man majority had made the privileges and immunities provision "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people upon its passage."

Although Burgess, an attorney since 1869, expressed "perfect confidence" that the Supreme Court would in time rights its wrong, that faulty ruling would remain "the law of the land" until it did so.28

Burgess's evaluation of the judicial interpretation of the Fourteenth Amendment was not totally negative. A strong critic of the "blunder-crime of Reconstruction," he agreed
that despite the Enforcement Acts of 1870 and 1871 it was "extremely doubtful" that the amendment had "created any other means of meeting the hostile acts of the commonwealth than the judiciary." The Thirteenth Amendment left Congress flexible in enforcing its prohibition; the Fourteenth Amendment did not. But, although he cited Barbier v. Connolly's ruling that the latter article did not interfere with state police powers, Burgess did not conclude that the Fourteenth Amendment exerted little force. As Ex parte Virginia showed him, the constitutional addition restricted state action. "The rule would . . . seem to be that when a commonwealth clothes an officer with discretionary power, and he, in the exercise of such power, violates due process of law, then the commonwealth itself is guilty."\(^{29}\)

Burgess also concluded that while the courts generously left the definition of due process up to each state, they also generously—for the states—defined the equal protection that the Fourteenth Amendment obligated states not to deny. The definition, he argued, did not include nonracial discrimination. "Age or sex, . . . mental, or even property, qualifications" were not the intended targets of the amendment, but when discriminations arose from race, the individual denied protection could call for "the interference of the judicial department of the general government . . . ."\(^{30}\)

Eight years after Burgess presented this mixed review of the Fourteenth Amendment's operation meaning, attorney William D. Guthrie provided a more positive evaluation.
Guthrie, who later lectured in the law schools of both Yale and Harvard, saw in the Fourteenth Amendment "a new Magna Charta." However, for Guthrie as for most constitutional scholars at the turn of the century there was a threat to the amendment and to individual liberty. That threat was related to property rights, not black rights. Like Dillon, Guthrie feared "the despotism of the majority . . . abusing the power of legislation, and ignorantly or intentionally undermining the foundations of the Constitution itself." He urged the nation's lawyers, "the great conservative force in American politics," to resist those who sought to use state power "to meet the expediency, the prejudice, the passion of the hour."\(^3\)

Guthrie admitted that the Fourteenth Amendment's framers had intended the article to "have the broadest scope, and . . . constitute a universal rule applicable to all cases in which an attempt was made to deny, infringe, or abridge the fundamental rights and liberties of the individual, whatever his race." But while he willingly accepted the judiciary's extension of Fourteenth Amendment protections to corporations, Guthrie argued that the framers' intent had been to include in the protected privileges and immunities the rights listed in the first eight amendments. Like Burgess, Guthrie believed that the Court had erred in *Slaughterhouse*. Rejecting the "essential rights of life, liberty and property" as elements of national citizenship had made the privilege and immunities section "practically meaningless and superfluous." On the other hand, the Supreme Court's due process ruling was cor-
rect; each state defined its own forms and procedures but could not in doing so violate a substantive or fundamental right.32

Like Von Holst, Guthrie believed that the Fourteenth Amendment's equal protection clause was intended by its creators to be broadly defined and applied. Equal protection was not a "mere theory or sentiment" or to be of benefit only to Negroes. The provision was a valuable one and would have the most "far-reaching" effect of any section of the amendment. In particular, its value lay in economic areas. Therefore, like others who expounded on the Fourteenth Amendment as the new century began, Guthrie, an attorney who argued numerous cases before the Supreme Court against state regulations, found little that necessitated comment when the topic was race relations. When the subject became economic conditions, he saw issues of "vital and permanent welfare" that required serious analysis. How best could the Fourteenth Amendment protect individual rights from the "arbitrary and despotic exercise" of state police power?33

Guthrie believed that the Fourteenth Amendment's service as a weapon against expedient and prejudiced economic regulation did not make the article a dangerous threat to federalism. Congress could not create municipal law, and states could regulate "in all reasonable ways their own systems of police and internal order . . . ." Congress gained no power through the amendment to reach the "erroneous or wilfully improper acts of state officers or courts in violation or dis-
regard of [state] law." State sanction by statute or by other equally clear authorization was necessary to turn an individual's act into state action. Also, the Fourteenth Amendment would have been "deprived of a great part of . . . [its] intended effect if state officers enforcing unconstitutional state laws and clothed with the power of the State could not be sued in federal court." At least, therefore, in the area of official enforcement of laws unconstitutional under the Fourteenth Amendment, there was no conflict between that amendment and the Eleventh. The Fourteenth Amendment reached the states but only in limited ways.

. . . the federal courts cannot supervise or interfere with the internal affairs of a State unless some constitutional right has been invaded by state authority. The wrongful actions of individuals, unsupported by such authority, are not to be redressed under this amendment. They constitute merely private wrongs, or crimes of the individual. The denial of a constitutional right must rest upon some state law or state authority for its excuse or perpetration if the Fourteenth Amendment is to furnish any remedy. Nor is the hardship or injustice of state laws necessarily an objection to their constitutional validity. . . . The remedy for evils of that character ["ill-advised and oppressive state statutes"] is to be sought in the state legislature, or at the ballot-box—not in the federal courts.

In addition,

The Fourteenth Amendment was not adopted in order to grant to Congress power to prescribe the local legislative policy or the forms or modes of process or procedure in the respective States, nor to vest in the Supreme Court general supervision over the legislation of the States . . . .

In 1899 John Randolph Tucker, in a posthumous work edited by his son, Henry St. George Tucker, agreed with his
contemporaries that the Fourteenth Amendment had not deprived the states of the "sovereign powers" they had long shared with the national government. The professor of constitutional and international law and equity at Washington and Lee University believed that the Thirteenth Amendment, which authorized congressional use of "appropriate legislation" in a manner similar to the "necessary and proper" clause, was equally unoffending. The narrow definition of slavery in the Civil Rights Cases helped remove any threat the Thirteenth Amendment posed, while other Court decisions helped reduce the reach of the Fourteenth. The result was that the latter amendment did not "affect radically the nature of the Federal System . . . ."

... while these [Reconstruction] amendments have increased the powers of the general government to some extent, and have abridged the powers of the States, and have given interpretation to the nature of the constitutional compact between them, yet that in all essentials, the system of our Constitutional Union, its structure and its fundamental principles have not been changed. It is a union of States, ... [a] double system of governments ... [with] justice, right and self-rule under the States, as the homes of the people.33

The Fourteenth Amendment permitted congressional negation of state action that deprived an American citizen of his privileges and immunities. These rights, however, did not include those rights listed in the first eight amendments. The distinction between rights of state and national citizenship meant that the first provision of the amendment little affected state police power. State authority was affect-
ed more by the due process and equal protection provisions which extended federal protection to "persons."

Tucker also pointed out that the negative phrasing of the Fourteenth Amendment guaranteed that Congress could not take "affirmative action" within states. The national government could only "nullify any . . . hostile action by the State through its laws." Congress's powers remained delegated and limited; the national government could not share the states' police power.

. . . neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the people, develop its resources and add to its wealth and prosperity.

In addition, the national government could only reach state action under the Fourteenth Amendment; Congress could not address private discrimination. And even when state action was the issue, the Fourteenth Amendment had a limited application to state-mandated racial distinctions. The Supreme Court had held that separation of races ordered by states was not a wrong prohibited by the amendment's equal protection clause.

Tucker's primary conflict with operational meaning involved Ex parte Virginia and the other jury discrimination cases. The onetime Virginia attorney general and American Bar Association president disagreed with the implications of the cases. Removal to federal jurisdiction in such situations
was "neither necessary nor proper." State courts could handle state violations; if they could not, "... appeal lies to the Supreme Court" under the removal statutes. Tucker also asked why, if one equated equal protection with political power, the law did not require that blacks be on juries and be judges, legislators, and governors. If Negroes did not have to be any of the latter, why did they have to be jurors? Should only whites try whites and Negroes blacks? How could corporations sit on juries? Why were blacks but not aliens, women, children, and other unprotected groups a "favored class"?  

The first years of the new century brought several new major constitutional studies as well as new editions of old works, but none of them shared Tucker's concern for the jury cases. Interest was elsewhere. Horace Flack's was in the intent of the framers of the Fourteenth Amendment. In his 1908 study, The Adoption of the Fourteenth Amendment, the Johns Hopkins Ph.D. revealed a theory little different from Burgess's. The Baltimore city official believed both that the Fourteenth Amendment extended the Bill of Rights' protections and prohibitions to the states and that the amendment applied only to state action. Flack did, however, disagree with Burgess on the amendment's statutory predecessor. Relying heavily on primary sources, he concluded that the 1866 Civil Rights Act had applied only to discriminatory state laws, such as the 1865-1866 southern Black Codes.
Asserting a determination to avoid political arguments, Flack noted that the three Reconstruction amendments marked a "new epoch in the constitutional history of the country, since they trench directly upon the powers of the States . . . ." The trenching had not been too deep because the Supreme Court had rescued the nation by giving the Fourteenth Amendment "a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have." Flack avoided specifically rendering an evaluation of the Court's rescue, particularly in Slaughterhouse and the Civil Rights Cases, but he prefaced his study with a note that the Justices had preserved dual federalism and prevented a

... revolutionary change in the respective powers of the States and the General Government. Those who believe this dual form of Government best, all things being considered, must thank the Judicial, and not the Legislative, Department for preserving it.41

Two years after Flack's work appeared, the third edition of Henry Campbell Black's Handbook of American Constitutional Law repeated a broader but no less accepted view of the Fourteenth Amendment.

The duty of protecting all its citizens with enjoyment of an equality of rights was originally assumed by the state and it still remains there. The only obligation resting with the United States is to see that the states do not deny the rights[,] . . . no more. The power of the national government is limited to the enforcement of the guaranty.

The Fourteenth Amendment created no "new rights, but [was] . . . simply prohibitory of certain kinds of state action or [class]
legislation." It applied to state "agencies and instrumen-
talities officially employed in the execution of the laws," but states were not liable for their agents' "neglect, mis-
conduct, or unauthorized act[s]" or for agents' "tortious or
wrongful acts." The Eleventh Amendment prohibited suits
against state officers that directly affected the state.42

Like most of his contemporaries, Black, an attorney,
editor, lecturer, and author, believed that the protection of
Negroes had been the primary reason for the creation of the
Fourteenth Amendment, but like them he thought that the arti-
cle was broad enough to cover "any person," including corpora-
tions. Pointing to the position taken by the Court in the
Civil Rights Cases, Black also explained that Congress could
take only corrective steps to counteract or repair the harmful
effects of a state's unconstitutional act. Congress, as
Tucker had already noted, could not act against states that
regulated race relations through separate-but-equal require-
ments and through miscegenation and intermarriage prohibitions.
The Fourteenth Amendment did not require identical rights;
states could still regulate fundamental rights.43

The national government might not have been able to
interfere with segregation statutes, but its regulation of
the food and drug industry prompted Black to discuss in de-
tail what others had largely ignored, the federal police
power. Accepting the traditional view that Congress possessed
no police power, Black nevertheless asserted that ". . . with-
in its appointed sphere, congress possesses paramount author-
ity." That authority involved a police power since Congress had "the power to legislate for the preservation of national existence, the protection of national integrity, and the supremacy of national law." Therefore, statutes enacted to carry out expressed powers were "strictly and properly speaking an exercise of the police power." Merely because an act resembled a police regulation did not mean that Congress was without the authority to enact it. For example, control over the postal system, interstate commerce, and immigration justified regulation of lotteries, adulterated foods, and entry of undesirable aliens. When questions arose about what was a "necessary and proper" implementation of delegated responsibilities, Congress was to decide, with the courts voiding its decisions only if the steps taken were clearly unnecessary and clearly inappropriate. Legislative intent was not a matter for judicial consideration. 44

Also in 1910 attorney and lecturer David K. Watson presented the nation's law students with theories Black and others were simultaneously publicizing. Watson explained that the target of the Fourteenth Amendment was state wrongdoing and that while Congress could "enforce" that amendment it could not interfere with "purely domestic" state affairs. Congress did not have "general [enforcement] power" under the Fourteenth Amendment, and, as with all its implementations of expressed power, its enforcement of the amendment had to be "appropriate." For Watson, Congress's interstate commerce powers, not those powers under the Fourteenth Amend-
ment, warranted concern and diligent scrutiny. He did not think that Congress's flexibility in prescribing "the method, or manner" of enforcing the amendment was a threat to the nation. Congress would have had such flexibility without Section Five of the amendment since McCulloch v. Maryland (1819) and Prigg v. Pennsylvania (1842) both acknowledged Congress's discretionary power when the national legislature executed delegated duties.  

According to Watson, rather than being a threat, the Fourteenth Amendment was likely "the greatest" of all constitutional amendments. It had affected more people in less time than had any other addition, changing the civil, political, and economic life of four million people. In less than fifty years, fifteen hundred cases in federal and state courts had arisen because of it, corporations had come under its coverage, and the definition of "liberty" had been broadened. The amendment covered official maladministration of neutral laws, as well as state classification which did not have a reasonable and nonarbitrary base. The judiciary had interpreted the amendment and guaranteed its effective implementation. In addition,  

. . . the question cannot be regarded as any longer open to construction or debate. It rests with the judicial branch of the government to determine what [state] legislation under the amendment is, and what is not appropriate.  

Another major constitutional law study that appeared in 1910 joined Watson's work in assuring readers that the
Fourteenth Amendment was not a threat to dual federalism. Written by W. W. Willoughby, the Johns Hopkins political scientist who advised Flack, the two-volume *Constitutional Law of the United States* explained that although there had been initial uncertainty as to the amendment's delegation of authority "fortunately . . . the Supreme Court . . . [had] been led to give these words a construction that robbed them" of the strength to "alter the very nature of the Union itself." The Court avoided a "revolutionary change in the American constitutional system" by limiting Congress's power under the amendment and by denying it "primary and direct legislative authority."[47]

The Fourteenth Amendment, according to the Supreme Court and Willoughby, merely granted the national legislature power to provide relief against states that deprived "individuals and corporations" of their constitutional rights; the article functioned "as a limitation upon the powers of the States rather than as a grant of additional power to the General Government." The Tenth Amendment continued to reserve powers to the states, while the "classic statement" on implied powers in *McCulloch* guaranteed a liberal definition of Congress's "necessary and proper" powers. The inherent limitations that the Supreme Court found in the Fourteenth Amendment assured that the goals of the framers of the Constitution were not in danger. There would continue to be "an effective National Government" and a viable federal system.[48]

Willoughby's confidence that the national government
had a limited and rather harmless reach under the Fourteenth Amendment did not mean that he was unconcerned when he viewed the entire panorama of federal powers as they had developed during the late nineteenth century. As did Cooley, Willoughby believed that the Civil War had settled the issue of national "sovereignty." Since 1865 the national government had assumed the "administrative powers" necessary to carry out its duties, and it had done so to an extent that would have startled constitutional observers a generation earlier. Congress had also utilized what Justice Story had called "'resulting powers,'" those which "resulted from the aggregate authority of the General Government," and "'inherent' sovereign powers," those implied from "an abstraction." Although Willoughby considered the latter to be a "constitutional[ly] unsound" and "revolutionary" doctrine, he found that the Supreme Court had carelessly used it as obiter in such decisions as the Legal Tender Cases. But despite his concern for this thoughtless and dangerous expansion of federal power, Willoughby was confident that the Court would continue to prevent Congress from using national supremacy theories to interfere with state powers.49

Willoughby's analysis of the Fourteenth Amendment's operational meaning was little different from Watson's confident assessment. While the states could no longer determine citizenship.

... they still retain[ed], as the decision in the Slaughter House Cases declare[d], a full authority, free from federal supervision and
control, to decide what political privileges . . . shall exist, and who shall be entitled to enjoy them.\textsuperscript{50}

Willoughby reported that \textit{Yick Wo v. Hopkins} established the rule that equal protection could be denied through mal-administration and that classification on "a reasonable ground . . . [of] administrative or political necessity or convenience" was not a Fourteenth Amendment offense. \textit{Barbier v. Connolly}, he believed, provided the most complete statement on proper and improper classification. When states provided for racially segregated public facilities, Willoughby recognized that the \textit{Plessy} decision governed. Such segregation was permissible as long as "similar or substantially similar conveyances and comforts" were available.\textsuperscript{51}

Although Willoughby believed that the Supreme Court had settled major Fourteenth Amendment questions when it broadly defined "liberty" in \textit{Allgeyer v. Louisiana} and when it expanded the definition of "property," he thought that the Justices' problem-solving was far from an end. The interplay between the Eleventh and Fourteenth Amendments demanded attention.

In a series of great cases the Supreme Court . . . has laid down the doctrine that the Eleventh Amendment does not grant to States nor to their agents a power, unrestrainable by judicial process, either to interfere with the exercise of federal rights or, under color of unconstitutional legislation, to violate the private rights of individuals. . . .

. . . [T]he suability of the United States, and, since the Eleventh Amendment, of the individual State of the Union, by a citizen is not and has not been questioned, the courts have often found great difficulty in determining just when a
suit may be said to be against the State itself, and, therefore, beyond their jurisdiction, and when against the officials of the State personally, in which they have jurisdiction. . . . The courts have not been able to lay down any fully satisfactory rule upon this point . . . .52

In 1911 former Princeton University president Woodrow Wilson, a historian-political scientist, implicitly agreed that the Fourteenth Amendment had not destroyed constitutional federalism and that the system was not without potentially serious problems. His concern was more general than that of other constitutional observers, but Wilson indirectly touched on the more specific interests of many of his contemporaries. He worried about "the cardinal question of our constitutional system," "the question of the relation of the States to the federal government." While pleased that the Constitution, federalism, and American life were not stagnating, Wilson realized that solutions that met the needs of one generation might be totally inapplicable and unsatisfactory for the next. "The general lines of definition" in the federal system were clear, but the ever-changing "subject-matter" did not always easily fit on either side of the division.53

As the future progressive Democratic president explained in Constitutional Government in the United States, "Almost every great internal crisis in our affairs has turned upon the question of state and federal rights." While Wilson concentrated on taxation and slavery as examples, a multitude of implications of a broader range suggested themselves. The Civil War had largely eliminated the issue of state sover-
eighty, Wilson noted, but the complexities of state rights and national power remained, most notably in the economic arena.

What, reading our Constitution in its true spirit, neither sticking in its letter nor yet forcing it arbitrarily to mean what we wish it to mean, shall be the answer of our generation, pressed upon by gigantic economic problems the solution of which may involve not only the prosperity but also the very integrity of the nation, to the old question of the distribution of powers between Congress and the States? For us, as for previous generations, it is a deeply critical question. The very stuff of all our political principles, of all our political experience, is involved in it. 54

The federal system was not only wise but practical and perhaps inevitable, Wilson concluded. Sectional variations, needs, and jealousies meant a "vitality," "elasticity," "spontaneity and variety" that centralization would not have allowed or encouraged. The framers of the Constitution had found the "natural" dividing line between state and national powers and had used it well.

. . . the States possess all the ordinary legal choices that shape a people's life. Theirs is the whole of the ordinary field of law; the regulation of domestic relations and of the relations between employer and employee, the determination of property rights and of the validity and enforcement of contracts, the definition of the many and subtle rights and obligations which lie outside the fields of property and contract, the establishment of the laws of incorporation and of the rules governing the conduct of every kind of business. . . . [T]he States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes.
When states did a poor job handling the economic ills plaguing them, "... the remedy alone for neglect and mistake ... lies, not outside the States, but within them."\footnote{55} Concluding that "constitutional law ... must look forward, not backward," Wilson praised both "conservative change" and "conservative progress." He argued that courts should continue to "'make' law for their own day," but he rejected the idea that judges and legislators should "wilfully \[sic\] seek to find in the phrases of the Constitution remedies for evils which the federal government was never intended to deal with." When the federal government began handling "moral and social questions originally left to the several States for settlement," the threat to the development of state and local "vitality" grew accordingly. In addition, like sociologist William Graham Sumner in his classic \textit{Folkways} (1913), Wilson believed that legislating morality would not change "vital habits or methods of life unless sustained by local opinion and purpose ... ."\footnote{56}

The following year, 1912, Alabama attorney Charles W. Collins vehemently disagreed with all optimistic evaluations of the Fourteenth Amendment. The primary complaint he voiced in \textit{The Fourteenth Amendment and the States}, as well as in numerous journal articles, was that the amendment had become a general restraint on the states. Uncertain as to just how far the amendment reached, the attorney crusaded against its general use. Especially since 1889 the article had become a tool of the corporations, Collins charged; it prevented state
regulation of the economy. While employing "the Magna Charta of accumulated and organized capital," courts had used a "rule of reason" to override state regulations based on the police power. Collins concluded that the Supreme Court of the 1870s and 1880s had been correct to fear that the Fourteenth Amendment would become "the chief source of litigation among all the provisions of the Federal Constitution."

Collins found little to applaud or even tolerate in the amendment or its judicial handling. Noting the frequent dissents in Fourteenth Amendment cases, he solemnly warned that cases "final in so far as they relate to the immediate parties" were of "questionable value" from "the standpoint of judicial precedents as a source of law . . . ." However, while the amendment had become a threat to state police power in economic areas, the judiciary had early and wisely accepted the authority of the state when race separation mandated or tolerated by the state was the questioned practice. Although a potential "rod of iron to beat the people . . . into one consolidated empire," the Fourteenth Amendment had only briefly been such a threat because of its use by Negroes. So well had the Supreme Court and the nation settled its racial policy that Fourteenth Amendment black cases were by 1912 "only of historical interest and bear no relation to the present situation." The rationale of Slaughterhouse and Plessy had closed "that avenue of activity."

[The privileges and immunities] clause of the Amendment was not intended to interfere with the police power of the States.
So far as the Fourteenth Amendment is concerned, the Federal Government would be powerless to prevent armed mobs of whites from driving negroes out from a state, or otherwise threatening or intimidating them in their attempt to exercise the privileges of citizenship. 58

Collins's concern about the Fourteenth Amendment's impact on state police powers was not shared by former University of Iowa law professor Emlen McClain who in 1914 described those powers as the "most fundamental and essential" ones belonging to the states. As did his predecessors, McClain, at one time chief justice of Iowa's supreme court, believed that the primary aim of the framers of the Fourteenth Amendment had been the protection of blacks from oppressive states. However, the amendment's application to all citizens and, in some cases, to all persons had provided "a new conception of federal power" that placed the national government in the position of protecting all individuals from the states. 59

The new conception of "federal sovereignty" did not mean that the Fourteenth Amendment had an unlimited reach. Since the Bill of Rights continued to provide guarantees against action by the federal government and the privileges and immunities to which the amendment referred were those of national citizenship, Congress and the states still shared power. Only if states denied fundamental rights without due process or equal protection could the federal government act against them. State classification based on "reasonable necessity" would not initiate a federal response. Neither would discrimination by individuals.
The law of the land affords a remedy to the individual for injuries done or threatened to him by other individuals. . . . [The individual harmed] is left to [rely on] the remedies which the law of his state [provides] . . . .

As the Civil Rights Cases explained, individuals could not find in the Fourteenth Amendment protection "in their ordinary rights as against unjust and unlawful discrimination in their relations with other individuals." 60

McClain looked to the national government's limited police power as another safeguard. The difference between the states' police power and that of the national government had "never been lost sight of." The latter was limited by the requirement that it be part of the exercise of expressed or implied powers. Regulation of lotteries was "not one of the implied functions of federal legislation" except when it was an aspect of Congress's interstate commerce and postal powers. 61

Princeton professor Charles S. Corwin also felt reasonably secure with the status of the Fourteenth Amendment and the federal system during the early decades of the twentieth century, but like his mentor, Wilson, he recognized that ever-changing national needs made complete security a virtual impossibility. Corwin believed that because the Supreme Court was as devoted to "dual federalism" as was the nation the former took the lead in both emasculating the Fourteenth Amendment and securing state police power. To give to the Fourteenth Amendment the scope its framers had intended it to have would have meant "bid[ding] farewell to the old time federal balance
which before the [civil] war had seemed the very essence of our constitutional system." But because the nation was devoted to "dual federalism" and to its past Americans abandoned the view of the framers of the amendment: that the first eight amendments were made binding on the states, that denial could be by omission as well as by commission, and that Congress could act against wrongdoers through affirmative legislation. If the nation had not rejected this view in the area of race relations, the Fourteenth Amendment's interpretation would have set a dangerous precedent.\(^{62}\)

The Supreme Court not only aided the nation in dealing with race problems but it helped the country meet its new problems, those growing out of the changing economy. The concern that had once concentrated on the Fourteenth Amendment and race had become focused on the amendment and economic ills. According to Corwin, 

\[\text{The Court in its early fear for the federal balance denied the Fourteenth Amendment practically all efficacy as a limitation upon State power, save in the interest of racial equality before the law. Subsequently, however, the Court found reason to abandon its early conservative position and take a greatly enlarged view of its supervisory powers over State legislation [particularly of due process].} \]

\[\text{... But now an interesting thing is to be noted. The Berea College [v. Kentucky] decision makes it perfectly plain that the enlarged view of 'due process of law' is not available against legislative classifications based on racial differences, such classifications being deemed prima facie reasonable. Thus it comes about that property ... succeed[s] to the rights which those who framed the Fourteenth Amendment thought they were bestowing upon the negro.}\] \(^{63}\)
By 1924 when Corwin instructed his readers in *The Constitution and What It Means Today*, the nation was dealing with increasingly complex issues and a Constitution whose interpreters were adapting to meet them. Certain questions seemed settled, Corwin concluded, such as the Fourteenth Amendment's reach only to the state and its applicability to discriminatory administration of neutral laws. The amendment did not prohibit reasonable and nonarbitrary classification, but the courts had yet firmly to establish the definition of reasonable and arbitrary, and the changes the nation underwent in its attitudes and daily life seemed to make firm establishment an impossibility. "[T] is reasonable to provide that whites and negroes shall travel in separate cars, but it is not reasonable to require that they shall be segregated as to their abodes." And, finally, there were certain questions Corwin believed remained as unsettled as they had been decades earlier: "The full extent of the powers of Congress under . . . [Section Five], in the regulation and protection of civil rights, has never been conclusively determined."64

Corwin's fellow historians, those who concentrated on the postbellum years of racial and constitutional reorganization were of little more help to Burton and his congressional antilynching allies than were these lawyers and political scientists. The historians, particularly those taught by Columbia University's William A. Dunning, shared a perspective. Their conclusions hinged on a view of the federal system and of the black that opposed Reconstruction theories and programs
for federal protection of racial equality in political and civil rights. In their histories, some of which were the first products of new scientific methodology, these scholars portrayed Reconstructionists as men who, in an attempt to uplift the inferior Negro, went too far for a myriad of commendable and despicable reasons. Whether the Reconstructionists' idealism had been untouched by reality or their personal ambitions untouched by idealism, they had initiated policies that led to an inevitable and foreseeable result: racial conflict and sectional antagonism that had taken decades to correct. The Reconstructionists had ignored, lost sight of, or taken advantage of black inferiority. The result was a nation immersed in political disorder and social chaos. Behind claims of "humanitarian idealism" and with little comprehension of racial realities, the Reconstructionists rejected southern solutions and, with political and vindictive goals competing for dominance, began through the Fourteenth Amendment to undermine the constitutional federal system. The result was what Burgess called the "blunder-crime." In the long run the result was alienation of South and North and of white and black and the need for a judicial rescuer to save constitutional federalism.

*     *     *

General acceptance by scholars and lawmakers of the "Dunning School" view of Reconstruction assured at best a
very slow return to the theory that the Fourteenth Amendment was a viable weapon in the defense of black civil rights. The consensus view of Reconstruction, the Negro, the federal system, and the Fourteenth Amendment guaranteed that Congressman McSwain would never be without a large group of supporters. It also assured the antilynching struggle of 1917-1922 a ready source of theories for both sides of the debate. Although few congressional debaters referred by name to the experts who taught the nation about its government and history, the legislators revealed in their discussion of *Slaughterhouse*, *Ex parte Virginia*, and the *Civil Rights Cases* the impact that Cooley and his colleagues had on Congress's view of its powers. They knew that for almost half a century the courts had interpreted the Fourteenth Amendment more narrowly than its framers had intended, that the federal government did not exercise general jurisdiction over private discrimination and did not enjoy an easy reach to the subtle varieties of state denial. But they also knew that new questions blurred old lines. Federal antilynching authority raised questions, and both the views of McSwain and the conclusions of Burton offered "constitutional" answers.
NOTES


2Congressional Record, 67 Cong., 2 Sess., 1525 (McSwain, January 21, 1922), 1282 (Burton, January 17, 1922). Burton explained that he could not, only weeks earlier, "quite overcome the arguments against the constitutionality of this kind of legislation in 109 U. S. and other cases." After receiving additional information from the NAACP he changed his view of the Dyer bill. Burton to G. D. Goff, December 29, 1921, General Records of the Department of Justice, Record Group 60, National Archives, Washington, D. C., #158260-162.

3Charleston News-Courier, December 21, 1922, in Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (Washington, D. C.), Group I, Series C, Box 248; hereinafter cited as NAACP Records.


5George W. Nilsson, speaking to Arizona Bar Association, February 11, 1922, in "Legal Education and Admission to the Bar," Judicature, 5, no. 6 (1922), 105: "If the applicant can pass the examination prepared by our Board of Examiners, whether he has crammed with a quizzer for one month, or studied for years at a law school, he is admitted to the bar and entitled to practice law." For a picture of legal education during the late nineteenth and early twentieth centuries, see Alfred Zantzinger Reed, Present-Day Law Schools in the United States and Canada (New York: Carnegie Foundation for the Advancement of Teaching, Bulletin No. 21,


9 Ibid., I, v.
Ibid.; II, 653-54, 656, 676-77, 681-84; Cooley, General Principles of Constitutional Law, 228-29, 229n, 257. In the eighth edition of Constitutional Limitations, Cooley noted that the definition of privileges and immunities in 1927 was still not "conclusively settled." (II, 821). In the fifth edition of Constitutional Limitations, he had reaffirmed his view of the intent of the framers of the Fourteenth Amendment: "There was no diversity of opinion as to its object between those who favored and those who opposed its adoption." 13. Cooley also stated, "... any discrimination which narrows to one class, while leaving unrestricted to others, the freedom of choice in employment, must be regarded as the establishment of involuntary servitude ...." General Principles of Constitutional Law, 227.


General Principles of Constitutional Law, 209-10 (emphasis added).

Ibid., 229; Constitutional Limitations, 5th ed., 359n; Benedict, "Preserving Federalism," 51.


25. Ibid., 248n, 250-51, 257. Von Holst noted, "I cannot understand how Cooley [in General Principles of Constitutional Law, 244] can say . . . " that state citizenship could really exist separately from national citizenship. Von Holst believed the Fourteenth Amendment made it clear the two were separate. 248n.


29 Burgess, Political Science and Comparative Constitutional Law, I, 213, 210; Burgess, Reconstruction and the Constitution, 1866-1876 (New York: Charles Scribner's Sons, 1902), 297.

30 Burgess, Political Science and Comparative Constitutional Law, 210, 217-18.


32 Ibid., 56, 53-54, 59-60, 104-105.

33 Ibid., 141-42, 144.

34 Ibid., 102, 72-73, 42, 43.


36 Ibid., 852-54.

37 Ibid., 856-60, 690-91.

38 Ibid., 856-59.

39 Ibid., 873-74.

40 Flack, The Adoption of the Fourteenth Amendment (Baltimore: Johns Hopkins University Press, 1908), 8-9.

41 Ibid.


43 Ibid., 546, 548, 555-57, 640-42.

44 Ibid., 392-93, 71, 69.


46 Ibid., I, 712, 1595, 1605, 1635-36, 1625-26, 1661.

48 Ibid., 191, 19, 44-45, 55, 58-59.

49 Ibid., 58-59, 62, 66-69, 111; *Legal Tender Cases*, 12 Wall. 457 (1871).

50 Willoughby, *Constitutional Law of the United States*, 271. Compare Sims, "Power of the Federal Government," 93: "My suggestion is that in creating a Central Government and giving it the named powers of sovereignty, they gave it all the powers which any nation needs to exercise internally or externally, except so far as they concern only some special locality . . . ."


52 Ibid., 872, 1074-75.


54 Ibid., 174, 178.

55 Ibid., 182-84, 185.

56 Ibid., 193-95. Sumner explained that "legislation . . . has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores . . . [R]egulations must conform to the mores, so that the public will not think them too lax or too strict." Specifically regarding America's race situation, Sumner added that "the civil war abolished legal rights and left the two races to learn how to live together under other relations than before. . . . The two races have not yet made new mores. Vain attempts have been made to control the new order by legislation. The only result is the proof that legislation cannot make mores." Folkways: A Study of the Sociological Importance of Usages, Customs, Mores, and Morals (Boston: Ginn and Company, 1913), 55, 59, 77-78. In *The Constitutional History of the United States, 1765-1895* (3 vols., Chicago: Callaghan and Company, 1901), II, 241, Francis Newton Thorpe looked at the failures of the Fourteenth Amendment and commented that "laws did not make public opinion; they are the product of industrial and social conditions." The amendment's failure was inevitable. Fellow American chronicler John Clark Ridpath noted in his popular history that the race question could


58 Collins, Fourteenth Amendment and the States, 20, 66-68, 72, 150; "Fourteenth Amendment and the Negro Race Question," 835. See B. Frank Dake, "The Negro Before the Supreme Court," Albany Law Journal, 66 (August 1904), 246: The post-1865 Court rulings showed that ". . . aside from the abolition of slavery, . . . [the Reconstruction] amendments . . . are now little more than empty formalities."


60 Ibid., 42, 11-14, 94.

61 Ibid., 122, 121.


63 Ibid., 98.


66 Cooley was cited four times; Burgess, three; Guthrie, four; Collins, one; Willoughby, one; Bryce, one; James G. Blaine [Twenty Years of Congress: From Lincoln to Garfield (2 vols., Norwich, Conn.: Henry Bill Publishing Company, 1884)]. See Congressional Record, 67 Cong., 2 Sess., December 19, 1921; January 4, 10, 12, 17, 18, 21, 24, 25, 26, 1922.
CHAPTER THREE

"ONLY A NEGRO":

SETTING THE STAGE, 1865-1922

The negro has many fine qualities; he is joyous, lighthearted and easily lynched.¹

By the early 1900s the American Negro had been free for several decades. By national constitution and statute he was equal to the white American. However, the judicial interpretation of that constitution and those statutes described in the preceding chapters had weakened his status to the point that the black had to defend it, and he had to do so largely alone and in a society dominated by whites who often viewed him as a rival and a threat. When these white antagonists were not violent or openly hostile, they were condescending, intolerant, impatient, and judgmental toward their "inferior."²

While a belief in black inferiority did not necessitate that whites physically dominate Negroes, they often did. Population density, race percentages, and economic conditions often determined to what extent, but a multitude of individual and local factors often determined when individual communities resorted to violence.³ Among that multitude, especially after the late 1880s, was a special catalyst—a black offense: everything from common law crimes against person and property to the black's refusal to settle into his "place"
without argument or protest.\textsuperscript{4}

Surely [Francis J. Grimké concluded] there . . . [was] nothing in the mere fact of stealing a hog, in the mere fact of being impudent to a white man, in the mere fact of daring to ask for a drink of soda water at a counter where white people are served, that could possibly, in and of itself lead a body of men to seize him and string him up by the neck, or riddle him with bullets.\textsuperscript{5}

But there was. While segregation served as the legal prop for white superiority and security, lynching was the extralegal one the South used to guarantee complete black obedience and subservience and to redraw caste lines when they blurred.\textsuperscript{6} As author and lynching analyst Herbert J. Seligmann discovered, "Many a white Southerner will confess in casual conversation that he believes it necessary to 'lynch a nigger' now and then in order that they may be kept in their place . . . ."\textsuperscript{7} If the rest of the nation did not agree, it generally kept its disagreement hidden in apathy and its own racism. As a result, the antilynchers of the 1920s had to clear a racial hurdle as well as a constitutional one.

*   *   *

In the broad day of an enlightened public opinion worldwide in its reach, it is not probable that backward steps will be taken. New acquisitions from the growing social and biological sciences are bringing to us a clearer and saner point of view than that evolved from the philosophy and theology of the past generation. . . . [The Fourteenth] Amendment . . . is the perversion of a noble idealism that the lowest and most benighted element of the African race should in these enlightened days be the ones to rise up and claim the sacred heritage of Anglo-Saxon liberties . . . .\textsuperscript{8}
While the courts dealt with the "perversion" that Charles Collins believed was the Fourteenth Amendment and while private citizens struggled to maintain a monopoly on the "Anglo-Saxon liberties" coveted by the immigrant multitudes in the American promised land, the social and biological sciences helped prepare an already fertile soil for lynching and mob violence. Using the measurements provided by the Civil War's U. S. Sanitary Commission, census reports, and insurance and army tables, scientists found the evidence upon which to base conclusions about racial differences. A modern scientific racism replaced a more primitive antebellum form. Science proved what had been asserted by both slavery's advocates and most of its critics: races were measurably distinct evolutionary entities that advanced at different rates and to different ultimate limits. Blacks were not simply white men with different physical features.

Environment had an insignificant influence on man. The inescapably determinant force on life was heredity. Mixing races did not mean the blend of the best traits and the elimination of the worst; it meant biological weakening, and for the superior race it also meant degradation. Even a "sympathetic" observer such as Charles McCord, who studied the "child race" at the turn of the century and found it to be in need of "at least a child's chance to adapt himself," concluded that the Negro was a coddled and spoiled "dependent, deficient and delinquent." Like a child, the black was easily
excitable, imitative, sensitive, and respectful of authority, although McCord refused to apply the label "inferior" to him. Rather, he explained that

It is not necessary to assume that one or the other race is inferior, but it is necessary to recognize the fact that they are different. As to whether or not they are fundamentally different may depend upon our definition of the term "fundamental."

The difference he and others observed provided definitions that suited white Americans in the new century and that kept the black from melting into the American pot.

Scientific studies supported the conclusion reached by Georgia businessman W. J. Kincaid in 1899 that the Negro was in many ways "truly to the manner born." A success as a slave, the black was a failure as a free man. His farms were than in name only; his efforts as an independent agriculturalist were a burden to the South. He was, however, a useful farm laborer and a domestic servant of unrivaled suitability, but only as long as the controls of the white boss were sufficiently strong and complete. The Negro was notoriously, naturally indolent, lazy, and unambitious. Winfield Collins, a professor of English and history who studied the black and lynching, decided that

. . . it is as natural for the Negro to sit it idleness, or shoot craps, to go on marauding expeditions or connive at insurrection, as it is for the white man to establish courts, collect libraries, and found schools.

Happy-go-lucky and without appreciation of responsibility or commitment, the black was prone to wander away from jobs.
With a tendency to pick up on a whim, the Negro gravitated to urban jobs of minimal responsibility, such as waiting tables and shining shoes.\textsuperscript{14} Other races could not improve the Negro. Only he could better his lot to its limited potential and "in the direction of his natural endowments." The "solution of the question [had to] . . . come from within the race," attorney B. Frank Dake advised. "Let them win their reward by diligent service" and not through any artificial status created by legislation or constitution.\textsuperscript{15} In his 1908 work, Studies in the American Race Problem, Mississippi cotton planter Alfred H. Stone recommended that "the immediate parties in interest," the black and the southern white, work out a normal, gradual solution. Such a policy, historian, author, and businessman Charles Francis Adams explained, would not lead to "a reversion to the old-time couterbalancing barbarism of slavery and brutal domination" because "the world, after all, does progress." But with no great literatures, philosophies, or arts in the Negro's lengthy past in Africa, there were, by the odds, to be none in his future in the United States. In decades of freedom, the black American had done nothing to justify the faith his emancipators had placed in him. Fifteen years . . . thirty . . . forty-five . . . and still the black was immoral, shiftless, and criminal.\textsuperscript{16} His flaws were more than the human "imperfections of his status," McCord concluded. "[E]xcusing the
race's faults on the plea of unavoidable poverty and ignorance due to previous condition of servitude" could not negate the failure. Neither could slavery and white antagonism explain the black's "sexual looseness," low self-esteem, weak family structure, shiftlessness, and criminality. Racists were not convinced by the arguments of black historian W. E. B. Du Bois or by that of the black Chicago Defender in 1917.

The Negro of today, be he angel or devil, is just what the white man made him . . . [The whites enslaved him and then] with one fell swoop they removed the bended prop from under him, leaving him in an unfriendly environment and expected him to measure up to the standards of a race that [had] hundreds of years of civilization behind it.\(^{17}\)

Racists, however, did agree that emancipation had been harmful. Slavery had provided training and a rigid but kind restraint; slavery had taught "old habits of command and obedience." Emancipation released "an irresponsible savage."\(^{18}\)

With these "facts," bigotry in turn-of-the-century America was natural and instinctive. "Racial antipathy," Alfred Stone discovered, "is a present, latent force in us all."\(^{19}\) As a reflection of racist "truths," it supported the avoidance of statutory and constitutional guarantees. If blacks, unqualified for and incapable of appreciating or wisely using their citizenship, had been given too many rights and responsibilities by the Reconstructionists, there was every reason to admit the mistake and hold back what Negroes had been erroneously presented. The ballot in the hands of an Anglo-Saxon encouraged development of praise-
worthy traits, but if the Negro were a child-race, no amount of suffrage rights could spur intellectual growth. As Stone advised,

Human law, does not, cannot, create the capacity for self-government, the possession of which we seek to evidence by certain tangible tests which we loosely call "qualification." The law cannot qualify a man to vote. Note 20

If, as Robert Bennett Bean and other researchers concluded, the black's skull limited his brain's growth and thus his mental capacity and emotional development, the ballot could not change Nature's decree. It could only upset a "judicious evolutionary process," the evolutionist Joseph LeConte warned. Suffrage would make the Negro the vulnerable tool of the unscrupulous. Better to disfranchise than to raise black hopes, encourage white dishonesty, and breed race friction. Note 21 Better to segregate than foster illusions of equality. Better to deal with reality. Slavery may have been wrong, but equal citizenship was not its proper replacement. As Florida Representative Frank Clark explained to Congress in 1908,

If God Almighty had intended these two races to be equal, He would have so created them. He made the Caucasian of handsome figure, straight hair, regular features, high brow, and superior intelligence. He created the negro, giving him a black skin, kinky hair, thick lips, flat nose, low brow, low order of intelligence, and repulsive features. I do not believe that these differences were the result of either accident or mistake on the part of the Creator. I believe He knew what He was doing, and I believe He did just what He wanted to do. Note 22

The United States had strayed far from its ideals,
not when it repressed the Negro but when it attempted to
equalize the unequal. As historian Hubert Howe Bancroft
lamented in 1912,

. . . How fast and how far in one brief century
have we drifted from the plans and purposes of
the founders of this republic! We have made ten
millions of negroes, of a servile race and ante-
cedents, whose fathers were slaves and themselves
in intellect, in natural proclivities, not too
far removed from the jungles of Africa, our
equals, politically and some would have it social-
ly were it possible—a blot upon our name and
nation, and now we know not what to do with them
. . . .

. . . A citizen of the commonwealth he
is an unmitigated nuisance, and judging from the
past he will so remain. . . .
In plantation life alone he finds happiness.
. . . He is by nature and habit a servant, not
alone because of his long period of enslavement,
but because of his mental inferiority.23

The loss of slavery's controls and the encouragements of
premature freedom, not to mention citizenship, had worked
considerable damage on the race and nation. As Charles
Francis Adams explained in 1906,

. . . the work done by those who were in political
control at the close of our Civil War was work done
in utter ignorance of ethnological law and total
disregard of unalterable fact. Starting the move-
ment was wrong, it will be yet productive of in-
calculable injury to us. The Negro, after eman-
cipation, should have been dealt with, not as a
political equal, much less forced into a position
of superiority, he should have been treated as a
ward and dependent . . . . Equality results not
from law, but exists because things are in essen-
tials alike; and a political system which works
admirably when applied to homogeneus equals re-
sults only in chaos when generalized into a nos-
trum to be administered universally. It has been
markedly so of late with us.24

Lily Hammond, a southern white crusader for racial jus-
tice, believed that southern paranois about race was the re-
sult of the South's "really [having] felt the claws once; 
. . . the memory is deep in every nerve." The paranoiacs agreed. The North had tried to be a humanitarian magician after the Civil War and change what Nature had ordained, had told the blacks they did not have to stay on plantations with former masters who knew them and knew what was best for them, had not listened when southerners said Negroes would not work without supervision, had presented an "entirely un-fitted" race with suffrage rights. The result had been, inevitably, hatreds and exploitations. National laws for civil rights and suffrage only inflamed "sectional prejudice and race hate," unlike the southern postwar Black Codes which had reconciled the loss of slavery with reality by treating the black as what he was, a member of an inferior, dependent race. Reconstruction had called the black equal, had instructed him to assert his equality against his southern white enemy, and had overlooked his crimes. Reconstruction's idealistic humanitarians, greedy victors, and ambitious politicians had disrupted the nation's peace, and the South had struggled hard to repair the damage, restore friendly race relations, and negate the unrealistic promises of equality. But the damage had been done; laws had disrupted the evolutionary process.

Laws, however, had not eased the realities of freedom faced by the inadequate black. Although flawed in methodology and interpretations, censuses indicated that freedom had
brought the Negro few of its promised advantages. The figures may not have supported theories, such as those propounded by Joseph Camp Kennedy, superintendent of the Eighth Census (1860), and those of New York physician Charles E. Woodruff in 1909, that the black faced quick extinction if allowed to struggle alone, but they supported theories that the Negro was not adapting to freedom. The 1870 figures revealed that the black rate of population increase fell far short of the antebellum figure. From 1790 to 1850 the Negro population increased an average 36 percent every ten years; from 1860 to 1870 the increase was less than 10 percent. The 1870-1880 figure was over 34 percent, but from 1880 to 1890 the rate of increase was only between 13 and 14 percent.27 Other surveys demonstrated a new susceptibility to diseases—mental and physical—which interpreters found to be the result of racial traits that slavery had hidden.28

Black freedom also meant constant threats to white lives and security. The root of much of the danger was the Negro's alleged immorality and lack of self-control, flaws that freedom intensified. Through measurements of skulls, jawbones, and brains, scientists such as zoologist and paleontologist Edward Drinker Cope and popularizer John Fiske concluded by the 1890s that the black, born with mental and emotional capacities equal to the white's, was stunted at approximately age twelve by a skull that ceased to grow, confining within it the brain of a child. But even though his
mental and emotional growth was at an end, the Negro's physical development continued. The result was an adult with the emotional maturity of an adolescent, constantly responding to his body's sexual demands, with little or none of the emotional strength needed to sublimate them. Once sexually aroused he was guided by what Dr. William Lee Howard in 1903 called a "sexual madness," unrestrained by any respect for personal and private property. This madness gave his natural criminal tendencies free rein, as did his "indifference to chastity in the females" and his "lewdness." In addition, sociologist Lester Frank Ward reported, something instinctive instructed the Negro to seek a higher race with which to mate. Finally, sermons on racial equality merely played further havoc with undisciplined desires as the Negro sought the most unattainable symbol of equality, the white woman. 29

If the black responded to his instincts, so too did the white. Instinct told the white to protect himself and his race, to meet what Winfield Collins called "extraordinary conditions with extraordinary means." "We would not destroy the negro," Congressman Clark explained, "but we would preserve the Caucasian." Although interracial mating was possible—fertile offspring being produced by such unions—it was not natural—the black penis being too large for the white woman's uterine canal and the mulatto children produced being mentally superior but physically inferior to
the Negro. No white woman except the most degraded would be attracted to or engage in sex with a black man. 30

Although rape was never statistically the major crime for which Negroes were lynched, the South labelled it "the usual crime" and said it explained lynching's frequency and its strong racial and sectional focus. If blacks would stop raping white women, the litany went, whites would stop lynching blacks. A gallant southern gentleman did not subject a despoiled white woman to the humiliation of testifying in court; he did not play to the Negro's love of pageantry, talk, and attention by conducting trials and formal, legal executions; he did not risk an escaped rapist or an overturned verdict. Instead, responding to the "primary law of personal and awful vengeance," he grabbed a rope or gun or kerosene can; he would make the black beast pay and provide a suitably horrible lesson for would-be criminals. "As the world is to be made safe for democracy, so ought the South to be made safe for white women," Collins explained. The litany continued. 31

Suffering from what North Carolinian L. P. Chamberlayne in 1916 called "mass-nervousness," most southerners publicly acknowledged that lynching was not "right." But by pointing out the racial situation in the South, with its real and potential horrors, they sought national understanding. However, although admitting Negroes posed dangers, many fellow southerners never understood the necessity of lynching. A
deterrent of questionable value, lynch law was an extreme alternative to doing nothing about the Negro problem. Why not a "return to the courts"? Why not judicial reforms to make punishment of the guilty inevitable and swift and protection of the rape victim certain? Rejection of these alternatives was tied not just to racism, the need for caste controls, and the national government's and North's lack of interest in the black's problems during the Gilded Age and Progressive Era. Rejection was also tied to a faith in a justice system defined by local needs.  

This latter factor played an important role in lynching's history and the antilymphing crusade's difficulties. While some observers called it lynching and blamed it on racism, others called it Lynch Law and blame a poor justice system. Particularly in the late 1880s and early 1900s, the specific focus of apologists for lynching was a faulty, inefficient judicial system. There were infrequent cases to support charges that the system was fatally flawed, especially when it dealt with black offenders, yet a long record of such problems, however infrequently they appeared, led many to cite a vacuum that extralegal lynching filled. The legal system, as noted by numerous authorities, such as jurisprudent Roscoe Pound in 1906, was a set or procedures filled with "uncertainty, delay and expenses." Lynch Law's apologists noted that enraged citizens often refused to tolerate commutations of touch sentences, innocent verdicts after
second trials, mediocre efforts by mediocre officials that
allowed felons to go free, and the reversal of convictions
because of minor procedural errors.35

When slow courts, tricky lawyers, technicalities, and
easy pardons distorted the procedures and purposes of law,
localities assumed the responsibility of protecting them-
selves frontier-style. The Pittsburg (Texas) Gazette de-
finite the problem in 1884: ". . . the courts are generally
too slow and uncertain in the administration of justice that
some such means is necessary to the relief of the public
mind." Lynching was, Washington University historian Roland
G. Usher explained in 1919, "nothing more nor less than the
old self-help." The people made the law and, when necessary,
administered it by eliminating the inefficient, ineffective,
and faulty middlemen.36 Lynching was not a violation of the
law but its vindication. As Charles Bonaparte, Theodore
Roosevelt's attorney general, explained in a widely cited
1899 Yale Law Journal article, "... the law is violated in
form that it may be vindicated in substance . . . ." In a
1910 post-lynching note, the Dallas Morning News commented
that many lynchers were "moved by their contempt of the de-
lays, reversals, and failures of courts." Such, the paper
said, helped explain why a mob of five thousand took Allen
Brooks, a black, out of the Dallas courthouse during a re-
cess in his trial for assault and lynched him.37

Southerners explained that although mobs attacked indi-
vidual criminals and not a race, if blacks were naturally
criminally inclined they would logically be the primary
victims of southern local and personal justice. "[C]rime
and not color is the incentive to lynchings," Thomas Walker
Page explained; Negro "bestiality and unholy passion"
prompted retaliatory white justice. The black's great
wrongs required severe punishment. Lynching provided an
efficient, low-cost way to punish threats to life, proper-
ty, and caste in a way which the criminal and "inferior"
could understand; therefore, the Negro was the primary tar-
get of an often brutal extralegal South: "Damn the law;
we want the n[i]gger."38 As early as the nineties, pri-
vate executioners had developed a "typical" lynching style,
a ritual embodying "racism and sadism." Groups of whites
numbering from a small handful to thousands hung, shot,
burned, and, with greater frequency during the 1890s, slow-
ly tortured to death Negro men and women in the South.
Often supplemented by local citizens drawn to the circus
atmosphere of mid-day, advertised, town square executions,
the lynchers provided "punishment," a warning, and enter-
tainment--hot pokers slowly twisted in eyes and mouths,
hundreds of bullets shot into swinging bodies, men dragged
naked through streets before being slowly burned to death,
ears, fingers, and sex organs cut off, body parts and post-
card pictures sold to eager souvenir hunters.39

As Winfield Collins explained in 1919, the United States
had "two races so widely apart in origin, characteristics, and development" that it was reasonable to "have two codes of law suited, as nearly as possible, to each race, respectively." In the South that theory necessitated the use of lynch law for Negroes: "A mode of punishment that would be out of place as to the white man may well be suited to the Negro. Small-pox is not to be treated as chicken-pox..." Even the North, Collins explained, would resort to lynching, or at least see the justification for it, when its black population increased, when it found it necessary to "strike terror into the soul of the possible or incipient Negro criminal" by the only method--"immediate, sure, and adequate"--that his slowwits could understand. Failure to lynch meant an increase in crime. Lynching was "an indirect act of self-defense against the Negro criminal as a race." As Lynch-Law author James Cutler summarized in 1905,

A judicial system adapted to a highly civilized and cultured race is not equally applicable to a race of inferior civilization, and the failure to realize this fact and act upon it, by making special provision for the control of the negro population in the Southern States since slavery was abolished, is a fundamental reason for the disrepute into which the legal procedure has fallen as regards negroes accused of offenses against the whites.

This theory and those similar to it garnered little formal organized attention as long as the South was the major home of black Americans. While the country conquered the "little brown brothers" in the Philippines and complained of the ills brought by the immigrant millions, the South was free
to handle its regional problems in local ways. But with the increased migration of southern rural blacks to northern urban areas in the early twentieth century, the southern "Negro problem" became a national "race problem." Black population in the North increased over 43 percent from 1910 to 1920; in the West, it rose 45 percent. By contrast the South's Negro population rose less than 2 percent over the same period. Whereas New York's black population increased by sixty-four thousand, Illinois's by seventy-three thousand, and Michigan's by forty-three thousand, Tennessee's dropped twenty-two thousand, Louisiana's thirteen thousand, and Mississippi's seventy-five thousand. This black movement presented the North with housing and employment problems that increased latent racial misunderstandings, apprehensions, and fears, and it presented the South with an intensification and modification of old concerns. In both regions, violence was a response to the black's dislocations.  

The Negro may not have been a reliable, industrious worker, according to the South's employers, but he was cheap and plentiful. To prevent his escape north, southerners often resorted to trickery, pressure, and even violence.  

The tactics failed to stop the exodus. David M. Southern, a student of the Progressive period's racial attitudes, explains that Negroes "vote[d] with their feet" against southern repression. The North was no Garden of Eden, as Negroes who had long lived there knew and as the new arrivals soon discovered, but for many migrants it at least offered
some hope of avoiding institutionalized violence. Blacks encountered discrimination, segregation, and race riots in the North, but their exodus from the South demonstrated their willingness to brave the alluring unknown rather than suffer the often unbearable, always dangerous conditions in the South. As T. Arnold Hill of the Chicago Urban League explained, "... whenever we read newspaper dispatches of a public hanging or burning ... we get ready to extend greetings to the people from the immediate vicinity of the lynchings." The Chicago Defender, a weekly which filled its pages with descriptive accounts of racial violence and black migrations, noted that the South did not have to pass laws to prohibit migration; it had only to outlaw lynching, segregation, disfranchisement, and unequal protection. If "the same 'colonels' who live[d] in the land of cane and cotton and who proclaimed but yesterday that we were a nuisance, a problem, and retarded the growth of the section want the black to stay South," they had only to change their race policies. 44

While the black exodus increased the nation's awareness of its racial problems and while allegedly faulty law enforcement systems directed attention to theories of justice and fair play, the lynching of aliens prompted concern for lynching itself. During the 1890s and early 1900s, mob murder of Japanese, Italians, Mexicans, and other nationalities caused tense diplomatic relations and prompted payment by the
United States of $800,000 in indemnities to bereaved and angry mother countries. However, concern for the mob murder of aliens did not usually translate into a concern for black lynchings prior to World War I. 45 But if that concern lagged, the cases and statistics that would by the end of the war provide a reason for a general antilynching effort were mounting steadily, as lynchers exhibited their ability to act and the states exhibited their willingness to let them act.46

As opponents of federal antilynching jurisdiction pointed out in the early 1920s, the number of recorded lynchings had generally and noticeably declined after the peak years of the 1890s. Not since 1901 had mobs killed a hundred persons in a single year; not since 1892 had they killed two hundred in a twelve-month recording period, although few dared to speculate on the number of men who died quietly and without publicity in the southern backwoods. Nevertheless, the number of recorded mob deaths remained disquietingly large, at least fifty every year, with the exception of 1917. In addition, the percentage of victims who were black was considerably greater than in the 1880s and the 1890s when frontier justice meant frequent vigilante attacks on whites. While not as frequent as in the more isolated rural days of the late nineteenth century when lynching first appeared as a tool for race control, mob murder was still at epidemic levels.47 The figures were, protestors announced, high enough to have sparked national action if the victims had been whites, the murderers the bar-
baric "Huns," or the cause of death a disease. Even a white racist paper could be babbled in 1919 by the contradictions. "Aren't burnings at the stake, mutilations, tortures, unsexment, hangings, disembowelments, crucifixions and human tortures just as atrocious in America as they are overseas?" The usual answer from the states was silence. After 1917's statistical low of thirty-eight deaths, the murders became more frequent, up to sixty-four in 1918, eighty-three in postwar 1919. Some of the wartime murders were of union organizers and German-Americans, but these few white deaths and the national reaction to them simply served to emphasize the overall infrequency of mob attacks on whites and the nation's lack of concern for black lynchings.

In addition, riot deaths were not counted in the statistics. When Representative John C. Raker of California asked, "What chance on earth has a poor, innocent Negro in a place like this?" his question, so applicable to the rural deep South, was actually about East St. Louis, Illinois. There in July 1917 riotous whites killed scores of blacks. Riots also struck Chicago, Tulsa, Memphis, and Washington, D. C., when frustrated whites, sparked by black migration and housing and employment ills, swept through black residential and business sections indiscriminately burning, looting, and killing. As with most southern lynchings, the local police and state militia often did little to halt the riots, occasionally helping rioters light torches and
throw rocks, often releasing white offenders while jailing black defenders and retaliators. However, by the standard definition used by record keepers, lynching was the taking of life without legal authority in order to punish a particular person for an offense or to achieve a correctional goal. Rioters did not attack for this "legal" reason as they sought general rather than particular targets. Their victims, therefore, were not added to the annual lynching totals compiled by Tuskegee Institute and the Chicago Tribune.

In other ways, lynching and rioting resembled but differed from each other. Although increasingly common during the war and postwar years of 1917-1922, riots were not daily or weekly events as were southern rural lynchings. And unlike their southern cousins urban rioters could not feel assured that the courts would not demand retaliation. Legal actions—arrests, indictments, convictions, imprisonments, and fines—were common because of the massive nature of the riots, the sometimes staggering loss of life and property, and the publicity riots generated. But, added to the southern record of unequal justice, riots and their aftermaths revealed much to blacks. They noted that however much blame and punishment whites received for their riotous actions, Negro victims suffered punishment for protecting themselves, black soldiers who rioted in angry frustration in Houston in August 1917 were swiftly court-martialed
and executed or imprisoned, and the white press continued to find blacks responsible for racial violence. The East St. Louis riot, in particular, both offered hope and increased frustrations. It demonstrated a general hands-off policy where blacks were mob victims. The first of the wartime riots, its handling by the national government set the pattern of federal noninvolvement and served as a reference point for Negroes alienated by a country that claimed to be the symbol of equal protection and justice. Within days of the outbreak, which was sparked by economic and racial frictions, municipal maladministration, political and police corruption, and organized crime and which took dozens of black lives, a national demand rose for federal action. Illinois Senators Lawrence Y. Sherman, a Republican from Springfield, and James Hamilton Lewis, a Chicago Democrat, East St. Louis Representative William Rodenburg, and the city's Committee of One Hundred asked that Kennesaw Mountain Landis, federal district judge for northern Illinois, fill the vacancy on the federal bench whose jurisdiction included the riot-torn city. The new incumbent could conduct a federal grand jury investigation of the rioting. Landis did not get the appointment; no federal judge conducted an investigation. The absence of a federal question was the technical obstruction. The only federal action taken was an investigation by the Justice Department to determine if it had jurisdiction and a five-week investigation
by a special House committee. This "nonaction" was significant for both blacks and future antilynchers. Petitioners for federal action saw a president who turned to his attorney general for answers and an attorney general who found in the advisory reports of Justice Department lawyers insufficient cause or jurisdiction for action against rioters. This asserted lack of statutory jurisdiction, when added to the Department's similar claim regarding lynching, presented federal lawmakers and those who wished to influence their lawmaking with a vacuum to fill. However, the reason for the vacuum's very existence made filling it especially difficult. As Senator Lewis explained to his colleagues when they briefly considered a joint congressional investigation, the problem the national government faced with riots was substantial. There was . . . the constant difficulty, which has confronted the Congress every time it has assumed to enter upon a similar field, . . . whether the Federal Government will enter upon the jurisdiction of a matter which States have already assumed the jurisdiction of, or whether it will wait until the State has concluded its efforts and then either cooperate or refuse to complicate the results by its interference. 60

Lewis's problem was not as great as it would have been if he had not assumed that Congress could constitutionally help or take over for a state when the latter was unable to perform certain jobs effectively. He assumed that the federal government could find in race riots a federal question, an opening that would not run Congress against the wall of state powers
protected by the Tenth Amendment and the Supreme Court.

While President Woodrow Wilson sent word to black leaders that he was doing his "utmost" in the wake of the East St. Louis riot to protect "the interest of the colored people," he was explaining to Attorney General Thomas Watt Gregory his understanding that "we cannot under the existing law extend our jurisdiction [to the riot], as much as we should like to." Gregory's agreement led Wilson to give Missouri Congressman Leonidas C. Dyer, to whose St. Louis district many of the East St. Louis blacks fled, a disappointing reply to his appeal for federal action. The President, after "a great deal of thought," felt obligated to say "in candor" that there was no justification for federal action other than "... aid to the state authorities in their efforts to restore tranquility and guard against further outbreak."

Justice Department memoranda on the riot and on the use of federal troops to aid state authorities in other mob situations, however, appeared to keep open the door to federal jurisdiction that Wilson was willing to close. A July 20 memo found the Thirteenth and Fourteenth Amendments to be wedges for action. Sections 19 and 20 of the federal statutes were based upon them. These sections until 1909 bore the numbers 5508 and 5510 and were the modern manifestations, slightly changed, of the 1866 Civil rights Act and 1870 Enforcement Act. The former prohibited conspiracies
to deprive citizens of their federal rights; the latter prohibited depriving persons "under color" of law of those same rights. Amended in 1909, Section 20 required that such deprivation be "willfully" done, a limitation that the memo failed to note.65

The memo writer, Assistant Attorney General William C. Herron, believed that the rioters of East St. Louis probably fell under the coverage of the civil rights provisions. Briskly scanning a few of the relevant federal cases, Herron found Ex parte Virginia and Hodges v. United States to be particularly important. He concentrated on the former's discussion of state action and then linked the case, without explanation, to the state agents who failed to stop them. Hodges was relevant for Herron because it dealt with all the civil rights sections. Although the Hodges Court had found blacks to have no right to be free from violent interference with the labor, the memo noted that the Justices had not dealt with interference by state action. Hodges "clearly settled"

. . . that unless there is some element of State interference, by way of direct legislation or by its agents, crimes against the colored people, although committed because they are colored, do not present any question of Federal jurisdiction. 66

After noting the natural link between Hodges and Twining v. New Jersey (1908), which dealt with state denial of state-protected rights, Herron concluded that "the rights of a colored citizen to equalize before the law" were federal
rights explicitly covered by the Fourteenth Amendment. 67

With the aid of a line of inconsistent lower court decisions, Herron ended with the opinion that

. . . if evidence can be procured showing either the State, the county or the municipal authorities failed to perform the duties required of them by the Illinois law in relation to these people, and failed to perform these duties concerned, there is a basis for a grand jury investigation and that such an investigation should be had. 68

Three days after Herron prepared his report, the federal attorney for East St. Louis, Charles A. Karch, sent his own recommendation to Gregory. It provided a suitable companion for the Herron theory of state denial because Karch also saw a tool in Section 19, a tool to be used against the state's denial of protection to East St. Louis blacks. The federal attorney found "the violence against the negroes and the consequent denial of their constitutional prerogatives and immunities" to be directly due to state action. City, county, and state officials, sympathizing with the rioters, had permitted the violence to take place. 69

Despite Karch's finding of state involvement, Attorney General Gregory was "disposed to believe that no Federal question is involved and that there is no ground for the proper exercise of the jurisdiction of the Federal court." Because Gregory acknowledged that it was "conceivable, even if not probable, that facts not as yet disclosed might give the Federal authority jurisdiction," he instructed Karch to be alert for new evidence indicating federal jurisdiction
existed; however, Karch's primary responsibility was to carry out a policy of "helpful cooperation with the state authorities . . . to aid them as far as possible" to perform their jurisdictional obligations. As Gregory explained to Wilson the same day, July 27, "a complete investigation" and a "good deal of thought" about facts and laws revealed no reason to conclude a federal law had been violated or that federal action was warranted. This explanation led to Wilson's note to Dyer but did not deter a congressional investigation that did much to support the Herron-Karch evaluation.70

Sparking that investigation were various claims that federal jurisdiction existed. East St. Louis businessmen had reported on July 3 that the mob's destruction of various manufacturing plants would be "injurious to the interests of the National government."71 Federal interest in the riot also revolved around other issues. The use in East St. Louis of federalized Illinois National Guard which might have been needed in Europe and the need to discover the whereabouts of draft-age blacks who scattered to escape the mob both involved the nation's ability to wage war. Mob interference with interstate commerce and the mail suggested another target for federal jurisdiction.72

On September 11 the House assigned a special five-man committee to investigate whether conditions, particularly "riots, strikes, mob violence or failure of State authori-
ties to enforce the law during . . . 1917" in Illinois and Missouri "obstruct[ed] or interfere[d] with interstate commerce or render[ed] unsafe to person or property, travel from other States into or out of said States . . . ." The committee of two Republicans and three Democrats that investigated from mid-October through November, 1917, took five thousand pages of testimony that neither found their way into public print, because of printing costs, nor led to any further federal action.\textsuperscript{73}

The Justice Department refused to turn its records over to the committee which Kentucky Democrat Ben Johnson chaired, but the Representatives, authorized by House Resolution 128 to consider all information, "whether . . . hearsay testimony or otherwise," found easy access to evidence in East St. Louis and Washington, D. C., to reach conclusions that matched many of Rarch's. In addition, the committee's report revealed that

\textbf{. . . interstate commerce was not only openly and violently interrupted but was virtually suspended for a week or 10 days during and following the riot . . . . For months after . . . interstate commerce was interfered with and hindered . . . by a subtle and effective intimidation or colored men who had been employed by the railroads to handle freight consigned from one State to another.} \textsuperscript{74}

Despite the ties the riot had to municipal corruption and to labor frictions, its roots, the committee concluded, were in "bitter race feelings." East St. Louis whites found southern blacks taking jobs, increasing crime, and distorting elections. A corrupt and inefficient police force
did not deal with the July rioters. In fact, policemen who
did not flee the riot "shared the lust of the mob for negro
blood, and encouraged the rioters by their conduct, which
was sympathetic when it was not cowardly." The state mili-
tia in general also failed to perform its duty. "As a
rule, they fraternized with the mob, joked with them and
made no serious effort to restrain them." After providing
pages of examples to support these conclusions, the commit-
tee announced it would not adjourn *sine die*; it wanted to
be in a position to issue a second report on the "benefi-
cial resul*ts*" of its first report. 75

The investigation, however, had only a few "benefi-
cial results." In East St. Louis they took the form of
municipal reforms--replacement of the mayoralty system with
a commission form--and local convictions for rioting, mur-
der, arson, conspiracy, and assault to murder. Outside of
the city, little positive action occurred on any level of
government. Gregory's decision held, even when the black
soldiers who rioted in Houston in August 1917 were quietly
and quickly court-martialed, convicted, and punished for
their riotous acts. But this conflict of action and non-
action was only one aspect of the nation's general race
policy, of its division of jurisdiction, and of the great-
est contributor to black frustration and increased rioting
and lynching: the world war. 76

When the United States entered the European conflict
in 1917, the Chicago *Defender* announced that

> The war is going to revolutionize American life on an undreamed-of scale . . . .
> The war will work many miracles. Will one of them be an amelioration of the violence of American race and color prejudice?77

A year later Charles Evans Hughes, former Supreme Court Justice and defeated 1916 Republican candidate for the presidency, suggested that the war might "... get rid to some extent of the impurities of class distinction, of racial bigotry and separateness, ... to give us the new America with a better appreciation ... of the worth of character, regardless or race, or color, or sex, or fortune." The hopeful speculations of both the *Defender* and Hughes were not realized.78 The war intensified racial anxieties. It increased black bitterness and resentment, as well as southern determination to show the black that a uniform changed nothing.79 In appraising the situation in early 1919, NAACP president Moorfield Storey, who once served as Charles Sumner's private secretary, found

> ... a deliberate purpose ... gradually taking form in the South to prevent the negroes from claiming any further consideration on account of their services in the war. The negroes will come back feeling like men, and not disposed to accept the treatment to which they have been subjected. The South will be afraid that with arms in their hands they will be a dangerous element, and the attempt will be made to disarm and intimidate them.80

During the conflict War Department policy kept the Negro in segregated units, commanded by white officers, and limited in assignments and privileges; nevertheless, the
country needed and used the black soldier, who eagerly
offered his service, and the black civilian, who served
as producer and investor. But while willingly and loyally
aiding his country's cause, the Negro made clear that he
recognized the contradiction between what his nation gave
to him and what it took from him. "We are loyal and will
remain so, but we are not blind." The Defender wondered,
"With tens of thousands of our Race fighting for civiliza-
tion in France under the American flag, how much longer
are the American people to tolerate lynching" and keep Ameri-
ca unsafe for Negroes? The nation should, the paper advised,
"... insist that charity begins at home and that Prussian-
ism which infests the south, and to a great extent the north,
first be wiped out by the men who call us to colors." As
silent protestors in 1917 marched with placards announcing
that "No land that loves to lynch 'niggers' can lead the
hosts of Almighty God," Howard University's Kelly Miller,
a middle-of-the-road black leader, explained the problem
to President Woodrow Wilson in a public letter.

... a chain is no stronger than its weakest
link. A doctrine that breaks down at home is
not fit to be propagated abroad. One is re-
minded of the pious slaveholder who became so
deeply impressed with th plea of foreign mis-
sions that he sold one of his slaves to contri-
bute liberally to the cause. ... ... You have given the rallying cry for
the present world crisis. But this shibboleth
will be robbed of instant meaning and power un-
less it applies to the helpless within our
gates. ... ... A democracy of race or class is not
democracy at all. . . .

"Behold a stranger at the door,
He gently knocks, has knocked before,
Has waited long, is waiting still,
You treat no other friend so ill."82

The Negro, explained the Defender in 1918, resisted German propaganda based on lynching only because he saw no need to "jump from the frying pan into the fire," but resistance did not mean that morale at times was not, according to Tuskegee president Robert Moton, "little short of dangerous." As the black Forum of Los Angeles informed Wilson, ". . . if the country could not protect us in the time of need, we feel it is not humanly possible to nourish our hearts to loyalty by the memory of cold neglect from the general government." A June 1918 petition signed by thirty-one black editors explained that "German propaganda among us is powerless, but the apparent indifference of our own Government may be dangerous."83

In 1919 Secretary of War Newton Baker, who helped promote and took part in the conference from which this last appeal originated, advised Negro veterans that "if there have been some things which you think were not as they should have been, you must try to forget them and go back to civil[ian] life with the determination to do your part to make the country what it should be." Many Negroes could not forget, and they demanded a national reform in race policy: economic opportunity, protection of voting rights, and abolition of Jim Crow cars, lynching, and peonage--"simple justice."84
To achieve this goal, "the most quiet man in the United States" sometimes became a "New Negro" who was unwilling to be forever patient. If the government would not defend the Negro against whites, the black would, at least in urban areas, sometimes attempt to defend himself. Mary White Ovington, a white reformer who helped found the NAACP in 1909 and thereafter served on its board of director, thought that "the last place to which the returning colored soldier can look for justice is Washington . . . ." If true, if postwar federal policy followed prewar and wartime precedents, white America might find black America refusing to submit weakly. *Crisis*, the NAACP organ and the voice of the impatient W. E. B. Du Bois, issued a postwar promise.

We return.
We return from fighting.
We return fighting.
Make way for Democracy! We saved it in France, and . . . we shall save it in the United States . . . or know the reason why.85

As both the Justice and War Departments knew, black agitation, bitterness, and eagerness for a reform in America's race policies existed beyond the editorial rooms of a Negro publication whose circulation in 1920 was slightly more than sixty thousand. Both departments learned from their mail and from expert advisers during and after the war the extent to which the American Negro resented his unequal statutes, whether such resentment was the result of radical, labor, or socialist propaganda or of what the black learned from personal experience.86 Whatever caused the dis-
content, lynching was a major element in it. To prevent
black dissatisfaction and protest from threatening the war
effort, an officer in Military Intelligence, Major Joel E.
Spingarn, in civilian life a board member of the NAACP, pro-
posed to his superiors a general program to counteract enemy
propaganda or moderate the problems that propagandists dis-
torted to suit their ends. In addition to recommendations
for a presidential antilynching statement, a federal anti-
lynching bill—discussed in Chapter Four—and contacts with
cooperative black leaders, Spingarn proposed a "conference of
thirty or forty colored editors, and race leaders." The
idea for the June 1918 conference grew out of the "con-
stant complaints from Intelligence Officers and others . . .
that the colored press was spreading dissatisfaction among
negroes . . . . " Addressed by Baker, George Creel of the
Committee on Public Information, Assistant Secretary of the
Navy Franklin D. Roosevelt, and various French officials, the
conference in Washington allowed the blacks to "'let off
steam'" about racial inequalities and to express unanimous
agreement that there was "great unrest" among blacks. "[T]he
unwillingness or inability of the federal government to pro-
tect colored people against lynching seemed the paramount
grievance," Spingarn reported.87

Less than a month after the conference, Baker again took
Spingarn's advice, this time regarding the presidential state-
ment. The Secretary of War notified Wilson ". . . that there
has never been so much unrest among the colored people as at the present time, and that the main source of this unrest is the prevalence of lynching." Affected by "the numerous outrages," the black's low morale was "interfering in some measure with the prosecution of the war." Therefore, he recommended that Wilson inform the American people "that military necessity no less than justice and humanity, demands the immediate cessation of lynching." Baker reasoned that "an utterance from you would have more effect . . . than anything else that could be done . . . ." A week later, on July 26, Wilson publicly denounced mob violence. Three days after that, Baker rejected Spingarn's suggestion for a war-powers antilynching bill; the Department of War decided that its focus would be military rather than both military and civilian morale. 88

A year later the war was over but concern for black attitudes continued as the nation reacted to Bolshevik threats, war's disillusionment, and economic and labor ills and sought to protect itself from further disruptions. In an August 15, 1919, memorandum directed to the director of Military Intelligence and forwarded to the Justice Department, James Cutler, "a recognized expert" on racial violence, warned his Army superiors that agitators and radicals were "daily winning new converts among the negroes, particularly among the younger and more irresponsible element." NAACP "propaganda" in favor of racial equality and even the use of
force when "necessary," was "bearing abundant fruit" among the "new negro." Blacks who had been "led to expect a modification, or possibly removal, of some of the discrimination" were increasingly disappointed and bitter about lynching and segregation. "'Fight for your rights'" was the Negro's postwar slogan; arms purchases and the Negro's belief that he triumphed in race riots indicated to Cutler the delicate state of race relations in 1919. Even "thoughtful and substantial negro citizens" saw a need for "agitation" and the "strongest pressure" Negroes could exert short of overreaction. The United States was at "a critical junction" in its racial history. Recommending an end to lynching, the modification of some Jim Crow laws, and the creation of a new Army policy for the treatment of Negro troops, Cutler concluded:

It is difficult for any one who knows the negro at his best to believe that any considerable proportion of the colored population, outside of the younger, more or less irresponsible element, will be misled by unsound doctrines and self-appointed radical race leaders. Yet, unquestionably there is a potential and impending danger in the present situation which may not wisely be disregarded, particularly in view of the existing general social and industrial unrest. There is a race consciousness among the colored people today which is of recent origin and which is susceptible to direction and manipulation by those who have sinister motives. 89

Not considering it "a very serious matter," the Justice Department had "at first" "paid little attention to propaganda among the negroes," but by the time Cutler's report reached it, the Department was quite interested. Its inves-
tigative branch had assigned "a negro man as a special agent" in the District of Columbia and had given instructions to field agents to obtain information and "employ reliable negroes." Whatever its cause and its degree of seriousness, black discontent was more than a few editorials, random riots, and silent protest marches. 90

The "Spirit of 1918" that these responses to lynching prompted confronted Woodrow Wilson during and after the war, but they won little of the president's attention or sympathies. The former Princeton University president and New Jersey governor had indicated in 1912 that a switch of black votes from the Republican to the Democratic column would provide a "president of the whole nation [who] . . . would know no difference of race or creed or section," who would provide blacks with "not mere grudging justice, but justice with liberality and cordial good feelings" and with "absolute fair dealing." His administration, however, provided the Negro with little and even took some of what the black had, allowing the extension of segregation into executive departments. 91 Wilson resisted meeting with black representatives and, "see[ing] no way out," left problems to those who had long managed them. Deluged with letters and petitions from blacks who saw in a presidential statement against lynching the terrible swift sword of a Lincolnian savior, Wilson, taking Baker's and Spingarn's advice, did issue an anti-mob statement, but the president, single-minded
in his attempt to bring democracy and order to the world, framed his statement around that goal.

... mob spirit ... has recently ... very frequently shown its head ... in many and widely separated parts of the country. There have been many lynchings, and every one of them has been a blow at the heart of ordered law and humane justice. No man who loves America ... or who is truly loyal to her institutions, can justify mob action while the courts of justice are open ... .

We proudly claim to be the champions of democracy. If we really are, in deed and truth, let us see to it that we do not discredit our own. I say plainly that every American who takes part in the action of the mob or gives any sort of countenance is no true son of this great democracy, but its betrayer ... .

I, therefore, ... beg that the Governors of all the States, the law officers of every community, and, above all, the men and women of every community in the United States ... will co-operate--not passively merely, but actively and watchfully--to make an end of this disgraceful evil. It cannot live where the community does not countenance it. 92

Although black reaction to this general condemnation was initially favorable and hopeful, the continuation of lynching, often of black veterans and their families, pushed Negroes to request a specific condemnation of and federal action against the lynching of colored men. Wilson never found the right "occasion" to take action "naturally" or to make other than a "sub rosa" show of antilynching support. 93 Concentrating on problems of war and peace, he failed to change what Kelly Miller described as his "warm aloofness" and his "passive solicitude" toward blacks. He did not find in black lynchings cause for his aroused concern. They were no more than "a regrettable social malady to be treated
with cautious and calculated neglect," Miller complained. Wilson continued to believe that the "Negro question" occupied a minor position in the list of national priorities.\textsuperscript{94}

For numerous other black leaders and the Negro rank and file who sent pleading, patriotic, dignified, and desperate letters to the White House, Wilson's nonactions and forgotten promises proved that he was "out of sympathy with them, and . . . indifferent to their fate as a people." He was, James Stemons of Philadelphia informed Wilson, perhaps the greatest "exponent of abstract justice" the world had known; however, "the verdict of the masses . . . has long been that while you were vigorously preaching one thing you were, when expediency demanded it, as vigorously practicing the direct opposite." Despite pleas that he "be consistent" while leading a world crusade in Europe, he represented to Archibald Grimké of the NAACP "the ripe, consummate fruit of all this national contradiction between profession and practice, promise and performance." He was, other critics noted, worse than his Republican predecessors, a strong indictment since William Howard Taft had scarcely acknowledged the black's existence and Theodore Roosevelt, often referred to by blacks as "our president," had been no more than a child of his age and a politician of the real-politik school. Taft had felt lynching was a concern of the states and had believed that southern whites were the Negro's "best friend." Roosevelt had linked lynching to black rapists,
had feared the mob's effect on white America, and had left the antilynching cause to others. 95

One fruit of this nonpartisan presidential view of black lynching was a growing Negro belief that the colored man should be a free agent politically. If not unofficially disfranchised, as in the South, the Negro should give his vote, an increasingly significant factor in northern urban states, to whichever party best listened and responded to him. He should, A. D. Coles of New York encouraged, "get together and support the most friendly Party, not because we are indebted to the Party, but in order to make that Party feel its indebtedness to us." Chandler Owen, an editor of the black Messenger, advised that

We Negroes can make lynching an issue. We can question each candidate running on lynching and make him take some position or else knife him at the polls, be he spineless Republican or spineless Democrat. 96

In 1920, however, the black did not tamper with his traditional Republican bloc vote. With the nation weary of war and world involvement and with widespread lawlessness, a Red Scare, and a resurrected Ku Klux Klan responding to postwar fears and anxieties, the Negro helped select Warren G. Harding to replace Wilson. 97 For the Negro leadership, the issue was not membership in the League of Nations but "The Race Question--and Continued Lynchings." 98 Would Harding take over where Roosevelt, Taft, and Wilson had left off 99 or would he find a reason and justification for
enforcing the long distorted and ignored Reconstruction amendments? Harding had an interest in black rights and made statements in which might be read a call for action on civil rights. But few white American in 1921 listened for or responded to such calls, and blacks soon found Harding's "flattering assurances and evasive replies" the source of little real action. The president's April 12, 1921, statement that "Congress ought to wipe the stain of barbaric lynching from the banners of a free and orderly representative democracy . . ." assured Harding of an antilynching label, but the statement, which the NAACP had recommended in an April 4 meeting, specifically asked only for a general investigating committee and for Congress to take some antilynching steps. In his speech in Birmingham, Alabama, six months later, Harding concentrated on general recommendations for black political equality and educational opportunity. 100

Whatever stand Harding took, the NAACP had determined by his inauguration to put its weight behind a federal antilynching bill. It did not abandon its publicity campaigns, pressure for enactment of state antilynching statutes and enforcement of state murder laws, or efforts to obtain a general race commission, but the organization concluded that state action was either not coming or not coming fast enough. And, if Harding could or would not take the lead Congress would have to act on its own. 101
For observers of the post-World War I years who felt that equality before the law could be destroyed for all Americans once the nation began making exceptions in its application, there was growing concern about the "trials" and executions conducted by men with no legal authority. Where, in the midst of the public's claim of a lynching power and science's apparent support for the theory that black justice could be less than white justice, did the constitutional guarantee of equal protection of the laws and due process fit? Was it correct to define the right of due process and equal protection so as to allow states the "power" to do nothing when private individuals usurped the powers of sheriffs, juries, and judges and determined the fate of one class of persons? Did state rights, fortified by science's theories, outweigh the reality of three thousand lynchings, the majority of them of blacks, virtually all of them followed by no indictment, no trial, no punishment . . . no deterrence for future mobs?

Whatever the answer to these questions, what could end lynching? Suggested solutions included enforcement of state laws, changes in community attitudes, educational campaigns, judicial reforms, publicity programs, and investigations. If national legislators could find the answer in the Constitution, did that power reach and overcome the southern deputy sheriffs whose communities nodded approval
when they argued, "Should I in defending [a black man from a mob] wound or kill my best friends? No!" \textsuperscript{104}
NOTES


2James Ford Rhodes, *History of the United States* (8 vols., New York: Macmillan, 1907-1919), VI, 36. Andrew Carnegie, in his role as philanthropist, remarked in 1907 that "in considering the Southern problem, we must never forget that the 'poor whites' are an element complicating the situation, the attitude of this class to the blacks being intensely hostile . . ." Carnegie, *The Negro in America: An Address Delivered Before the Philosophical Institution of Edinburgh, 16th October, 1907* ([Philadelphia: Press of E. A. Wright Bank Note Company, 1907]), 10. For the failure of white observers to recognize their prejudice, see Alfred H. Stone, *Studies in the American Race Problem* (New York: Doubleday, Page and Company, 1908), ix. Stone states in his introduction that so far as he knew he had no "partisan temper of . . . biased mind" toward the black. In his introduction to his 1907 study of the Negro, Robert W. Shufeldt explains that although the Negro was "not by any means" his "favorite race," he had "no special prejudice against them." He states that he had no prejudice against the Negro "purely on account of his color"; he opposed only what the black's color represented. Shufeldt, *The Negro, A Menace to American Civilization* (Boston: R. G. Badger, 1907), 10.


4 For examples of economic and social "crimes," see accounts in the Chicago Defender, September 22, 1917 (lack of proper respect), March 9, November 2, 1918 (refusal to work for fifty cents a day and labor disagreement), July 10, 1920 (threatening to leave town).


and Social Science, no. 339 (1928), 231-32; Herbert L. Stewart, "The Casuistry of Lynch Law," Nation, August 24, 1916, 174; Allison Davis, Burleigh Gardner, and Mary Gardner, Deep South: A Social Anthropological Study of Caste and Class (Chicago: University of Chicago Press, 1941); John C. Dollard, Caste and Class in a Southern Town (New Haven: Yale University Press, 1937); Cantril, Psychology of Social Movements, 91; Scott Nearing, Black America (New York: Vanguard Press, 1929), 197. Despite claims to the contrary, lynching was a regional and sectional crime by the 1880s and 1890s. Between 1889 and 1918, southern states led the lynching statistics: Georgia, 360; Mississippi, 350; Louisiana, 264; Texas, 263; Alabama, 244; Arkansas, 182; Tennessee, 162; Florida, 161; Kentucky, 124; South Carolina, 117; Virginia, 67; Missouri, 51; North Carolina, 36; Oklahoma, 36; West Virginia, 22; Maryland, 15; Delaware, 1. The southern states' total was 2600; the national total during the same period was 3133. Brown, Strain of Violence, 214-17.


Collins, Truth About Lynching, 41.

[Presley,] Negro Lynching in the South, 63.


16 Seligmann noted that "statistics of crime are adduced in proof. Then the social scientists investigate and discover that a far greater per cent. of Negro mothers than whites must leave their families during the daytime in order to earn money, thus contributing to juvenile delinquency." Seligmann, The Negro Faces America, 117. Lily Hammond suggested that any black failure to advance in fifty years of freedom was "a grave indictment of us white-folks," who had the black "subject to us in all things." Hammond, In Black and White: An Investigation of Southern Life (New York: Fleming H. Revell, [1914]), 60. William Hannibal Thomas, a mulatto, advised in 1901 that while the Negro had "many despicable traits that environment has accentuated, nevertheless his acknowledged exemplars have not all been saints, nor are his teachers blameless for existing racial conditions." Thomas, The American Negro, xx.


21 Bean, "The Negro Brain," 778-84; McCord, *American Negro as Dependent*, 60-61; Haller, *Outcasts from Evolution*, Edward Drinker Cope, "The African American," *Open Court*, 4 (July 1890), 2400, cited in Haller, *Outcasts from Evolution*, 199. "We mocked the African with the gift of the franchise. We have to begin where we should have begun thirty-five years ago, with measures that are proportional to the needs . . . ." Nathaniel Southgate Shaler, "The Future of the Negro in the South," *Popular Science Monthly*, 57 (June 1900), 147 (ibid., 175).


23 Hubert Howe Bancroft, *Retrospection: Political and Personal* (New York: Bancroft Company, 1913), 378-74. Bancroft also noted the Negro was "a monstrosity" as a citizen. He was "lazy and licentious." As a slave the black "laughed
and grew fat, threw care to the winds, and slept undisturbed . . ." Only when he gained his freedom did the Negro encounter problems; suffrage increased those difficulties. "We gave him his freedom, but he did not know what to do with it, and he gained from it no new happiness." (368-71)


Census Bureau has, for many years, been telling many stories . . . ." Hunter to G. Frank Lydston, March 11, 1893, "Sexual Crimes Among the Southern Negroes--Scientifically Considered," Virginia Medical Monthly, 20, no. 2 (1893), 106.


30 Collins, Truth About Lynching, 59-60; Congressional Record, 60 Cong., 1 Sess., A39 (Clark, February 2, 1908). "The South has an obsession with sex which helps to make this region quite irrational in dealing with Negroes generally," according to Myrdal, An American Dilemma, 562. See "Lynch
Law in America and the Effort Made to Stamp It Out," Central Law Journal, 57 (July 3, 1903), 2; Shufeldt, The Negro, A Menace, 77-78, 103. McCord, American Negro as Dependent, 222, notes that "rape is not always rape."


35 There were also problems involving scarcity of law enforcement officers to patrol the vast, frequently swampy and mountainous remote regions of the rural South. Page, "Lynching and Race Relations," 241-42. See also Brown, Strain of Violence, 154-59; John B. Clark to Moorfield Storey, March 11, 1919, NAACP Records, Group I, Series C, Box 75, Storey file; O. F. Hersey, "Lynch Law," Green Bag, 7 (September 1900), 468-69; William Roberts, "The Adminis- tration of Justice in America," Fortnightly Review, 51 (January 1892), 90-108; "Lynching and the Criminal Law," Review of Reviews, 34 (December 1906), 751-52; "Legal Impotency and Lynching," 407-8; "Criminal Law, A Paper Read Before the Texas Bar Association by Hon. T. S. Reese . . .," Pro-


37 Bonaparte, "Lynch Law and Its Remedy," 336; Glasrud, "Child or Beast?" 41; Rice, Negro in Texas, 250.


39 Brown, Strain of Violence, 217-18, elaborates the "stylized features" of the "macabre ritual." An observer of one lynching noted that "it was the biggest thing since Ringling Bros' came to town." "The Burning at Dyersburg," Crisis, 15 (February 1918), 183. The Nation editorially explained that "seven-eighths of every lynching party is composed of pure, sporting mob, which goes nigger-hunting, just as it goes to a cock-fight or a prize-fight for the gratification of the lowest and most degraded instincts of humanity . . . . They do not care a straw about seeing justice . . . ."
What they want to see is a hunted man in terror of his life, or a human body torn to pieces without fear of consequences." Nation, September 28, 1923, 223. See account of decapitation in Memphis in Chicago Defender, September 8, 1917; of fingers and ears taken as souvenirs in Athens, Georgia, with pictures selling for a quarter, ibid., March 12, 1921. For account of man being marched naked through streets, hanged to a telephone pole, shot, his flesh taken for souvenirs and pictures sold for twenty-five cents, ibid., January 1, 1921. A lynching that was followed by the sale of chains and bones and by photographs being advertised in a Georgia newspaper is described in Carlisle Mosley and Frederick Brogdon, "A Lynching at Statesboro: The Story of Paul Reed and Will Cato," Georgia Historical Quarterly, 65 (Summer 1981), 104-6. In 1921 a Texas mob slowly burned to death a Negro while jabbing his mouth, nose, and eyes with sticks. Carter, "Lynching Infamy," 902. See Memphis Press account in Nearing, Black America, 199-200; Jackson Daily News in Crisis, 23 (November 1925), 42. The Defender of December 18, 1917, recounts a torture that lasted over three hours and which eight thousand men, women, and children attended on a Sunday. The crowd used hot pokers on the victim. In 1921 an Arkansas mob caught up with its target, Henry Lowrey, in El Paso, Texas, and returned him to Arkansas by way of New Orleans and Mississippi. The Memphis Press and New Sentinel announced the time and place of the upcoming public burning; post-lynching newspaper coverage provided details of the execution. William Pickens, "The American Congo--Burning of Henry Lowrey," Nation, March 23, 1921, 426-28.

40Collins, Truth About Lynching, 58, 59, 62, 70, 84.

41Cutler, Lynch-law, 244-45.


43The refusal of businesses to invest in areas where there was mob rule also meant potential economic hardships for the South. Ida B. Wells-Barnett, On Lynching: Southern Horrors, A Red Record, Mob Rule in New Orleans (New York: Arno
mob lynching case in Tuscumbia, Alabama, in November, 1918,
"made an impassioned appeal for conviction on the ground that
if 'niggers' are lynched, North capitalists would not invest
any more money in Southern industries." Untitled report,
NAACP Records, Group I, Series C, Box 76, White file. See
also Chicago Defender, April 10, 1920; George E. Haynes,
Negro Migration and Its Implications North and South, an
Address . . . ([New York: American Missionary Association,
1923]); Carnegie, Negro In America, 32; Walter White,"'Work
or Fight' in the South," New Republic, March 1, 1919, 146.
As Herbert Seligmann explained, "It is not much good being
a superior race if the inferior race moves away." Seligmann,
The Negro Faces America, 93.

44 David M. Souther, The Malignant Heritage: Yankee
Progressives and the Negro Question, 1901-1914 (Chicago:
Loyola University Press, 1968), 15; William M. Tuttle, Jr.,
Race Riot: Chicago in the Red Summer of 1919 (New York:
Athenaeum, 1970), 86; Chicago Defender, May 17, 1919; Arno
Bontemps and Jack Conroy, Anyplace But Here (New York: Hill
and Wang, 1966); Johnson, "Lynching--America's Disgrace,
600-1; Mims, comp., A Handbook for Inter-Racial Committees;
New York Times, January 2, 1924, 14; St. Louis Argus, July
23, 1920, noted that a Memphis paper estimated one hundred
blacks a day left the South. In NAACP Records, Group I,
Series C, Box 245.

45 See Cutler, Lynch-law, 258-60; George Ticknor Curtis,
"The Law and the Lynchers," North American Review, 152 (June
1891), 691-95; Crisis, 12 (August 1916), 163, 82; Literary
Digest, February 5, 1916, 276.

46 Arthur Raper estimated in 1933 that half of all lynch-
ers had law enforcement aid. Ninety percent of the other half,
he alleged, were condoned by law enforcement officers. Raper,
The Tragedy of Lynching (1933; reprint, New York: Negro
that law enforcement aid tolynchers was a rare happening.
Page, The Negro, 103. An arguments usable by both supporters
and critics of law enforcement efforts against lynching was
the lynching prevention rates, the success of law officers
in stopping lynch mobs. In 1914 it was 32 percent and in 1921
it was 63 percent; however, as late as 1918 it was as low as
23 percent. John S. Reed, "A Note on the Control of Lynching,"
Public Opinion Quarterly, 33 (Summer 1969), 271.

Conviction rates in lynching cases were low during the
late 1800s and early 1900s. They were less than one-tenth
of one percent. Chadbourn, Lynching and the Law, 14. In 1932
Harry Haywood and M. Howard could report with emphasis that
since Georgia enacted an antilynching law in 1893, "No one
has ever been convicted under this law, although Georgia has

47 Until approximately 1906, lynchings outnumbered legal executions. William H. Glasson, "The Statistics of Lynching," *South Atlantic Quarterly*, 5 (October 1906), 344. In 1901, of 130 lynched, 105 were black; in 1892, 161 of the 230 lynched were Negro. From 1893 to 1904, approximately 100 blacks and 29 whites were lynched annually. Of 3337 lynched from 1882 to 1903, 60 percent (1985) were southern blacks. Gossett, *Race*, 269; Brown, *Strain of Violence*, 151. In the 1880s 44 percent of those lynched were black; in the 1890s, 73 percent; from 1900 through 1910, 89 percent, and from 1911 through 1921, 91 percent. These figures are based on the annual totals provided by Harry A. Ploski and Ernest Kaiser, comps. and eds., *The Negro Almanac* (New York: Bellwether Company, 1971), 267-68.

48 A Statement from Governor Hugh M. Dorsey; *New Republic*, May 11, 1921, 306-7; William Walling to Wilson, July 3, 1917, Wilson Papers, Series 4, #152, reel 230; Wells-Barnett, *On Lynchings*, 97. In an April 27, 1918, editorial the Chicago *Defender* asked, "How long would it take congress to act if the record of lynchings was reversed and the white man were the victim . . . ? Would state rights supersede federal rights?" On March 5, 1921, the paper added that "perhaps it isn't charitable to say that only since the lynching of white men become [sic] so prevalent has there been any tangible move to check this form of lawlessness, but it is a fact nevertheless." See *Defender* cartoons from May 4, 1919; August 7, 1920; March 12, 1921; and editorial from March 4, 1922; *Literary Digest*, February 5, 1916, 276; Ralph W. Tyler to Warren Harding, March 28, 1921, General Records of the Department of Justice, Record Group 60, National Archives (Washington, D. C.), #158260-2-131; Storey, "Negro Question," 24-25.
Jim Jam Jems (North Dakota), in Crisis, 18 (September 1919), 248.

Of the thirty-eight lynched in 1917, thirty-six were black. Sixty of the sixty-four lynched in 1918 were black, as were seventy-six of 1919's eighty-three victims. Ploski and Kaiser, comps. and eds., Negro Almanac, 267-68.


Elliott Rudwick, Race Riot in East St. Louis: July 2, 1917 (Carbondale, Ill.: Southern Illinois University Press, 1963), 227; Walter White, "The Eruption of Tulsa," Nation, June 29, 1921, 909; Crisis, 14 (September 1917), 221-25. White told Mary White Ovington that "... in one case [during the Chicago riot] white men were caught red-handed beating up and killing colored people. They were arrested by the police, put on the 'L,' carried down as far as Van Buren Street station and then told them to go home -- set scot free." White to Ovington, August 13, 1919, NAACP Records, Group I, Series C, Box 76. See Crisis, 19 (January 1920), 129; Chicago Defender, August 9, 1919; July 17, November 3, 1917; Tuttle, Race Riot, 11-12; Major General Barry to Commanding General, Central Department, Chicago, July 26, 1917, Record Group 60, Glasser File, Box 14.

The Chicago Tribune began keeping tabulations on lynching deaths in 1883, noting dates, names, color, nationality, alleged crime, town, state. Its recordkeeping was prompted by post-Reconstruction lynchings, which exceeded legal executions. Tribune, January 1, 1883, cited in Cutler, Lynch-law, 157-58, 162-63 (chart); Brown, Strain of Violence, 151. A standard definition of lynching was mob violence resulting in death of a person in the custody of peace officers or suspected of, charged with, or convicted of a crime -- or to serve justice, race, or tradition.
ploski and Kaiser, *Negro Almanac*, 266. The criteria used in recordkeeping at Tuskegee Institute were (1) there was legal evidence of the occurrence; (2) the killing was done illegally; (3) there was group action involved; (4) the killing was done on the pretext of serving justice, race, or tradition. See "Origins and Statistics Concerning Lynch Law," *American Lawyer*, 5 (May 1897), 215, for similar "legal definition." Illinois's lynching law did not cover the East St. Louis riot because of the difference between the goals of rioters and lynchers. Chicago *Defender*, April 6, 1918, 1.

By April, 1918, ten blacks and thirty-eight whites in East St. Louis had been convicted of riot-related charges. The blacks and four of the whites received prison terms of fourteen to fifteen years. Eighteen whites were fined. Seventeen others and thirty-three blacks were acquitted. In Tulsa sixty-five whites were indicted for murder, looting, and arson. The Tulsa police chief was indicted for a variety of derelictions which contributed to the atmosphere which sparked the riot. In all, eighty-four whites and seventy-four blacks were eventually indicted. Chicago *Defender*, August 18, 1917, June 25, July 2, 1921.

The NAACP estimated that East St. Louis suffered $400,000 in property damage. *Crisis*, 14 (September 1917), 219-20. The *New Republic* estimated that the Tulsa black business district would cost $1.5 million to replace. *New Republic*, June 15, 1921, 57-58.

The Tulsa grand jury, while indicting almost ninety whites, still largely blamed blacks. *Crisis*, 18 (September 1921), 228. In a comparison of the East St. Louis, Detroit, and Chicago riots of 1917-1919, Elliot Rudwick finds that more blacks than whites were indicted and convicted for riot related felonies. Rudwick, *Race Riot in East St. Louis*, 230.

Robert V. Haynes, *A Night Of Violence: The Houston Riot of 1917* (Baton Rouge: LSU Press, 1976); Martha Gruening, "Houston," *Crisis*, 15 (November 1917), 14; P. J. Bryant to Wilson, March 5, 1918, Wilson Papers, Series 4, #543, reel 285; Emmett Scott to Spingarn, July 25, 1918; Spingarn, "Memorandum for Col. Churchill. Subject: Anti-lynching Legislation," July 22, 1919, both in Records of the War Department General and Special Staffs, Record Group 165, #10208-154-35, #10996-36-21; Storey, "Negro Question," 29-30. The black soldiers killed fifteen whites in the Houston rioting. There were three court martials; twenty-nine blacks received death sentences. After thirteen were
quickly executed without opportunity for appeal, Wilson commuted ten other death sentences and confirmed six. Eighty-one other soldiers received prison sentences. For negative press reaction to the executions, see Ft. Worth News, Boston Herald, Buffalo Express, New York Evening Globe, Pueblo (New Mexico) Chieftain, all quoted in Crisis.

58 Generally blacks did not assert their total innocence or blamelessness; however, they rejected the theory that all blacks were troublemakers, and they asserted that their race was denied necessary protection from state and local officials. See Benjamin Alvin Arnold to Wilson, August 15, 1917, Wilson Papers, Series 4, #152, reel 230; Seligmann, "Democracy and Jim-Crowism," New Republic, September 3, 1919, 150-51. The Chicago Defender frequently discussed press responsibility for rioting and inaccurate accounts in white papers. A Defender cartoon found three "Allies" at work in the South: the lynchers, the courts, and the press. Defender, August 27, 1921. Whites frequently blamed black ties with "Reds" and radicals. See Mary Frances Berry, Black Resistance/White Law: A History of Constitutional Racism in America (New York: Appleton-Century-Crofts, 1971), 151; Seligmann, The Negro Faces America, 301-2; Congressional Record, 66 Cong., 1 Sess., 4303-5 (Byrnes, August 25, 1919).


60 Congressional Record, 65 Cong., 1 Sess., 5152 (Lewis, July 16, 1917); NAACP to Wilson, February 13, 1917, Wilson Papers, Series 4, #543, reel 285.


63 Wilson to Dyer, July 28, 1917; Joseph Tumulty to Wilson, July 10, 1917, both ibid.

64 Two hundred fifty federal troops, armed with two machine guns, two automatic rifles, and a tank, went to Winston-Salem at the request of North Carolina Governor Thomas Bickett when state troops were unable to disband a lynch mob which threatened to spark a general race riot. Compare the 1921 Arkansas disturbances: the Army Chief of Staff informed Senator Joe T. Robinson that "law does not permit use of federal troops in anticipation of emergency." It was "necessary that emergency exist and that
it be beyond control of State authorities after it has exhausted its means, including civil officials and National Guard." Record Group 60, Glasser File, Box 14.

65Herron to Gregory, July 20, 1917, Record Group 60; 35 Stat. 1092 (1909).

66Herron to Gregory, July 20, 1917, Record Group 60.


68Herron to Gregory, July 20, 1917, Record Group 60.

69Karch to Gregory, July 23, 1917, ibid.


71George M. Brown (vice chairman, Advisory Committee on Purchase of Army Supplies) to Adjutant General, July 3, 1917 (copy, telegram); Peyton T. Karr (Kehlor Flour) to Adjutant General, July 3, 1917; J. R. Mathews (Corno Mills) to Adjutant General, July 3, 1917; H. P. McClain to Commanding General, Central Division, Chicago, July 4, 1917 (on Commercial Acid's request for aid, July 3); E. C. Andrews (Kehlor Flour) to Edward T. Donnelly, July 16, 1917, all in Record Group 60, Glasser File, Box 14.

72See, for example, Senator Lawrence Sherman who considered the killing of aliens in violation of treaty rights, as well as the interference with interstate commerce, mail delivery, and war mobilization. Congressional Record, 65 Cong., 1 Sess., 5151 (July 16, 1917).

73H. Res. 128, ibid., 6961 (September 11, 1917). The committee included three Democrats and two Republicans. Sam Johnson of Kentucky, John R. Raker of California, and Martin D. Forster of Illinois were the Democrats, and Henry A. Corgier of Wisconsin and George E. Foss of Illinois were the Republicans. Only the first four signed the report. Committee chairman Johnson estimated it would have cost $5100 to print five hundred copies of the testimony. The committee had but $800-1000. The report of the "Select Committee to Investigate Conditions in Illinois and Missouri Interfering with Interstate Commerce between these States" ran twenty-three volumes and was never published. Dyer objected to its being published without illustrations. His opposition perhaps accounted for the nonpublication of the entire report. "Report of the Secretary" in Minutes of the Board of Directors, NAACP Records, Group I, Series A, Box 1 (Reel 1).
75. Ibid., 2, 3, 6, 8, 21, 24.
76. Rudwick, Race Riot in East St. Louis; Crisis, 14 (July 1917), 112. Within two months of the riot, there were one hundred eight indictments of one hundred five persons. Eighty-three whites were indicted for murder, arson, conspiracy, rioting, and assault to murder. The grand jury also censured the police and the city and urged creation of a state police. Eventually ten blacks and four whites received prison sentences of fourteen to fifteen years.
77. Chicago Defender, November 25, 1917.
79. Crisis reported the lynching of one uniformed black in 1918 and of eleven soldiers in 1919. Crisis, 17 (February 1919), 182; 19 (February 1920), 183. Tuttle noted ten veterans lynched in 1919, some in uniform. Race Riot, 22. During the war months there were one hundred two reported lynchings. Frank Coleman, "Freedom From Fear on the Home Front," Iowa Law Review, 29 (March 1944), 415-16; Carter, "Lynching Infamy," 901.
tary in American History: A New Perspective (New York and Washington, D. C.: Praeger Publishers, 1974); Bernard C. Nalty and Morris J. MacGregor, Blacks in the Military (Washington, D. C.: Brookings Institute, 1982), 17-18. Wrongs included lack of colored officers for colored troops, discrimination against black officers, lack of respect and proper assignments for black doctors, the barring of blacks from the navy and marines, segregation in military Pullman and dining cars, and lack of blacks on draft boards. This list, presented to Wilson by one of his vocal critics, prompted presidential secretary Joseph Tumulty to respond, on Wilson's orders, that investigations had revealed "no discrimination . . . [was] practiced by the War Department." Nick Chiles to Wilson, August 19, 1918; Tumulty to Chiles, [October 1, 1918], both in Wilson Papers, Series 4, #152, reel 230.

82. P. J. Bryant, et al., to Wilson, March 5, 1918, Wilson Papers, Series 4, #543, reel 285; Chicago Defender, June 1, 1918, November 17, 1917; Miller to Wilson, August 4, 1917, Wilson Papers, Series 4, #152, reel 230; National Association of Colored Women and Empire State Federation of Women's Clubs to Wilson, July 5, 1917, ibid.; Crisis, 14 (June 1917), 59; "To the Colored Soldiers of the American Army," propaganda circular dropped on 367th Infantry, September 1918, quoted in Emmett J. Scott, Scott's Official History of the American Negro in the World War ([Chicago: Homewood Press, 1919]). 139.

83. Chicago Defender, January 5, 1918; Forum of Los Angeles to Wilson, July 18, 1918, Wilson Papers, Series 4, #152, reel 230; Scott, Scott's Official History, 92; Scott to Wilson, July 26, 1918, Wilson Papers, Series 4, #152, reel 230. See National War Savings Committee of Baltimore City, Colored Division to Wilson, February 15, 1918; Lester Walton to Herbert Bayard Swope, May 26, 1918, both in ibid., #543, reel 285; Charles Thomas Tumulty, August 15, 1918; Newton Baker to Wilson, July 1, 1918, ibid., #152, reel 230; Crisis, 14 (September 1917), 241; Seligmann, "Race War?" 49-50.

George William Cook, testimony, House Committee on the Judiciary, Segregation and Antilynching: Hearings on H. R. 259, 4123, 11873, part II: Antilynching, 66 Cong., 2 Sess., 1920, 75; Neval Thomas, ibid., 70; Mary White Ovington, "Reconstruction and the Negro," Crisis, 17 (February 1919), 172; Chicago Defender, March 22, 1919), 13-14; 17 (April 1919), 291; Sweeney, History of the American Negro in the Great War, 304; Barbeau and Henri, Unknown Soldiers, 185, 189; William Amey to Wilson, August 2, 1919, Wilson Papers, Series 4, #543, reel 286; J. J. Davis to Wilson, July 31, 1919, ibid., #152, reel 230; George C. Cannon to Wilson, July 28, 1919, ibid; Storey to Shillady, October 1, 1919, NAACP Records, Group I, Series C, Box 75, Storey file; Congressional Record, 66 Cong., 1 Sess., 4303-5 (Byrnes, August 25, 1919). Byrnes refers specifically to the Crisis editorial "We return." See R. S. Johnson to Department of Justice, May 1, 1921 ("Retribution is as sure as the sun shines."); Neval H. Thomas to A. Mitchell Palmer, December 19, 1919 ("We have fought for it [democracy] and now we are going to get it or the world will know the reason why.") Both in Record Group 60, #1528260-2-137, #1528260-2-119; Crisis, 18 (September 1919), for nonviolence black views. See C. J. Johnson to Department of Justice, October 25, 1919 ("... the Government has the same power to stop lynching as it has to draft Negro men to give their lives for this Government."); "Some Soldiers [from Hattiesburg]" to "Finance, War Department," June 2, 1919 ("... They Have Sheded Blood for This County & Look Like we ought to Have a Little Rights.") in Record Group 60, #158260-2-117, #158260-1-201, #158269-2-1.

Spingarn, "Memorandum for Colonel Churchill," July 22, 1918, Record Group 165, #10996-36-1; "Memorandum for the Chief of Staff: Subject: The Negro Question," August 20, 1919, ibid., #10208-361; Major H. A. Strauss to Director of Military Intelligence, memorandum on "Negro Agitation," July 1, 1919, Record Group 60, Glasser File, Box 14. For concern in 1918 about black loyalty, see confidential memorandum for Spingarn from Captain Harry A. Taylor, "Re: German Propaganda Among Negroes," July 1, 1918, Record Group 165, #10218-443-8; Spingarn to "Lt. Gregory," July 1, 1918, ibid., #10218-443-7. For the continuing concern during the 1920s, see Record Group 60, #10218-432 through #10218-447, #10218-158, #9140-459.

Baker to Wilson, July 19, 1918 (copy), ibid., #10218-154-34f/w; Spingarn to Scott, August 1, 1919, ibid., #10218-154-38; Churchill, "Memorandum for M. I. 4," ibid., #10996-36-25; Committee on Public Information, press release, July 26, 1918, ibid., #10218-158-2.


Captain Henry G. Sebastian, memorandum, "Subject: Activities of Department of Justice on Negro Question," August 9, 1919, Record Group 60, Glasser File, Box 14.

Wilson to Negro Committee, [fall 1912]; Wilson to Bishop Alexander Walters, October 16, 1912, both quoted in Southern, Malignant Heritage, 77; Tumulty to Wilson, August 3, 1917, WILSON Papers, Series 2, reel 90. The Republicans of 1912 were the first since 1868 to have a specific plank indicating they were the party of black rights. Kirk H. Porter and Donald B. Johnson, comps., National Party Platforms, 1840-1964 (Urbana: University of Illinois Press, 1964). "Honestly feeling" that segregation was in the Negroes' "interest," that it protected "them from friction and criticism in the departments," Wilson allowed the Secretary of Treasury and the Postmaster General to segregate their departments. He also cut black federal officeholding.


Wilson to Villard, meeting of October 7, 1913, quoted in Villard, Fighting Years, 240; Earl Cranston to Tumulty, May 30, 1913, Wilson Papers, Series 4, #543, reel 285; Dyer to Wilson, July 26, 1917; Wilson to George Creel, June 18, 1918, ibid., #152, reel 230; press release for Wilson's speech issued by Committee on Public Information, Record Group 50, #10218-154; Henry Blumenthal, "Woodrow Wilson
and the Race Question," *Journal of Negro History*, 48 (January 1963), 11; *New York Times*, July 27, 1918, 7; Lynch-Law as Treason," *Literary Digest*, August 10, 1918, 13. Black demands included a clip-and-mail "protest petition" to Wilson and the House and Senate Judiciary Committees protesting East St. Louis and asking compliance with Dyer's request for investigation. Chicago Defender, August 4, 1917; Walling to Wilson, July 13, 1917; National Association of Colored Women and Empire State Federation of Women's Clubs to Wilson, July 5, 1917; Tumulty to Wilson, July 10, August 1, 1917, July 10, 1918; Dyer to Wilson, July 26, 1917; Wilson to France, July 11, 1918; Wilson to Gregory, July 26, 1917; Gregory to Wilson, July 27, 1918, all in Wilson Papers, Series 4, #152, reel 230; Francis H. Warren to Wilson, May 13, 1913; [New York] Riverside Civic Association to Wilson, June 15, 1916; Northeastern Federation of Women's Clubs to Wilson, August 26, 1916; NAACP to Wilson, February 13, 1917; National War-Savings Committee of Baltimore City, Colored Division, to Wilson, February 15, 1918; Lester Walton to Tumulty, June 12, 1918; Robert Moton to Wilson, June 15, 1918; R. L. Bailey to Wilson, June 28, 1918; Shillady to Wilson, February 13, 1918; Boston National Equal Rights League to Wilson, May 21, 1918; Colored League of Augusta, Georgia, to Wilson, May 21, 1918; Tennessee Conference of Charities and Correction resolution, May 14, 1918; Walton to Swope, May 24, 1918, ibid., #543, reel 285.

Barbeau and Henri, *Unknown Soldiers*, 186; the Reverend H. A. Booker to Wilson, July 26, 1918, Wilson Papers, Series 4, #543, reel 286; National Race Congress to Wilson, October 1, 1918, ibid., #152, reel 230. See also "The President and the Mob Spirit," *Nation*, August 3, 1918, 114, for liberal white praise; "An Appeal to America Not Yet Written by Woodrow Wilson," *Nation*, August 9, 1919, 160, for quick disenchantment with Wilson's silence on racial lynching; "Mob Violence and War Psychology," *New Republic*, August 3, 1918, 5-7, for general praise of antimob position. Wilson's speech apparently prompted the already antilynching San Antonio (Texas) *Express* to initiate a five-year, $100,000 fund to reward antilynching efforts by private individuals and law enforcement officers. Rewards ranged from $500 if the victim were white to $1000 if black. None of the fund was ever dispensed. Chicago Defender, August 17, 1918, 1; *Crisis*, 16 (September 1918), 240; "A Federal Bill to Halt Lynching," *Literary Digest*, December 31, 1921, 11-21.

Miller to Wilson, August 4, 1917, Wilson Papers, Series 4, #152, reel 230. Wilson explained that he could not "come to a conclusion which satisfies me with regard to the best occasion or medium." He informed Robert Moton of Tus-
kegee Institute that he "realize[d] how critical the situation has become and how important it is to steady affairs in every possible way." Wilson to J. M. McCullough, August 5, 1919; Wilson to Moton, August 12, 1919, ibid., #543, reel 286; John Morton Blum, Woodrow Wilson and the Politics of Morality (Boston: Little, Brown and Company, 1956), 19-20; Crisis, 13 (November 1916), 12. When George Creel attempted to have Wilson speak to the meeting of black editors Wilson declined because he had, he said, earlier left blacks "dissatisfied." "I have never had an opportunity actually to do what I promised them [at earlier meetings] I would seek an opportunity to do." Wilson to Creel, June 18, 1918, Wilson Papers, Series 4, #152, reel 230. Wilson did take a step to fulfill promises when he commuted some of the death sentences of the Houston rioters. Most of the responsibility for that action, however, belonged to Baker. The Secretary of War believed there had been no "serious flaws as to matters of law" in the trials and that verdicts had reflected the "overwhelming weight of ... testimony." However, a rejection of black requests for clemency based largely on the Negro's loyalty and the lateness of the executions—a year after the riot—"would come as a shock and re-open an old race wound." Therefore, Baker wanted Wilson to consider "degrees of guilt" and to make "a merciful concession." Wilson followed Baker's recommendations on specific cases and confirmed six death sentences and commuted ten as "a recognition of the fidelity of the race to which these men belong ... ." Baker to Wilson, August 22, 1918; Wilson memorandum to Adjutant General of the Army, August 31, 1918, both in Wilson Papers, Series 4, #152, reel 230.

82; Somerville, "Some Cooperating Causes of Negro Lynching," 510. In 1921 when his name surfaced as a candidate for Chief Justice of the Supreme Court, blacks referred to Taft as "a lukewarm friend" whom the Negro's enemies manipulated to advance their cause. Crisis, 22 (July 1921), 101.

96 A. D. Coles to [?], October 2, 1920, Records of the United States House of Representatives, Record Group 233, National Archives, bill file for H. R. 13; Chandler Owen, The Remedy (New York: Cosmo-Advocate, [1917]); Chicago Defender, October 30, March 6, July 31, 1920, September 17, 1921, April 29, October 21, November 4, 1922; Elbert Tatum, The Charged Political Thought of the Negro, 1915-1940 (New York: Exposition Press, 1957); Richard B. Sherman, The Republican Party and Black America. Prior to the 1918 election, two Democratic advisers informed Wilson that the party was "neglecting a fertile field"—northern and western black votes totaling 600,000. Negroes were "not wedded" to the Republican party but they were also not happy with the Wilson Administration. The Negro could be "placated," however, if something were done about the treatment of black soldiers, federal discrimination, discrimination in emergency housing, discrimination on federally run state railroads, lynchings, and general lawlessness. "Memorandum Concerning the Negro and the Present Political Situation in the United States Submitted for the Consideration of the President at the Suggestion of Secretary Tumulty by J. Milton Waldron and John McMurray," [1918?], Wilson Papers, Series 4, #153, reel 230. W. E. B. Du Bois exclaimed, "May God write us down as asses if ever again we are found putting our trust in the Republican of the Democratic parties" in 1922. Crisis, 24 (May 1922), 11. In a February 1922 letter to White, Sue White of the National Woman's and the Democratic parties advised the NAACP on the problems of associating with the Republican party. "[W]e all know that the Republican party, while claiming to be your friend, hasn't always been the best sort of friend, but the proposition you must face is whether or not at this stage or your movement you can throw down a poor sort of a friend for what is very honestly no sort of friend at all." Sue White realized that the Republicans were reluctant to back the anti-lynching bill because they needed all the "'lily-whites'" if they hoped to "break through the 'solid South.'" White to White, February 3, 1922, NAACP Records, Group I, Series C, Box 243.

gressional Elections, 1896-1944: The Sectional Basis of Political Democracy in the House of Representatives (Norman: University of Oklahoma Press, 1947), 23. The Chicago Defender endorsed Harding but not enthusiastically. Defender, June 19, 1920. In an interview with NAACP representatives prior to the presidential election, Harding said that he favored black suffrage, even if a "force bill" were necessary. He also stated that he opposed segregation by government departments, opposed lynching, believed black education was a "loaded" issue, and supported equality in the military. But he also said race issues would lose votes for the Republicans, so he would not go further publicly than did his party's platform. The NAACP interviewers saw Harding as a practical, honest politician.

"Minutes of the Meeting of the Board of Directors," September 13, 1920, NAACP Records, Group I, Series A, Box 1 (reel 1); "Report of the Field Secretary on Interview with Senator Warren G. Harding[,] Marion, Ohio. August 9, 1920," ibid., Series C, Box 64, Harding file. See also Harding to Shillady, February 20, 1920, ibid.

Chicago Defender, October 23, 1920 (cartoon).

99 Robert K. Murray, The Harding Era: Warren G. Harding and His Administration (Minneapolis: University of Minnesota Press, 1969), 401; Crisis, 19 (June 1920), 69; Chicago Defender, October 20, 1920 (cartoon). In 1891 Benjamin Harrison recommended that Congress enact a law to protect aliens from mob violence. William McKinley attacked lynching in his first inaugural, saying the country could not tolerate it, but he took no positive steps against lynching as president. See Sherman, Republican Party and Black America, 14; Sinkler, Racial Attitudes of American Presidents, 361.

101 Robert L. Zangrando, The NAACP Crusade Against Lynching, 1909-1950 (Philadelphia: Temple University Press, 1980), 25-50; Kellogg, NAACP, 216-30. The NAACP's 1921 program called for an end to segregation in federal departments, Haitian liberty, pardon of the Houston rioters, appointment of a black assistant secretary of labor and agriculture, the protection of black voters in the South, and an end to segregated cars. Crisis, 21 (February 1921), 162. In 1920 NAACP leaders Shillady, Johnson, Grimké, and James Cobb argued for federal investigations of lynching and rioting. See Chicago Defender, January 17, 1920; Eugene Levy, James Weldon Johnson: Black Leader, Black Voice (Chicago: University of Chicago Press, 1973), 237; "Federal Law for Lynching," Crisis, 18 (May 1919), 30-31; Robert R. Moton, "The South and the Lynching Evil," South Atlantic Quarterly, 18 (July 1919), 191-96; "The Lynching Evil From a Southern Standpoint," Review of Reviews, 60 (November 1919), 531-32. When Shillady resigned as NAACP Secretary in April, 1920, he explained that he was "... less confident than heretofore of the speedy success of the Association's full program and of the probability of overcoming within a reasonable period the forces opposed to Negro equality by the means and methods which are within the Association's power to employ." Shillady to Chairman of the Board, April 1, 1920 (copy), NAACP Records, Group I, Series A. Box 19.

102 Arguments included: "The mob which lynches a negro charged with rape, will in a little while lynch a white man suspected of crime," in C. B. Galloway, et al., "Some Thoughts on Lynching," South Atlantic Quarterly, 56 (1906), 349; "Lawlessness which pleases you when it is on your side has an unfortunate tendency to change sides," Stewart, "Caustry of Lynch Law," 174; lynching "quickly becomes a habit, and ... deepens and widens rapidly," "A Collegiate Move on Lynching," 178; "... from lynching Negroes for the one gross crime we have taken to lynching them for every other crime, or for no crime at all, and we are mobbing white men!" Georgia Judge Blanton Forts, in Committee on Inter-Racial Cooperation, Progress in Race Relations, 11-12; "... it fosters murder as a habit," Columbia (S. C.) Star in Crisis, 19 (January 1920), 142; "If we sow mobs, and violence, and disrespect for courts of justice, we shall reap murders, lawlessness and debased public opinion," Weatherford, Negro Life in the South, 109. See also Ray Stannard Baker, Following the Color Line: An Account of Negro Citizenship in the American Democracy (New York: Doubleday, Page and Company, 1908), 215; Storey, "Address on Lawlessness," 12; "Judge Lynch as Educator," 222-23; Page, "Lynching and Race Relations," 247; Chicago Defender, March 1, 1922, 1.

104 Chicago Defender, September 14, 1920; Baker, "What Is a Lynching?" 306.
CHAPTER FOUR

"IF THE LAWS ARE INSUFFICIENT":

HOUSE CONSIDERATION OF ANTILYNCHING LEGISLATION, 1918-1920

. . . the question before us is not a Negro question but a white man's question."

Called upon in 1919 to give his advice on the constitutionality of a federal antilynching bill based on the Fourteenth Amendment, sixty-nine-year-old Boston attorney, former Massachusetts attorney general, and reformer Albert Pillsbury warned the National Association for the Advancement of Colored People about the foes such a bill faced. While doubts could logically and quite naturally exist about a poorly framed bill, constitutional arguments were generally "but a pretext," albeit a quite effective one. Although courts had "gone to greater lengths and could sustain an anti-lynching bill if disposed to," an opponent of a federal statute had an ideal "red herring."

. . . the scheme of the South and of the Democrats always . . . [is] to put up at the threshold the question of Federal power to legislate, on which everybody is either doubtful or prejudiced against it, and suppressing the matter in that way. Of course no committee of Congress and nobody but the Supreme Court can settle that question, and the only way of getting it settled is to pass a bill and put it up to them, but this they will not allow to be done if they can help it, and the game always is to cry unconstitutionality and so put an end to it.

This dour evaluation by the man who had framed the
first general federal antilynching bill in 1901\(^3\) illuminated the basic problems that advocates of federal antilynching legislation faced. By the winter of 1919-1920 the NAACP was already aware of many of the congressional obstacles it had to overcome if its support of federal legislation was to end in passage of an effective statute. Responding to one of Pillsbury's warnings, James Weldon Johnson, the NAACP Secretary who was the administrative and lobbying force behind the antilynching crusade during the 1920s, explained the job ahead. The organization had to convince Congress, through the use of lynching statistics, of the need for antilynching action and of the states' failure to act. In addition, it had to demonstrate "that there are constitutional grounds on which the federal government may proceed."\(^4\)

The immense difficulty of the federal antilynching task had become clear during World War I when, as noted in Chapter Three, the lynching of Negroes prompted black discontent. While the War Department sought to uncover Negro "subversion" and counteract the enemy's propaganda with its own\(^5\) and Wilson issued his general antilynching statement, Congress considered going beyond investigations and enacting remedial legislation. The legislators' consideration of a statutory solution in 1918 was an important first step toward enacting peacetime legislation and toward preparing Pillsbury for dealing with "red herrings" and the NAACP for
combatting them.

* * *

Congressman Dyer had been particularly stirred by the racial violence in East St. Louis. And although the House pushed aside his proposal for a joint Senate-House investigating committee, as Wilson did his request for use of federal power over the riot area, his proposed antilynching bill of 1918 led to House Judiciary Committee hearings. The focus of the hearings was not Dyer's Fourteenth Amendment bill but rather one based on war powers and proposed by Military Intelligence—and no report came out of the investigation. Yet several critical questions received a public hearing, and Dyer's personal antilynching crusade was launched.

On February 16, 1918, when Assistant Attorney General William C. Pitts told the NAACP that on the basis of Supreme Court decisions the federal government had no jurisdiction over lynching, he had added, "nor are they connected with the war in any way as to justify the action of the Federal Government under the war power." Not everyone agreed. The rationale behind war powers support for an antilynching measure was simple. The concern for draft-age Negroes and of black soldiers for their endangered loved ones threatened to undermine their devotion to America. Such concerns led to a proposal, presented to the Judiciary Committee on June 6,
1918, by Major Joel E. Spingarn and Captain George S. Hornblower, both of the Army’s General Staff, Military Intelligence.\(^8\)

Spingarn and Hornblower attended the hearing with the permission of their superiors and Hornblower wrote the proposed statute, but the bill was the brainchild of Spingarn, the NAACP’s "New Abolitionist" chairman of the board. Transferred from the Infantry to Military Intelligence while he recovered from ulcer surgery, Spingarn, a former Columbia University professor of comparative literature, used his unexpected and undesired home-front assignment to work on a "constructive [race] program" while he "look[ed] into this question of negro subversion" in an effort to counter German propaganda and bolster Negro morale. His intimacy with black and white reformers ideally suited him for the job of devising a plan to undermine the growing Negro bitterness that had already prompted the appointment of a black, Emmett Scott, as special adviser to Secretary of War Baker on black military affairs. Spingarn worked with Scott on how best to reduce dissension among black soldiers and civilians. His June 10 outline of a plan to counter "Negro subversion" included not just "Intelligence" activities, such as the conference of black editors, but also "Counter propaganda." To "offset [the] chief causes of colored disaffection," Spingarn proposed a statement by General John J. Pershing on the fair treatment of black troops in Europe, the reassignment of
Colonel Charles Young, who until his forced retirement—ostensibly for health reasons—was the ranking black Army officer, a presidential proclamation against wartime lynchings, and an antilynching bill based on Congress's war powers. 9

In a lengthy July 22 memorandum dealing specifically with antilynching legislation, Spingarn explained to his superiors on the General Staff the special need for his proposed law. The major cause of "widespread unrest" among blacks was "the continuance of lynching." The 4210 lynchings since 1885 had created considerable bitterness, leading many Negroes to leave the South "in search of a new environment where life and property might be more secure." More recent inequalities intensified black anger. Over two hundred wartime lynchings, the East St. Louis riot, the "swiftness and silence" with which the black Houston rioters were executed, and the nation's call on blacks to fight for democracy in Europe while "... they themselves and their kinsfolk are not safe at home" provided ammunition for a "bolder and more truculent" black leadership and press. With the white press maintaining a largely "unsympathetic or patronizing tone" toward blacks, Negroes looked to themselves for information and guidance, becoming more susceptible to enemy propaganda. They were an increasingly literate and receptive audience who were resentful of their "inferior status." Looking for a method of reducing this resentment and safeguarding black
manpower, Spingarn analyzed the Fourteenth Amendment bills introduced only weeks before by Dyer and Merrill Moores of Indiana. Both, he determined, 

... look to the determination of a permanent policy in respect to lynching. I assume that the interest of the Military Intelligence Branch in this matter is entirely one of military necessity, and that a Bill, based upon the war powers granted by the Constitution, and intended to authorize Federal prosecution of lynching only during the continuance of the war, would meet this situation better from a military point of view.

As a result, he recommended

... that steps be taken to obtain antilynching legislation, based on the war powers of the Constitution, in order to cope with the danger which the growth of unrest and dissatisfaction among colored people involves with respect to the successful prosecution of the war.

His specific recommendation was for a bill "To punish the crime of lynching in so far as such crimes tend to prevent the success of the United States in war."

... whenever the United States is at war, whoever shall participate in any mob or riotous assemblage whereby death or mortal injury is intentionally caused to any man or woman employed in the service of the United States, or any man liable to service in the military forces of the United States under the act approved May 18, 1918, entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States," or under any present or future statute of the United States or any person held under arrest by or as a prisoner of or in internment by the United States, or the wife, husband, brother, sister, father, mother, son, daughter, uncle, aunt, nephew, niece, or first cousin, whether of the whole blood or half blood, of any person in the military or naval forces of the United States or liable to service therein, as aforesaid, shall be deemed guilty of a capital offense against the United States and shall upon conviction be punished in accordance with the punishment for the crime of murder under the United States Criminal Code."
When the two officers brought this bill before the Judiciary Committee, which had ordered the hearings to consider Dyer's earliest Fourteenth Amendment bill, they faced problems antilynching congressmen would soon meet with predictable regularity. The second substantive question posed by the committee—the first asked for details on black "dissatisfaction"—dealt with the highest hurdle: "Have you gone into the constitutionality of this proposition?" Georgia Democrat J. Randall Walker wondered. Spingarn's answer implied how difficult was the search for a constitutional base. Avoiding a direct response, the major explained that a war measure was "more available at this time" than a Fourteenth Amendment bill.12

During the hearing neither Spingarn nor Hornblower speculated on postwar bills, but both repeatedly emphasized the "entirely military" need to launch a "counter offensive" against a crime which spread bitterness through black ranks.13 In doing so, however, they suggested an argument that would be used in peacetime by antilynchers who believed a nation, by its very existence, owed citizens protection. As Hornblower explained, threats to civilians could be covered under the war power because ". . . the power to raise and maintain armies carries with it power to punish those acts which interfered with the raising and maintaining of armies." In other words, certain relationships involved reciprocal duties and responsibilities. Spingarn added that the bill sought to defend sol-
diers, "potential soldiery," and their families because "... the Government ... accepted the principle that a soldier cannot fight properly or efficiently if he is worrying about the condition of his family at home." Therefore, when the national government deprived a family of its protector by making him a soldier, it owed that family the protection he could not provide.14

Besides the constitutional question, which Hornblower took up in more detail in a July 19 brief, discussed below, the committee of eleven Democrats and ten Republicans, chaired by North Carolina's Edwin Y. Webb, pondered the nature of lynching itself.15 The committeemen questioned why blacks were lynched, whether wartime lynchers concentrated on uniformed Negroes, and how states would react to federal interference with traditional jurisdiction over crimes. While the two officers hoped to eliminate one cause of black insecurity that, at least potentially, undermined recruitment, congressmen were already considering what would be two critical issues in the postwar antilynching debates. They wondered about the basic question of constitutionality and the need to provide special protection for one group when states protected all groups, at least theoretically. Even as they were authorizing national encroachments into areas traditionally reserved for the states, wartime legislators were alert to even the slightest and briefest challenge to "48 sovereign States." Still willing to pronounce in Congress belief in
the theory that "a man who is guilty of rape should be lynched," opponents of federal antilynching bills in general had much at stake in the Spingarn-Hornblower bill. If, as the NAACP would soon suggest, a war powers bill might accustom the nation to federal antilynching jurisdiction, southerners faced not just a threat to Lynch Law but to their segregationist society which federalism, in theory and in practice, guarded. Therefore, any bill based on any constitutional authority was an issue of more than passing interest.\textsuperscript{16}

In his brief for the war measure, Hornblower emphasized that he was speaking only for himself on the matter of constitutionality although he had the permission of the chief of Military Intelligence to do so. He also reiterated the limited nature of his proposed bill—"in time of war"—and concentrated on the question of special concern, the federal government's authority over the lynching of potential soldiers and their dependent relatives.\textsuperscript{17}

After noting that he had eliminated his bill's coverage of a soldier's cousins, a particularly criticized feature of the measure, Hornblower explained that constitutional supports for federal antilynching authority were in Article I, Section 8 of the Constitution, the Fourteenth Amendment, and the theory of the "peace of the United States"; however, the captain refused to look at any base for his statute other than the war powers clause. The other two
foundations, the bases for other antilynching bills, involved the "large question of permanent public policy" with which his bill did not attempt to deal.18

Hornblower admitted that defense of his proposal was limited by the lack of directly applicable court decisions. The Civil War had been the only other United States war requiring a draft, and in it the enemy "fought fairly and above board" and did not force the enactment of measures to counter subversion. As a result, Hornblower concentrated on demonstrating the similarities between his bill and other recently enacted war measures. He found the logic to support his bill in the War-Risk Insurance Act and the Soldiers' and Sailors' Civil Rights Acts. All included the "repeated recognition that the power to raise armies involves as a corollary a Federal duty to protect the family of the man conscripted (or invited to join) into the Army . . . ."

Hornblower twisted the logic of the bills and determined that

. . . If the Federal Government can protect them against "oppressive action on the part of creditors," can it not protect against lawless action of murderers? If it has power to hold the soldiers' "savings intact until his return," what of guarding his human possessions, for whom he made the savings?19

"Practically all the eminent lawyers in elective Federal office," he added, agreed with him that Congress had constitutional power to protect soldiers' families and "the peace of mind of the soldier." The Hornblower bill would provide protection while only "add[ing] a cumulative criminal remedy
for what [was] already denounced as a crime by the laws of every State." If that addition prompted questions, Hornblower pointed doubters toward the Sabotage and "Disloyalty" Acts. The former punished destruction of war materiel; the antilynching bill would punish the destruction of personnel. To make his point, Hornblower quoted committee chairman Webb who expressed concern that the antilynching proposal was inconsistent with state rights. In 1917 Webb had explained that

The unlawful acts denounced in the [1917 Sabotage] bill are covered in most cases by State laws, but in time of war it is important for the national defense that such unlawful acts, so peculiarly aimed at the success of our aims, should be denounced and penalized by the Congress of the United States.  

Hornblower did not deal with intent—the intent to sabotage or hinder the war effort versus the intent of mobs to murder an individual because of his race or his "crimes." His attempt to define a racially motivated crime as sabotage because of its possible effect ignored the nuances of willful and unintended crimes; he tried to turn one crime into another because of their similar results. His examples, however, did not acknowledge this difference. Whether or not differences in intent outweighed similarities in results, Hornblower's simplistic and earnest argument was a forerunner of others. The similarity between lynching and murder—as here between two types of war sabotage—would lead antilynchers to other, more serious, flawed comparisons and weak analogies. These
comparisons would downplay the critical point of the anti-lynching crusade, that lynching was a racist tool aimed at denying the Negro his constitutional rights. But in 1918 Hornblower's comparison led him to announce that

. . . the unpunished lynching of the dependent wife, sister, daughter, son, or brother of an American sergeant, in some company holding under trying circumstances a strategic position on the front lines in France, would be far more likely to have a disastrous effect upon the outcome of the war than the unpunished utterance of the most scurrilous possible language about the flag of the United States.\(^2\)

In concluding, Hornblower stated that there was a demonstrated need for an antilynching law; however, he appeared to take for granted that a few general statistical references provided all the evidence necessary to support his claim. Without undeniable proof--still being compiled by the NAACP from thirty years of newspaper reports--the statistical justification for the bill was lacking. If later congressional debates are any guide, full debate on the proposal would have turned at some point to the special reasons for nationalizing only one state crime. Killings by mobs and rioters were few; assaults and ordinary murders were much more frequent. Was it the blacks' knowledge that states seldom if ever protected Negroes from mob murderers? Hornblower did not say, other than to refer to "unpunished lynchings." And since the bill was not specifically limited in its coverage to Negroes, was the black to be the only recipient of federal protection?\(^2\)

Whether or not congressmen agreed with Hornblower's eva-
luation, other policy makers felt that the usefulness of a war measure was not worth the effort of a congressional struggle. Within six weeks after Hornblower's presentation, the War Department ended its support of the bill. As late as the last week of July, Military Intelligence supported Spingarn and Hornblower's efforts, albeit not as a matter of departmental policy. On July 29 all support, real and potential, ended. After Wilson's anti-mob statement on the 26th, Secretary Baker decided to forgo further effort on behalf of the antilynching bill. The President, Baker advised, had "already taken a determined stand against lynching."

Drafts of letters from Baker to the Senate and House Judiciary Committees requesting favorable action on a bill "necessary for military reasons" to counter crimes "which clearly tend to impair military morale" were filed away. And five days after Spingarn wrote Emmett Scott about the "need of antilynching legislation" and putting "the weight of your authority behind it," the major informed him of the decision "to restrict Military Intelligence to colored troops." Dyer was another who doubted the worth of an antilynching war measure. He had begun communicating with the NAACP in early April 1918, informing it for the first time of his interest in sponsoring a federal antilynching bill--the one he introduced April 8--and asking for "all the facts you have with reference" to recent lynchings. His goal, he explained, was to prove that a federal law was needed because
nothing else had been successful in ending mob murder. Later Dyer went to great pains to emphasize that his interest in protecting blacks was of long standing; it had not grown out of the wartime mob murder of whites. The Missouri Republican, first elected to Congress in 1911, explained that he had waited until 1918 to introduce a bill because he had wanted to be sure that "such a Bill would be constitutional and stand the test of the Courts." He hoped that once introduced the proposal would create a public demand for action and would lead to a hearing by the House Judiciary Committee, of which he was a member. 25

Certain problems exist with accepting any of Dyer's claims at face value. His bill, so "carefully drawn" and refined over many years, was actually the same one Albert Pillsbury framed in 1901. Pillsbury had written the proposal for Representative, later Supreme Court Justice, William H. Moody of Massachusetts; George Frisbie Hoar, also of Massachusetts, had been Senate sponsor of the measure. While failing to acknowledge the true author of H. R. 11279, Dyer also failed to reveal that the Senate Judiciary Committee, chaired by Hoar, had returned an adverse oral report on the 1901 bill because of doubts about its constitutionality and the nature of state action in mob cases. Dyer's May 7 speech was also largely the work of Pillsbury, who again received no credit for his contribution. Dyer's request to the NAACP for whatever aid it could give him had
resulted in its supplying him with a copy of Pillsbury's 1902 Harvard Law Review article, "A Brief Inquiry into a Federal Remedy for Lynching." Written to support the Moody-Hoar bill, the essay was largely an appeal to the Fourteenth Amendment. So was Dyer's speech.

Pillsbury had argued that "the power of protection followed upon the duty," that forbidding the state to deny equal protection is equivalent to requiring the state to provide," that the Fourteenth Amendment could "be violated by acts of omission, no less than by acts of commission," and that Congress could legislate against "individuals who participate in or contribute to [mob violence], directly or indirectly." In other words,

That open and notorious neglect or omission of this duty on the part of a state, by suffering lawless mobs to murder citizens for want of legal protection, may be declared an offense against the United States, and if so, that the United States may punish all persons who contribute to it.27

Perhaps Pillsbury's bill set Dyer toward a Fourteenth Amendment attack on lynching despite the general view that both Congress and the supreme Court would reject such an approach and despite the legislator's inability to grasp the complexities of the proposed base. Dyer's rather weak and loose command of the intricacies of the amendment was obvious in his public defense of his bills. His speeches, except for those he borrowed from Pillsbury's article, were usually simplistic and dominated by faulty analogies. He added no
contemporary cases to Pillsbury's 1902 list when he made his
May 1918 defense; he referred to Sections 19 and 20 by their
pre-1909 section numbers.

As a member of the Judiciary Committee, his encourag-
ing leading questions, asides, and contributions were often
off the point, seldom of substantive worth, and occasionally
insensitive or frivolous. As late as 1928 when Dyer coauthor-
ed a St. Louis Law Review article supporting a bill virtually
identical to his earliest effort, the Missourian's grasp of
case law, constitutional arguments, and logic remained faulty. 28
Although legal training by the apprentice method, with only
brief contact with law schools, may have been partially to
blame for these failures, Dyer's legal education was no dif-
ferent from numerous other congressmen, and he had been prac-
ticing law for several years before he entered Congress in
1911. Even if the cases brought to him by the citizens of
St. Louis involved few if any constitutional questions, by
1918--and assuredly by 1928--Dyer had been forced to deal
with such questions in Congress where he authored antilynch-
ing bills for a decade and gave his name to the interstate
auto-theft law. Perhaps Dyer simply lacked the mind of a
constitutional lawyer; however, his inability to utilize and
develop what others better skilled gave him would in time
hurt his antilynching efforts. Men more able than he would
have had little more success in convincing a stubborn Congress
to pass an antilynching statute, but the Missouri Republican
made the attacks of his opponents more effective when, as principal sponsor, he defended his measure with superficial, illogical, and irrelevant arguments.

Regardless of Dyer's failures as a constitutional lawyer and his flaws as a debater, his desire for a long-range statute was clear and contributed to, if not explained, his lack of enthusiasm for the Military Intelligence bill. But despite his objections to the Spingarn-Hornblower proposal, Dyer supported its appearance before the Judiciary Committee since it could "form a good foundation" for asserting the necessity of his H. R. 11279, the subject formally before the committee. The war powers measure would be the foundation for Dyer's law "for all time to come."29

Other congressmen in 1918 looked beyond the war. Having counted 4210 lynchings since 1885, Indiana Representative Merrill Moores, a Republican, felt virtually certain that states which had denied and withheld the protection of the law in the past would continue to do so. As a result, on April 19, just two weeks after Dyer introduced his bill, Moores asked the House to consider H. R. 11554. Dyer's bill, based on the Fourteenth Amendment, was "To protect citizens . . . against lynching in default of protection by States." Using the same base, Moores' was "To assure to persons within the jurisdiction of every State the equal protection of the laws; and to punish the crime of lynching." As these titles hint, there were differences and similarities,
some significant, between the two bills that potential backers had to consider. 30

Moores' bill offered protection to all persons, the first proposal of such broad coverage since an 1897 bill by Alexander Stewart of Wisconsin. 31 Dyer's protected only citizens. In the area of procedure, Dyer's gave federal district and circuit courts jurisdiction over the various federal crimes created by his bill; Moores' gave such authority to the district courts only. Counties in which lynchings took place faced a $5000 to $10,000 fine under Dyer's plan, $10,000 under Moores'. In addition, Moores' measure provided forfeiture for counties through which a mob transported its victim, an idea the congressman borrowed from antilynching laws in South Carolina and Ohio.

The most potentially far-reaching difference between the two bills, other than the citizen-person coverage, were the seven sections Moores, an 1880 graduate of Central Law School, included for the prevention of lynching. These sections, intended to be a broadening of the civil rights removal statute, Section 641, detailed the procedure to be used by "every man who may have cause to think that his life is in danger from the mob." 32

Any person arrested for, charged with, or under warrant for arrest for a crime could petition a federal district court when he felt there was "reasonable cause" to believe that the state would deny him equal protection because of the
the state's, its agents', or its citizens' antagonism toward
the petitioner's race, religion, or nationality. The peti-
tioner or his agent had to include a statement that others
of the same race, religion, or nationality charged with
the same offense had been denied a fair trial for the same
discriminatory reason. Receiving this appeal, the district
court clerk would issue a warrant to a federal marshal who
would then take the petitioner into federal custody. A
"summary hearing" would determine whether to keep the peti-
tioner in federal custody, return him to the state, or
free him if he had not been in state custody. Section Five
retained the existing removal procedures while Sections Six
and Seven amended a 1909 law regarding individuals who as-
saulted or "knowingly and willfully obstruct[ed], resist[ed],
or oppose[d]" any federal officer or who aided, hid, "res-
cue[d], or attempt[ed] to rescue, take or adduct" federal
prisoners. Resistance to or attacks on federal officers
could lead to a maximum prison term of ten years and to a
fine of $10,000. Aiding or kidnapping prisoners incurred
fines up to $1000 and imprisonment up to six months.

After these provisions, Moores' bill, with the excep-
tions noted above, was essentially the same as Dyer's cor-
rective and punitive measure. In other words, both owed
considerable debts to Pillsbury's 1901 measure. Based on
the Fourteenth Amendment's guarantee of equal protection of
the laws, they both defined a lynching as a killing by three
or more persons in concert, in violation of state law, and in default of protection by the state or its officials. For each the mob's action was a state denial of equal protection and a violation of "the peace of the United States." Lynchers were guilty of a federal offense and subject to prosecution in federal court for murder. Counties in which mob killings took place faced forfeitures recoverable by the dependent family of the victim or, if none, by the United States, all in actions in the name of the latter and brought by federal attorneys.

In attacking lynching as a state denial of equal protection, both Moores and Dyer sought to reach the state and local officers who failed in their duty to protect mob targets. Section Four of Dyer's bill and Section Twelve of Moores' specified that officers who had "the duty or power" to protect the peace, who had "reasonable cause" to suspect danger and a threat to the peace, and who then neglected or omitted "to make all reasonable efforts to prevent the same" faced federal trial and fine. So did officers who failed to make reasonable efforts to bring lynchers to justice. Each bill provided federal remedies for use against officers who, "in default of protection," gave to a mob a person in their custody. Violators faced maximums of five years imprisonment and $5000 in fines.

Finally, both Dyer's H. R. 11279 and Moores' H. R. 11554 attempted to secure fair federal trials for lynchers and dere-
licit officials by barring from jury service all who had taken part in mob attacks and all who sympathized with mob action and who had, in the opinion of the trial court, views which made them prejudiced jurors. It would be the duty of federal attorneys to produce evidence of partiality. A refusal to answer questions on grounds of self-incrimination disqualified potential jurors.

Moores' preventative-punitive bill, Dyer's less far-reaching proposal, and the Military Intelligence measure required antilynchers to consider with great care a variety of constitutional foundations and types of federal criminal sanctions. So too did a fourth proposal, H. R. 12190, introduced by William E. Mason of Illinois on May 20; however, Mason's bill never became a major factor in the drama. Similar to provisions in both Moores' and Hornblower's bills, H. R. 12190 provided that any individual who without legal authority attempted to punish someone accused of violating a federal law, whether they had or had not killed their victim, was guilty of a federal crime. Mason, as well as Moores and Hornblower, built on the theory of jurisdiction enunciated by the Supreme Court in *Logan v. United States* in 1892.33

The complex relationship between lynching and the federal system complicated the study of the 1918 bills. A link between federal rights and individuals or between states and individuallynchers was necessary to provide a link bet-
ween lynching and the national government. This connection had to be clear enough to hurdle court decisions that limited the relationship between the national government and private action. Moores' simplistic and erroneous assertion that "there can be no doubt whatever as to the power of Congress under the Constitution, as construed by the Supreme Court, to punish lynching" had little support in the Court's records. 34

Race was another complication. Antilynchers might agree that lynching was a racially motivated offense, but they could not afford to link a bill only with blacks. Moores had some sense of the overall problem that constitutional doubts and racial prejudice combined to present antilynchers. Admitting his bill was not "perfect" and did not offer "a complete cure," the Indianan explained how various factors limited his search for a bill based on "the broadest ground and base" and which had "any hope" of passage. He realized that southerners had "serious" arguments against constitutionality and that Congress was "bitterly opposed" to federal antilynching power. He also knew that southern control of crucial congressional committees necessitated proposing a weaker bill than he preferred. Hoping to survive "a very bitter prejudice against the negro . . . in many members of Congress," Moores sought to use a Fourteenth Amendment statute to lay the groundwork for an effective "subsequent amendment." Such a law would be justified if it saved
one life. Moores, however, thought his measure might be "effective to save nine cases out of ten or possibly a greater proportion and that when it has done, the good sense of Congress will bring about the making of a law which will be effective in all cases."

The NAACP, advised by its lawyer-president Moorfield Storey and by Pillsbury, had considerable doubt in 1918 whether either Moores' or Dyer's links were clear enough or sufficiently disassociated with race. Mason's bill, with its concentration on individual action and federal officers, was easily brushed aside by NAACP officers as they missed Mason's Logan theory that the federal government could protect federal offenders from private action. Devoted antilynchers searching for solutions could not so easily dismiss the other two proposals, but the bills could be pushed into the wings by the more immediate, temporary, and therefore less threatening war measure.

In deciding whether to back one of the bills and send witnesses to Judiciary Committee hearings, the NAACP had to consider two factors, constitutional foundations and the advisability of bestowing its public blessing on a specific measure, making antilynching a racial issue. Dyer wanted NAACP backing for his bill. A member of the Judiciary Committee, he suggested that the organization set a date and prepare a presentation for a summer hearing. The NAACP's Anti-Lynching Committee, headed by the Association's co-founder
William English Walling, concluded by May 13 that the group should "actively" support either Dyer's or Moore's bill, "whichever . . . seemed most likely to accomplish the purpose the Association had in mind and to have some chance of passage." The "favorable publicity" generated even by an unsuccessful effort was a strong reason for the NAACP's "participation in public hearings." This conclusion, however, still left difficult decisions, including choosing the bill to support and deciding whether to spearhead the congressional drive for the selected measure. 36

While the NAACP wanted a constitutional measure that could withstand the expected congressional pressure on behalf of state rights, it also wanted an effective measure, one that would strike at as many instances of lynching as possible. Therefore, while Moore's seven preventative sections had a certain appeal, they would have provided no help for the many victims who had no opportunity to write petitions and await the arrival of federal marshals. In addition, there were victims who had never been arrested, threatened with arrest, or prosecuted. Many mob targets knew that they had committed an "offense" only when the mob attacked. Searching for the perfect cure, NAACP investigator and assistant secretary Walter White informed Moores in May that

... in the majority of cases persons lynched[,] particularly Negroes, are not formally arrested, or charged with crime, but are put to death by mobs only on suspicion. For this reason it is our
belief that in the new provision of your bill, that it would be difficult to lessen to any great extent the number of instances of mob violence.37

Two months after this evaluation, Storey gave White a trained lawyer's opinion of the various bills, one which largely determined the immediate course of the NAACP's anti-lynching program. A practicing attorney in Boston and a former president of the American Bar Association, Storey had long been sympathetic toward the struggle of the black American. These sympathies, developed when he served as Charles Sumner's personal secretary in 1867-1869, stretched across half a century and carried him to the NAACP presidency and into the courtroom on behalf of various black petitioners. His success in, for example, Buchanan v. Warley (1917), however, did nothing to change his mind on how the Supreme Court would view a Fourteenth Amendment attack on lynching. Citing Dyer's reliance on the doctrine of "the peace of the United States" and on the Fourteenth's guarantee of equal protection and due process, Storey gave a negative review of the Missourian's bill. The Bostonian's major concern was the Supreme Court's interpretation of the Fourteenth Amendment as a guarantee against state action and not against action by or conspiracies of private persons. There were federal remedies for private action in violation of federal rights, as the Logan Court explained, but not for violation of such state-protected rights as life and liberty.
Most of Moores' bill, Storey added, was endangered by the same factors. Although he considered the two Moores sections dealing with federal officers to be constitutional, Storey announced he could not appear on behalf of either bill. He could not clear the hurdles.

The Supreme Court of the United States has held that the right to punish for the ordinary common law crime is within the exclusive jurisdiction of the States, and I think that any statute which undertakes to transfer that jurisdiction from the states to the federal courts, or which undertakes to make those crimes punishable under the federal statutes would not be upheld by the court. The law is that the rights and immunities which are created by the United States alone can be protected by federal legislation.39

What the antilynchers needed, according to this opinion, was a definition of lynching that made it more than an "ordinary common law crime." If federal privileges and immunities did not include protection from lynch mobs, the Fourteenth Amendment could still cover lynchings by defining such mob action as a denial of equal protection or due process which the state permitted. Yet, Storey in 1919 would explain to John Shillady, who preceded Johnson as NAACP Secretary, just one of the many problems with that solution.

The only ground on which the federal government can interfere is that the states by inaction and connivance with criminals deny to the colored people the equal protection of the laws. In any given case the omission to prosecute may not be the fault of the governor nor the fault of the district attorney, but the fault of the jury. . . . [T]here are many cases where the authorities of the state and the grand jury have done their best only to be defeated by the action of the jury. It cannot be said in such a case that the state denies to its citizens the equal protection of the law.39
One aspect of the multifaceted dilemma was defining state "inaction" and determining whether the state was liable under the Fourteenth Amendment for official nonaction. If so, was the nonactive state liable when mob targets were not in custody or when they were not tied to the state in some procedural way, such as by arrest warrant? Shillady posed this question in 1919 to his organization. "Is it possible by assembling the data showing that no attempts were made, or are being made, in a large number of cases to indict lynchers, to overcome the objections raised by Mr. Storey?" 40

Storey made no attempt in 1918 to provide answers for a question Shillady had yet to ask. Instead he supported both the chances of enactment and the constitutionality of the Military Intelligence proposal. Although he doubted whether the Supreme Court would allow federal coverage of soldiers' relatives, Storey believed that Hornblower's general theories were sound. And since the proposal only "suggested" its special aim was aiding blacks, it had a chance of passage, as long as the NAACP did not "injure" it by "pressing" for its enactment.

If the House believes that under the guise of trying to protect the soldiers we are really undertaking to commit the government against lynching of Negroes I think the bill will never pass.

... We cannot go ... [before the Judiciary Committee] and present our statistics without at once making it apparent that the real difficulty is with the colored people, and we should be pretty
certain to influence the committee against us. As a practical matter, . . . I think it better to let the matter stand as the movement of the war office made in the prosecution of the war, if that is possible.\textsuperscript{41}

Citing an "expediency" based chiefly on Storey's constitutional and practical evaluation, the NAACP refused to take part in any antilynching hearings in 1918 and only privately backed the Spingarn-Hornblower proposal. No Association attorney or witness appeared at committee hearings, although the organization offered Dyer all the information it collected on lynching.\textsuperscript{42}

The NAACP's refusal to become involved with the antilynching struggle of 1918 combined with other factors to undermine that year's campaign. With the organization's refusal to take a public stand in favor of a bill, with the War Department's decision to drop Spingarn's antilynching program,\textsuperscript{43} and with Dyer's dedication to a Fourteenth Amendment bill, the war measure was soon without a champion. With the armistice of November 1918, the constitutional foundation of Spingarn's bill also began to disappear. But despite Wilson's July 26 antilynching statement, lynching did not disappear. As noted in Chapter Three, postwar race tensions increasingly became a national problem, one over which the national government continued to deny jurisdiction. The Justice Department's position was simple and repeated with little variation to the various letter writers who demanded that the attorney general, be he Gregory, A. Mitchell Palmer,
or Harry Daugherty, use federal power to end lynching. During the war, Gregory informed the NAACP that he knew of "no jurisdiction the Federal Courts have to deal with an ordinary case of lynching, any more than they have any other case of murder." After the war Assistant Attorney General R. R. Stewart explained to Arthur A. Schomburg,

This Department endeavored to persuade the Supreme Court [in Hodges] that the Negro Race had rights guaranteed to them under the Constitution . . . under certain circumstances . . . . The Supreme Court, however, did not adopt this view but rules directly in the contrary, and its decision has never been questioned since. This is stated . . . in order to impress you with the difficulties which stand in the way of any action by this Department and with the hope that you will explain these difficulties to other persons, so that this Department may not be subjected to further demands for action in cases where it has no authority under the law to act.44

Three years later, in 1922, the explanation was the same when Assistant Attorney General John W. H. Crim handled the question of federal antilynching power.

It has been held by the Supreme Court of the United States in numerous decisions, beginning with cases immediately after the civil war, that there is no federal statute punishing outrages by individuals upon colored people on account of the race. . . . [T]he court seems to intimate in these decisions that there could be no such federal statute under the present constitution of the United States. It follows that neither the Federal Government nor this Department in particular has any jurisdiction whatsoever over matters of this kind. The only remedy is through the laws and the authorities of the particular state in which the outrages occur.45

The NAACP saw a flaw in the position of the Justice Department. If state governors claimed to be without author-
ity to act, as did Theodore G. Bilbo of Mississippi and Tom C. Rye of Tennessee, were there not "grounds of humanity and national honor" which required the federal government to act? Such grounds in a constitutional system based on morality, justice, and fairness were by nature constitutional, the NAACP implied. Shifting to more objective grounds, the NAACP reasoned that the law was "broken down" in areas where lynching occurred. The Justice Department reasoned that state law still operated in such areas. Looking for a nonlegal answer to the race problem of lynching, Attorney General Gregory expressed confidence that the black's wartime service would sufficiently change racial attitudes as to reduce mob violence against Negroes.46

When Gregory's confidence proved to be misplaced, Dyer continued his statutory attack. On August 23, 1918, he announced his intention to "fight along the lines of my bill till a law is enacted."47 Dyer's dedication to a Fourteenth Amendment solution was shared by few others. Some of those who disagreed with him supported a constitutional amendment similar to the prohibition amendment, but the Missourian rejected the need for such a measure as long as there was a Fourteenth Amendment available for use.48 The argument he presented to the House of May 7 was the base of his 1918 faith and would support his decade-long effort to convince Congress to enact his bills.

As he—and Pillsbury—explained, the United States had
a limited but important "police power" which enabled it
to act when an individual violated a federal right or duty.
The Supreme Court in In re Neagle and Logan v. United States
had relied on the principle "that the persons so assailed
[federal officers and federal prisoners] are within the
peace of the United States; that the United States owes
them the duty of protection and that the power of protec-
tion follows upon the duty." This was the "peace of the
United States" argument. As Pillsbury explained in Decem-
ber 1919, this argument did not require that states must fail
to protect before the national government could act. The
United States' power to protect its citizens at home as well
as abroad was an independent responsibility since the nation
had a "direct interest in the lives of its citizens." In
his Harvard Law Review article, the constitutional lecturer
had explained that the Fourteenth Amendment had changed
the national government's relationship with its citizens
by making national citizenship a "primary right and status."
Any national government had the inherent power to protect
its citizens, and in the United States that government could
do so "within the states, for the vindication of federal
rights and duties. The duty of a government to protect the
lives of its citizens is correlative with the power." Since
the Fourteenth Amendment allowed Congress to use "appropriate legislation," it could do so to correct a "particular
mischief"; it could protect its citizens from mob violence
when states did not. Rounding out the argument, which Dyer borrowed from him, Pillsbury explained that

... it would seem that citizens of the United States, whatever may be said of other persons, are entitled to live in its peace, and to have it preserved for the protection of their lives. If the United States can legislate directly for the preservation of its peace within the states, the pending [1901 Moody-Hoar] bill appears to be within its powers. If the power and duty to preserve the peace of the United States within the states belongs solely to the states ..., the failure of the states to preserve it is a breach of duty toward the United States. In this view, ... the United States has power to deal with such a breach as an offense against itself, on the part of all individuals who contribute to it, directly or indirectly.50

By 1919 Pillsbury believed the Fourteenth Amendment's national citizenship clause was the crucial anti-lynching foundation. "[A]s the government has a direct interest in the lives of its citizens, the United States has the same power to protect them in their lives in the states that it has in all other parts of the world." State failure was an additional, although not necessary, basis for federal action.51

Dyer's and Pillsbury's theory rested also on the equal protection clause, which prohibited all types of state denial, not merely denial by statute. Using Pillsbury's logic, Dyer defined denial as both active and passive. He found failure to provide equal protection, that is, passive denial, to be a positive act of omission, a positive denial. In other words, "forbidding the State to deny equal protection is equivalent to requiring the State to provide it."
And since the Supreme Court defined a state as a conglomeration of its agents, omission by any of these officers was a positive act of denial by the state itself. In the specific case of lynching,

It would seem to follow that when a citizen or other person is put to death by a lawless mob, in default of the protection which the State is bound to provide for all alike, there is a denial of equal protection by the State, in the sense of the equality clause, which Congress may prevent or punish by legislation applying to any individuals who participate in or contribute to it, directly or indirectly.32

This argument, first suggested by Pillsbury in 1902, provided Dyer’s 1918 link between federal authority over state officers and federal jurisdiction over lynchers. If a state failed to provide the equal protection that could save lives from mobs, Congress could declare a mob’s acts to be federal offenses. Dyer explained that Sections 19 and 20, previously Sections 5508 and 5510, of the federal statutes covered the acts of both state agents and individuals, just as would his proposal. As the earlier laws provided federal remedies for violations of federal rights and privileges, so would Dyer’s. The congressman did not, however, suggest that Sections 19 and 20 were antilynching statutes nor did he indicate an awareness of their potential in that regard. They were important to him only as examples of the reach of congressional power. If the national government could use the statutes against jury discrimination based on race, why could not Congress legislate federal pro-
tection for blacks in custody and awaiting trial by a jury over whose membership "it has exercised material power"? The Fourteenth Amendment gave Congress authority to use "appropriate legislation" in enforcing the guarantee of no state denial of equal protection, and if Congress could enact pure-food, drug, child labor, and alcohol laws when states "lagged," it certainly could act against lynching. Ignoring adverse court decisions, the interstate commerce, taxing, and Eighteenth Amendment bases of the examples he cited, and drawing the logical, moral conclusion, Dyer demanded to know if "the rights of property, or what a citizen shall drink, or the ages and conditions under which children shall work, [were] any more important to the Nation than was life itself?"\(^53\)

Dyer's arguments and logic strained those of a line of cases he failed to mention, many of which came after Pillsbury wrote the 1902 brief upon which Dyer so heavily relied. Moores, in his May 3, 1918, discussion, indicated slightly more awareness of the twentieth-century judicial considerations, which in general offered little hope for a federal antilynching law, but like Dyer he relied on what should be rather than on what was; faulty logic, critical omissions, and casual misreadings of constitutional law plagued both Republicans. Moores, for example, cited Ex parte Virginia's definition of "state" to support his statement that the Fourteenth Amendment prohibited a denial of equal protection by both state action and nonaction. In fact, the Court had con-
sistently and expertly avoided the complicated issue of state nonaction. 54

In general, the logical connection that both Moores and Dyer said existed between private and state action, between action and nonaction, and between federal and fundamental rights had not been so logical and obvious to the Court. The congressmen's reliance on logic to bridge the many gaps in their arguments and to link federal remedies with mob murderers through the Fourteenth Amendment was tenuous at best, according to the Constitution's established operational meaning. And if, as Dyer and Moores claimed, lynching was the result of a passive state's denial of equal protection, the legislators needed to provide the proof of the discrimination, the evidence that Shillady sought from his associates in 1919. Tarrance v. Florida, quoted by Moores, did, as he suggested, accept administrative discrimination as a covered Fourteenth Amendment offense, but Justice Brewer had stipulated in his ruling that the discrimination be "proved or admitted." 55 Therefore, Dyer's assertion that jury discrimination had been effectively eliminated by federal laws and their court enforcement was faulty on two points, theory and practice. Outside the earliest jury cases, the judiciary had seldom found the preponderance of proof it demanded to prove unconstitutional discrimination in jury selection. The implication Dyer missed was that
assertions and statistics alone would not prove discrimination in state law enforcement, especially when states had relevant statutes, such as laws against murder and lynching. However, if sufficient proof of denial existed and if the national government could punish state officers who violated their state's laws or who passively aided mobs, it was not a logical second step based on operation meanings to say that Congress could also legislate against private individuals. As Dyer would learn, the best hope of hurdling state-rights barriers and enacting a federal antilynching law was in removing any direct application to private individuals. That removal would leave "only" the need to prove that state failure to stop and punish mobs was a denial of equal protection. That need would, over the course of two decades, lead to a definition of lynching that required the victim to have been "in custody." In 1918, however, antilynchers had not yet discovered how limited an antilynching bill had to be if it was to have a chance of success.

In January 1920 as he prepared for Judiciary Committee hearings on his second antilynching bill, introduced the previous May, Dyer indicated that he again wanted NAACP support and witnesses, as well as the organization's support for his bill's constitutionality. Although he indicated that he was strengthening his constitutional arguments, little of what Dyer later explained suggested that his constitutional reinvigoration was successful. His arguments
changed imperceptively, which was unfortunate for his allies. Additional data on lynching was important, but it would accomplish nothing if Congress could find no constitutional way for the national government to affect the mounting totals. The situation was so delicate that Attorney General Gregory considered even federal "suggestions" to the states on how to deal with lynch mobs to be "a delicate matter"; "a palpable disregard of individual rights," Gregory noted in late 1919, involved federal responsibilities but not clearly enough in most lynching cases.58

Therefore, Dyer's job was a sensitive one, one that Pillsbury did not feel the Missourian was up to. Pillsbury, a lecturer on constitutional law at Boston University Law School since 1896, thought that Dyer, who held no university or law school degree, was moving too fast, ignoring the need for "investigation" before any "direct attempt at legislation" began. As Pillsbury explained, "... it is impolitic to present a bill upon the constitutionality of which its own friends are not agreed."59 An unusually cautious position considering Pillsbury's early role in seeking a federal antilynching bill, it was, nevertheless, one with which few disagreed. To some extent even Dyer did not disagree. He too continued to press for congressional investigations of racial violence.60

As lynchings continued, support for a federal criminal statute grew. Perhaps most significantly for the antilynchers,
by January 1920 Storey was increasingly in favor of Congress's doing something more about mob violence than investigate. Worrying about the "dangerous relation between the while and the colored people," the NAACP president saw ill treatment of blacks in public places, in the courts, and in the voting booth, as well as an "increasing tendency to lynch colored people on suspicion or on very trifling charges, and frequently to kill them with extraordinary cruelty." The problem of lynching, about which the general public was little interested, provided a difficult constitutional and law enforcement problem, but there were several factors that supported federal action. These were, Storey explained, (1) state denial of trial by impartial jury when authorities tolerated lynch law, (2) years of state failure to punish lynchers, and (3) lack of a "republican government" for blacks. In addition, Congress had authority to investigate, and based on the results of an investigation it could either legislate or propose a constitutional amendment. Storey had not lost his doubts, since he told the NAACP that he thought Dyer's bill would be held unconstitutional by the courts, but the need for legislation had converted him into a reluctant but willing supporter. 61

Revealing few doubts of his own, Dyer pressed on, and on January 29, 1920, the House Judiciary Committee, chaired by Andrew J. Volstead of Minnesota, conducted hearings on three bills introduced in 1919. 62 Sponsors of the measures
were Dyer, Moores, and Frederick W. Dallinger of Massachusetts, whose bill was, he noted, "almost identical" to Dyer's. Because it studied three Fourteenth Amendment bills and concluded by recommending a fourth, the committee dealt in much greater depth with the statistical reasons for and the constitutional basis of a general federal antilynching bill than had the 1918 hearings. 63

Testimony by Dallinger and Moores and by various NAACP representatives touched on, however inexpertly, many constitutional questions while also demonstrating that the nation did have a problem with lynching and state nonaction. The NAACP's appearance at the hearing and the evidence it introduced on lynching's racial focus publicly and formally linked the postwar congressional antilynching effort with racial problems. Ignoring or denying the link had not led to any federal action or to any substantial reversal of state policies, and the NAACP, like Storey, was coming to admit the pointlessness of pursuing remedies short of federal criminal statutes. For this point on, the racial nature of lynching was unavoidable and would provide a side issue to all discussions, as would the fact that once again the sponsors of the antilynching bills were Republicans. How vulnerable these points made the antilynchers would be apparent in the committee's minority report. 64

If Congress and the Supreme Court had to do "some little juggling" in order to end America's peculiar crime, as Howard
University professor George William Cook suggested, that acrobatic accomplishment had at its core the question of state responsibility for lynching. James W. Husted, a New York Republican who had in 1917 indicated an interest in protecting aliens from mobs, immediately brought before the committee one complex aspect of that responsibility, state nonaction in some lynching cases. Responding to claims that the racial nature of lynching proved the state was denying one class the protection it guaranteed and provided all others, Husted wondered about the general application of the proposed measures. They did not, he pointed out, "provide against race discrimination." Twice in Dallinger's testimony, Husted sought some word that the courts had equated the denial of equal protection with failure to enact laws or failure to execute them. Unfamiliar with the territory Husted sought to cover, Dallinger reaffirmed that the facts of lynching made it "self-evident that in certain sections of the country a certain class of citizens are denied equal protection of the laws." Husted was determined to make his point:

But your bill does not provide, does it, against either class or race discrimination? Of course, if you provide against race discrimination, that would be clearly constitutional; but this bill does not in its terms, provide against race discrimination; it is general.

Dallinger's response was to admit the bill's general application and to cite the lynching statistics for 1919; arbitrary state nonaction and the need for federal action were
self-evident. 65

As this opening testimony of the hearings indicated, a war of definitions began early, revealing a critical problem. Although linking a federal bill with black injustice would cost valuable support among congressmen who were racist, not providing a statutory link to race would weaken constitutional arguments based on an equal protection theory. Moores' was the only proposal that specified the link, but it did so only in its preventative sections. None of the proposals copied William Moody's first 1901 proposal, which under the Fourteenth Amendment specifically sought to protect the civil rights of black citizens who were mob victims. 66 Racial discrimination was the target of the antilynchers but only by implication because congressmen sought passage of bills by demonstrating the general, nonpartisan application of their proposed protections. 67

While Dallinger, the first to testify about these complexities, faced committee questions that were among the most substantial of the entire hearing, Moores, who followed him, did not. As sponsor of one of the bills under consideration, Moores might have been expected to bear a great part of the defense load, but he added little, the result of illness and insufficient preparation time. In his brief discussion, Moores focused on three topics: the benefits of his preventative sections, the logic of making communities liable for mob murders, and the necessity of providing protection
for aliens. He concluded his presentation by praising his proposal for going "a little further in the direction of saving life and protecting the treaty rights of foreigners" than did Dyer's or Dallinger's, which had no alien coverage. 68

Since Dyer left the defense of his bill to the defenders of federal antilynching legislation in general, Dallinger was the only author to confront the skepticism of the committee. Unlike Dyer he credited the Moody bill, which Pillsbury had written, with providing, "as I understand," a Fourteenth Amendment equal protection base. Immediately, however, the Massachusetts's representative ran into demands that he be more specific. Was the bill, Texan Hatton Sumners wanted to know, based on state failure to protect or state failure to try to protect? What did "in default of protection" mean? Dallinger struggled. "I should say [in default means] in the absence of protection," but "of course, there might be some insincere efforts to protect." He finally decided it meant in default of adequate or effective protection. When questioned by William Igoe of St. Louis about the constitutional "authorities and decisions under the fourteenth amendment," Dallinger claimed that "this matter" had never "come up or ever been passed upon--This particular phase of it." Igoe disagreed with this finding, although it was only hours later that he remembered the facts and name of a case that supported his view. Dyer, responding to Igoe's probings, explained that he had "made an investiga-
tion and [had] some authorities." He thereupon submitted his May 1918 speech in which he cited Section 19, the statute at issue in Igoe's forgotten case; he did not, however, indicate that he recognized any relationship between Igoe's case and his precedent for federal action.\textsuperscript{69}

Returning to his argument, Dallinger sought to deal with the issue of constitutionality, but in doing so he did his cause little good. He read from an August 25, 1919, letter to him from Storey.

\ldots it has seemed to me a very doubtful question whether legislation by Congress against lynching in the States is constitutional, but I am very clearly of the opinion that it ought to be tried. \ldots At the most, the country will be no worse off if the experiment fails than it is now.

Storey's letter also indicated that the problem of defining "in default" was not a new one for Dallinger, who should have been better prepared for Sumners's questions. Storey had suggested that Dallinger's bill "be altered a little," providing a specific time limit for states against lynchers before their failure to do so became a denial of equal protection. Finally, Storey considered a fact that many other analysts would use in arguing against antilynching bills--that lynching was murder and murder was a state crime. The Bostonian accepted that view of lynching but argued that a state crime might become a federal one if state authorities did not "prosecute the offenders in earnest, or if \ldots when advised that a lynching was to take
place, they [state governments] profess absolute inability to act. . . ."\textsuperscript{70}

Only haphazardly did those who testified after Dallinger contribute anything substantial to this constitutional dilemma or develop any of Storey's evaluations. In fact, during his presentation, Arthur Spingarn, brother of Joel and head of the NAACP's Legal Committee, asserted that constitutionality was "absolutely immaterial." A wrong existed; so too did a constitutional remedy. Logic demanded it. If Congress was truly doubtful about the constitutionality of a bill that constitutional experts, whom Spingarn did not name, believed was a proper exercise of federal power under the Fourteenth Amendment or guarantee clause, a constitutional amendment was the obvious alternate action.

\textbf{If the American people can stop long enough to change the Constitution to decide whether the American people shall drink, or not, or 6,000,000 people shall vote, they can at least stop long enough to change the Constitution to say whether 12,000,000 people can live in safety.}\textsuperscript{71}

Spingarn was not alone in his frustration that lives were in jeopardy because men maintained a too great reverence for strict constitutionalism. William Trotter, the black editor of the Boston \textit{Guardian} and representative of the National Equal Rights League, objected to "a difference of opinion among lawyers" being used by Congress to justify its refusal to act. He found it incomprehensible that the federal government, while lecturing Europe on the responsibilities of democracy and equality, could do nothing about a
crime against which states took no action.\textsuperscript{72} 

Spingarn and Trotter's argument that "There must be a cure because there is an illness" left to James Weldon Johnson the burden of proving that an illness existed and that a cure was available. By using eight pages of lynching statistics, newspaper announcements of upcoming lynchings, and gubernatorial statements about state impotence in the face of mob violence, Johnson sought to demonstrate the states' failure to protect a specific group from a specific crime. In addition, the NAACP Secretary argued that the Dyer bill's constitutionality was not so dubious that Congress could use constitutional doubts to justify nonaction on it. He noted that William Howard Taft, Elihu Root, A. Mitchell Palmer, Charles Evans Hughes, and other nationally prominent lawyers and jurists had called on Congress in 1919 to investigate and end lynching. That "call," at least in Johnson's mind, was sufficient support for favorable congressional action on a federal antilynching bill.\textsuperscript{73} 

Resistance to Johnson's admittedly inexpert views on the constitutional question came, again, from Igoe. The Missourian could not equate an investigation with a law; nor could he discover the constitutional base of the proposed federal antilynching bills. If they aimed at private individuals, they would be, he felt, no more usable than was Section 19. The Supreme Court had limited its use against white mobs. Looking at \textit{United States v. Powell},
the case he sought to recall when he questioned Dallinger, Igoe concluded that the statute that prohibited conspiracies to deprive citizens of federal rights had the same "underlying" principle as the antilynching bills. If the Court could not accept Section 19's application to lynch mobs, how could it accept an antilynching bill? Igoe did not recognize that Section 19's coverage of federal rights violated by individuals differed from the other bill's focus on state denial.74

No one pressed Igoe or challenged his comparison. No one appeared interested in pre-existing laws, much less Section 19. The Missouri Democrat said that he was "merely discussing the matter for my own information, to get your views on it." He got few. Constitutional concern was muted. Dyer, who two years before had explained how Section 19 was precedent for his bill and who valued his constitutional knowledge, responded only with a general, tangential theory. Again crediting himself with Pillsbury's words, he explained that state nonaction was a constitutional wrong and informed his listeners that he did not believe anyone "would refuse to vote to enact a law that would give protection to the lives of the people." Without connecting the Fourteenth Amendment to class discrimination and unequal protection, Spingarn contributed an explanation of the double edge of state nonaction which resembled the "peace of the United States" theory.

The States are either powerless to prevent lynchings or they do not choose to prevent lynchings. If
they are powerless to prevent lynchings, then we
have mob rule in the states . . . and the violation
of the Constitution [in its guarantee of a republi-
can form of government]. If they can do it and
they do not prevent it, you have a violation of the
Fourteenth Amendment in that we do not give equal
protection.\textsuperscript{75}

Archibald Grimké, the seventy-year-old Bostonian who
headed the NAACP's Washington, D. C., chapter, also left
connecting the Fourteenth Amendment and unequal protection
to others. The "authorities" on the Judiciary Committee
could handle questions of constitutionality. Grimké would
concentrate on the racial aspect of the problem as he sought
to convince the committee to view lynching as it would if
victims were white and mobs were black. Southern propagan-
da about black "brutes" had, Grimké felt, simply reinforced
a racist predisposition not to act to protect Negroes. Dr.
William H. Wilson, also of the Washington, D. C., NAACP re-
peated both this analysis and an untrained, simplistic
Dyeresque view of the federal system.

\ldots the Government which can step into a State
to imprison a man for stealing a postage stamp
or selling a drink of liquor or for the denial
of the right to vote--provided one is not black--
that Government can stop the murder of men. \ldots
[T]he question is, does the Government desire to
do it? If the Government desires to do it, it
will do it.\textsuperscript{76}

This last assertion symbolized the frustration of
those who in seeking a federal remedy for lynching ran into
a legislatively and judicially constructed wall of constitu-
tionalism, federalism, and racism. Symbolic, too, was the
repeated pleas that Congress do its jobs and let the Supreme
Court do its. When he made this plea, Neval Thomas, a member of the NAACP's legislative committee in Washington, presented both logical and emotional arguments whose slight relationship to substantive constitutional issues would be typical of later debates. Judicial "read[ing] away" of and "national indifference" toward the Fourteenth and Fifteenth Amendments did not mean Congress could not act or take the lead. Thomas thought that if the judicial rejected an antilynching bill a constitutional amendment would follow. Therefore, he was eager not to "quibble over constitutionality," instead finding nonlegal reasons--improving morale, repairing the national reputation, warning whites of future measures, calming impatient blacks--which were insufficient in themselves to justify enactment of a federal law. As George Willism Cook concluded for him, "We are here to ask you [congressmen] to attempt to do something, even though there is a doubt as to the constitutionality of it."77

The House Judiciary Committee of thirteen Republicans and seven Democrats that responded to Cook's request was split in its answer. Dyer's majority report and Arkansas' Thaddeus Caraway's minority response dealt with different aspects of the question of federal antilynching authority. Neither report was objective, scholarly, or thorough, but together they presented much of what would soon be the standard positions in the antilynching debate.

Caraway's report, only two pages long, strayed into the
emotional side issues that relied on constitutionality as a "red herring." In doing so, the report justifed the fear that a federal bill's link to Negroes would be an insurmountable barrier in segregationist America. According to Caraway, the hearing, conducted without sufficient notice or a quorum, never dealt with the specific provisions of the proposed statutes. In addition, he claimed that the majority report was no more than the NAACP's brief, with the organization's eight pages of statistics duly appended. The minority acknowledged no constitutional base for H. R. 14097, the Dyer-Moores bill introduced May 17 that combined the major provisions of the three original bills and which received the majority's approval. The report particularly disapproved of the county liability provisions. It also found no federal power to coerce states and no similarity between protecting aliens and citizens, the new bill having included Moores' provision to protect aliens.78

Beyond these briefly noted positions, the minority's report was an exercise in racial and political warfare. According to Caraway, the NAACP, which appealed to "that portion of the negro race that desires license and immunity and not law and justice," cared only for freeing black criminals and not for punishing them. Demonstrating the subtle yet direct line of attack taken by those who used constitutionality as a cover, the report concluded by noting that "it is possibly bad taste to suggest and therefore it is not suggested, but
it almost seems to be obvious that this measure was reported for political and not legislative reasons." Continuing Republican sponsorship, NAACP support, and growing northern black urban populations would guarantee that this ill-disguised racist questioning of the very need for anti-lynching measures was only the earliest of many similar attacks. 79

Dyer's majority defense of H. R. 14097 did not deal with the same issues. It focused on local prejudice, state failure to prevent and punish Lynchers despite some "admirable" laws, unequal distribution of protection as revealed by the treatment of black and white rioters, and the increase in black unrest as a result of these conditions. Dyer explained that Congress had sufficient constitutional authority to deal with these conditions when they contributed to lynching. 80

Authority for H. R. 14097 lay in two possible sources. Article I, Section 8 of the Constitution allowed Congress to call on the militia to suppress insurrections, but that was a limited power. More significant was the Fourteenth Amendment, which covered state denial that took forms other than the most obvious, positive legislation. Lynchings most often involved state denial by officers who failed to protect persons in their custody, and the Fourteenth Amendment gave Congress discretion as to how it dealt with that denial. Judicial support for a broad definition of state
denial could be found, Dyer explained, in Ex parte *Virginia, Home Telephone and Telegraph* v. *Los Angeles*, and *Buchanan v. Warley*. He did not elaborate on these cases, but he did quote, without identifying the source of each, from the opinion of a "distinguished southern judge," *Vick Wo v. Hopkins*, and *Tarrance v. Florida*.81

The majority pointed to three goals of the bill which were constitutionally acceptable.

. . . (1) to prevent lynchings as far as possible; (2) to punish the crime of lynching; and (3) to compel the community . . . to make such compensation as is possible.

Dyer, however, often failed to explain what was acceptable about the provisions which sought these goals or to deal with the complaints against each. The removal provisions, based on general removal statutes and the 1866 Civil Rights Act, "simply extend[ed] to one whose life is about to be taken unlawfully the same protection the law now gives to his civil rights." Using the "it has to be possible" argument, the majority rhetorically asked, "Could anything be more absurd than the law should safeguard one's civil rights and wholly disregard the protection of his life?" Congressmen who knew of the judicial distinctions between civil rights and fundamental rights and between state and national responsibilities in protecting each had to wait to present their answer. In the meantime the majority accepted, without even a rhetorical question as explanation, the provisions making lynching a federal crime. They let the pro-
vision that defined individual action "in default" of state protection as a denial of equal protection speak for itself.\textsuperscript{82}

County fines were common in state law, upheld by state courts, and apparently effective deterrents against lynching and official inaction; therefore, they could also be effective and constitutional as federal measures. Dyer explained that a county's "nonenforcement of the laws" made it responsible for compensating "for a local wrong." Dyer, however, offered no explanation for Section Eleven, Moores' contribution, which provided equal liability for counties mobs traversed.\textsuperscript{83}

Provisions on official malfeasance and negligence, restricted jury duty for lynchers and sympathizers, and protection of aliens received the committee's favorable verdict also. The majority believed the United States could not afford more than the $792,499.39 it had already paid to mother countries as a result of federal impotence. "[T]he Supreme Court has several times intimated that such legislation would be constitutional."\textsuperscript{84}

* * *

Although their support of the 1918 war-powers bill and their 1920 majority report implied that antilynching legislators were familiar with the complexities of the constitutional arguments they were considering, they were
not. Rather, they plunged into deep constitutional waters aware that it was critical to know how to swim but unaware that they would have to swim so hard. As a result, their efforts against the current of constitutional interpretation was only a treading of water. Cognizant of the Fourteenth Amendment's operational meaning, congressmen knew that the national government's reach into a traditional state domain could be only a limited and closely defined one, but they did not yet know what those limits were.

Trapped in a web of federal limitations, state non-action, and private discrimination and unable to comprehend the need to distinguish between the murder of a black and the denial of black rights through murder, congressional antilynchers by 1920 confidently attacked both lynchers and the states. The subtle shades of individual action which violated the even subtler shades of individual rights caught the antilynchers in a swirl of constitutional whirlpools. They knew there was an answer; and because lynchings continued so did their search.
NOTES

1"Moorfield Storey, "Address on Lawlessness . . . at the . . . Maryland State Bar Association" ([Boston?]: n.p., 1904), 9; Storey, "The Legal Aspects of the Negro Question: An Address" (Atlanta: n.p., 1920), 5.

2Albert Pillsbury to James Weldon Johnson, December 18, 1919, Records of the National Association for the Advance- ment of Colored People, Library of Congress, Manuscript Di- vision (Washington, D. C.), Group I, Series C, Box 242 (hereinafter referred to as NAACP Records); Pillsbury to Johnson, January 22, 1920, Moorfield Storey Papers, Library of Con- gress, Manuscript Division, Box 2.

3For a list of almost all federal antilynching bills which involved proposals of legislation, investigation, or constitutional amendment, see Jesse W. Reeder, "Federal Efforts to Control Lynching" (Ph.D. diss., Cornell University, 1952), 231-36. Pillsbury's bill was approximately the tenth introduced.

4Johnson to Pillsbury, December 20, 1919, NAACP Re- cords, Group I, Series C. Box 242.

5For concern about Negro subversion in World War I, see confidential memorandum for Major Spingarn from Captain Harry A. Taylor, "Re: German Propaganda Among Negroes," July 1, 1918; Spingarn to "Lt. Gregory," July 1, 1919; list of "NAACP Branch Offices," June 20, 1918, sent by John Shil- lady to War Department [Spingarn], June 19, 1918; M. G. Baten to Harry Daugherty, [October 1921]; "Memorandum for Mr. Matthews" from "Director," November 3, 1921, all in General Records of the Department of Justice, Record 60, National Archives, Washington, D. C., #10218-443 (8), #10218-158-2, #10218-158-1, #10218-158-3, #158260-157.

7. William C. Fits to NAACP, February 16, 1918, Record Group 60. See also Crisis, 15 (April 1918), 28; Harry E. Davis to Theodore Burton, January 18, 1922, NAACP Records, Group I, Series C, Box 76.

8. House Committee on the Judiciary, To Protect Citizens of the United States Against Lynching in Default of Protection by the States: Hearings on H. R. 11279, 65 Cong., 2 Sess., 1918, pt. 1, 8-9. Spingarn was almost evasive when he handled committee questions about whether the bill had official Army sanction. Cautiously admitting it had, Spingarn immediately concentrated on arguments in favor of the bill. What he did not say was just how much War Department and Army backing his proposal and committee appearance had. Hornblower said that the chief of military intelligence "approved the mayor's plans in regard to countering the enemy's propaganda." Spingarn only said that "I have the permission of my superiors to appear here" and "my presence here has the sanction of the Military Intelligence Branch of the General Staff." (9) See also Shillady to Dyer, August 12, 1918, NAACP Records, Group I, Series C, Box 242.

9. Spingarn, memorandum for Colonel Churchill, July 22, 1918, Records of the War Department General and Special Staffs, Record Group 165, National Archives, #10996-36-1; Spingarn to William H. Lewis, July 23, 1918, #10996-36-18; memorandum, Spingarn to Colonel Churchill, June 15, 1918, #10218-154-24; "Memorandum. Subject: General Pershing on the treatment of colored troops abroad," #10218-154-f/w, all in Record Group 165. Upon graduation from officers training camp in the summer of 1917, Spingarn, who had struggled to get such camps for Negroes, was assigned to the 311th Infantry battalion. Taken ill with ulcers prior to his battalion's departure for France, he underwent surgery and was hospitalized for nearly two months. Rejecting his request to join his men in France, the army assigned him to the General Staff's intelligence division in Washington, D. C. B. Joyce Ross, J. E. Spingarn and the Rise of the NAACP, 1911-1939 (New York: Atheneum, 1972), 97-101.


11. To Protect Citizens Against Lynching, pt. 1, 4-5.

12. Ibid. Spingarn offered the same explanation to the NAACP. In a letter asking for information on Dyer's and Moores' bills, Spingarn told Shillady that "we feel . . . that legislation based on the 14th Amendment is less available at this time then legislation based on the war powers
granted by the Constitution." Spingarn to Shillady, June 3, 1918, Storey Papers, Box 2. See also Spingarn to Storey, June 18, 1918, ibid.

To Protect Citizens Against Lynching, pt. 1, 4.

Ibid. See Spingarn to Storey, June 18, 1918, Storey Papers, Box 2; Spingarn to Shillady, June 3, 1918, ibid.; Newton Baker to Woodrow Wilson, July 1, 1918, Woodrow Wilson Papers, Library of Congress, Manuscript Division (microfilm edition), Series 4, #152, reel 230.

House Judiciary Committee members were Democrats Edwin Y. Webb (North Carolina), Charles C. Carlin (Virginia), Robert Y. Thomas, Jr., (Kentucky), William Igoe (Missouri), Warren Gard (Ohio), Richard W. Whaley (South Carolina), Thaddeus Caraway (Arkansas), M. M. Neely (West Virginia), Henry J. Steel (Pennsylvania), J. Randall Walker (Georgia), and Hatton Sumners (Texas), and Republicans Joseph Flynn (New York), Andrew Volstead (Minnesota), Dyer (Missouri), John Nelson (Wisconsin), Dick R. Morgan (Oklahoma), Walter Chandler (New York), Joseph Walsh (Massachusetts), Charles Reavis (Nebraska), and Walter W. Magee (New York).

To Protect Citizens Against Lynching, pt. 2, 6-8, 12-13, 16. During the June 6 hearings, Congressman Thomas explained, "I think that a man who is guilty of rape should be lynched." Ibid., pt. 1, 7.

Ibid., pt. 2, 15. In a June 24, 1918 "Memorandum for Colonel Churchill. Subject: -Permission to submit brief to Congressional Committee," Spingarn noted that "Captain Hornblower indicates clearly that the brief is to be 'regarded only as expressing the views of the writer as a lawyer.'" According to a July memorandum by Colonel Churchill of the General Staff to the Chief of Staff, which apparently was never sent, Hornblower submitted his brief "pursuant to approval endorsed July 6, 1918 by Brigadier General William S. Graves, General Saff, Executive Assistant to the Chief of Staff, on the memorandum of the Chief, Military Intelligence Branch, Executive Division, dated July 5, 1918," submitted by Spingarn. "Subject: Proposed bill to punish crime of lynching in so far as such crimes tend to prevent the success of the United States in the War." Record Group 165, #10996-36-24. See also Colonel M. Churchill to Congressman Edwin Y. Webb, July 12, 1918, ibid., #10996-36-16.

To Protect Citizens Against Lynching, pt. 2, 6.

Ibid., 20.

21. Ibid., 25.

22. Ibid., 26, 27.

23. When Nick Chiles, a black and editor of the Topeka Plaindealer, suggested a "war measure," he had in mind a presidential "demand that the governors of the several states see to it that their citizens desist from such outrages as such acts interfere in the prosecution of the war between this country and the allies against Germany." Chiles reasoned that if federal troops could be sent to settle a miners' strike in Kansas because of the threat to coal mining and the war effort, the same could be done to protect blacks who dug the coal or fought the war. With much of the Constitution in limbo during the war, Chiles argued, state rights were nonexistent and federal power in almost unlimited strength was present in the president's office. Chiles to Wilson, February 13, 1918; Chiles to William C. Pitts, February 21, 1918, both in Record Group 60, #19027-2 and 6; see also Robert Moton to Wilson, June 24, 1918; Kelly Miller to Wilson, August 4, 1917, both in Wilson Papers, Series 4, #152, reel 230; "Rewards to Catch Lynchers," Nation, August 31, 1918, 219.

24. "Memorandum for M. I. 4" from Churchill, July 29, 1918, Record Group 165, #10996-36-25; Baker to Charles A. Culberson, July 18, 1918; Baker to Webb, July 1918, both in Record Group 165, #10996-36-19 and 20; Spingarn to Scott, July 27, August 1, 1918, ibid., #10218-154-36 and 38. See Spingarn, "Memorandum for the Chief of Staff. Subject: Proposed bill to punish crimes of lynching in so far as such crimes tend to prevent the success of the United States in the War," July 1918, ibid., #10996-36-24.

25. Dyer to Shillady, April 6, May 3, 1918; Shillady to Dyer, April 10, 1918; Dyer to Nannie H. Burroughs, May 3, 1918, in NAACP Records, Group I, Series C, Box 242.

26. Congressional Record, 65 Cong., 2 Sess., 6176-78 (May 7, 1918); Johnson to Pillsbury, December 17, 29, 1919 (the latter with a copy of Dyer's speech with margin notes indicating "verbatim" borrowing from Pillsbury); Pillsbury to Johnson, December 18, 1919, in NAACP Records, Group I, Series C, Box 242. For the Hoar-Hoar bill, see Congressional Record, 57 Cong., 1 Sess., 51, 212 (December 2, 9, 1901); Hoar's unofficial report, ibid., 5905 (May 25, 1902). In his May 7 speech, Dyer omitted portions of Pillsbury's article dealing with the primacy of national citizenship, appropriate legis-
lation when states are in default of their duty, and the
"peace of the United States." He added comments on Sec-
tions 5508 and 5509 of the Revised Statutes and on feder-
al power. Dyer also gave Pillsbury no credit when he sent
a copy of the speech to Wilson. Dyer to Wilson, July 25,
1918, Wilson Papers, Series 4, #543, reel 285. In 1921
Pillsbury judged the Dyer bill to be a "literal transla-
tion from my antilynching bill of 1901." Pillsbury to
Johnson, July 22, 1921, NAACP Records, Group I, Series C,
Box 242. Judging Dyer's motives, in general, appeared to
be a difficult task. See suggestions in Columbia (S. C.)
State, quoted in Johnson to Dyer, October 28, 1921, ibid.;
J. E. Mitchell (editor of St. Louis Argus) to Shillady,
June 29, 1918, Record Group 165, #10218-154-29.

27Pillsbury, "A Brief Inquiry into a Federal Remedy

28Leonidas C. and George C. Dyer, "The Constitution-
ality of a Federal Anti-Lynching Bill," St. Louis Law Re-
view, 13 (May 1928), 186-99.

29Dyer to White, June 5, 28, 1918, NAACP Records,
Group I, Series C, Box 242.

30Congressional Record, 65 Cong., 2 Sess., 4821
(April 1918), for Dyer's H. R. 11279; 337, 338 (May 3, 1918),
for Moores' H. R. 11554. There is a copy of Moores' bill
in the Arthur Spingarn Papers, Library of Congress, Manu-
script Division, Box 55. The NAACP sent a "Memorandum to the
Anti-Lynching Committee on Federal Anti-Lynching Bills" on
May 17, 1918, as it tried to assess the merits of the vari-
ous proposals. NAACP Records, Group I, Series C, Box 74,
Shillady file.

31Congressional Record, 54 Cong., 2 Sess., 1506
(February 4, 1897), for H. R. 10222.

32Ibid., 65 Cong., 2 Sess., 339 (May 3, 1918).

33Mason's H. R. 12190 can be found in Congressional
United States, 144 U. S. 263 (1892) accepted the powers
of the federal government to pass laws to protect federal
prisoners as part of the national government's responsibili-
ty to safeguard those in its custody. The law it con-
sidered, Section 5508, prohibited conspiracies to deprive per-
sons of their federal rights.

34Congressional Record, 65 Cong., 2 Sess., 338 (May
20, 1918).
35. Moores to White, May 6, 17, 1918, NAACP Records, Group I, Series C, Box 70. See also Moores to Sumner A. Furniss, May 10, 1918, ibid.

36. "Memorandum to the Anti-Lynching Committee on Federal Anti-Lynching Bills," May 17, 1918, ibid., Box 74; "Report of the Anti-Lynching Committee" in Minutes of the Board of Directors, May 13, 1918, ibid., Series A, Box 1 (reel 1). Shillady asked the Anti-Lynching Committee for its advice on May 7. Shillady to William Walling, May 7, 1918, ibid., Series C, Box 74. Moores also suggested that the NAACP get "some lawyer familiar with the question of the constitutionality" to appear at a May 10 subcommittee hearing. Moores to White, May 6, 1918, ibid., Box 70. Moores encouraged NAACP backing of his bill. Moores to White, May 3, 10, 1918, ibid.

37. White to Moores, May 14, 1918, ibid., Box 76; "Memorandum to Mr. Grimke: Re Anti-Lynching Bill; "Memorandum to the Anti-Lynching Committee on Federal Anti-Lynching Bills," May 17, 1918, ibid., Box 242.


40. Ibid.

41. Storey to White, July 11, 1918, ibid., Box 75. For examples of congressional racism which took the form of proposed legislation to segregate street cars in Washington, D. C., prohibit interracial marriage, and separate government clerks by race, as well as bar African immigration, see Congressional Record, 63 Cong., 3 Sess., 803 (Reed, December 31, 1914); 65 Cong., 1 Sess., 299 (Vinson, April 4, 1917); 65 Cong., 2 Sess., 5325 (Trammell, April 19, 1918). See Joel Spingarn to Emmett Scott, July 27, 1918, Record Group 165, #10218-154-36.
42 White to Dyer, June 3, August 26, 1918; Shillady to Dyer, August 5, 1918, NAACP Records, Group I, Series C, Box 242; Shillady to Walling, July 19, 1918; Shillady to Ovington, July 16, 1918, ibid., Box 74; NAACP, Thirty Years of Lynching in the United States, 1889-1918 (New York: n.p., 1919), published in April 1919.

43 Shillady to Dyer, August 12, 1918, NAACP Records, Group I, Series C, Box 242; Report of John R. Shillady to the Anti-Lynching Committee, September 9, 1918, Storey Papers, Box 2. Joel Spingarn told the NAACP that the military would do nothing to back his bill. Shillady to Dyer, August 12, 1918, NAACP Records, Group I, Series C, Box 242.

44 Gregory to Shillady, May 18, 1918, answering Shillady to Gregory, May 10, 1918, Record Group 60; Assistant Attorney General R. R. Stewart to Arthur A. Schomburg, September 20, 1919, ibid., #158260-2-11, answering Schomburg to Justice Department, September 1, 1919, ibid. See also the following letters, all in Record Group 60: Stewart to J. E. Boyd, December 7, 1920, responding to November 19, 1920 inquiry, #158260-126; Claude R. Porter to Charles Douglas, May 24, 1919, responding to February 20, 1919 inquiry, #158260-88; Stewart to C. D. Allen, April 27, 1921, #158260-2-135; Porter to James A. Ray, May 24, 1919, #158260-1-89; Stewart to J. S. Knight, May 12, 1920, #158260-2-123; W. R. Harr to C. P. Covington, January 1, 1921, #158260-10; John W. H. Crim to Fannie Miller, April 3, 1922, #158260-187. Note White to Storey, March 14, 1921, NAACP Records, Group I, Series C, Box 77.

45 John W. H. Crim to W. D. Johnson, June 8, 1922, responding to June 1, 1922 inquiry, Record Group 60, #158260-202. In a December 2 "Memorandum for the Chief of Staff," Secretary of War Baker explained a letter to be sent to all corps commanders and state governors regarding use of federal troops in domestic disturbances. He cited army regulations which prohibited use of troops except "... when the State, having summoned its entire police power, is still unable to deal with the disorder which threatens it." Relaxation of the rule during the war and immediately following it did not mean that the prohibition had been voided. Record Group 60.

46 Gregory to Thomas H. Franklin, August 17, 1918, Thomas Watt Gregory Papers, Library of Congress, Manuscript Division, Box 1. See also Crisis, 19 (January 1920), 106, when in criticizing Attorney General A. Mitchell Palmer's views on intermarriage, Crisis concluded with a reference to the Justice Department's lack of power "to prevent or punish lynching ... ."
Dyer to White, August 23, 1918, NAACP Records, Group I, Series C, Box 242; promise by Dyer, Congressional Record, 65 Cong., 3 Sess., 4645-46 (February 28, 1919).


Congressional Record, 65 Cong., 2 Sess., 6177 (May 8, 1919).


Pillsbury to Johnson, December 19, 1919, NAACP Records, Group I, Series C, Box 242.

Congressional Record, 65 Cong., 2 Sess., 61 (May 7, 1918).

Ibid.

Ibid., 338 (May 3).


For example, see Congressional Record, 74 Cong., 1 Sess., 101, 104 (January 4, 1935) for S. 24.

Dyer to Shillady, November 7, 1919, Spingarn Papers, Box 27; Johnson to Storey, January 16, 1920, Storey Papers, Box 2; "Report of the Secretary," in the Minutes of the Board of Directors, November 10, 1919, NAACP Records, Group I, Series A, Box 25.

Gregory to Joe [Tumulty], December 26, 1919, Wilson Papers, Series 4, #152, reel 230.

Pillsbury to Johnson, January 22, 1920, Storey Papers, Box 2.

On October 2, 1919, Dyer introduced a resolution calling for an investigation of the riot in Washington, D. C., as noted in footnote 6. He was not alone. Senate majority whip Charles Curtis, a Kansas Republican, made a similar proposal on September 22, 1919. Congressional Record, 66 Cong., 1 Sess., 5673 (S. Res. 189). Broader than Dyer's measure, Curtis's resolution also called for an investigation of "lynch-
ings which have occurred in different parts of the United States, and to ascertain as far as possible the causes for such race riots and lynchings and report what remedy or remedies be employed to prevent the reoccurrence of the same."


63 Segregation and Antilynching. Part II: Antilynching, 13

64 In May 1917, when the NAACP discussed whether to back Dyer's or Moores' bill, it considered following Dyer's request that six blacks and six whites speak for the bill and present "an argument on the constitutionality of the bill . . . ." In addition, there had been considerable effort spent trying to arrange for Pillsbury to testify at some time for the bill. Apparently the schedule could not be arranged to fit Pillsbury's schedule and health. Johnson to Pillsbury, December 17, 1919; Pillsbury to Johnson, December 18, 1919; Johnson to Dyer, December 20, 1919, all in NAACP Records, Group I, Series C, Box 242; Pillsbury to Johnson, January 22, 1920, Storey Papers, Box 2.

65 Segregation and Antilynching, Part II: Antilynching, 73, 19, 18. In 1917 Husted twice proposed amendments which would have guaranteed federal protection for aliens threatened by mobs.

66 Congressional Record, 57 Cong., 1 Sess., 51 (December 2, 1901), for H. R. 21.

67 Ibid., 80 Cong., 1 Sess., 5397 (May 15, 1947), for H. R. 3488.

68 Segregation and Antilynching, Part II: Antilynching, 22-23.

69 Ibid., 14-17.

70 Ibid., 17-18.

71 Ibid., 35. At one time the NAACP advised Dyer to check with Arthur Spingarn, who had "given consideration to
the legal aspects of lynching . . . ." Shillady to Dyer, April 10, 1918, NAACP Records, Group I, Series C, Box 242.

72 Segregation and Antilynching, Part II: Antilynching, 38, 39.

73 Ibid., 46. They were among many, including Simeon E. Baldwin, Johnson, ovington, Pillsbury, and Storey, who issued a call in late 1918 for an antilynching convention in New York City on May 5-6, 1919, at Carnegie Hall. At the meeting they adopted a resolution calling for "Federal legislation against lynching." For a complete copy of the resolution see "Address to the Nation," in Congressional Record, 67 Cong., 2 Sess., 789-90 (January 4, 1922). See also "The Anti-Lynching Conference," Crisis, 16 (June 1919), 92; "A Ten Year Fight Against Lynching," type-written list prepared by White, NAACP Records, Group I, Series C, Box 338.


75 Segregation and Antilynching, Part II: Antilynching, 49, 51.

76 Ibid., 62, 63, 65, 60, 67.

77 Ibid., 69, 70, 71, 75.


80 Ibid., majority report, 2-3.

81 Ibid.

82 Ibid., 4, 5.

83 Ibid., 6.

84 Ibid.
CHAPTER FIVE

"AN EXPERIMENT WORTH TRYING":

THE BATTLE RENEWED, 1921

Now let us watch the progress of this bill through the Congress of the United States. To draft a bill is much easier than to pass it.¹

Philanthropist George Foster Peabody, an advocate of an educational campaign against lynching, explained pessimistically to Walter White that it was "a waste of energy to try to deal with the [lynching] issue through congressional legislation." Without "a courageous leader," the "moral issue" would be hopelessly "tangled up in the great issue of the liberty of the individual." The latter, he implied, would be the victor. Congressman Anthony Griffin, a New York Democrat who represented black Harlem, saw in the House of Representatives' consideration of the 1921 Dyer bill the realization of Peabody's fears. "The prolonged argument on the bill . . . actually degenerated into a quasiconstitutional defense of the inalienable right to resort to lynching." Across the House floor, Edward Little agreed. The Kansas Republican listened to fellow congressmen defend "the constitutional right to burn . . . fellow citizens alive . . . ."²

Such defenses plagued antilynchers. Their demand for federal action focused congressional attention not on the
criminal taking of life but on the distribution of government powers to deal with that taking. This concentration, already evident in the Judiciary Committee hearings of 1918 and 1920, became even more defined in 1921. Testimony and questioning during the House Judiciary Committee hearings in 1921 set the stage for a climactic floor struggle in 1922 and reaffirmed what the earlier hearings had revealed and what the floor debate would repeatedly substantiate. Griffin noted that point when he commented on men's tendency to become constitutional interpreters "when some impending law threatens to tread on our prejudices." The Dyer bill of 1921 did so tread, challenging sectional, racial, and political prejudices and thereby prompting constitutional responses which were not always "camouflage."4

The fact that there were so few legal experts on lynching complicated the House's search through its Judiciary Committee for a constitutional mode of relief for the mob's victims and of protection for the nation's prejudices. Although the NAACP's volunteer attorneys and the legal consultants to whom the Association turned were familiar with many of the constitutional hurdles, Albert Pillsbury barely exaggerated when he said in late 1921 that there were fewer than "half a dozen competent lawyers in the country who have given the subject serious consideration or have any definite idea of what ought to go into the bill or ought to be left out of it."5 Lynching was a crime against black Americans,
and murder was a felony in every state; few white Americans had incentive to become expert at finding faster and more effective cures for lynching. And the NAACP's preliminary investigation into these cures revealed why the members of the Judiciary Committee, with little experience in constitutional law, would find reaching unanimity, or anything approaching it, so difficult.\footnote{Attorneys Moorfield Storey, Pillsbury, and George Wickersham agreed on what Wickersham called "the public situation" and on the need for federal action, but all looked at the Constitution's operational meaning and found a tough road both in Congress and in the courts for federal antilynching legislation of any sort.}

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Although Dyer remained optimistic about the ultimate legislative and judicial success of his bill, as 1921 began his sanguine outlook was not shared by either Johnson or White, the NAACP's major lobbyists. Soon after Dyer assured the organization that he would "immediately become active in pushing" a measure in the Sixty-seventh Congress, the NAACP turned to Storey, Pillsbury, and Wickersham. The NAACP search for aid and comfort began when rumors reached it in February 1921 that Wickersham, who had headed the Justice Department under Taft, was drafting an "effective and constitutional" antilynching bill. At the suggestion of the organization's legal adviser, Arthur Spingarn, whose probes
had turned up little information on Wickersham's rumored "theory," White sought Storey's aid. The Association, with Dyer's pledge on file, already had "reasons to believe that a Bill will be introduced and passed" by the Sixty-seventh Congress, regardless of the policy of the incoming Harding Administration. Nevertheless, the organization sought every opportunity to discover the proposal that would "be most effective if enacted into law and at the same time stand the test of constitutionality." The search for an effective, constitutional, and passable bill began in the offices of the NAACP's consultants.

Even before the Association heard the Wickersham rumor, however, Storey and the former attorney general, one in Boston and the other in New York, had initiated a dialogue. On January 7, 1921, Wickersham sought Storey's views on Moores' removal provisions. Wickersham, much as had White and Storey three years before, rejected removal as a remedy for lynching. As he explained May 11, despite the provisions' similarity to Section 31 (formerly Section 641), removal because "an inhabitant" denied equal protection was unconstitutional. As an alternative he suggested "a provision making it a criminal conspiracy for two or more persons" to conspire to deny any person "of the constitutional protection of the laws because of race, color, or previous condition of servitude . . . ."

Wondering if there were "any better line on which to proceed," he suggested further development of this conspiracy theory.
The onetime attorney general, in private practice since Taft left office in 1913, did not mention the similarity between his proposal and Section 19 of the federal statutes. By the time Storey reminded him of the provision, Wickersham had already lost faith that anyone could find a constitutional base for a federal antilynching authority.\textsuperscript{12}

Storey's faith remained firm but cautious. Pillsbury's did also, but in a different way. For his part, Storey, th NAACP's "'ablest constitutional lawyer,'"\textsuperscript{13} as well as its hardly disinterested president, believed that the need for federal action was undeniable. But familiar with the subtleties in the judicial definition of the Fourteenth Amendment, he was much less secure on its constitutional validity. Aware of settled Fourteenth Amendment interpretation, both Storey and Pillsbury found fault with any bill that placed mobs and inactive state officials under federal jurisdiction, but unlike Wickersham, both, with varying degrees of reluctance, urged Congress to frame and pass the best bill possible despite the doubts. For Storey and, as time showed, for the congressmen who shared both his eagerness and reluctance, it was better to "make the courts, if they will, declare it unconstitutional rather than resolve the question against our position by not passing any bill at all." A nullified act might be in force only a short time but "if we break the [lynching] habit even for a short time it will be of service."\textsuperscript{14} This habit, which had killed one
hundred forty-four persons since the end of the Great War, would increasingly concern both Storey and the nation. As Cleveland Republican Harry Gahn remarked to his House colleagues, if the "speed of prevention [by the states] is gauged by the past, unaccelerated, it will take a thousand years for them to make good their predictions" that states would end lynching.15

Pillsbury's view of the future of a Dyer-type anti-lynching bill was generally less encouraging than Storey's. He indicated no resentment that his bill had been appropriated by both Dyer and Moores.16 But Pillsbury was irritated that his 1901 Moody-Hoar bill, "the best I could do at that time," had not been improved. Changes in it had not been for the better. The removal provisions "weaken[ed] rather than strengthen[ed] the anti-lynching bill as a whole." Another major addition, protection for aliens, was subsidiary. Not a new idea, it was also not unique in 1921 to Dyer's proposal; Senator Frank Kellogg of Minnesota was sponsoring a bill to expand federal protection for aliens.17

The Dyer edition of Pillsbury's bill rested on the same variety of constitutional foundations as its predecessor, despite its expansion of protection to include all "persons." These foundations were the Fourteenth Amendment's equality clause, the doctrine of the "peace of the United States," and the power of the nation to protect its citizens. This carry over of authorities from 1901 was dangerous, Pills-
bury argued, since it meant that the Dyer bill, except for the removal and alien provisions and the coverage of persons, was "a literal transcript" of the proposal that had received an adverse report from Hoar's Senate Judiciary Committee. "That old hypocrite" had been guided only by partisan considerations when he rejected the bill, but Pillsbury felt that any adverse report, even a partisan one twenty years old, on a virtually identical bill would generate hesitancies among legislators in 1921. In addition, Pillsbury still demanded a "full investigation" into southern conditions. This study to prove the need for federal action was especially necessary, he argued, since uncertainty over constitutionality was so strong within the antilynching ranks.  

Judicial problems also faced the antilynchers. The Supreme Court was not likely to accept a federal antilynching bill, and Pillsbury saw little cause for hope in a recent change in Court membership.

... some expressions of the court, if not direct cases, in the interval [between 1901 and 1921], cast additional doubt ... , and I do not think we can look to the new Chief Justice [William Howard Taft] for any support. He is perfectly upright and impartial, but he would not originate, as Judge Harlan might have done, any novel or doubtful rule or doctrine toward enforcement of the rights of the negro under the Constitution. 

With little faith that the antilynchers could overcome "the encrusted prejudices of a hundred years," Pillsbury predicted that the Dyer bill's broad coverage doomed it to "lose
the benefit" of whatever arguments existed in its favor. The "strongest," the "simplest," and the most "impregnable" of these arguments was the responsibility of the national government to protect its citizens. This responsibility was "unquestioned throughout the world outside the United States and existing equally within the states unless they have reserved to themselves the exclusive right to protect" national citizens. The Fourteenth Amendment had made national citizenship "the fundamental thing and citizenship of the the states derivative from that."

In short, the United States has now formally adopted all the native born into its own family, with no reservation to the states of the exclusive right of protecting their lives within the state. In view of direct interest of the United States in the lives of its citizens, whose services for various purposes it has a right to command, . . . it is monstrous to say that the United States has no power to protect them in their lives within the states if and so far as the states permit their murder by mobs by failing to maintain an effective government of law and order."

A bill that offered protection to all persons undercut this virtually unarguable position by resting almost totally on the equality clause. Federal protection of citizens had multiple supports; federal protection of persons did not.

Wickersham was less concerned about persons and citizens than about states and individuals. As a result, the 1920 bill and the Judiciary Committee's report on that Dyer-Moores proposal troubled him. His studies showed that the "line of demarcation [had been] so clearly drawn [by the
Court] between what may and what may not be done . . ." that passing such a bill was a waste of time. None of the Reconstruction amendments authorized what the antilynchers proposed. The Fourteenth Amendment applied to state action; "it is well settled that it does not extend to protect one citizen from attack of another." In fact, he questioned Storey, how "can you say that a State denies to a person within its jurisdiction the equal protection of the law because an individual official neglects his sworn duties? Must not there be State action as distinguished from individual dereliction?" The courts' distinction between federally protected and state protected rights also precluded such federal antilynching action. "Primary" or fundamental rights of life, liberty, and property were outside federal reach. When Storey suggested that Section 19 be amended and made usable against lynchers, Wickersham explained that the Supreme Court had not included life, liberty, and property in its definition of "right[s] or privilege[s] secured . . . by the Constitution" or by federal law. As reviewed in the 1920 Bisbee Deportation case, United States v. Wheeler, Section 19 protected only political rights, not civil rights.21

As for the Thirteenth and Fifteenth Amendments, Wickersham found that the Supreme Court had also eliminated them as possible answers to the antilynching dilemma. In its 1906 decision in Hodges v. United States, the Court rejected a
"badge of slavery" argument and released from federal jurisdic-
tion a mob that had prevented blacks from contracting
and working. It also consistently defined the Fifteenth
Amendment as security only from state denial of suffrage
rights. The former attorney general did not expand his
discussion to cover federal authority over federal elec-
tions or over individuals who denied suffrage because of
race.22

Sharing Pillsbury's primary concern, Wickersham in-
formed Storey that Congress could not extend federal anti-
lynching power over "all persons." When used in the removal
provisions, that "vice" allowed any person to request federal
protection when threatened with denial of equal protection
"by any inhabitant," and "this is precisely what the Supreme
Court, in a series of well reasoned decisions, has held
could not constitutionally be done." One had only to look
at the 1920 Wheeler case if a constitutional trip back to
1876 and United States v. Cruikshank was too time-consuming.23

Although federal protection of aliens was "entirely
constitutional and competent," the 1920 bill in general
sought "to accomplish something which the Supreme Court
has said cannot be done by Congress." And, unlike Storey
and Pillsbury, Wickersham in early 1921 found nothing "to be
gained by seeking to have Congress pass [such] a law in the
teeth of the Supreme Court." A year later he would moderate
his position and join Storey in accepting a House substitute
of more limited reach as "the best" bill available, leaving to the courts the question of constitutionality while Congress sought to do what the state could not. But in the spring of 1921 the only constitutional and acceptable method of ending lynching was agitation and a constitutional amendment to "focalize discussion in a helpful way." To assure himself and the NAACP of the correctness of his position, Wickersham sent case references and letters to Louis Marshall, a fellow New York attorney whose special interest was the rights of Jewish Americans. Marshall confirmed his evaluation but, Wickersham explained, with "the same reluctance of mind, and yet, with the same professional concern." Marshall explained that

... a direct attack of the character proposed in the bills introduced in Congress would be unavailing. Perhaps somebody may have sufficient ingenuity to work out a plan which by indirection may surmount and circumnavigate the shoals and snags that impede progress toward a solution of the lynching evil. I shall keep the subject in mind in the hope that I may receive inspiration that may not degenerate into an ineffectual "happy thought".  

For Storey more so than anyone, the unbroken lynching habit and broken state promises had produced sufficient concern to trigger a restudy of constitutionality and a reconsideration of personal doubts. As he explained to White in the spring of 1921, Storey investigated several theoretical bases for federal jurisdiction: the peace of the United States, the Constitution's guaranty clause, the Fourteenth and Fifteenth Amendments, and the Fifth Amendment. While
he briefly considered the precedent of the 1871 Enforcement Act and the possibility of amending the leftover Section 19 to cover lynching, the Bostonian concentrated on the creation of entirely new federal remedies. In doing so, he immediately confronted the judicial limits of the Fourteenth Amendment. While finding little of use in the more contemporary Supreme Court decisions, Storey believed there was some hope of inducing the Court to emphasize "earlier" decisions. He also believed that Congress had "authority enough" to legislate against lynching; when Congress's work was complete, he and other legal experts would present to the Court a constitutionally acceptable source of federal anti-lynching power.25

When dealing with Wickersham's pessimism, Storey found himself with little room to maneuver. The Supreme Court's rulings were what the New Yorker said they were, but "while the isolated act of an individual is not to be treated as the action of the state, is it true on the other hand that a state can act only through its legislature?" If the Fourteenth Amendment prohibited state denial of equal protection, which it did, "I see no reason why that denial should not come from the refusal of the executive officers to secure to colored citizens the protection of the laws with the approval, tacit if not active, of the people in the state as well as though it were done by legislation." Lynching was "a practical denial to the colored persons in the South of a long-
term, systematic denial carried out by southern whites. Considering the Fourteenth's "obvious intention," refusal by state officers to enforce laws designed to protect all citizens was state denial.

How else can the state ever deny the equal protection of the laws? Can it be said that the only representative of the state is the legislature, and that the denial by the executive is not the denial by the state? If so the old maxim that laws should be construed in favor of freedom has been ignored.26

Mobs of violent individuals who interfered with the exercise of rights by blacks did so only "because the whole community approves their violence, either by silence or by more active demonstrations." Daytime crimes committed before crowds of men, women, and children raised no protest from state officialdom, leading to the inevitable conclusion that for the southern black "there is . . . no republican form of government." Storey did not develop this brief reference to the guaranty clause except to remark that if this lack of proper government existed, so too, notwithstanding Wickersham's presentation, did the national government's responsibility for protecting black Americans. "[A]llegiance and protection go hand in hand . . . ."27

Although the former American Bar Association president could find no ground upon which to "safely rest" constitutionality, having made up his mind that federal action was a necessity he did not abandon the struggle as easily as did Wickersham or require as limited an answer as did Pillsbury.
Looking at "a situation as well as a theory," Storey sought a way to "dodge" judicial constructions harmful to his goals. Since, he said, Cruikshank and Wheeler dealt with flaws in specific statutes, a statute could survive court scrutiny if more precisely framed to protect civil rights. If still declared unconstitutional, the antilynching measure would have done some "permanent" good. Southern support for lynching may have been so strong as to necessitate federal legislative action, but "the American people are not naturally cruel and they want justice, and we must at least appeal to their conscience." Georgia Governor Hugh M. Dorsey had done that in April 1921 with a pamphlet exposé of his state's history of lynching and peonage. Further publicity would create the popular support necessary to enact a constitutional amendment if the Court overturned Congress's statutory remedy, which Storey believed it would. 28

Storey surmised that however one viewed the antilynching campaign, America, its world image tarnished, had three choices: a federal antilynching law, an antilynching constitutional amendment, or the Negro's forceful assertion of his rights. Storey had long seen the last as a real danger since America was "sowing the wind" in its treatment of Negroes.

I recognize the legal difficulties, but I also recognize the dangers which confront us, and I had rather try and fail than throw up my hands and say that nothing can be done to relieve this country from the reputation for barbarity which is too richly deserved.

"In a word," he thought that the United States could "defend
the law if it is passed, but whether we can or not I think it ought to be passed as an experiment which is worth trying" because "if we confess our indifference, you can easily imagine if you were in the place of the colored man what you would be inclined to do." 29

Plagued by this view of white America "reap[ing] the whirlwind" of its racial policy, the NAACP president sought answers in sources other than the Fourteenth Amendment. Although he once considered using the Fifteenth Amendment as an indirect tool, 30 by mid-1921 he was looking to a Fifth Amendment weapon. As he explained to Dyer,

It is a shield which the Constitution throws over every person, citizen or not, within our jurisdiction, and I cannot doubt Congress has the power to enforce this provision like every other provision of the Constitution. Nothing can be more fundamental than the rights thus protected which are declared by the Declaration of Independence to be inalienable, and which in great part our government was formed to maintain. 31

He also informed Johnson of his concern that antilynchers were placing "too much stress" on the Fourteenth Amendment and too little on the Fifth. However, by January 1922 Storey's fascination with the latter was dimmed by reality. As Storey sought to provide arguments in support of an amended Dyer bill and its equal protection base, he advised Johnson to eliminate "reference to the Fifth Amendment as that will provoke active opposition and I have perhaps gone a little far in suggesting that the Fifth Amendment justifies the anti-lynching bill." Explaining his retreat in a handwritten adden-
dum, Storey carefully summarized the traditional view of the Bill of Rights. Yet because he was reluctant to reject "obvious intention" in favor of operation meaning, Storey concluded his explanation with the appeal of a frustrated humanitarian and logician: "... but why couldn't the United States also protect them [fundamental rights enumerated in the Bill of Rights] against invasion by the actions or refusal to act of the States"?32

While Storey struggled with his constitutional dilemmas, the NAACP struggled additionally with some of the more practical concerns of federal antilynching jurisdiction. The county liability sections, soon the target of mocking southerners for the very reason the organization favored them, were the "most important" antilynching weapon, according to White. They affected "the better [nonlynching] element" who would not "take very active steps" to end lynching as long as the mob alone "suffer[ed]." On the other hand, White joined later critics who doubted the effectiveness of shifting lynching trials from state to federal courts. Juries of each were composed of the same people. Changes of venue in state courts offered, perhaps, a better answer. White also could not shake his long-standing doubts about the removal sections. Their "rather involved legal procedure" offered little hope to illiterates, those who were "at best very unfamiliar with the law," and those whose dangers from mobs were immediate. But White, the perfectionist who sought a law that acted against
all lynchings "completely and satisfactorily," was also
White the practical man who knew no billyet proposed would
end mob violence. Therefore, if a proposal became law only
to meet court rejection, all would not have been in vain.
"The ground will then have been cleared for an amendment to
the federal constitution." 33

Johnson also blended the practical with the theoretical. As he informed Republican Senator Richard Ernst of
Kentucky, Congress had to pass "the best bill that can be
framed and [then] put it up to the Supreme Court." If an
"undoubtedly" split Supreme Court rejected it, the next
step would be a constitutional amendment, and, echoing White
and Storey, "we would be no worse off than we are now without
any action at all." 34 Arguing against constitutionality was
pointless, as was another investigating committee or fact-
finding expedition, although only the year before Johnson had
argued that "there ought to be a bona fide investigation by
Congress of lynching of its causes" since Congress owed the
nation "a clear statement from an authoritative federal source
of the responsibility of the states for their failure . . . ."
By 1921 circumstances had altered. As White explained to
Storey on April 26,

We shall not of course, support any such measure
and if need be, wiol actively oppose these two
bills [proposed by Senator Medill McCormick of
Illinois and Representative Martin Ansorge of New
York for investigations] and any similar ones that
may be introduced in the future. Such a commission
will not serve any purpose other than to give a few
jobs and defer action by Congress against lynching
for several years. Our position is that a commission on lynching is no more necessary than a commission on murder or treason.\textsuperscript{35}

If a fact-finding commission was not necessary,\textsuperscript{36} getting a bill past the scrutiny of the House Judiciary Committee was. The committee would consider both facts and law and make the opinion of its lawyer members known to the full House. The facts were not hard to find, although the legitimacy of lynching statistics collected by various groups and published most frequently by the NAACP was subject to debate. How accurate were they and what did they reveal that was relevant to consideration of federal antilynching power? Beyond these questions was the crucial one to which all discussion eventually turned. Could the federal government constitutionally act against lynching? Dyer explained—with some confusion—that "the one thing upon which the Bill can be attacked, is the authority of Congress to so legislate."

"With reference to the constitutionality" of his bill, however, there was no need for analysis. Rejecting Dyer's distinction, Wickersham explained a simple theory.

\begin{quote}
The authority of Congress to legislate depends upon the provisions of the Constitution. If by any fair construction, the powers enumerated in the Constitution shall embrace a proposed legislation, it is constitutional,—otherwise, not.\textsuperscript{37}
\end{quote}

While White was finding Wickersham's evaluation of Dyer's 1920 bill "disappointing" and "discouraging," Johnson accepted the New Yorker's conclusion that it was "upon the question of constitutionality that the fate of the bill hangs."\textsuperscript{38}
The fifteen Republicans and six Democrats who served on the committee during the first session of the Sixty-seventh Congress were chaired by Republican Andrew Volstead. A lawyer who had spent the preceding seventeen years representing the fourteen counties of Minnesota's seventh district in the House, Volstead's name was already permanently linked to liquor prohibition. The Republicans serving with him on the committee included George S. Graham, a graduate of and former professor at the University of Pennsylvania law school who was next in seniority, Dyer, who was head of the subcommittee that studied lynching, and two men who would take strong independent stands against the Dyer bill in committee and on the floor, C. Frank Reavis of Nebraska and Ira Hersey of Maine. All the committee's Democrats came from southern states. There were two committee veterans, Robert Y. Thomas of Kentucky who was serving his twelfth year in the House, and former Dallas, Texas, prosecuting attorney Hatton Sumners, who was in his eighth. After service as a prosecuting attorney, judge, and president of the University of Arkansas, John N. Tillman was a first-time member of the committee, as were Frederick H. Dominick of South Carolina, Andrew Montague of Virginia, and James W. Wise, the former mayor of Fayetteville, Georgia. A degree from the University of Virginia law school made Montague, a former federal district attorney, state attorney general, governor, and law school president, the only law school graduate among the minority.39
The committee heard testimony on June 18 and July 20 from Moores and from Guy D. Goff, assistant United States attorney general. On August 9 they received a supplemental opinion from Attorney General Harry Daugherty on the construction and constitutionality of Dyer's third antilynching bill. One of at least seven antilynching measures submitted for House consideration in 1921,40 H. R. 13 (Appendix A) was little different from the measure upon which Moores and Dyer had collaborated in 1920 and which the Judiciary Committee had reported that May. It retained the provisions of the 1920 proposal that Storey, Wickersham, and Pillsbury used as the subject of their analyses. "A bill to assure to persons within the jurisdiction of every State the equal protection of the laws, and to punish the crime of lynching" included: (1) Moores' seven removal provisions; (2) a definition of lynching that placed under federal authority Lynchers, counties in which mob murders took place and through which mobs traveled with their victims, and derelict officers; (3) jury disqualifications for Lynchers and their sympathizers; and (4) protection for treaty aliens.41

In covering these areas, H. R. 13 was one of the most comprehensive federal antilynching proposals ever submitted for congressional consideration. It covered "any person" who might be put to death by an assembly of three or more persons without legal authority. Such a mob murder was a federal crime, according to Section Eight, because it took place "in default of protection . . . by . . . [the] State
of the officers thereof." The murder was a Fourteenth Amendment violation since it was a "denial to . . . person[s] by such State of the equal protection of the laws and a violation of the peace of the United States and an offense against the same." The removal sections provided preventative anti-lynching protection under the amendment's enforcement section, allowing any person facing state criminal prosecution who feared a denial of rights by the state, its officers, or its inhabitants because of his race, nationality, or religion to petition for removal to federal jurisdiction. The bill also created county liability without regard to a county's sincere efforts at law enforcement. Finally, the federal government asserted jurisdiction over local officers who played no role in a mob murder other than to fail to act when they had "reasonable cause" to foresee a lynching or when they failed to "make all reasonable efforts to prosecute [mob murderers] to judgment."

Section Thirteen, which brought under federal jurisdiction officers who lost persons in their custody to mobs, offered few of the problems of the preceding sections since there was a much closer and visible tie between the state and the mob with which to justify a "default of protection" theory. Nevertheless, this section as well as the other official and county liability provisions hinged on a nonaction theory. That theoretical base made defining the state denial prohibited by the Fourteenth Amendment a key task in supporting the Dyer
bill's constitutionality. That definition would provide the link that turned a mob's murderous act and a state officer's failure to act into federal crimes.

When the Judiciary Committee met on June 18 to consider this measure, Dyer, as acting chairman, immediately faced a practical problem. South Carolina's Fred Dominick requested that witnesses who had testified in 1920 return to explain their "many wild, irresponsible, and libelous statements" about the South and their attempts to use the antilynching bill "as the basis for an argument on social equality."

Dominick's interest in the 1920 hearings grew out of Dyer's decision to reduce the need for hearings by relying on the earlier presentations and by focusing committee consideration on but one of two questions involved in the bill. In May he had expressed to White, who was well aware of "certain opposition in both Houses" that needed overcoming, his belief that since the bill was "essentially the same bill introduced by him during the last session's hearings were unnecessary.

The only question before the committee was constitutionality; the "advisability" of a statute needed no discussion since it was, "of course, evident to everybody, and no one denies" that lynchings had and did take place. But in June Dyer responded to Dominick's demand by acknowledging that several men on the committee had not been members in 1920 and thus had not taken part in the earlier questioning. These men, including Democrats Montague and Tillman, as well as the Republi-
can Hersey, proved during the hearings that, like Dyer, their interest centered on questions of constitutionality and not on rebutting earlier accounts of state fallibility.42

When the committee launched its consideration of the federal government's antilynching power, Moores, as much the author of the bill as anyone, excluding Pillsbury,43 was a considerably more prepared witness than he had been the preceding year. However, if illness and lack of preparation time plagued him in 1920, other problems limited his effectiveness in 1921. The committee frustrated his attempts to explain the constitutionality of each part of H. R. 13. Pillsbury, who considered Moores to be one of only two men with "any competent knowledge of [the bill's] constitutional aspects," complained that the Indianan's presentation was "so broken up by interruptions . . . that he did not get anywhere."44 Pillsbury's other expert, Goff, was interrupted equally as often, but he seemed to welcome the give and take, and it disrupted his presentation less. Nevertheless, Moores' discussion allowed consideration of a multiplicity of issues.

In contrast to the 1920 hearings, when generalities dominated, the 1921 hearings, interruptions and all, offered opportunity for greater analysis of constitutional questions.

By explaining that Section One through Five were "based absolutely" on what had once been Section 641,45 Moores quickly introduced the Fourteenth Amendment as the bill's source of power. Just as quickly his interrogators questioned
federal power to remove cases because of individual prejudice or discrimination. Although Moores attempted to explain the reach of federal power to protect rights created by the Constitution and federal laws, questions from Reavis, Dominick, Sumners, Montague, and Tillman indicated how little interest his listeners had in that theory.

Moores did not seek "to deceive the committee," but his colleagues' single-minded dedication to proving that H. R. 13 had no basis in state action sometimes implied that deception was his goal. He read from numerous cases to explain the long-settled constitutionality of Section 641, the broad definition the Supreme Court had given "State," and the varieties of discrimination that justified removal. To counter the Indianan, Reavis selected a few lines from the 1903 Fifteenth Amendment case, James v. Bowman, that were relevant to his argument and reminded Moores that the Court still held that the Fourteenth Amendment applied only to acts of states. Determined to prove that the federal government had only one target against which it could legislate, Reavis ignored Moores' general point as well as the national government's responsibility for protecting federal rights violated by individuals. 47

His responses increasingly sharp and defensive as the questioning and interruptions continued, Moores sometimes hurt himself, as when the questioners' probe shifted to the bill's penal sections and to the scope of federal power. His
defense of the proposal's limited reach suffered numerous self-inflicted blows. In one exchange in particular Moores lost his way in the constitutional maze.

Mr. Moores. . . . If a State does not punish a man for murder, the Federal Government may.

Mr. Montague. How could that be done under the fourteenth amendment? That would not be denying him a right, and there must be an equal right involved.

Mr. Moores. We have a right to life.

Mr. Montague. We have institutions under the constitution and laws of the States guaranteeing the right to life, and if there are States not having such institutions they can supply them by amendment. What we are considering now is the fourteenth amendment, and that only applies to unequal rights, and prohibits States from providing an inequality of protection under the law.

Mr. Moorre. [sic] Suppose it has been the constant condition or practice in a State for the State officers not to afford protection to the lives of its colored citizens, but suppose that such State, through its officers, does not afford protection to the lives of its white citizens—would not that be unequal protection of the guaranty?

Mr. Reavis. . . . Suppose there is a law against murder within a State and a person is lynched, or his life is taken by an individual in the State. Now, the fourteenth amendment provides that there shall be equal protection under the law, and that no State shall deny anyone equal protection. Do you contend that under the fourteenth amendment, or any other section of the Federal Constitution, the Federal Government could take jurisdiction of that murder and punish the offender?

Mr. Moores. Yes, sir; I do . . . .

Mr. Dominick. Would this bill apply with equal force to the crime of larceny or any other crime?

Mr. Moores. It certainly would. If a white man is not prosecuted for bootlegging and a colored man is, then the fourteenth amendment applies.

Mr. Tillman. Would not that be unequal administration of the law under those conditions?

Mr. Moores. No, sir; I do not think so.

Moores had allowed himself to tangle his theories. By not carefully selecting his words, defining his terms, and
avoiding generalizations, he gave the national government what the anti-bill forces feared, a broad federal police power. He created federal rights—a right to life—and a statutory goal not defined in H. R. 13—protection of blacks. His example of systematic denial of rights to blacks deserved more attention, but Moores allowed Reavis to blend it with ordinary murder and permitted Dominick and Tillman to merge it with crimes in general. He lost his way, forgetting the definition of denial by maladministration in *Vick Wo v. Hopkins* that he himself would explain only minutes later. Although Moores' confusion slipped by the committee in this instance, the Indianan's critics would challenge him at other times on other theoretical and practical problems.

As the hearings revealed, there were problems not just in federal jurisdiction over individual mob members but in using the mere existence of crime as justification for the imposition of penalties on counties. The county liability sections, Reavis argued, did "not even remotely connect with any action of the State..." Admitting that a state had the duty to protect through its officers, Reavis failed to find in the county provisions evidence that they were "predicated upon the failure of anybody to discharge a duty"; the sections were predicated "upon the simple fact of taking the person of the Negro over there."

The Nebraska representative again questioned the bill's clarity when Moores launched a brief foray against official
nonaction and "presumptive failure" to protect. In his counterattack, Reavis challenged the assumption that "the mere fact of a previous lynching raises the presumption of failure of the State to protect . . . ." When Moores contended that the bill was built on a presumption of repeated failures to protect, Reavis asserted, "I know, but the bill does not say anything about repeated acts." Toward the end of Moores' testimony, Reavis again confronted him on this point. Under Section Thirteen officers who lost prisoners to mobs faced federal prosecution. Reavis could not understand why such a loss was a federal concern. "There is no suggestion that there is any inequality of protection under the law," he explained, ignoring Section Eight's definition of mob murder as state denial.51

Perhaps the most jarring note of uncertainty and confusion during the hearings came when the weary sixty-five-year-old congressman seemed unable to bear further misguided questioning. As Reavis continued his search for state action in lynching, he questioned Moores about removal for a petitioner threatened by a denial of equal protection'by any officer or inhabitant.'" Taking a casual view of the choice of the word "inhabitant," Moores brushed aside a critical aspect of his removal provision in a way Pillsbury never would have if "physical reasons" had not prevented him from testifying.

If I have made a mistake by putting the word "inhabitant" in there, you are the judges, strike
it out. I think it is all right, but why argue about it?
... I am not going to quibble with you about a word in a bill of that sort. I think the word inhabitant is all right. If you think it is wrong, strike it out. I leave it to the committee. I am not going to waste all morning discussing a word.52

Similarly, Moores' response to a query on providing time limits for removal was an authorization to the commit-tee to set whatever limit it wanted. To a question on state financial liability, he explained that he had "never thought of that in my life." Although the bill dealt with county liability and counties were governmental subdivisions of the state, Moores saw state liability as "a new question" which was "not material" to the constitutionality of the bill. Under the Fourteenth Amendment, however, Congress could probably require the state to pay damages, and he found support in In re Neagle and Logan, cases involving federal jurisdic-tion over federal officers and federal rights, for congressionally imposed county liability. Such a forfeiture would not violate the Tenth Amendment. County fines, acceptable under state laws, were "appropriate legislation" under feder-al.53 While these county liability theories created little controversy, the committeemen were unable to let Moores' as-sertion that "this act is not intended to protect the colored men alone" pass without serious comment. Unable to see how more than one class could be subjected to unequal treatment or that H. R. 13 targeted state policies that allowed lynching
of Negroes, Montague asked, "... where do you get its in-
equality of protection [then]? Suppose colored people lynched
colored people; suppose white people lynched white people?
Where do you get your inequality?" The former Virginia
governor explained what the antilyncers and their critics
would so frequently forget.

You have to have inequality. It is not a fai-
lure to protect; it is an inequality of protec-
tion. You must protect one class and not protect
another that gives you the authority for this . . . .

As Moores' testimony neared an end, Sumners looked be-
yond Montague's position and, considering the bill's proba-
ble ramifications, rhetorically asked,

Suppose this law were constitutional . . . , isn't
there some serious question in your mind, from the
standpoint of policy, looking solely to the inter-
est of the people whom you are seeking to protect,
that you make a mistake by interposing the power
of the Federal Government as you propose?

Sumners was concerned not just about a usurpation of power
by the federal government but about the implications of a
power increase even if constitutionally proper and authorized.
Federalism was at stake; so too were the blacks who would,
he implied, suffer with the interference of an outside force.
As Sumners explained, law "was the creature of public opinion
rather than the creator of public opinion . . ."; the Dyer
bill sought to lead rather than follow. 55

A month later, free from these disruptions, Moores res-
ponded to his critics with an analysis of "Additional Authori-
ties as to the Constitutionality of [the] Antilyncing Bill,"
which he submitted to the committee. In it he quickly dismissed Reavis's *James v. Bowman* as having "no bearing at all on the questions at issue." It was, he discovered, a case involving the Fifteenth Amendment, federal suffrage statutes, and congressional elections. Piercing to the heart of his analysis of state and federal responsibilities for "the protection of life and liberty of the governed," Moores explained that men created government for protection, and "it goes without saying that in a civilized government like ours if any person is assaulted, beaten, maimed, or lynched by a mob, some officer . . . was derelict in his duty . . . ." After citing *Yick Wo* as judicial confirmation of this utopian imposition of a duty of perfection, Moores used a variety of tort law theories and practices to explain how a state's failure to provide protection required the national government to provide that safeguarding. In ratifying the Fourteenth Amendment, the states had bound themselves to "perform . . . a positive, affirmative duty of equal protection" and the national government, as guarantor, had assured that performance. As recognized in *McCulloch v. Maryland* and *Ex parte Siebold*, the national government had the power to carry out its duties and powers "'on every foot of American soil'" as long as it did so through legitimate and constitutional means in order to accomplish "'legitimate'" and constitutional ends. 56

This theory of guaranteed equal protection found support
on July 20 when Assistant Attorney General Goff presented his theories on federal police power. An 1891 graduate of Harvard Law School with a long record of service as a federal law officer, Goff had been recruited by Dyer as one of a string of "able Attorneys" who would "fortify the Bill." Appearing "as a representative" of the Justice Department, Goff explained that the Dyer bill was no more than the latest in a long line of constitutionally proper implementations of federal police power. The national government had the inherent power to carry out responsibilities and duties expressly defined by the Constitution. Cases ranging from Gibbons v. Ogden to the white slave cases, which Goff had frequently prosecuted, defined this authority. Because numerous other Supreme Court decisions, such as Ex parte Virginia and United States v. Cruikshank, specified that the state in none of its capacities—legislative, judicial, or executive—could deny persons of their life, liberty, or property, Goff concluded that

Wherever the Constitution has delegated to Congress certain rights and duties, which Congress is permitted to bound to enforce and to carry out, the extent to which Congress may go in thus enforcing rights or fulfilling duties within the limitations prescribed by the Constitution is sufficiently great to permit of the exercise of a Federal police power, and the exercise of this Federal police power is neither repugnant to nor superior to the police power of the State. Each is concurrent with the other.

Regarding lynching,

... If the State, in the mind of Congress, denies this [fundamental] right because all legislation as-
sumes the existence of an evil to be corrected, then Congress, having legislatively determined that fact . . . possesses the authority under the fourteenth amendment and under the interpretation which the courts have given it to go forward and say that since the States . . . have denied to many people within their borders because of race and nationality the right to be protected in their property, in their lives, and their liberty, and have also denied them the equal protection of the laws, a necessity exists that not only justifies but compels adequate and appropriate legislation to the end that the people of our several States may enjoy and be secure in those right which the organic law guarantees them. 59

If their silence was a guide, the Judiciary Committee, unlike the full House six months later, seemed to accept Goff's general concept of a federal police power. Goff encouraged that acceptance by explaining that states could foreclose enforcement of the law by prosecuting lynchers and derelict officers themselves. He also explained that the federal prosecutors would have to provide proof of a denial of equal protection in trials of officials, an argument he did not support with his later theory of state negativity. 60

Notwithstanding their failure to challenge the specific idea of a federal police power, the bill's critics on the committee did express concern about the general concept of federal jurisdiction over individuals whatever their action or nonaction. Once again Reavis led the questioning. Goff assured him that the federal government had authority over a state officer acting in his official capacity. But, Reavis wanted to know, by what reasoning could an officer be held responsible for prisoners forcibly taken from his custody by
a mob? "The State is not only not denying him the equal protection of the laws but is doing everything in its power to give him the equal protection of the laws." And what of innocent counties whose only crime was being traversed by mobs?61

Goff answered that inability to protect constituted a denial of protection under the Fourteenth Amendment.

... Must the Congress ... sit supinely by when it knows that a State, either affirmatively or negatively, is denying that right? If the State omits to give or withholds protection through motives of indifference or inability, is the guaranty performed and the duty of the Federal Government discharged? In a word, is the fourteenth amendment meaningless because of State negativity? ... Is it an answer to say that the individual invasion of individual rights is not the subject of the amendment --

Elaborating, Goff, who had not read Pillsbury's 1902 theories on nonaction in the Harvard Law Review, explained that

... if a State omits affirmatively to legislate upon such questions it has denied this protection by not taking affirmative action; if it takes affirmative action and does not enforce that action, or if it will take no action because, within the judgment of the State, no action along those lines should be taken, then I say the Federal Government can say to that particular State, "You have denied negatively," "You have failed to give," "You have defaulted ..."62

In explaining this view of federal power and state dneial, Goff eagerly placed himself in the same position as Moores had a month earlier.

Mr. Reavis. Would you carry that further, to burglary, larceny, and assault and battery?

Mr. Goff. Of course ... If a State declines to maintain order under the law, could Congress jus-
tify a refusal to protect and enforce such rights as were violated if these rights were dependent on the Constitution . . . ?

Mr. Reavis. Then . . . under the fourteenth amendment Congress would have the right to enact legislation under the police power covering the crimes of homicide, burglary, and embezzlement, which are purely State offenses.

Mr. Goff. Yes.65

In meeting skeptics' charges that Congress could take action without serious and substantial evidence of a state policy of denial, Goff repeatedly explained that it was established policy that "the courts can not concern themselves with the motives of the legislative department"; "the courts have no right to question the expediency or the reasonableness of legislation" as long as a legislative act was "necessary and proper." This explanation, however, had little appeal for Reavis who believed that the courts did have a say in the fate of the Dyer bill and that in its lawmaking Congress had to consider the judiciary's possible verdicts.

I am trying to find out just what rights were delegated to us, because we have got to act within those rights. The bill before us, and which we are considering, provides that if an inhabitant, not necessarily a citizen of the State, by superior force takes the accused away from the authorities and executes him the State shall be liable, although the State may have done everything within its power to protect the accused. . . . Do you think that would justify us in saying that the State had denied that man protection?65

Goff's "yes" was so tangentially supported by his elaboration that Representative Hersey entered the discussion to ask more succinctly, "What is a default of protection of such persons by such State or the officers thereof in your construc-
tion of this statute?" The assistant attorney general summarized for Hersey his simple but frighteningly broad answer: "... a failure to protect, a failure to have sufficient authority or physical power present, to guarantee to the persons ... the rights which that person has under the law." State responsibility, in addition, applied whether the person deprived of his rights had been in state custody or not. "[T]he State could be charged with the omission to have sufficient power at its command, at every instant of time, to enforce the law, or to protect the rights of the individual." In other words, Goff, like Moores, was defining a Fourteenth Amendment requirement of state perfection in law enforcement. Just as with individuals who could not plead ignorance of the law to excuse their crimes, states could not excuse themselves by pleading helplessness or ignorance of a mob threat.

... does the State not violate and render meaningless the provisions of the amendment by neglecting to legislate, refusing to enforce its laws, or by allowing its laws and its officials to drift into a condition of utter helplessness and indifference? 66

When Goff concluded his remarks, he left the legislators with many questions unanswered and with many fears confirmed. His testimony had been both precise and ill-defined, his farewell statement perhaps best indicating the latter. As he departed he noted that he had yet to discuss the problems he had apparently just discussed, noncustodial lynching and state default. 67
Goff also left without solving a dilemma noted by Reavis during his questioning. Although phrased differently, the dilemma was related to the policy decision Sumners had discussed during Moores' testimony. It was one that grew out of the presence in a predominantly white nation of a sizable "inferior" racial minority. It grew out of the need to define equality, justice, and fairness when the needs of that heterogenous population differed.

The failure to pass laws would constitute a denial . . . . Also protecting one class of citizens and not another would constitute a denial. But when they have passed laws, all of them constituting homicide, a capital offense, protecting blacks and whites equally do you think the mere fact that we might disagree as to whether further legislation was necessary to protect the blacks would constitute such a denial as would justify Congress in legislating?68

While this question silently colored all congressional thought on lynching and the Dyer bill, congressmen and observers discussed it only indirectly. As they implicitly accepted theoretical equality of citizenship and a practical inequality of persons, they concentrated instead on specific elements involved in and necessary for any policy change that would assure minorities extra efforts to handle their special (unequal) needs. For example, Goff's theory that Congress could create the crime of lynching under its "federal police power" increasingly stirred the opposition to action. As Louis Marshall noted, it was not an easily acceptable theory, especially considering the presence of the Tenth Amendment.
In a letter to James Weldon Johnson only days after Goff's testimony, Marshall explained that the basic problem with Goff's arguments was one that also characterized Moores' presentation: "At the critical point, they jump hurdles and beg the question." Marshall argued that Goff was wrong in claiming judicial acceptance of federal police power. "All that the courts have thus far decided and all that they can hold, with due regard to the Constitution is that, in the exercise of the constitutional power expressly granted, Congress may adopt provisions that are in the nature of police regulations." White slavery laws were no more than "mere incidents to the exercise of a power expressly conferred." And just as a few members of the committee challenged Goff's theory of congressional discretion, Marshall opposed the claim that Congress had the power to make "a conclusive determination that it has jurisdiction to legislate on a given subject . . . ." As Marshall recognized, if federalism quaked at the sound of concurrent federal-state powers, it threatened to disintegrate under the impact of this discretionary theory. 69

Despite Marshall's unqualified rejection of his theories, Goff had his supporters, such as James A. Cobb, a black attorney in Washington, D. C. Cobb asserted that the federal police power theory "hits the nail on the head." In fact, the support given by the Supreme Court to this power made the theory sufficient in and of itself to support a federal anti-lynching bill. In addition, a national government had the
responsibility to preserve itself and the power to enact laws toward that purpose. When these two theories combined, "it necessarily follows that Congress has authority to pass any reasonable law or regulation for the protection of this government and its citizens." Cobb, however, did not attempt to define "reasonable law" or to detail how the courts would react to Congress's discretionary creation of an imprecise phrase. 70

Warren Harding's attorney general also disagreed with those who announced that "an inadequate" and unconstitutional bill had run into "a stone wall." In a "personal and not official opinion" sent to the Judiciary Committee August 9, Daugherty, in office less than six months, presented the results of a somewhat hasty examination of the Dyer proposal. On July 20 the committee had voted to send the bill to the Justice Department for an opinion, and Volestead had requested Daugherty's opinion July 26. The committee sought from him "changes in phraseology" and suggestions for substantive changes to make the bill "more effective or to avoid any constitutional objections . . . ." 71

Daugherty recommended several minor textual changes and clarifications but made only one suggestion for major revision. Although "heartily concur[ring]" with Goff's view of the measure's solid Fourteenth Amendment foundation, the Attorney General suggested that the committee change "and to punish the crime of lynching" in the bill's title. The
phrase, he noted, could be read to show "a purpose upon the part of Congress to directly punish acts of individuals irrespective of any action or failure to act upon the part of the States." The bill in its entirety did not suffer from this lack of clarity. Under the Fourteenth Amendment, Congress had the power to deal with lynching as the Dyer bill sought to do.

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.72

After looking at Ex parte Virginia and the Civil Rights Cases, Daugherty concluded that all the Dyer bill's provisions were "predicated upon some action--either negative or positive--upon the part of the States and that therefore the same is wholly within the competency of Congress to enact."73 In particular, he considered the removal provisions to be no more than "elaborations of existing law," "well drafted and within the competency of Congress to enact." The controversial county liability provisions lacked precedent, but since penalties were "a well-established means of enforcing the laws" and Congress had power under the Fourteenth to enact appropriate legislation, there was "little question" that Dyer's provisions were proper. As for the rarely discussed alien section, it met "a long-standing need" and was supported by the Supreme Court's rulings on Congress's power to effectu-
ate treaties. This point made, Daugherty's elaborated suggestions ended. 74

The result of the committee's consideration of these questions and answers was a substantially new bill, largely the work of Volstead. Pillsbury saw the revision as "a total departure from the previous drafts in form and nearly so in substance except as it stands upon the proposition . . . that the neglect of a state to secure equal protection to all persons may be made a Federal offense." 75 The bill (Appendix B) was much simpler and much briefer than Dyer's, as Volstead intended it to be. The committee eliminated the removal, alien, and jury discrimination sections. It retained the provisions that defined lynching as a federal crime; however, for an unexplained reason, the committee changed the definition of a mob. Section One explained that the "phrase 'mob or riotous assemblage,' when used in this act, shall mean . . . five or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense." While this definition portrayed the mob as a usurper of state power, a proviso following it presented a more specific explanation of why such groups fell under federal jurisdiction. That provision, Section Two, stipulated that state failure, neglect, or refusal to protect any person against "a mob or riotous assemblage" was a denial of the equal protection of
state law that was "guaranteed to the citizens of the United States by its Constitution." That denial, the section explained by ending with a colon, justified Sections Three through Six, which detailed federal jurisdiction over state and local officers who failed, neglected, or refused to carry out their "power or authority" to protect mob targets, "to make all reasonable efforts to prevent" mob murder, and to "make all reasonable efforts" to catch and prosecute mob members "to final judgment." These sections also provided that mob members who took persons from state custody or who prevented an officer from protecting, apprehending, prosecuting, and punishing someone by killing him faced imprisonment. Section Four declared all members of a mob that murdered "a person" to be federal felons. 76

Dyer wrote House Report 452, which presented this substitute on October 31 77 and which was not much more informative or analytical than Dyer's 1920 report. Most of the report, eleven of its eighteen pages, were reprints of Goff's testimony, Daugherty's letters, and Moores' brief. The "Views of the Minority" submitted by Democrats Summers, Tillman, Wise, and Dominick added no facts and no objective analysis. Going into less detail than had Caraway in 1920, the half-page critique of the Volstead substitute merely assaulted the bill for being an unconstitutional attack on "the philosophy of our [federal] system of government." Once enacted, the measure would destroy local law enforcement, government
efficiency, state "sovereignty," and "mutual respect and trustful cooperation" between the national and state governments. By making the federal government "an arbitrary dictator" with coercive powers, the committee's bill would set a dangerous precedent leading toward a total loss of state "sovereign power, control, and final responsibility for . . . personal and property protection" and toward state "vassalage." 78

In arguing necessity and constitutionality, the majority had a much different view of the measure's likely effects. Dyer explained that antilynching appeals from former Attorney General Gregory, former President Wilson, President Harding, and the Republican party had so far "gone for naught." Already fifty-two lynchings were on the record for 1921. States "continue[d] to tolerate mob murder" even though it was "a denial of the rights secured by law to every man of a fair trial before an established court in case he is charged with crime . . ." State objections to charges of neglect, malfeasance, and complicity were worthless; so too were "isolated prosecutions. "We can no longer tolerate burning of human beings in public in the presence of women and children; we can no longer tolerate the menace to civilization itself . . . ." 79

Dyer once again found constitutional support for the bill in Article I, Section 8 of the Constitution and in the Fourteenth Amendment. The former referred to Congress's power to suppress insurrections and the latter authorized "appropri-
ate" actions. Since insurrections included mobs and riotous assemblages, there could be "no doubt whatever" that Congress could make lynching a federal crime. Congress could punish "those who take part in . . . or who permit" lynching since, under the Fourteenth Amendment, states could not deny equal protection. When they did, Congress could "exercise its discretion as to what laws or what means can best accomplish the desired end." To support this assertion, Dyer cited the same "distinguished southern judge" and provided the same quotes as he had in 1920, although he did add references from Ex parte Virginia. He also referred his readers to "the very recent cases" of Home Telephone and Telegraph v. Los Angeles and Buchanan v. Warley but did not explain what constitutional interpreters would find there. 80

Dyer's questionable defense of the new measure went beyond unexplained case citations. For example, although the committee deleted the alien provision, Dyer argued that the United States' payment of large indemnities for the mob deaths of aliens was "pertinent." He reasoned that "if we have paid $800,000 for less than 100 murdered foreigners, how much has the country lost by the murder of 3,307 Americans . . . ?" He did not provide the committee's reason for the deletion although Senator Kellogg's bill on alien protection was the likely explanation. 81

More baffling was Dyer's announcement that "in nearly all cases of lynching" the person killed had been in official
custody. The NAACP had not supplied evidence to support this assertion, and the Missourian appended no statistical proof. Dyer also did not explain why, if his statement were correct, the committee eliminated Moores' removal provisions. Neither did he provide an explanation that would have accounted for the NAACP's outrage a month later when black Republican politicos Henry Lincoln Johnson of Georgia and Perry Howard of Mississippi publicly suggested limiting the Dyer bill to custodial lynching. As James Weldon Johnson explained, since "the great majority of lynchings do not come under these conditions, the [Johnson-Howard] amendments would amount to almost complete emasculation of the measure."82

Dyer's defense of the county liability provisions was hardly more solid or unchallengeable. When he explained that Congress was not attempting anything new or of questionable effectiveness in the creation of county liability, he pointed to the states. They had long made it "to the interest of every taxpayer of the county to prevent . . . lynching." For Dyer, state precedents authorized action by the national government.83

The bill that this flawed presentation defended drew a mixed review. Moores thought Volstead had succeeded too well in shortening the broad original proposal. In his pruning the Minnesotan had left out some "good things" to which Moores "had given very great labor." Nevertheless, the Indiana congressman felt as had Representative Harry Gahn
months earlier when he "subordinated" his bill to Dyer's--"Half a loaf is better than no bread"--and he was willing to vote for it on the floor. 84

Congressman Theodore Burton of Ohio agreed with Moores that the committee should have retained the controversial removal sections and the provision protecting aliens. In addition, he had doubts about what the committee did keep. Feeling a need to fulfill the 1920 Republican platform pledge of federal antilynching action, Burton sought in letters to Dyer and Johnson to overcome his doubts about the substitute's constitutionality. 85

The former Senator found coverage of derelict or complicitous officers to be un controversial. The sections that penalized mobs and individuals interfering with officers and the county liability provisions were all "doubtful, but worth trying." On the other hand, penalizing counties through which mobs travelled was asking for trouble. The penalty's benefits, if any, would not outweigh possible injustices to innocent county residents. The most significant problem for Burton, who was unknowingly presenting the principal arguments the bill's critics would use, was Section Four. He urged Dyer to omit the individual liability section entirely. Citing Justice Miller's opinions in Ex parte Virginia and United States v. Waddell (1884), Burton explained that the Court still held that federal power over individuals did not exist under the Fourteenth Amendment although it did exist
to protect federal rights. 86

Even with these difficulties plaguing him, the man whom Johnson called "one of the best lawyers in Congress" was still able to hope that the nine Justices would accept a federal antilynching law aimed at individual action. That hope had two bases. Antilynchers could use an argument similar to that in Ex parte Riggins on state due process obligations. They could also attempt to develop recent Supreme Court tendencies to enlarge federal powers and to allow "affirmative legislation for the prevention of prohibited acts." 87

These sources of limited optimism did not dissuade Burton from considering a constitutional amendment; however, the sixty-nine-year-old Ohioan's forty years in the House and Senate provided him with an understanding of both congressional rules and national attitudes that led him to doubt an amendment's chances of success, particularly in the Senate. He also feared that the antilynchers risked revealing a lack of faith in their proposed statute if they simultaneously worked toward an amendment. 88

Volstead, the bill's author, joined Burton in wondering "how far" Congress could go "under the Constitution without having our efforts declared unconstitutional by the courts." 89 His fellow committee member, Michigan Republican Earl C. Michener, a 1903 graduate of the law department of Columbian (George Washington) University, shared this concern but even more so since he believed the bill was unconstitution-
al. Congress needed antilynching power, but Michener did not think it had it. His yes vote in committee, he explained to Johnson on November 12, reflected only his desire to let the courts evaluate Congress's power to enact such a bill. It did not guarantee a similar vote on the floor. "[A]s a lawyer, ... I will not vote for a law which I am clearly satisfied is unconstitutional" no matter how much need there was for it. "My oath prevents my doing this." While he was much relieved that the committee had eliminated certain provisions of the original bill, provisions which "no lawyer yet appearing before the Committee has been willing to suggest were constitutional," his doubts remained. And since those doubts—and the negative vote they would likely spawn—made him vulnerable to charges of racism and the loss of black votes, Michener also sought to explain to Johnson that his concern for constitutionality was real. His attitudes were "well known among my neighbors and friends, some of whom are ... colored people ...".

Johnson understood that there was a basis for constitutional doubt, but as lynchings continued the NAACP Secretary could not understand how the need for federal action could be sidetracked by constitutional "pussy-footing." Increasingly, at least publicly, he refused to allow lawmakers to use constitutionality as grounds for their nonaction. As Johnson wrote congressmen in mid-November 1921, delay based on constitutional doubts was "a mere pretext"; claims
of sincerity were "nothing more than an empty gesture"; black Americans would view the bill's House defeat as "a betrayal."91 As White later explained, "The question is one which is larger than that of Constitutionality. It is a question of national welfare and humanity." The lynching of thirty-eight persons between the bill's April introduction and December 6--seven after the committee's October 31 report--indicated that all barriers to lynching's eradication required razing. As White explained to Volstead, the constitutional issue could be--was being--given too much importance. The Judiciary Committee had "threshed out" the bill and the Attorney General had approved it. Should not the House accept these evaluations and leave the "question of ultimate constitutionality" to the courts? That strategy had worked with the income tax, so why let a "'constitutional snag'" kill a bill that the public demanded? Since further conferences and discussions would likely yield no "complete agreement"--"unless the measure is weakened beyond all value"--the Court should be left to make the final decision on "fine differences of opinion on constitutionality."92

Ever-attentive, Pillsbury agreed that "for moral effect it may be that any bill, good or bad, is better than none at all . . . ." There was psychological and precedent value in House passage of an antilynching bill, but that passage would come only if antilynchers could overcome several problems. One was the bill's complete reliance on the equality
clause of the Fourteenth Amendment. Another was the extension of federal protection to all persons. Beyond these familiar concerns was the measure's definition of mob and its penalty for counties through which mobs travelled. Like the full House that would soon analyze the bill, Pillsbury puzzled over the number five, "not only because three can do the mischief but three follows the ancient common law of riotous assemblages [sic] . . . ." 93

Wickersham believed the new bill was "very greatly improved but the fundamental defect in its constitutionality is . . . beyond remedy." This criticism, with others, led Volstead and Dyer back to the Attorney General's office for Duagherty's evaluation of the substitute. They especially sought his views on Section Four. On November 15 Daugherty assured the Judiciary Committee that "taken together the substitute is constitutional." Section Four was the bill's only problem, but its clear application to situations defined in Section Two assured its constitutionality. Together the two sections left "to the jurisdiction of each state, where it belongs, the definition and punishment of the old common law crime of conspiracy to commit a murder." Dyer reported to the anxious NAACP officials that the Attorney General had expressed his determination to "defend the present Bill in any court in the United States." 94

*       *       *
If one of the "two great [constitutional] problems" facing the United States during the late nineteenth and early twentieth centuries was defining the limits of the Fourteenth Amendment, the Judiciary Committee's consideration of the Dyer antilynching bill in the summer of 1921 indicated why. And although that consideration ended with a favorable evaluation, there was little victory in its report. A "herculean" task lay ahead. A reluctant, "weak-kneed" House and a filibustering Senate awaited, and the hearings that preceded the report had cleared away little if any of the constitutional haze surrounding the national government's antilynching power. Congressional authority over lynching was no clearer on October 31 when the committee presented its amended bill than it had been on April 11 when Dyer introduced the original. The scope of the national government's jurisdiction remained unclear, as did the solution to the more immediate problem of balancing the sacredness of federalism's division of power with that of human life.
NOTES

1Moorfield Storey to George W. Wickersham, January 15, 1921, Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (Washington, D. C.), Group I, Series C, Box 242 (hereinafter cited as NAACP Records); Boston Herald, July 2, 1921, ibid., Box 345.

2George Foster Peabody to James Weldon Johnson, January 4, 1921, ibid., Group I, Series C, Box 76; Congressional Record, 67 Cong., 2 Sess., 1717, 1740 (Griffin, Little, January 25, 1922). Many of the letters cited in this chapter—particularly those in the NAACP collection—are copies, either carbons or retyped copies. The assumption is that the originals were sent and received; therefore, no effort has been made to note which letters are copies and which are not.

3Congressional Record, 67 Cong., 2 Sess., 1740 (Little, January 25, 1922).

4Johnson to Frank Cobb, January 24, 1920, NAACP Records, Group I, Series C, Box 338; Congressional Record, 67 Cong., 2 Sess., 1302 (Yates, January 17, 1922); Philadelphia American, November 5, 1921, in NAACP Records, Group I, Series C, Box 247.

5The NAACP relied on volunteers due to financial shortages and only "at such time and in such manner" as each volunteer indicated he could help. See Arthur Spingarn to Herbert K. Stockton, July 6, 1922, Arthur Spingarn Papers, Library of Congress, Manuscript Division, Box 9.

6Albert Pillsbury to Johnson, October 26, 1921, NAACP Records, Group I, Series C, Box 242.

7Walter White asked Arthur Spingarn of the NAACP Legal Committee for information on how to obtain copies of United States v. Harris, the Civil Rights Cases, Hodges v. United States, the Slaughterhouse Cases, United States v. Wheeler, and Bailey v. Alabama. White to Spingarn, April 28, 1921, Spingarn Papers, Box 2. The NAACP failed to obtain Slaughterhouse when West Publishing informed them that the case would cost $13.70. Johnson felt that the cost was too great. W. G. Fndyes to NAACP, July 28, 1921; White to Fndyes, August 5, 1921, both in NAACP Records, Group I, Series C, Box 114.
8 George Wickersham to White, May 16, 1921, NAACP Records, Group I, Series C, Box 80.

9 Leonidas Dyer to NAACP, March 10, 1921, ibid., Box 242; Arthur Spingarn to Johnson, February 24, 1921, ibid., Box 74; "Memorandum Re Secretary's Trip to Washington—July 26-28, 1921," Moorfield Storey Papers, Library of Congress, Manuscript Division, Box 2. White reported that "a source we could not entirely trust" told the NAACP of Wickersham's efforts. Spingarn asked him for a draft of the bill, but on February 24 he learned that Wickersham "had not as yet found a satisfactory solution." White to Storey, February 25, 1921, ibid. Spingarn's request for the Wickersham draft was issued in order to obtain a copy of the proposal to send to Storey and other board lawyers. He had heard of Wickersham's alleged efforts from Gilchrist Stewart. Spingarn to Wickersham, February 21, 1921, Spingarn Papers, Box 2. Wickersham informed him that ". . . I have not yet found a satisfactory solution." Ibid. Johnson reported to his organization that the NAACP provided Wickersham with copies of Dyer's and Dallinger's 1921 proposals once they were introduced later in the spring and asked ". . . if either of them can be amended and made constitutional." The NAACP also requested that Wickersham draft a substitute if they could not be and that he prepare a brief for the Judiciary Committee. "Report of the Secretary," May 5, 1921, ibid., Box 41.


11 White to Storey, March 7, 1921; White to Wickersham, April 26, 1921, both in NAACP Records, Group I, Series C, Box 77.

12 Wickersham to Storey, January 7, 1921, ibid., Box 76; Wickersham to White, May 11, 1921, ibid., Box 80; Section 19, 35 Stat. 1092 (1909).
Mary White Ovington to Storey, October 24, 1921, Storey Papers, Box 2. See also William B. Hixson, Jr., Moorfield Storey and the Abolitionist Tradition (New York: Oxford University Press, 1972), 101-45, 159-86; Crisis, 20 (July 1920), 132. The latter contains a statement which reveals a flaw in Storey's constitutional expertise. In his memo on the NAACP for the War Department during World War I, Captain James L. Bruff, while easily associating rumored disloyalty with most of the NAACP leadership, noted that Storey was "without a shadow of doubt, one of the leading lawyers of the U. S. and a man of the highest personal reputation." His only flaws were "an exaggerated idea of the negro race, pacifism and similar weaknesses that oftentimes afflict those of brilliant mind." "Memorandum Re Officers and Directors of the National Association for the Advancement of Colored People," July 13, 1918, Records of the War Department General and Special Staffs, Record Group 165, National Archives, Washington, D. C., #10218-158-6.

Storey to White, February 28, 1921, NAACP Records, Group I, Series C, Box 76.

Congressional Record, 67 Cong., 2 Sess., 1346 (Gahn, January 18, 1922).

Frederick Dallinger credited the 1910 Moody-Hoar bill with being an early precursor of the Dyer bill. Ibid., 1308 (January 17, 1922).

Pillsbury to Johnson, July 22, 1921, NAACP Records, Group I, Series C, Box 242. In 1891 after President Harrison, who could find no federal power to protect aliens from lynching, recommended that Congress enact a law to protect aliens from mob violence, Senator John Sherman introduced a resolution that the Foreign Affairs Committee prepare a bill to protect aliens' treaty rights. This bill failed to find the necessary support for passage, as did bills in 1893, 1899, 1900, 1902, 1903, 1905, 1907, 1909, 1915, 1917, 1919. See David O. Walter, "Proposals for a Federal Anti-Lynching Law," American Political Science Review, 28 (June 1934), 436-42; Charles H. Watson, "Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens," Yale Law Journal, 25 (May 1916), 570.

Pillsbury to Johnson, July 22, 1921, NAACP Records, Group I, Series C, Box 242; Pillsbury to Merrill Moores, August 5, 1921, Storey Papers, Box 2.

Pillsbury to Johnson, July 22, 1921, NAACP Records, Group I, Series C, Box 242. In July 1921 White learned that Taft supported the constitutionality of the Dyer bill
and wanted to so testify at the committee hearings that summer. However, within days White learned that Taft had given his views "wholly in the nature of a private opinion" before he became Chief Justice. White to Louis Marshall, July 30, August 2, 1921; White to Oswald Garrison Villard, August 1, 1921; Marshall to White, August 4, 1921, ibid.; Johnson to Storey, August 1, 1921, Storey Papers, Box 2. On Taft's belief in a static Constitution and immutable natural law as the basis of dual federalism, a system which had gaps in it over which neither state nor national government had control, see Paul L. Murphy, The Constitution in Crisis Times, 1918-1969 (New York: Harper and Row, 1971), 42, 47-49, 52.

20 Pillsbury to Johnson, July 22, 1921, NAACP Records, Group I, Series C, Box 242; Pillsbury to Moores, August 5, 1921, Storey Papers, Box 2.

21 Wickersham to White, May 11, 1921, NAACP Records, Group I, Series C, Box 80; White to Wickersham, April 28, 1921, ibid., Box 77; Wickersham to Storey, January 20, March 18, 1921, ibid., Box 242; Wickersham to Storey, May 11, 1921, Storey Papers, Box 2. White told Storey that Section 5508 seemed an unlikely weapon. He informed Storey that "Assistant Attorney-General Herron told me in Washington that this law had proved practically useless as he had prosecuted a number of cases under the law during the past five years and in every case the Supreme Court had decided against the Department of Justice." White to Storey, March 14, 1921, NAACP Records, Group I, Series C, Box 77. Storey believed the federal statute could apply if mobs were thought of as denying citizens the constitutional right to trial by jury and due process. He did not--nor did Wickersham--indicate that jury trials were not federally guaranteed. Storey to Wickersham, March 17, 1921, ibid., Box 242.

22 Wickersham to Storey, January 20, 1921, NAACP Records, Group I, Series C, Box 242.

23 Ibid.

24 Wickersham to Johnson, February 10, 1922, ibid., Box 76; Wickersham to White, May 16, 20, 1921; Louis Marshall to Wickersham, May 19, 1920, ibid., Box 80. The views of two "eminent lawyers" like Wickersham and Marshall "will not deter us from doing all that is within our power to secure the enactment of the Dyer bill into law." White to Harold B. Allen, May 26, 1921, ibid., Box 77.
25 Storey to White, March 9, 17, 1921, ibid., Box 76; Storey to White, [undated], ibid., Box 242. His suggestions for a "slight amendment" included "putting in after . . . 'United States' in the fourth line 'or to deprive any citizen of any such right or privilege.' " Storey to White, March 17, 1921, ibid., Box 76. On Storey's shifting views on constitutionality and necessity, see telegram, Storey to Shillady, November 9, 1919, ibid., Box 75.

26 Storey to Wickersham, January 22, 15, March 21, 1921, ibid., Box 242; Storey to White, May 13, 1921, ibid., Box 76.

27 Storey to Wickersham, January 15, 22, March 21, 1921; Storey to Johnson, August 1, 1921, ibid., Box 242.

28 Storey to Johnson, August 1, 1921; Storey to Wickersham, January 15, March 21, 1921, ibid.; Storey to Wickersham, May 13, 1921, ibid., Box 76; Hugh Dorsey, A Statement from Governor Hugh M. Dorsey as to the Negro in Georgia ([Atlanta: n.p., 1921]). Johnson thought Dorsey's work to be "of great importance" since Georgia was "the most powerful state in the South." The pamphlet added little to the constitutional argument but it had "direct bearing upon the necessity for Congress to act." Johnson to Andrew Volstead, August 16, 1921, NAACP Records, Group I, Series C, Box 242. Calling it "one of the strongest indictments of the South for injustice, cruelty and brutality against Negroes ever made," Johnson included excerpts from it in press releases and in a letter to Harding. "Report of the Secretary," May 5, 1921, Spingarn Papers, Box 41.

29 Storey to Wickersham, January 15, 1921, NAACP Records, Series I, Group C, Box 242. Compare Charles Sumner who said the nation was "sowing dragon's teeth which in time would arise as armed men." Storey, "The Negro Question: An Address Delivered before the Wisconsin Bar Association . . . June 27, 1918" (New York: NAACP, 1918), 27.

30 Storey to Wickersham, March 31, 1921, NAACP Records, Group I, Series C, Box 242; for Storey's concern for reform through black suffrage protections, see Storey to Johnson, December 18, 1919, ibid., Box 75; Storey, "The Negro Question," 20.

31 Storey to Dyer, August 4, 1921, NAACP Records, Group I, Series C, Box 76; Storey to Johnson, August 1, 1921, ibid., Box 242. Storey also suggested the possible use of the Sixth and Eighth Amendments but offered no explanation or elaboration. Ibid.
32 Storey to Johnson, August 5, 1921 (emphasis added), ibid., Box 76. See Pillsbury to Storey, January 27, 1922, Storey Papers, Box 2, in which Pillsbury questions how Storey deals with "the settled doctrine . . . that the first eight amendments are restraints only upon the Federal Government."

33 William T. Francis to White, April 21, 1921; White to Francis, April 26, 1921, both in NAACP Records, Group I, Series C, Box 242; White to Wickersham, May 21, 1921; White to Harold B. Allen, April 29, 1921; White to Storey, May 12, 1921, ibid., Box 77; "Memorandum Re Secretary's Trip to Washington--July 25-28, 1921," Storey Papers, Box 2.

34 Johnson to Richard P. Ernst, May 17, 1921; White to Arthur Spingarn, June (?) 1921, both in NAACP Records, Group I, Series C, Box 242. In October 1921, Pillsbury believed chances of passage were "exceedingly doubtful, and of course it is possible that a case under it may never reach the court and that all shall get out of it is the moral effect of the passage of such a bill upon the southern situation." Pillsbury to Johnson, October 26, 1921, ibid.

35 White to Storey, April 26, 1921, NAACP Records, Group I, Series C, Box 77; Johnson to Frank I. Cobb, January 24, 1920, ibid., Box 338; Wilson to Xonia Baker, May 3, 1921, ibid.; Johnson to Ernst, May 17, 1921, ibid., Box 242; White to Hersey, January 13, 1922, ibid., Box 76; "Report of the Secretary," May 5, 1921, Spingarn Papers, Box 41. Medal McCormick's S. 409, which created an unsalaried federal commission on lynching appointed by the president, was first introduced during the Sixty-sixth Congress, May 28, 1920, as S. 4456; McCormick reintroduced it during the Sixty-seventh Congress on April 12, 1921. Ansorge's H. R. 4378 was "to create a commission, in accordance with the President's recommendation to the joint session of Congress, to embrace representatives of the white and colored races to investigate the subject of lynching, and to report to Congress legislative measures intended and designed to prevent, discourage, and to punish lynching . . . ." He explained on December 19, 1921, that his proposal "was a second line of attack, ready should the first line fail." Once the NAACP felt secure that Dyer's bill would survive committee scrutiny, Ansorge "subordinated" his bill to H. R. 13. Congressional Record, 66 Cong., 2 Sess., 770 (May 28, 1920); 67 Cong., 1 Sess., 409 (April 12, 1921), 461 (April 19, 1921); 67 Cong., 2 Sess., 547 (December 19, 1921); New York Age, April 30, 1921, in NAACP Records, Group I, Series C, Box 345. On Charles Curtis, see "Report of the Secretary," June 9, 1921, ibid., Series A, Box 15.
36 The NAACP distinguished between an inter-racial commission and an antilynching investigating commission, explaining why Johnson urged Harding to support a race commission and a federal statute in April 1921. As Johnson explained to Herbert Seligmann, "... there are many general racial conditions which should have scientific, intelligent and impartial study. ... [W]e have definitely opposed the appointment of any commission, merely for the investigation of lynching." Johnson, Memorandum To HKS," [June 1921], NAACP Records, Group I, Series C, Box 164.

37 White to Storey, July 11, 1921; White to Wickersham, July 11, 1921; White memorandum to Johnson, July 11, 1921, ibid., Box 77; Wickersham to White, July 12, 1921, ibid., Box 80.

38 White to Storey, May 12, 1921; White to Wickersham, May 11, 1921, both in NAACP Records, Group I, Series C, Box 77; Johnson to George D. Cannon, August 10, 1921, ibid. Series A, Box 19; White to Spingarn, May 12, 1921, Spingarn Papers, Box 2.

39 The other Republicans on the committee were Joseph Walsh of Massachusetts, who had attended Boston University law school, been admitted to the bar in 1906, and worked as a government clerk and reporter; David G. Classon of Wisconsin, an 1891 graduate of the University of Wisconsin's law department and a former county attorney and judge; William D. Boies of Iowa, an 1880 graduate of the State University of Iowa's law school and a former judge; and Charles A. Christopherson of South Dakota, who had been an attorney since 1893 and who was involved in banking. In addition, there were Richard Yates of Illinois, who graduated in 1884 from the University of Michigan's law department and then served as city attorney and county judge; Wells Goodykoontz of West Virginia, who passed the bar in 1894 after studying at Washington and Lee's law department and who then worked in both law and banking, becoming president of the state bar association in 1917; Walter Chandler of New York, a teacher, historian, and lawyer, who studied in Europe and then taught at the AEF University in France; and Israel M. Foster of Ohio, who attended Harvard Law School during the mid-1890s and graduated from Ohio State's law school in 1898. Also on the committee were Michigan's Earl Michener, a graduate of Columbian (Georgetown) University's law department and a former county prosecuting attorney, and Indiana's Andrew Hickey, who had attended Buffalo Law School before being admitted to the bar in 1897 and serving as a state district attorney. Volstead graduated from Decorah Institute in 1881,
was admitted to the bar in 1883, and served as a board of 
education member, a city attorney, and mayor of Granite 
Falls. Dyer attended Central Wesleyan and Washington Uni-
versity (St. Louis) before being admitted to the bar in 
1893. Biographical Directory of the American Congress, 
1961).

40 White to Harold B. Allen, April 23, 29, 1921; 
White to Storey, April 26, 1921, both in NAACP Records, 
Group I, Series C, Box 77; White to Xonia Baker, May 3, 
1921, ibid., Box 338. These bills included H. R. 4978 
proposed on April 25 by Harry Gahn. It provided for a 
$10,000 county fine and included removal provisions. Ac-
cording to Gahn, it was "absorbed in the Dyer bill . . . 
by the Judiciary Committee," which omitted the removal 
section. Congressional Record, 67 Cong., 1 Sess., 629; 
67 Cong., 2 Sess., 1346 (January 18, 1922). In addition, 
there were bills by Frederick Dallinger and Martin An-
sorge in the House and Joseph France of Maryland and 
Medill McCormick, cited previously, in the Senate. Ibid., 
67 Cong., 1 Sess., 218 (H. R. 2881; April 13); 461 (H. R. 
4378; April 19); 148 (S. 409; April 12); 67 Cong., 2 Sess., 
35 (S. 2791; June 22). The Chicago Defender called Dyer's 
(1921) bill the "best yet" on May 12, 1921, 3. But White thought 
Dallinger's was. However, since White believed that de-
spite its being "a much better piece of workmanship than the 
Dyer bill" it was subject to "the same objection," he did 
not push the Dallinger bill. What White thought was better 
about it, he did not say, but the proposal was essentially 
the same as Dyer's bill. White to Storey, April 28, 1921, 
Storey Papers, Box 2; Boston Herald, July 2, 1921, in NAACP 
Records, Group I, Series C, Box 345.

41 Congressional Record, 67 Cong., 1 Sess., 604 (April 
11, 1921).

42 House Committee on the Judiciary, Constitutionality 
of a Federal Antilynching Law: Hearings on H. R. 13, 67 
Cong., 1 Sess., 1921, Serial 10, pt. 1, 3-6; White to Storey, 
May 14, 31, 1921, NAACP Records, Group I, Series C, Box 77.

43 When the hearings opened, Dyer referred to him as 
"really the author of this bill." Constitutionality of a 
Federal Antilynching Bill, pt. 1, 3. James Weldon Johnson 
also called him the "actual author." "Report of the Secre-
tary," August 15, 1921, NAACP Records, Group I, Series A, 
Box 15. The Chicago Defender on June 18, 1921, 3, credited 
Moores with being the real author of Dyer's bill.
44 Constitutionality of a Federal Antilynching Bill, pt. 1, 29; Pillsbury to Storey, August 5, 1921, Storey Papers, Box 2; Pillsbury to Johnson, October 26, 1921, NAACP Records, Group I, Series C, Box 242. Pillsbury, in his August 5 letter, noted that Moores was "so far as I know the only Congressman who has even attempted to make a constitutional argument in support of the bill . . . ."

45 Section 31, 36 Stat. 1096 (1911) allowed removal of any civil or criminal suit if "any person" unable to have in state court the protection of his civil rights as a citizen or person as provided in "any law."

46 United States v. Reese, 92 U. S. 214 (1876); Virginia v. Rives, 100 U. S. 313 (1880); Strauder v. West Virginia, 100 U. S. 303 (1880); Neal v. Delaware, 103 U. S. 370 (1880); Ex parte Virginia, 100 U. S. 339 (1880).

47 In the cases Moores cited, the Court held removal to federal court to be appropriate enforcement of the Fourteenth Amendment. Constitutionality of a Federal Antilynching Bill, pt. 1, 9-12. Reavis explained that James v. Bowman, 190 U. S. 127 (1903) "reviewed and commented upon" the cases upon which Moores concentrated. In it the Court concluded "that the fourteenth amendment, being a prohibition on the States, had reference to the acts of the States only and not to the acts of individuals. In the bill before us, you have the right of removal predicated upon the action of an inhabitant who may not even be a citizen of the State." (13)


49 Ibid., 17.

50 Ibid., 16-19.

51 Ibid., 18-19 (emphasis added).

52 Ibid., 19-20; Pillsbury to Moores, August 5, 1921, Storey Papers, Box 2.


54 Ibid., 26.

55 Ibid., 26-28.

56 Constitutionality of a Federal Antilynching Bill, pt. 2, 56. As for state agents, Moores argued that the state,
when it consented, was liable for their negligence or for
torts committed within the scope of their duty. States and
private corporations were, he explained, analogous. In
addition, states could be sued by the United States at any
time. The Eleventh Amendment had not foreclosed these possi-
bilities.

57 Born in 1866, Goff practiced law in Boston before
moving to Milwaukee. In Wisconsin he was a special assis-
tant district attorney. In 1911 Taft appointed him federal
attorney for the eastern district of Wisconsin. As such he
worked on Indian cases, violations of the eight-hour federal
work day regulation, and the Mann Act. In 1917, after two
years in private practice, he returned to federal service
as special assistant to the Attorney General for prosecu-
tion of white slave cases in Wisconsin. With the outbreak
of World War I, Goff joined the staff of the judge advocate
general as a major. In 1919 as a colonel, he served on
Pershing's staff in France as acting judge advocate general
for the AEF. After brief service in Germany, Goff left the
Army and served on the Shipping Board. In 1921 he became
assistant attorney general and acted as a general super-
visor who also handled war fraud cases, antitrust cases, etc.
In November 1922 he resigned due to the demands of personal
responsibilities. He later served in the U. S. Senate, re-
representing West Virginia, his family's home state (1925-1931).
G. Wayne Smith, Nathan Goff, Jr.: A Biography With Some Ac-
count of Guy Desiard Goff and Brazilla Carroll Reece (Charleston,

58 Dyer to Johnson, July 7, 1921, NAACP Records, Group
I, Series C, Box 242; Constitutionality of a Federal Anti-
lynching Bill, pt. 2, 36. Goff also noted that the Dyer
bill was framed to "preserve law and order, and to see that
the laws are enforced equally, and to see that no man is
denied or deprived of the common right, to enjoy life, li-
berty, and property . . . ." Power to enact it was "con-
ferred upon the Federal Government by the fourteenth amend-
ment . . . ." Goff made note of his failure to have read
Pillsbury's article in a letter to Wayne B. Wheeler, De-
cember 30, 1921, Records of the United States House of Re-
presentatives, Record Group 233, bill file for H. R. 13,
National Archives, Washington, D. C. See also Goff to
Thomas B. Hull, October 14, 1922; Goff to Walter Nelles,
January 23, 1922, General Records of the Department of Jus-
tice, Record Group 60, National Archives, #158260-212,
#158260-179y. In his letter to Wheeler, Goff also consid-
ered other possible constitutional defenses. He discussed the
national government's responsibility to guarantee "a repre-
sentative form of government" and to "reestablish it by force
of arms." He felt that "if it could enter and build up, it
certainly could enter at the call of the governor to prevent destruction; and if it could do these, why can it not, by anticipation, legislatively, prevent destruction, and avoid the necessity of ever being called upon to build up." He believed Dyer's opponents overlooked "the simple, underlying structure of the true meaning of the rights of an American citizen. . . . The power of the very government to protect the lives of its citizens throughout the world is inherent in sovereignty. . . ."

Johnson felt that "the Attorney General's office . . . put itself on record as sustaining the constitutionality of the bill . . . [which was] of the greatest importance and significance." "Memorandum Re Secretary's Trip to Washington--July 25-28, 1921," Storey Papers, Box 2.


60 Ibid., 39.

61 Ibid., 40.

62 Ibid., 41, 43.

63 Ibid., 43.

64 Ibid., 45.

65 Ibid., 45, 39, 47.

66 Ibid., 48, 49, 50.

67 Ibid., 51-52.

68 Ibid., 42 (emphasis added).


Constitutionality of a Federal Antilynching Bill, pt. 2, 55; pt. 3, 57. Part Three includes two letters from Daugherty to Volstead, 57-60, as well as a report of Daugherty's recommended changes in H. R. 13, 60-61.

Ibid., pt. 3, 57; [Volstead] to Daugherty, July 26, 1921; Daugherty to Volstead, August 9, 1921, both in Record Group 233, bill file for H. R. 13.


Ibid., 69, 60. Daugherty made no comment on fines for counties merely traversed by mobs except, in a separate letter to Volstead, to question the clarity of the phrase "jointly and severally liable."

Pillsbury to Johnson, October 26, November 1, 1921; Johnson to White, November 15, 1921 (telegram), both in NAACP Records, Group I, Series C, Box 242; Daugherty to House Judiciary Committee, November 15, 1921, Record Group 233, bill file for H. R. 13.


The Committee, slow in its final work on the bill, was not pushed by Dyer because, as he informed Johnson and the NAACP, the summer's "hot weather and the large amount of work to be done" demanded that no one antagonize the burdened legislators beyond their endurance levels. "Report of the Secretary," August 15, 1921, NAACP Records, Group I, Series A, Box 15.


Antilynching Bill, 2, 3.

Ibid.

Ibid., 6, 4, 5. Kellogg's S. 1943, proposed June 2, 1921 (67 Cong., 2 Sess., 2303), died in the Committee on Foreign Relations.
82 Antilynching Bill, 7; "Special Report of the Secretary on Washington Trip," November 18, 1921 (emphasis added), NAACP Records, Group I, Series C, Box 76. The Chicago Defender of March 5, 1921, reported that "a well drawn up act to make lynching a federal crime" had been prepared—along with an enfranchisement bill and one for an interracial commission on discrimination—by Henry Johnson, Gilchrist Stewart, Robert Church, Charles Cottrill, and Perry W. Howard. The paper stated that they had checked out the measure's constitutionality with Wickersham and Frank Hendricks of New York.

83 Antilynching Bill, 6.

84 "Moores to F. B. Ransom, November 18, 1921; Moores to Johnson, October 21, 1921, both in NAACP Records, Group I, Series C, Box 242; "Report of the Secretary," June 9, 1921, ibid., Series A, Box 15.

85 Burton to Johnson, November 12, 1921, ibid., Series C, Box 242; Burton to Dyer, November 9, 1921, Record Group 233, bill file for H. R. 13.

86 Burton to Dyer, November 9, 1921, Record Group 233, bill file for H. R. 13.

87 Ibid.

88 Burton to Johnson, November 12, 1921, NAACP Records, Group I, Series C, Box 242. See also Burton to Goff, December 29, 1921, Record Group 60, #158260-162. By the end of the year Burton still could "not quite overcome the arguments against the constitutionality of this kind of legislation in 109 U. S. and other cases." In addition, Willoughby and Cooley provided "unfavorable arguments" against the bill. See also Wayne B. Wheeler to Goff, December 31, 1921, Record Group 60, #158260-163.

89 Volstead to Andrew F. Hilyer, November 29, 1921, Record Group 233, bill file for H. R. 13; Volstead to Johnson, November 15, 1921, NAACP Records, Group I, Series C, Box 242.

90 Michener to Johnson, November 12, 22, 1921, NAACP Records, Group I, Series C, Box 242.

91 Johnson to Harry E. Davis, November 21, 1921, ibid. Johnson noted in December as the House was deciding to lay the bill over until the first of the new year that "some Republicans ... would welcome the amending away of certain portions which they fear are unconstitutiona." Johnson to White, [December 1921], ibid., Box 76. The congressman to
whom Johnson wrote were Martin Madden, chairman of the Appropriations Committee, Philip Campbell, chairman of the Rules Committee, Simeon Fess, William Rodenberg, Nicholas Longworth, and Majority Leader Frank Mondell. Johnson said that Negroes "regard[ed] any question as to the constitutional discussions were "nothing more than an empty gesture." Congressional failure to act was a "betrayal." "Special Report of the Secretary on Washington Trip," November 18, 1921, Storey Papers, Box 2. Fess was not pleased: ". . . you undertake to dictate what kind of argument shall not be used . . . ." Such undertakings aroused congressional resentment; legislators did not like "veiled threat[s]." "Legislation is a matter of consideration and not dictation." Fess to Johnson, November, November 16, 1921, NAACP Records, Group I, Series C, Box 242.

92 White to Hersey, January 13, 1922, NAACP Records, Group I, Series C, Box 76; Johnson to Volstead, November 21, December 30, 1921, Record Group 233, bill file for H. R. 13. See also White to Wickersham, May 21, 1922, NAACP Records, Group I, Series C, Box 77; NAACP press release, "38 LYNCHED WHILE CONGRESS DEBATES ANTI-LYNCH BILL," December 6, 1921, ibid., Box 242.

93 Pillsbury to Johnson, November 1, 1922, NAACP Records, Group I, Series C, Box 242. During the House debates, Pillsbury changed his opinion, concluding that there were few sincere antilynchers behind the measure. As "bait for the negro vote," the bill was still failing to draw support needed for enactment. By the time the debates concluded in late January 1922, Pillsbury believed eventual Senate defeat would not be a problem. Pillsbury to Storey, January 27, 1922, Storey Papers, Box 2. See also Pillsbury to Ovington, January 27, 1922, NAACP Records, Group I, Series C, Box 76.

94 Wickersham to Johnson, October 24, 1921, NAACP Records, Group I, Series C, Box 80; "Special Report of the Secretary on Washington Trip," November 18, 1921, Spingarn Papers, Box 46; [Volstead] to Daugherty, November 8, 1921; Daugherty to Judiciary Committee, November 15, 1921, both in Record Group 233, bill file for H. R. 13. On November 15, Johnson wired White his summary of Daugherty's evaluation: "Attorney General says he will stand by bill." Johnson to White, November 15, 1922, NAACP Records, Group I, Series C, Box 242.

Johnson to Emily L. Osgood, October 25, 1922, NAACP Records, Group I, Series C, Box 154; "Special Report of the Secretary on Washington Trip," November 18, 1921, Spingarn Papers, Box 46.
CHAPTER SIX

"THE WORLD, THE FLESH, AND THE DEVIL":

THE HOUSE DEBATE, 1921-1922

The time has passed to apologize for lynching, or even to explain it. It must be stamped out.¹

In 1922 Ohio Representative William Chalmers echoed Abraham Lincoln, declaring that the United States could not exist "one-half lawless." Concerned about the dangers inherent in a half-lynching nation, Chalmers sought in the Judiciary Committee's amended Dyer bill a cure for the threats that Lynch Law posed.² But if he found it there, others did not.

Southern Democrats who led the opposition to the Dyer bill in the House argued that the proposal was unconstitutional. The antilynching forces argued, in general, that it was not. But the debates of December 1921 and January 1922 did not concentrate exclusively on the basic and central issue of federal antilynching authority. A variety of side issues were intermixed with and often dominated the constitutional arguments. State sovereignty had died with slavery, but state rights and racism lived on. With the Dyer bill threatening state control of race policy and law enforcement, the Southern Democrats and their small collection of northern and western allies took a strong emotional stand, claiming that the antilynchers had only political and
sectional reasons for demanding passage of the unnecessary, dangerous, and unconstitutional measure

* * *

House consideration of the Judiciary Committee's substitute technically began on October 31 when H. R. 13, with amendment, appeared on the calendar. Dyer moved for the immediate consideration of his proposal, James Weldon Johnson having convinced the "nervous" legislator not to wait "months or even more than a year" for the bill to come up for consideration as an ordinary piece of House business. The NAACP did its part in moving the bill closer to a vote. Johnson lobbied the chairman of the Rules Committee, Philip P. Campbell of Kansas, Speaker Frederick H. Gillett of Massachusetts, Majority Leader Frank W. Mondell, and Martin Madden, chairman of the Appropriations Committee whose south-side Chicago district included a large Negro population. Twenty-seven NAACP branches in states represented on the House Steering Committee demanded the committee direct the Dyer bill to the Union Calendar and immediate consideration. The NAACP sent letters to eighty-four representatives "to bring pressure to bear." The result of this first step in a massive lobbying effort was that on December 19, with commitments from the Steering and Rules Committees, Campbell presented a privileged resolution from his committee to consider H. R. 13 in the
Committee of the Whole House on the State of the Union. On December 20, following two days of racist diatribes, attempted filibusters, demands for quorum votes, locked doors, and warrants for absent congressmen, the House resolved itself into the Committee for consideration of H. R. 13. Then, as it prepared for fourteen hours of general debate followed by amendment consideration under the five-minute rule, the House only listened to the reading of the bill and the Judiciary Committee's amendment. But with a break over the Christmas holidays prompted by reluctant Democratic attendance, as well as by the absence of forty Republicans on a junket to Panama and of twenty more for the funeral of California Representative John A. Elston, the legislators did not begin their arguments on the Dyer bill until January 4, 1922.

Even in January the possibility of further delay by unenthusiastic congressmen lingered. Johnson's diligent lobbying prevented the House from considering an appropriations bill, action which could have meant a six month delay for H. R. 13. Therefore, January 4 became the first of nine days scattered over a month during which almost one hundred representatives filibustered against, spoke on, or questioned speakers about federal antilynching power. Debate time—seven hours for each side, controlled by Democrat Hatton Sumners and Republican Andrew Volstead—ran out on January 25, amidst what observers called "a wild scene of disorder" led
by a gallery crowded with interested Negroes. In the brief consideration of amendments that followed, there were numerous motions to delete sections of an amendment, which was actually a bloc substitute, offered by Volstead. After rejecting motions to delete all or parts of the amendment, the Committee of the Whole House accepted Volstead's proposal by unanimous consent and recommended it to the full House.\(^8\)

Volstead's eight-section "amendment" (Appendix C) began by retaining the first two sections of the Judiciary Committee's bill, one defining a mob and the other, equal protection. However, the Volstead bill returned to Dyer's original definition of a mob as three or more persons.

Volstead devoted all of Section Three to official liability as he covered the "State or municipal officer" who misused or failed to use his authority against mobs, as well as the officer who conspired with the mob. Eliminating the Judiciary Committee's Section Four, which covered private individuals, the Minnesota legislator specifically provided individual criminal liability only for persons who conspired with officers. To assure proper federal court jurisdiction of the trial of an officer and "those who participated" in a lynching, Volstead provided that it be "first made to appear" to the court either that officials with power over violators failed to act or that there was "no reasonable probability" of impaneling an impar-
tial jury for a state trial. A state's failure for more than thirty days after "the offense" to apprehend the guilty would serve as prima facie evidence of official failure."\(^9\)

The Minnesotan changed the county liability section to clarify the sharing of liability. Only the counties in which a mob seized and killed its victim were "jointly and severally liable" for the $10,000 fine. Volstead also returned the alien coverage. Section Seven made "violation of the rights of a citizen or subject of a foreign country secured . . . by treaty" a federal crime punishable "in like manner as in the courts of said State or Territory." Volstead's Section Eight defined, as had its predecessors, Washington, D. C., and each Louisiana parish as a county and included the proviso that judicial invalidation of one section would not nullify the entire statute.\(^{10}\)

Passed 231-119 on January 26, with four "present" and seventy-four not voting, this bill received the approval of only eight of 131 Democrats, all of whom represented states in the North or border areas. The 102 Democrats who voted against it came from southern and border states and California. Only one southerner voted for the bill, Texan Harry M. Wurzbach of Seguin, a Republican. On the other hand, only seventeen of the House's almost three hundred Republicans voted against the bill; these legislators included Hersey, a man whose vigorous and vocal nonpartisan opposition to the proposal during the floor fight much concerned its NAACP
backers. Fifty-six Republicans were absent on January 26 and did not vote. If the approaching congressional elections and the likely demise of the bill in the Senate did not determine the exact outcome of the vote, these factors undoubtedly influenced vote-conscious politicians. Their concern for reelection was frequently discussed during the debate. Most specifically, James Aswell wondered if the Republicans were supporting the measure "because the elections are less than a year away and you sorely need the Negro vote to stem the rising tide against the Republican Party?" If so, that tactic would not work because "they are for you already, but by this bill you will lose the support of many thousand very decent white men and white women." Arkansas Democrat John Tillman added that the proposal would "weaken your party in the South," eliminating recent "gains."

Throughout the nine days of debate, the Southern Democrats accused the GOP of being ruled by "political expediency" and "blind partisanship" and of making a harmful bill a test of Republican loyalty. While Democrat Thomas M. Bell of Georgia calculated for his colleagues that half of the Republicans who publicly backed the bill opposed it privately, his allies warned Republicans against voting for a clearly unconstitutional bill in the mistaken belief that it would fulfill a promise to black voters. Democrats pointed out that a plank in the 1920 Republican platform was not a promise but a statement urging Congress only "to consider the most
effective means to end lynching. . . ." The Republicans were not committed to a criminal statute; an investigating commission was sufficient and, as the Democrats knew, harmless.\(^\text{14}\)

Continuing their partisan attack, the Democrats cried that Republicans should not distort the Constitution in order to win votes already in the GOP column, however insecurely, to pay off a "political debt" or to do the bidding of radical blacks. A "half century of false pretense and deceit" had to end. Some Democrats warned that the black was no longer fooled by Republican "insincerity and hypocrisy." The bill, "a sop to the colored man," would not win Negro votes. The Negro had learned from his disillusioning experiences in Reconstruction and could spot the insincerity in the Republicans' "latest device to catch and to hold the deluded Negro to the chariot wheel of Republican supremacy." He would, unless tricked by black agitators, realize who his true friends were.\(^\text{15}\)

The 43,113 black voters whom Arkansas' John Tillman found in Dyer's seven St. Louis wards did nothing to blunt this line of attack. Neither did the demands and lobbying pressures of "race agitators and Negro organizations of the North," that is, the NAACP which was "responsible" for the Dyer bill. These "foolish Negro agitators" used such "vicious" vehicles as the NAACP's *Crisis* and the Chicago *Defender* to incite "sentimental hysteria," win Republican promises,
and achieve social equality.16

In their speeches the antilynchers ignored the NAACP's support even though their critics frequently reminded them of it. Behind the scenes congressmen were hardly oblivious to the role the NAACP was playing. Some representatives who supported the bill wanted that fact well publicized by the organization before the fall elections, just as the Democrats charged they did. For example, Charles L. Knight, who wanted his congressional district in northern Ohio to "understand my position on this bill," asked Johnson to print and distribute his speech in favor of the Dyer bill. Knight knew what he was doing because the NAACP realized that the fate of the proposal depended on political pressure. The Association made clear it would work to deny the Negro vote to those who did not respond correctly to its requests for aid. Walter White acknowledged that his organization was "... straining every nerve to bring pressure to bear on Congress . . . ." In February the NAACP told the readers of Crisis

If your Congressman votes against the Dyer Bill mark him down as your betrayer in the hour of trial and defeat him by every legitimate means when he asks your suffrage next fall. In the same way, reward those who met the test without flinching.

Johnson's pressure on Madden, long known in Chicago for his efforts on behalf of his black constituents, also demonstrated the NAACP's realistic approach. Politics and humanitarianism worked hand in hand so that a vote against
the bill was, according to Johnson, a vote for lynching. It was an argument, the Secretary later posited, which had more "force in getting the quick action . . . in the House than all other arguments put together."

Complaints about these NAACP activities and about the Republicans' partisan interests came also from Republicans. Both Charles Reavis and Ira Hersey criticized their party's search for votes. Hersey, who labelled himself a "regular Republican" in an age when progressives still fought party stalwarts, was the more vocal of the two, although Reavis impressed the NAACP by "fighting the Bill in a rather nasty manner." White wrote Hersey on January 11 and challenged his January 10 statement that the Dyer bill was strictly an opportunistic search for Negro votes and not a sincere lawmaking effort by the party in caucus. White asked why twelve million persons did not deserve to be heard and their lives and property protected. Hersey's response was moderate, pointing out to White that the bill would not be effective and would "greatly aggravate the wrong that we all oppose." White, who himself doubted the bill's potential effectiveness, responded in turn that lives and national welfare came before constitutionality and that the courts, not Congress, should decide the latter. He also rejected Hersey's recommendation that Congress create an investigating committee in lieu of a criminal statute. The existence of the lynching evil needed no further proof.
White's concern about Hersey's opposition had a solid basis since the Maine representative bolstered the argument of the bill's critics that they were not guided by strictly sectional or partisan motives. According to James Weldon Johnson, "no Democrat [was] . . . capable of making so able an argument" as Hersey. His speeches in the House against the measure drew standing ovations and Rebel yells from his southern Democratic listeners. How to stop him? White suggested to Storey that his friends in Maine urge Hersey to restudy the problem "in a broad humanitarian manner rather than from the view-point of a petty party politician."

Since White thought Hersey's white constituents could not possibly share the congressman's insensitivity and since Hersey's congressional district included few blacks and no NAACP branch, Storey's involvement was necessary.20

The task of "urging him to either support the bill or else keep quiet" proved a fruitless one. Hersey found no reason to change his views, and he did not, labelling the bill "a subterfuge" and on January 26 voting against the measure. Upset by the "awful pressure" exerted by Negroes on the House, Hersey announced that "we as a party owe the colored people nothing, and for one I refuse to be politically blackmailed." According to Hersey, Attorney General Daugherty backed the bill because he felt "duty bound" by party loyalty. Hersey did not feel this obligation. Neither did he accept the logic that the Republicans could both satis-
fy black voters and avoid a political backlash by turning the bill over to the Supreme Court for its inevitable rejection.21

The bill's backers expended little effort countering these and similar indictments, although the antilynchers did deny they opposed the bill and were arguing for it only for "home consumption and to capture a few Negro votes." They disclaimed base motives and asked how an effort to save lives could be labelled partisan. They did not dwell on the "home consumption" at which Democratic orations aimed, but they noted the opposition party's historic lack of concern for blacks. The Republicans explained that their 1920 platform and the Dyer bill expressed their concern for and were responses to both white and black public opinion, as revealed in numerous editorials, letters, resolutions, and petitions. As White told Hersey, the black voter, like all voters, deserved to be heard and represented. Democrat James P. Woods of Virginia might predict the loss of two white votes for every black vote the Republcans won for their sponsorship of the Dyer bill, but Richard Yates of Springfield, Illinois, believed "that for every seat in the House lost by Republicans for supporting this bill the Democrats will lose two for opposing it."22

Democrats denied that there was a national demand for such federal action. The proposed law was a "sectional" measure. The bill itself made that point clear. A qualifier added to Section One by the Republican-dominated House Judici-
ary Committee—and retained by Volstead's eventual substitute—proved that the entire measure was the result of "an unyielding animosity for and prejudice against the Southern States" and was a sectional gun aimed at Dixie. With the change, the proposal apparently did not cover the riots so frequent in the postwar North. As initially written the bill did not define a lynching "as punishment for or to prevent the commission of some actual or supposed crime," although the removal sections provided protection for persons facing state criminal prosecutions. Since northern riots were generally not the result of specific black crimes but of economic and political competition and tensions, southerners claimed that the bill would make it a federal crime for southerners to kill Negroes for having committed brutal crimes but not for northerners to murder blacks en masse because of race. Although Dyer, claiming "my State has been disgraced as well as others," described incidents such as the East St. Louis riot and pointed out that they would be covered by the law, Sumners, unconvinced, announced,

"Kill the innocent--those above suspicion--as much as you please," this bill says to the mob; "but if you lay your hands on the criminal, those who created interracial friction and discord and stir up racial conflict the Federal Government will send you to the penitentiary."

Sumners's allies did not suggest amending the bill and returning to the unqualified original. Instead they opposed the entire concept of federal antilynching action, emphasizing
that the bill jeopardized the domestic harmony which had slowly developed after the trauma of Reconstruction. H. R. 13 would "fan into flames the expiring embers of race and class hatred and bring back again to the beautiful Southland the awful horrors of those days of darkness that followed the Civil War." The South treated its blacks fairly, denying them the political rights the North gave them but which they did not deserve and assuring them the economic opportunity the North withheld, with education funded by white taxes. The South in large part had recovered from the federal government's first attempt to force its will on the region; there was no excuse for the North's "going crazy" again and endangering all that the southerners had patiently taught their Negroes. 25

Unable to oppose the Dyer bill without offering some solution of their own, southerners argued that federal interference was not the correct remedy for lynching. The solution was in local action and public opinion. Since 1915, they claimed, with no supporting statistics, there had been a decline in lynching, with increased enforcement of state criminal laws, more mobs turned back by local officials, and the growth of a general antilynching attitude among the majority of southerners. The Southern Democrats announced that if the federal government entered the fray with "blanket indictment and gratuitous insult to conscientious State officials every where," local resentment would grow and localities would
lose interest in stopping mobs. Only "race strife, race conflict, race riots, and lawlessness" would result when the North, which would "do the same thing" if it had "the Negroes in New England," attacked the South without understanding the unique and delicate balance of conditions that explained the region's greater prevalence of mob justice.26

Explaining that the black was "the most favored race protege ever coddled and petted by the sentimental sacrifice of an indulgent people," the southern representatives asserted that "to treat one [race] as helpless infants requiring Federal aid [was] . . . a mistake . . . ." It would encourage the black, whom the southerner knew as no outsider could, to expect charity and to demand equality even though he was still "slave to his appetite," had "but little moral restraint," and retained a "trend toward cruelty, which is seen in the merciless and frequent abuse and beating of his children . . . ." Even though relations between whites and "good" blacks were harmonious, the Dyer bill would change contented docile blacks into uncontrollable brutes filled with demands for the social equality long promised them by ignorant northern do-gooders. The new arrogant, swaggering black would force the southern white population to resort to violence to protect itself because the South would allow social equality only when "the stars . . . cease[d] to shine and the heavens . . . rolled up as a scroll . . . ."27

These racist arguments, intertwined with theories of
state rights, revealed a powerful concern for white control over and protection from the Negro, a "purely local" problem. Southerners who spoke against the bill claimed unyielding opposition to lynching, unflagging friendship for the Negro, and an unbending determination to protect black rights jeopardized by the bill, but their speeches substantiated rather than disproved charges that the South had a peculiar problem that it was unwilling to eliminate. This fact was most obvious when, relying on the mythical link between rape and lynching, the southerners argued for the safety of white women. "[Y]ou are buying black votes with the safety of white women in the South . . . ," Sumners alerted the southern Republicans. 28

He and his allies ignored the statistics on the relationship between rape and lynching, which the NAACP circulated, and tied the threat of "amalgamation" to black equality. Refuting theories of racially-motivated lynchings by labelling them black and northern propaganda, southerners claimed that the Dyer bill supported the North's ". . . 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 white women." The bill would give the black "incentive and a license" to commit such crimes and expect flowers and gift from the family of his raped victim. Mississippian Thomas Sisson explained that he "would rather the whole black race of this world
were lynched than for one of the fair daughters of the South
to be ravished and torn by one of these black brutes." Mi-
nority leader Finis Garrett, who represented northeastern
Tennessee, echoed these sentiments when he suggested that
H. R. 13 be renamed "A bill to encourage rape." Upset that
black lynch victims but not their white rape victims were
the objects of sympathy, Georgia Democrat William C. Lank-
ford implored Negroes and white northerners to "quit howl-
ing about lynchings and begin preaching against rape." As-
well and North Carolinian Edward W. Pou announced that Negroes
themselves could end lynching by stopping black crime. Join-
ing this chorus of emotional Southern Democrats, Hersey
urged that the South be left alone to deal with rape, a "le-
gacy" of slavery's abolition and the cause of lynching.29

In presenting rape as an explanation for lynching and
as a reason for opposing Dyer's bill, Tillman delivered one
of the most emotional statements of the debates, but one
which nevertheless represented the general tone of the ora-
tions. The Dyer bill, Tillman thought, would elimina.e the
states and

... substitute for the starry banner of the Re-
public, a black flag of tyrannical centralized
government, a black flag indeed, black as melted
midnight, black as the dust on the hinges to the
gates of hell, black as the face and heart of the
rapist ..., who deflowered and killed [the
young white girl] ... 30

Even while making this statement and others like it, the
Southern Democrats would not publicly and formally accept the
racist label. Lynching was not a race question, they explained. But the construction of their presentations, and their support of California's repression of its forty-five thousand Japanese residents, emphasized their general support for racial lynching. As the frustrated Democratic representative of Harlem, Anthony Griffin, noted, "They do not believe in lynching, but . . . they do not believe in stopping it [either]." Hersey asserted that one could not conclude from the fact that men had racial prejudices that they supported lynching, but his southern allies undercut his thesis when, understanding of and sympathetic with the lynch mob's raison d'être, they explained that the Negro who got the "wrong idea of his relation to the white man" faced violent disciplining.

A few of the worst Negroes will be lynched. The Negro in the South who commits rape knows what is coming. He simply commits suicide, that is all.31

Maintaining this stance of insensitive practicality, southerners eager for the House to move on to other questions, found "so many things that worry [them] more than the occasional lynching of a criminal." Tillman could not be concerned with "the burning of an occasional ravisher," especially when congressional consideration of the "important" issues of currency, tariff, and veterans bonus had to wait on the Dyer bill. Louisiana representative John Sandlin agreed. He thought Congress should occupy itself with the important
problems of railroad rates, unemployment, and trade im-
balances.32

House antilynchers made little use of these explicit
and implied admissions of prejudice. They mentioned rape
theories only to show that lynching was not an understand-
able outburst by an enraged society. According to Represen-
tative Madden, lynchings were deliberate rather than the un-
planned results of emotional releases. Ohioan Harry Gahn
added that southerners were "raised and bred" with a lynch-
ing mentality, seeing Lynch Law as a necessary element of
race control. In addition, the antilynchers concentrated on
the high, albeit reduced, rate of lynching--sixty-one in 1920
and sixty-four in 1921 as opposed to seventy-six a decade
earlier--while seldom referring directly, as did Gahn, to
specific southern racial policies. But some legislators did
join Gahn in proclaiming that lynching was a race-related
crime. "The very word 'lynch,'" Illinois Republican Guy L.
Shaw noted in a January 5 extension of his remarks, "suggests
to the average mind 'Negro.'" Republican Richard E. Bird of
Kansas had little to say during the debates, but he pro-
nounced that lynching was "largely a question of the South
and the colored man."33

As to the charges of sectionalism, most northern Re-
publicans took the lead of Dyer, who proclaimed their "abso-
lute untruth." Lynching was "a general question . . . not
a question . . . of North or South." Yates, seeing the
broad problem of discrimination in egalitarian but white America, rejected the claim that lynching was "any more a Negro question than it is a yellow or brown or an olive-colored question" or that it was a strictly southern one. But forced by the evidence before them, these same men did admit, however reluctantly at times, that if passed the law would be most used in the South and for the protection of blacks. While both denying and admitting the sectional nature of H. R. 13's committee substitute, many of its congressional supporters reflected the attitude of Republican Simeon D. Fess, an early backer of the bill. He declared that the claim of sectionalism

. . . really is not entirely true; it may be largely so, since in certain sections are found the great number and affects one race more than another. The truth about the matter is that the law is just as applicable to Ohio as to the South. If it affects the latter more it is because its crimes are greater.

To Fess, applying "the law where the crime occurs is not sectional. If it occurs in only one place the crime is sectional--not the law." 34

Leonard S. Echols of West Virginia and Hamilton Fish, Jr., of New York, were less tactful than the Ohioan, proclaiming that the framers had designed the bill to deal with the South and had specifically framed it to protect the Negro who had "been given to understand that the Republican Party was going to do everything in its power to provide" him with equal rights and the law's protection. Fish, in particular,
carefully singled out the guilty: "... the reason for this bill and ... the sole justification for the bill, is that ... [Georgia] and a few other States ... fail to prosecute lynchers." Although others came close to Fish's politically dangerous candor, which the bill's southern critics greatly appreciated, socialist Meyer London admitted that his fellow New Yorker, a World War I captain of the Colored Infantry serving his first term in Congress, had "told more of the truth about the bill than the other people on the Republican side." That side included Majority Leader Mondell who announced that the South "sometimes punish[es] a white man for lynching a white man" but "if his victim is black or brown or yellow no law is invoked against them," a view shared by Madden. They questioned the South's alleged need for mob violence when there was "no danger of any guilty Negro cheating the ends of justice" since "... the whole machinery of law is in the hands of the whites."35

According to Finis Garrett this northern and Republican interest in the "race question" blocked discussion of the real issue, federalism under siege. He erred since congressmen never shorted that topic, notwithstanding Missourian Edgar Ellis's warning that he, at least, would not listen to arguments based on "the old pestiferous bugaboo of State rights." Southerners elaborately predicted the demise of state rights if the Dyer bill passed; antilynchers disagreed.36

The tangled race question nurtured discussions of
federalism. In fact, throughout the debates race led debaters from secondary topics to issues of constitutionality and vice versa. The more emotional and general arguments on federalism vividly pictured how the bill's invasion of the states' reserved powers, seen clearly in the proposal to allow the federal government to "tax" counties, punish common murderers, and prescribe the duties of state officials, would lead to the inevitable destruction of the states. In stripping states of their "sovereignty" and reducing them to "governmental vassalage," Congress would "out-Herod Herod" and shock "even Alexander Hamilton" with the "super-government" it created. Therefore, the defenders of "liberty and self-government" pledged to continue to protect "the last defensive ditch around the citadel of State's rights." Like the "strong and brave judges" who had once resisted the "fanaticism" that threatened to create "the 'medieval fogs' of Federal imperialism and [to destroy] the 'sunlight of human freedom' . . . ," Congress had to resist Dyer's "act to assassinate State rights; to nullify the constitutions of the several States . . . ." 37

For Montague, the former governor of Virginia who had once personally encountered a mob's fury, the equation was simple. "Emasculate the States and you have devitalized the Union." Because the state had not yet become the "mere nominal unit of the Nation" described by London or the cartographer's "vanishing traces" pictured by Burton, the lovers
of federalism would defeat the Dyer bill. The national government, whose recent trek into "the realm of paternalism" had taken it "far afield from what the [Founding] fathers intended," would not take further steps in the form of a federal antilynching statute.38

In addition, when the antilynchers, with clock-like regularity, encouraged passage of their bill despite doubts about its constitutionality, the ghost of Abraham Lincoln would appear. "'No man,'" the opposition quoted, "'who has sworn to support the Constitution can conscientiously vote for what he understands to be an unconstitutional measure, however expedient he may think it.'" Next would follow sermons about the Republicans' willingness to violate "the integrity of their oaths," to pass their responsibility on to the courts, and "lynch" the Constitution. Although the Constitution was not a "scrap of paper" that could be torn up and discarded, the antilynchers were doing just that and more, becoming like the lynchers they so loudly denounced: ". . . you each get ropes and they go after the criminal and you go after the Constitution."39

Sisson, who argued against the bill, found these arguments and the general debates on constitutional federalism to be both "illuminating and convincing"; however, few of them were. Court decisions dealing with nuances in laws and fact situations hindered more than they aided the congressmen. Legislators on both sides of the debate who claimed
expertise in constitutional law but whose studies and careers involved little constitutional interpretation strove to simplify the theories that supported their views. But neither simplicity nor logic could handle the complex Dyer bill or the "more or less confusing and misleading" court decisions and Fourteenth Amendment operational meaning. Flawed analysis of these decisions and simplistic use and misuse of the cases indicated the complex subject with which the House dealt in its attempt to protect the black from the lynch mob and the states from the central government. 40

Floor discussions seldom gave the antilynchers the opportunity to develop and explain their analyses of federal power. Lengthy speeches on tangential and emotional issues sidetracked the serious constitutional debater, time restraints forced representatives into catch-all, generalized conclusions, and interruptions from curious and calculating legislators took speakers on complicated detours. 41 However, the most serious obstacle the antilynchers faced was the bills' umbrella coverage of individuals, mobs, officers, and counties, all on a Fourteenth Amendment argument of state denial of equal protection. This broad reach required the bill's defenders to present a multiple defense based on a single theory. On the other hand, because the coverage was so broad, the bill's opponents could generalize, lumping one constitutional horror with another and creating a Pandora's box of antifederalist evils. They could also erroneously
claim, as did Texan Tom Connally on January 25, that "the bill seems to have [been] drawn . . . from so many angles [so that] perhaps some feature may hang itself on some twig of constitutional authority."\textsuperscript{42}

He erred. The bill hung on only one twig, state denial of equal protection, but the antilynchers were also incorrect when they claimed that H. R. 13 was "... the best [bill] we could [frame] in the light of all experience and official decisions . . . ." It was hardly that. The bill's critics, in their own amateurish and imperfect way, pointed out numerous flaws or weak points as established by operational meaning--and Volstead acknowledged some of them when he presented his bloc substitute.\textsuperscript{43}

Although the NAACP poured into the House "as much of our dope as they can hold" and provided legislators with research and theories,\textsuperscript{44} most congressmen demonstrated a poor grasp of basic constitutional realities. The Dyer forces were able to overlook and minimize the bill's inherent weaknesses because the legislators declared that thirty years of neglect and thousands of lynching deaths necessitated some action. So too did the argument that all crimes had remedies. As a result, they looked for and found answers in Supreme Court rulings that defined the state as the totality of its agents, in the theory that nonaction was action, in the congressional discretion to use its "police power" to take "appropriate" action. For them power to correct affir-
the condition of the offender or the place of commission. Fourth, counties were creations of the states and could not be taxed by the national government or sued by any person or entity without the state's consent.

For the Dyer bill's critics, these four constitutional theories limited the national government. So did the Tenth Amendment. In addition, the spirit of federalism permeated the Constitution, denying Congress the power to establish a municipal code, to take jurisdiction of ordinary crimes, and to destroy a valuable, workable, benign federal system.

Responding, antilynchers concentrated on explaining constitutional rights, guarantees, and responsibilities. Explaining that their proposal did not threaten the states, they used statistics on lynching and mob prosecutions, much in the fashion of the Judiciary Committee's majority, to prove that lynching existed and that the officials where it existed failed in their constitutional duty not to deny the law's equal protection. Lynching's continuation was prima facie evidence of that failure, of a state policy of denial. Systematic inability and failure to protect those targeted by lynch mobs or to punish mob murderers equalled a denial of protection. As Fess explained, states with antilynching laws that they could not enforce needed supplemental protection and the federal government could equalize protection by correcting the state's equal protection default.
mative state denial meant power to legislate against omissions by state officers. That power in turn justified punishing individuals whose mob activities led to or grew out of those omissions.

For the opposition, constitutional rejection of the Dyer bill revolved around four general arguments, only some of which the judiciary had provided. First, the Fourteenth Amendment did not prohibit individuals from denying equal protection. It forbade state denial and then only through positive action in the form of laws or continuous unequal treatment of one group. In addition, nonaction or "mere failure," as when a state failed to protect or punish individuals, was not denial. Second, when officers violated a state law, such as statutes on dereliction of duty, murder, or conspiracy, they did not represent the state but acted as individuals. When they "misrepresented" the state, they were not covered by the Fourteenth Amendment's prohibitions. But as state officers, they fell under the protection of the Eleventh Amendment. Third, Congress did not have a "police power" and could act only to carry out its expressed responsibilities, to take corrective action against derelict states, and to punish individuals if they denied federal rights of citizens. Congress could correct a state failure to guarantee, but it did not have total discretion in doing that. It could not assume the state's lawmaking and enforcement responsibilities. Only something "peculiar in the crime,
Under the Fourteenth Amendment Congress could step in as guarantor, and through the Dyer bill Congress proposed to do just that by having the federal government reach the persons who initiated the chain of denial and the officials who, regardless of motivation or impotency, allowed the mob to act freely and without hindrance. The equal protection proviso linked the mob to the state by equating the state's failure to stop mobs with state denial of equal protection. Congress would have "concurrent" powers with the states although the states would retain primary responsibility for ending lynching. If states could or would not enforce laws equally, if their officers neglected, failed, or refused to take all reasonable efforts, those officers would face federal trial, fine, and imprisonment, as would the mobs they did not stop.

... whenever a State fails to protect life, liberty, or property it is the duty of the Federal Government to see that it is done, and if it can not be done in any other way it may be done by punishing the individual at fault.47

This view of the Fourteenth Amendment drew from the sixty-year-old theories of the framers of the Reconstruction enforcement acts. They also drew from the twenty-year-old theories of Albert Pillsbury that Dyer had resurrected in 1918 and for which he finally gave the Bostonian indirect credit in a January 4, 1922, speech in the House.48 But as Storey, Wickersham, and Pillsbury already knew, the theory, however old, was tangled in semantics as well as constitutional uncertainties.
The overriding constitutional problem the theory presented and with which the House had to deal was actually two problems: Did the federal government have any jurisdiction over lynching? If it did, what type of action could Congress take against mob murder? Representatives who answered yes to the first question pointed to provisions in the original and amended Dyer bills. Section Eight of the original H. R. 13 defined lynching as a "denial . . . by [the] State of the equal protection of the laws." The second section of both the Judiciary Committee's and Volstead's proposals explained that a state's failure, neglect, or refusal to protect a person from a mob was denial "to such person [of] the equal protection of the laws of the State, . . . as is guaranteed to the citizen of the United States by its Constitution . . . ."\textsuperscript{49} Although few legislators remembered Section Two's phrasing or the colon that separated it from the succeeding sections, it was the key to the government's antilyncing power.\textsuperscript{50} One congressman who at least periodically recalled the state-denial rationale, if not the equal protection theory, was Edward Little, whose membership in the NAACP received no mention but whose distinguished career as diplomat and soldier earned the Kansas City attorney some deference. In his January 10 speech he pointed out that the bill

\[
\ldots \text{specifically provides that its terms do not become effective until the State refuses to do its duty, and the minute that point is reached the}
\]
State officer who refuses a man protection and the private individuals who take advantage of his refusal and aid him in his violation of the Constitution will be tried and punished in the Federal courts and the counties whose officers and thus guilty will be liable for such damages as are proven. 51

Two weeks later in an extension of his remarks, New York's Martin Ansorge clarified some additional points.

The failure to prosecute those who violate the State law by means of lynching by official passivity or inactivity removes the protection which the State usually affords an individual by making an interference with his liberty criminal and to the extent of removing the deterrent of committing crime thus denies or deprives the citizen of the protection which he is entitled to have from his own State. . . .

Official neglect which instead of punishing and preventing further violations of the State's peace encourages the offenders to do a similar act at another time, allows two standards of conduct to exist in the State to the detriment of the liberty of the class against which the discrimination is made. 52

Even together, however, Little's and Ansorge's explanations left questions that stirred the opposition. Did the prohibition of state denial create a federal right to equal protection? Did deny mean withholding through nonaction as well as action? If so, did the power to guarantee authorize the federal government to supersede the state in its traditional spheres, providing the services it did not, or did that power permit only the nullification of a prohibited act? Finally, what was the equal protection that so concerned the antilyncers? The bill did not define the specific problem, labelling all lynching cases a denial of equal protection.
The antilynchers sometimes attacked the states' reaction to lynching as a racially discriminatory action and sometimes as a general law enforcement problem in which the victims of one crime were not protected as well as were victims of other crimes. Dyer's forces made it clear, at least by implication, that they would not clarify the link between race and lynching or reword the bill and thus limit its scope. All groups were possible mob targets since lynching's focus on blacks was subject to change, but with no specific racial focus explicit, Dyer's general discrimination criminal statute ran into the evidence that lynching was a statistically minor crime. Opponents portrayed its targeting as an overreaction. Murders by individuals were much more frequent than were mob murders and might, therefore, logically be more deserving of federal attack. Were lynch victims denied equal protection any more than were other murder victims? The states did not catch, try, and punish all lynchers, but neither did they do so with all murderers. Yet, as the House struggle in its entirety showed, a more racially focused bill would not have had a friendlier welcome. The lynching of an occasional white and the protection of many blacks "proved" that there was no state policy to refuse protection to blacks and that lynching was a general law enforcement problem that tended to plague Negroes most often because of their greater criminal tendencies.

Therefore, the Dyer bill, deceptively complex, required
answers for equally deceptively complex questions.

. . . what is meant by denying a person within the jurisdiction of the State the equal protection of the laws?

. . . if a State denies equal protection of the laws it is amenable to the inhibition of the fourteenth amendment, but the question at once arises: What is State action?

What is the dividing line? . . . To what extent must we go before the state loses its jurisdiction and the Federal Government . . . assumes jurisdiction?56

The antilynchers provided the inevitable complex answers in a simplified form. Ansorge provided one of the clearest, most focused summaries, but even it contained ambiguities and needed expansion.

The fact that a large percentage of the victims are Negroes, and that most of the lynchings take place in the South, leads to the conclusion that there exists there an intense prejudice against Negro offenders and a failure to grant or provide them with adequate protection of the laws. . . . I maintain that the equal protection of the law means adequate protection, and where by the nature of the crime or the nature of the prisoner, reasonably adequate protection is not given, then the equal protection guaranteed by the Constitution has failed.

In another and more important respect the Negro offender has been denied the equal protection of the laws. In many States lynchings have consistently gone unpunished. They have been tolerated, if not encouraged. . . . To have punished the offenders would have prevented many subsequent lynchings. That is the very purpose of this bill—to grant protection by punishing offenders. . . . [B]y failing to bring to justice the perpetrators of lynchings, clearly have . . . [states] denied the protection guaranteed by the Constitution.57

Opponents of the Dyer bill usually rejected the entire
set of assumptions upon which Ansorge operated. They took the position that only (1) unequal or class legislation, (2) state-sanctioned inequality of enforcement, or (3) massive inequality of protection implying a state policy could violate the Fourteenth Amendment. In other words, denial had to be affirmative. "Nowhere can it be shown in any case that the scope of the amendment has been extended so as to apply to acts of mere omission on the part of the State." One or two lynchings a year was no indication of a state policy. Neither was "mere miscarriage of justice in a State court" a constitutional violation warranting a federal statute. The Constitution did not require perfection.

... the acts of its courts and governor, sheriffs, constables, and others must be so continuous and consistent ... as to amount to a rule of action, and a rule of action is law, and in such case if the same rule of action is applied in all similar cases--e.g., if all Negro prisoners were lynched, or even all charged with capital crimes, or even all charged with rape, were uniformly lynched--it might be held "State" action.58

Exceptions did not prove the rule. The occasional lynching of a white proved that lynching was not a racial crime, as did some thwarted lynchings of blacks, the southerners' racist arguments notwithstanding.

Attorney General Daugherty's rejection of a legal system where individual rights "depend[ed] upon the whim or caprice or temperamental attitude of ... public official[s]" who obeyed only those laws they chose touched on the problem that plagued the debaters, the Dyer bill's reach to states
that failed to act. Dyer and his allies saw no difference between states that could not act and those that would not enforce laws equally: nonaction resulted in the freedom to lynch; state action saved lives. The bill's critics asserted that "by no process of reasoning can it be said of an executive officer who does not act at all that his failure to act is an act 'in the name or for the State.'" The Fourteenth Amendment dealt with unequal state laws or other equally affirmative acts and did not prohibit "a mere failure, neglect, or refusal to act."

A failure to seek out and punish the mob will not give jurisdiction. If it did, then a failure to punish for any crime would give the Federal Government jurisdiction.

The theory of federal jurisdiction over state "negativity" was the ultimate in "fanatical and freak legislation," although Volstead pointed to references to the withholding of protection in Strauder v. West Virginia and the Civil Rights Cases. He also cited United States v. Hall, United States v. Blackburn, and Louisiana & Northwest Railroad Company v. Bosworth, three lower federal court decisions which specifically held that "denying includes inaction as well as action."

From different starting points but down one main road, the opponents of the Dyer bill came to the conclusion that the entire theoretical base of the proposal was flawed. The Fourteenth Amendment did not guarantee equal protection of the laws; it guaranteed that no state could deny that protec-
tion. The acts of state officers were not state denial, and states could not deny equal protection in lynchings without some statutory provision that specifically withheld protection from lynching targets in general or black lynching targets in particular. Providing the clearest example of this Catch-22 escape was Ross Collins, from 1912 to 1920 attorney general of Mississippi. In a January 17 speech that pushed questioner Philip Campbell to mounting frustration, Collins explained that even though a sheriff holding a white prisoner protected him from a mob's attack and then did not protect a black prisoner similarly threatened, the state was not denying equal protection to the Negro. The reason was simple and logical. The officer was the state when he defended his prisoner and resisted the mob. When he supported the mob by ignoring his duty to protect, he was "acting in his individual capacity." The state provided equal protection; the officer did not.

In the one case murder was committed and in the other murder was not committed, but the State did not commit the murder. Some lawbreaker did it, and lawbreakers are not agents for the State . . . . States do not operate through reckless or lawless individuals and when an officer violates the law he is not acting for the State, but as an individual.62

If this explanation were not correct, Collins explained, ". . . any officer could do anything and the State would be vulnerable to federal action," which was "the height of absurdity in construction and conclusion," added Sumners. Al-
though invested with state authority, state officers held
dual identities, so that

When an officer has his shoes shined, he is not acting as a State officer. When he goes bird hunting, he is not acting as a State officer. After his day's work is over and he goes to a moving-picture show or to a theater, he is not then acting as a State officer. He is acting as an individual. So, when an officer violates the law against gambling, when he commits a homicide, when he commits any criminal act, he is acting as a private individual and not in his official capacity.63

This simple theory defined acting under state authority as on-the-job actions that upheld state laws. On-the-job activities that violated the law but which were nevertheless performed as a result of holding state office did not come under this definition.64 Only, John McSwain explained, when discriminatory and illegal actions were "continuous and with knowledge of the State authorities, and by a legal agency" was the state involved. Misreading the explanation of removal rights in Virginia v. Rives, just as he totally misinterpreted Ex parte Virginia, McSwain also found no constitutional authority for federal jurisdiction for an officer's discrimination when state courts were available.65

Not all of the Dyer bill's opponents shared Collins's and McSwain's views. Although accused by Little of suffering from "a slight astigmatism" and of making "wild, preposterous, and sweeping assertions," Reavis accepted some of the antilynchers' theories of official culpability. He then
went beyond the idea that a state agent represented the state and held that the agent was the state when he did his duty. The agent was also the state when he failed to perform his duty. Reavis saw in the Fourteenth Amendment the link between officers and the mobs with which they conspired.66

While the theory that the derelict official "does not represent, but misrepresents, the laws of the State" assumed a large role in the House discussion, so too did the theory announced by Ex parte Virginia, Yick Wo v. Hopkins, and Home Telephone and Telegraph v. City of Los Angeles. These cases all involved unconstitutional action by state officials, and their decisions followed one line of thought. State officers "clothed with the State's authority" who deprived persons of equal protection acted as the state; discriminatory administration of neutral laws equalled "a practical denial by the State of . . . equal protection"; and state officers cannot use their authority as state agents to commit a wrong and then escape the Fourteenth's application by claiming not to be the state. "Inquiry whether the State has authorized the wrong is irrelevant."67

Not surprisingly, these cases had little appeal for Dyer's opponents. They refused to value decisions adverse to their position unless the controversy involved questions identical to those in lynching cases. Those questions absent, they ignored general rules expounded by the Court and con-
cluded that no ruling held the state responsible for the discriminatory acts of its agents. Although the Court ruled that the Fourteenth Amendment gave Congress power to enforce it against state action "however put forth, whether . . . executive, legislative or judicial," the congressmen demanded such a ruling which was based on situations more similar to those with which the antilynching bill dealt. They found it in Barney v. City of New York. Expressly distinguished to virtual insignificance in Home Telephone and Telegraph, which John R. Tyson of Alabama incorrectly dismissed as "dictum pure and simple," Barney involved agents who violated specific state guidelines. The Court in 1904 rejected a view of those agents as the state, and, the legislators concluded, so the Court in 1922 would decide if the federal government prosecuted sheriffs who violated their state-defined duties or the state's criminal code.

In addition, if, as the Supreme Court ruled on January 3, the national government was not liable for its agents' torts, how could states be liable for their agents' crimes? The state was not responsible for the torts of its officers unless agreed to be; neither was it suable by its citizens according to the Eleventh Amendment. In other words, state officers were not the state under the Fourteenth Amendment but were under the Eleventh. The legislators gave no indication they recognized the conflicts involved in their use of the latter article; their references to the Eleventh Amend-
ment were always brief and sketchy, not distinguishing between suits against states and suits against state officers. For over one hundred years the Supreme Court had dealt with these distinctions, but the legislators did not, even when they cited Ex parte Young, the 1908 case in which the Court attempted to find a middle road between the Eleventh and Fourteenth Amendments. The Young Court did not totally separate the state from its officers, but Representatives Collins, Tyson, McSwain, and Connally concluded—just as easily as they dismissed Home Telephone and Telegraph—that it had. And although the Young Court had left the state attorney general, as an individual, subject to federal jurisdiction for imposing confiscatory rates, the legislators quietly moved on to their next point. 71

The refusal of Dyer's adversaries even to consider the Fourteenth Amendment as reaching state officers was not surprising. Not until the 1940s and 1950s did the Supreme Court specifically extend federal jurisdiction under the Fourteenth and its enforcement acts to state officers whose acts were prohibited by state laws. Not until the 1960s and 1970s did the Court begin providing guidelines for distinguishing between officials' "good faith" and absolute immunities. 72 But whether the refusal in 1922 was a result of a strict constitutional construction, a narrow knowledge of constitutional law, or sheer stubbornness is a debatable point, as Representative Little discovered on January 17.
Mr. LITTLE. The State acts by its legislative, executive, and judicial authority. It can act in no other way. [If it could,] Then the State has clothed one of its agents with power to annul or evade. The Supreme Court of the United States has said that it had.

Mr. COCKRAN. Oh, the Supreme Court has said nothing of the kind.

Mr. LITTLE. It did. I am reading from it. I do not wish the gentleman to contradict me. This is from page 347 of Ex parte Virginia. I am quoting from the Supreme Court and it contradicts the gentleman from New York. . . .

Mr. COCKRAN. When a State officer is violating the law of a State, he is acting against the State, and can not be acting for it?

Mr. Montague. Certainly.

Mr. LITTLE. The Supreme Court has held otherwise. I can only read it to you. I cannot make you understand it.

Mr. COCKRAN. The gentleman is mistaken. . . .

Mr. MONTAGUE. I do not think the Supreme Court will so hold [that a policeman represents the State when he loses a prisoner to a mob, and I do not think it has heretofore so held.]

Even if the legislators had accepted the federal government's authority over state officers, problems remained. "When does the sheriff fail [to make reasonable effort] to do his duty? And . . . Who prescribes the duty of the sheriff?" Antilynchers gave little time to these questions, implying that each state would continue to determine its officers' scope of duties and responsibilities and that the federal courts that heard lynching cases would decide issues of fact just as they decided fact questions in other cases. Volstead's January 25 amendment sought to repair cracks revealed in these assumptions by providing more guidelines and, at the same time, additional evidence that the bill was corrective, applying only when the state failed in
its duty. Section Four of his bloc amendment provided for federal district court jurisdiction over the mob,

... provided it is first made to appear to such court that the officers of the State charged with the duty of prosecuting such offense under the laws of the state fail, neglect, or refuse to apprehend or punish such participants ... 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 of such failure, neglect, or refusal.75

This type of limitation and definition evoked little interest or response from the bill's critics since their search was not for effective jurisdiction over lynching but for a ban on such jurisdiction. Connally labelled Volstead's qualifier another attempt to sidestep the Fourteenth Amendment and reach individual action.

If state officers were generally beyond the reach of Congress, lynchers were even more so, according to the Dyer bill's opposition, which repeatedly explained—and always with an enthusiastic but solemn sense of revelation—that the Fourteenth Amendment restricted only states. Volstead, holding to a theory reminiscent of Judge Jones's in Riggins, explained that "... if Congress has power to carry out the purpose of this amendment it has and must have power to punish not only the officers of the State but also persons who prevent a State from performing its duty." If Congress could deal with state nonaction, it had to be able to "reach and punish" the persons against whom the states did not act. 77
Volestad's opponents, however, heartedly disagreed. They found the Fourteenth Amendment's application limited by its words and by a consistent and continuous line of decisions, beginning with United States v. Cruikshank and continuing through Ex parte Virginia, whose use in this argument demonstrated the flexibility and opportunism of the bill's opponents. In the Civil Rights Cases, United States v. Harris, and Hodges v. United States, the Supreme Court had explained to federal lawmakers that the amendment did not reach individuals. As Reavis and Hersey repeatedly oversimplified and misstated, "... the bill ... is predicated on the acts of individuals while the constitutional prohibition runs against the State," "lynching is the action of private individuals," and "... Congress can not make individual acts a Federal offense without a constitutional amendment." So certain were they and their southern allies that their interpretation of the Fourteenth Amendment was correct that they occasionally rewrote the article, the most blatant adapter being John McSwain of South Carolina whose parenthetical additions created the following:

... nor shall any State (make or enforce any law to) deprive any person of life, liberty, or property without due process of law, nor (shall any State make or enforce any law which shall) deny to any person within its jurisdiction the equal protection of the law.78

As most congressmen recognized, there were exceptions to the ban on federal jurisdiction over individuals, but those exceptions reinforced the general ban—and they con-
fused the legislators. Sumners led the opposition in pointing to a federal criminal statute, Section 5508, that already offered individuals protection from other individuals and that had survived court scrutiny. Whether they understood the link between the statute and the rights of national citizens any more than had Dyer when he read the same statute to the House in 1918 is not clear. Discussions of Cruikshank and other cases that dealt with federal rights, such as Hodges, Powell, Ex parte Siebold, United States v. Wheeler, and United States v. Logan, were incomplete. Indiana Republican Everett Sanders did remind Sumners that the federal statutes protected individuals exercising federal rights; Connally simplified Cruikshank into a holding that Congress had no authority whatsoever over "individual action in contravention of the rights of individuals." They did not distinguish between the rights of national and state citizens. McSwain held that federal rights did not include freedom from physical force, and he corrected Little when he missed the federal rights issue in Siebold, Ex parte Clark, and Newberry v. United States. Citing Siebold as "perhaps the strongest [case] in our favor," Little saw the decision as judicial ratification of the theory that "whenever the sheriff refuses to give protection to one attacked by a mob, the United States marshal 'must necessarily have power . . . '" to protect the target and arrest the officer and the mob.
McSwain and his associates were hardly more thorough and precise, often falling "asleep at the switch" as they singlemindedly focused on finding in "recent" cases the statement that referred to the federal government's lack of jurisdiction over individuals or to the sanctity of state police power. If, like Ex parte Riggins, the case dealt with how the federal government might reach individuals through the due process clause, the congressmen presented the decision as a judicial strike against the Dyer bill's equal protection base. If, as in James v. Bowman, the Supreme Court explained when Congress could reach individuals, the legislators ignored the explanations and concentrated on when Congress could not. Their search for relevant statements always successful, they moved steadily through various cases, providing appropriate brief quotations and announcing as they did that the Court had already settled the issue of the constitutionality of the Dyer bill, and "for any other view to be judicially maintained it would be necessary to overrule a line of decision extending back to 1879." 82

For example, they handled Section 5508 by employing aspects of this methodology. Sumners quoted the law in full and explained that it was "as broad in its application and in its protections against wrongs inflicted by mobs . . . as are all the rights and privileges conferred by the entire Constitution." Although neither he nor Texas Democrat Mor-
gan Sanders explained how far Section 5508 reached when it prohibited rights, they argued that with Section 5508 "in effect . . . the law today" Congress had no reason to pass the Dyer bill.\textsuperscript{83} Neither congressman commented on the fact that the Justice Department was not using Section 5508; neither did they mention Section 5510, another unused statute which acted against those persons who "under color" of law deprived persons of their federal rights.\textsuperscript{84}

While the legislators from both sides ignored Section 5510, the opponents of the bill found much to notice in Section 5519, which the Court struck down in \textit{United States v. Harris}, a lynching case. Allegedly very similar to both Section 5508 and Dyer's proposal, Section 5519 prohibited individual denial of equal protection. The similarity between Sections 5508 and 5519 apparently confused the representatives despite their claims of familiarity with \textit{Cruikshank} and \textit{Harris}. Both statutes applied to individuals; both were creations of Reconstruction; but only one, Section 5519, had been declared unconstitutional.

Sumners, whose two major speeches on constitutionality were grand defenses of state rights, pointed out that a law "identical in legislative import," "identical in principle," and "almost virtually identical [in] language" with the Dyer bill had long been rejected by the Court. In the 1883 \textit{Harris} decision, the Supreme Court rejected Section 5519's extension of federal authority over individuals. What Sum-
ners's limited vision saw when he marveled at the similarities between Section 5519 and H. R. 13 were individuals denying equal protection. But what he confused was Section 5508's application to threatened federal rights and Section 5519's to denial of equal protection. As a result, he ended an otherwise able discussion of the Cruikshank and Harris cases by placing the Section 5508 prohibition in the condemned Section 5519.85

If defining federal rights and federal jurisdiction over individuals was difficult, it was no more so than determining the national government's power over counties. The difficulty involved three subjects: the nature of a federally imposed forfeiture, the nature of the action to recover, and the nature of the county itself.

Created by state statute or constitution as an administrative agency of the state, the early twentieth century county was a quasi-corporation, unlike but not totally dissimilar in powers, responsibilities, and liabilities to municipal and private corporations. A corporate "person," it had powers to contract and sue and be sued. Its agents were subject to civil liability in state court but only when the state agreed either by direct constitutional or statutory provision or by clear implication in expressed powers. A lost judgment, paid as other audited claims, such as by a tax, could not be met by an execution on county property. As a state auxiliary, the county shared state
immunity. The federal courts during the nineteenth century, however, had set guidelines for suing state agents in their official capacity without violating the Eleventh Amendment. In addition, an Eleventh Amendment prohibition against all suits against states and their agents conflicted with the Fourteenth Amendment's application, and it was still uncertain to what extent the latter amendment took priority over the earlier constitutional provision.86

Although state statutes that created county liability for mob violence were both penalty and remedy, Dyer's forfeiture provisions exacted a set fine that the county would pay like any judgment against it. H. R. 13 did not seek merely to create civil liability, authorize damage suits, and permit collection of a variable damage award. The forfeiture would follow an action "in the name of the United States" brought by a federal district attorney "against such county for the use of the [lynching victim's] family." If the county did not pay the fine, the federal court could force it to pay by, for example, an execution on county property or the collection of a tax. A lynching was prima facie evidence of county liability; it was proof of county responsibility. The forfeiture was a federal penalty exacted on the county just as was the variable fine and prison sentence imposed on state agents after federal trial. In one case, the county agents fell under federal jurisdiction; in the other, the county itself did.
In heatedly opposing the entire concept of a county fine, the bill's opponents presented contradictory and often illogical arguments as they attempted to exempt communities from responsibility for community justice. Expressing fears that the greedy lower class would arrange "lynching bee[s]" to raise money, the congressmen also questioned why Congress would want to provide an "insurance policy" for the criminal but not for his innocent victim. Why, asked John Sandlin of Louisiana, as he suggested still another name for Dyer's proposal, should Congress enact "A bill to provide accident insurance on the lives of persons who have committed or are about to commit a crime, payable to the family of the criminal?" Arguing against penalizing "thousands of innocent people because of the guilty few" who did not worry about the law's retribution, they marveled at the idea of Congress's fining a county for being unaware of a silent secretive mob operating in it or, worst of all, merely traveling through it. Against abundant evidence to the contrary, the southern representatives explained thatlynchers did not announce their "approach by posters or newspapers or advertising or advance notice to peace officers." The legislators distorted and then discounted the theory that fines indirectly paid by a community's wealthiest and most influential citizens would lead to pressure for law enforcement and an end to sympathetic or apathetic support of lynching.
When they strayed into the area of constitutionality, the legislators turned criminal fines into taxes and then into civil damages. Congress, they said, could no more "tax" state subdivisions than states could tax national banks. And as "creatures of State legislatures," the counties could not be "sued" unless the states agreed. If the national government taxed without that permission, states would be destroyed. Penalized without due process and their "day in court," counties and states faced inevitable extinction, or so said Missourian Harry Hawes who argued that counties in which lynchings occurred violated no constitutional duty and who found no precedent in state legislation and judicial evaluations for the federal levy. 88

Finding the relevant state and federal cases on county liability that Hawes missed, Dyer, Little, and Volstead devoted only a small part of their time to the county provisions. Volstead found counties to be the state, just as his opponents did, but as such he found them within federal jurisdiction under the Fourteenth Amendment rather than outside it under the Eleventh. He also found the Seventh Amendment's prohibition against excessive fines to be sufficient guarantee against the destruction of states by federal taxation. However, the antilynchers' limited discussion of county fines in general was easily challengeable since it focused on state precedents, Section Five of the Fourteenth Amendment as an open-ended grant of discretionary power, and
the national government's right to sue states. These bases
drew condescending critiques. In particular, Hersey found
fault with Dyer's overall weak defense of the county provi-
sions, commenting pointedly on the Missourian's willingness
to cite laws enacted under state powers to justify federal
statutes. 89

Hersey's rejection of Congress's discretionary power as
authority to "enforce" the Fourteenth Amendment through coun-
ty fines was part of a general rejection of federal intrusion
into state domains. That repudication grew from the idea
that Congress's power was strictly limited by the Constitution,
particularly by the Tenth Amendment. Congress had no general
police power. As in other aspects of the debates, a difference
over definition hampered substantive decision making regard-
ing federal authority. Courts and legislators for years had
loosely used the term "police power" when referring to feder-
al exercise of expressed powers. 30 However, to some observers
in 1922 that label implied the existence of general federal
powers that made inevitable the national government's usurpa-
tion of the state police powers, which the courts guarded in
a long line of decisions, including the Slaughterhouse case
and Barbier v. Connolly. According to these protesting ob-
servers, the first of these cases in particular showed that
even in the emotional Reconstruction period, when Congress
and the Supreme Court accepted the importance of a strong
national government, state police powers remained constitu-
tionally sacred. The *Barbier* court in 1885 polished the halo.91

While Burton quoted Justices Marshall, Chase, Bradley, and Brewer on the inherent power of all national governments to execute independently and freely their expressed powers, Ansorge, among others, innocently labelled federal exercise of constitutionally delegated powers a police power. According to Volstead, "The Federal Government has no general police powers, but it exercises all sorts of police powers under its express powers."92 His opponents, including McSwain, Montague, Sumners, and Collins, joined the Court of *Keller v. United States* (1909)93 in rejecting that label and the very idea that Congress could use delegated powers in "police" fashion to "create a mode of municipal laws for the regulation of private rights" rather than "to provide modes of re-

dress against the operation of State laws and the action of State officers . . . ."94

This disagreement was more than a debate over definitions and word choice since it involved determining the exact extent to which congressional acts were "necessary and proper" and "appropriate" implementations of express powers. It also involved distinguishing between corrective and primary legislation. "A denial of power to the States [as in Section One of the Fourteenth Amendment] is surely not a donation of the same power to the Congress," McSwain had decided "in the calm of . . . [his] study." Power to enforce a pro-
hibition of denial, only meant power to correct, "to provide modes of relief." The Civil Rights Cases, United States v. Harris, and Cruikshank set the rules for enforcing the Fourteenth Amendment. 95

For the antilynchers the argument was simple. If, for example, Congress under its interstate commerce power could regulate traffic in prostitutes or the quality of meats and drugs, it could under its Fourteenth Amendment obligation see that states did not deny by acting against private discrimination. The Court in Ex parte Virginia provided the explanation: "Whatever legislation is appropriate to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." In Virginia v. Rives the Court affirmed Congress's inherent and constitutional obligation to act at its "discretion." In his circuit court opinion in the Civil Rights Cases, Justice Bradley explained that Congress's enforcement of obligations "depend[ed] upon the character of the right inferred" and might take the form of regulations, penalties, and judicial actions. 96

Relying on these cases and the conclusions Goff drew from them, Dyer explained that "within the protection thus conferred, the Congress has the right to exercise its discretion as to what laws or what means can best accomplish the desired end." Ansorge's view that the bill was "founded upon a legis-
lative finding by Congress" that required it to fill the void
of authority by an "appropriate, useful . . . efficient,"
and "broad" measure had its vigorous critics. First of all,
these opponents explained, Congress had rejected a Fourteenth
Amendment that was a positive grant of power to Congress.
Second, Congress's interstate commerce power had its limits,
and so did its Fourteenth Amendment power but more so since
it was "a negative or prohibitive power" while the commerce
power was "an affirmative exclusive grant." The words of the
amendment said it all:

"State" means a State, "Deny" means an affirm-
ative act, or one that can be inferred from a
course of conduct. "The equal protection of the
laws" refers to the equality of all persons be-
fore the law.97

His opponents charged that Dyer changed all definitions
so that "inaction becomes action, failure becomes accomplish-
ment, absence becomes presence, innocence becomes guilt."
If the amendment did not limit federal power under it, Dyer's
definition of state denial and his broad view of the "ap-
propriate" power available to deal with that denial portended
federal involvement in virtually every state problem. If
prohibition of denial meant a requirement to provide, if
power to guarantee was a power to reach those whom the states
would not touch, congressmen had cause for concern. These
theories, they asserted, were ominous precedents that seemed
to be the "'open sesame'" for future extension of federal author-
ity into all areas of local affairs. Dyer's critics found a
congressional power to determine the limits of national authority, particularly if without sufficient investigation into the need for action, to be illogical as well as unconstitutional. In the case of lynching and an antilynching bill, once these critics rejected the Judiciary Committee's investigation as superficial and its report as little more than a regurgitation of black propaganda, there was little left with which to justify the sweeping reach of the Dyer bill as a constitutional or discrete exercise of power.98

Once the equal protection base and the broad definition disappeared, the "logical consequences" became clear. If Congress could act against lynching by five persons, it could act against any crime by any number of people, creating a "municipal code." If it could act when states did not enforce laws, it could act when they enacted no laws whatsoever or when Congress judged that a state legislature enacted insufficient laws. The apparently random selection of the number five simply added to the arbitrary nature of the Dyer bill.99 As Aswell noted sarcastically, "This bill provides that if you want to lynch a Negro, send four men—five, because five is a mob." However, even reducing the number to the old common law figure of three, which Volstead did in his substitute, did not make a substantial change in the bill's potential destructiveness. A federal reach of either five or three implied to many legislators a federal reach of one and a "code of laws for the enforcement and vindication of all rights of life, li-
berty, and property." If Congress had the police power to punish five men for murder, to define the duties of state officers, and to fine state subdivisions, it had the power to punish as few as one for committing a crime against property and to arrest and imprison a jury for acquitting an accused criminal or the governor of a state for allowing crime to exist in the first place. Images were vivid. 100

Gentlemen, draw the picture in your mind of a United States marshal putting shackles on the arms of the governor and pulling him out of the mansion of the people of the State and dragging him off to a Federal tribunal, to answer for something that he failed to do with reference to the protection of the people who elected him to office!

If the Federal Government assumes the right to punish an officer . . . 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. 101

Noting the theories of Moores and particularly of Goff because of his "expert" status, Dyer's opponents found that passage of H. R. 13 would flood states with "a host of new Federal judges" and "a swarm of Federal officers to punish every crime known to the law." When his opponents insisted on confusing the crime of murder with constitutional wrongdoing, Burton "call[ed] attention to the vital fact that there is a wide difference between lynching and an ordinary crime of murder committed by an individual for motives of hate, revenge, or in the commission of the crime of burglary." On
January 25, Ansorge further explained that "scattered, isolated, and unconnected individual offenses" were not within the scope of the antilynchers' bill. Nevertheless, while the antilynchers insisted upon the more majestic labels of "anarchy" and "defiance of the law," the anti-bill forces consistently referred to lynching as "mere" murder, a "form of homicide" prohibited in all states either by specific antilynching statutes or by more general murder and conspiracy laws. These statutes supplemented the theory that a denial of equal protection could not result when states had statutes against an evil. And it was not merely a case of demanding that a state be responsible for what it said and not for what it did: lynching rates were lower than they had been twenty or even ten years earlier.  

Those who asserted that Congress had a power to act against lynching frequently referred to the similarities between the Volstead Act and the Dyer proposal. However, reference to the prohibition enforcement act led to speedy reminders of the Eighteenth Amendment and arguments that the Fourteenth Amendment did not authorize the Dyer bill, that, in fact, it denied Congress the legislative flexibility its sponsors claimed. Congress could not use the amendment to reach a state crime merely by labelling it a federal offense; the nation needed to make lynching, as it had the manufacture, sale, and consumption of alcohol, a specific constitutional offense.  

In rejecting this view, Madden wandered briefly into
humanitarian theories and wondered why states would willingly share political power over prohibition but not over the saving of lives. As New York Democrat W. Burke Cockran colorfully phrased the apparent contradiction, "surely if the Federal Government can step in to take a mug of wholesome beer from the hand of a workingman, it can step in to take a murderous halter from the hands of a lynchers." Accepting the humanitarian consideration as legitimate, Montague nevertheless rejected Madden's and Cockran's reasoning. Lives were at stake, but unconstitutional legislation was not the answer. Sumners, who acknowledged his support for the Volstead Act, agreed that an antilynching amendment was needed. Frank Mondell, however, doubted both Sumners's sincerity and his constitutional concern. The state righter, he predicted, "would fight even more vigorously a Constitutional amendment . . . than he is fighting the bill . . . ." 104

The search for antilynching jurisdiction in the Fourteenth Amendment led some congressmen, who "chloroform[ed] . . . doubts and stretch[ed] . . . convictions against Federal invasion of State rights . . . ," to look to precedents other than the Volstead Act. All around them, as Burton found, the national government was engaged in activities once forbidden or thought forbidden by the Constitution. From them, Knight, the Ohio Republican, concluded that ". . . if the Constitution can be stretched to protect the profits of child labor and to safeguard the integrity of painted but-
ter, surely we can risk a little more [to attack lynching] . . . ." Socialist Meyer London agreed since if the federal government could "enter every home . . . and conscript every young man" it could legislate against criminal who deprived persons of their rights. But these examples provided little precedent as the legislators knew. In 1918 the Supreme Court overturned the 1916 federal child labor law based on Congress's power to regulate interstate commerce. Congress had responded in 1919 by enacting a similar statute based on its power to tax. Republican Cassius C. Dowell of Des Moines, Iowa, used this second effort to explain constitutional authority to his colleagues.

You will recall a few years ago when this same argument [of unconstitutionality] was directed with equal force against the [second] national child labor bill then under consideration in the House. The bill passed the House, however, and became law of the land, and has been of great benefit to our people. At the time this bill was uncercifully denounced as unconstitutional and interfering with the rights of the State. The Constitutional question involved in that bill was the same as the question involved in the Dyer antilynching bill. 103

If so, Dowell's position was seriously undermined four months later when the Supreme Court, in Bailey v. Drexel Furniture Company, held that the second child labor law was also a violation of the Tenth Amendment, an improper regulation hidden under the guise of a tax. 106

With the equal protection guarantees of Section One and Five of the Fourteenth Amendment an unclear source of federal
antilynching powers, legislators occasionally bolstered their arguments with references to the due process clause in both the Fifth and Fourteenth Amendments. Comments that lynching was a deprivation of due process were logical but not judicially supportable in 1922. The Supreme Court was still a year away from changing its view of due process in mob-dominated trials and not until decades later would it apply the concept of due process to pre-trial police matters. Volstead believed that the Court had already demonstrated a willingness to expand the due process definition, but he did not discuss the Court's implicit rejection of the "direct interest" due process theories in Ex parte Riggins. 107

Wells Goodykoontz, echoing Storey, his adviser, concentrated on the due process argument and lamented on January 10 that if the Fifth and Sixth Amendments, particularly the former, did not apply to lynching the "entire Constitution [was] a farce, a mere snare, and a delusion." Anthony Griffin, feeling that the Fourteenth did not permit federal action against lynchers, did find such permission in a combination of the Fifth and Sixth Amendments, in such rights as grand jury indictment, fair and speedy trial by an impartial jury, and counsel. 108 Dyer also noted the guarantees of the Fifth Amendment that Storey suggested, but few other legislators mentioned either that article or due process guarantees, at least directly, whether because of the explicit equal protection base of the bill or the Bill of Rights's accepted limited reach. Burton
observed that the Fifth had "a bearing" on the bill but that it could not be used as a constitutional base. Republican Nicholas Sinnott of Oregon saw no foundation in due process guarantees, and to make his point he placed in the Congressional Record not only Attorney General Charles J. Bonaparte's brief in United States v. Powell, which by implication rejected Riggins, but also the circuit court's counter-proposal, rejected without comment by the high court. But whether Sinnott or those others who looked to Riggins, Hodges, and Powell actually understood the direct interest due process theory is not clear from the debates. The focus there was the mere fact of judicial rejection of federal jurisdiction over individuals and not the why's of that repudiation. Sumners, for one, found the Riggins theory of "remarkable similarity" to that underlying the Dyer bill and viewed the Powell verdict as a one-issue decision in which the Court held against any federal jurisdiction when mobs took prisoners from custody and killed them.109

Beyond the Fifth Amendment and due process theory were other theoretical bases for federal antilynching power. Volestead suggested viewing the mob as having usurped the function of the state. A year before, his fellow Republican David G. Classon of Wisconsin, a member of the Judiciary Committee, had proposed using Article IV, Section 4 of the Constitution, the guarantee clause. Classon speculated that since Congress could help states requesting aid against domestic insurrection it
"should have a right to prevent a condition which will give rise to such violence." McSwain countered with a theory that this clause was a limitation on federal action. Only when a state was no longer "republican in form" could the federal government "step in and constitutionally take charge of the administration of justice within a State . . . ."\textsuperscript{110}

The constitutional base most praised by Pillsbury, the national government's responsibility for protecting the lives of its citizens, was never a major consideration in the House. And, unlike Pillsbury, the legislators did not even note the Dyer bill's attempt to provide protection for all persons rather than all citizens. Goodykoontz did see the obligation owed by the nation to its citizens, but he saw it as one owed by both state and nation. If the state did not meet its obligation and provide protection, then the national government had to meet its obligation to safeguard "the life of . . . [a] citizen at home as well as on the high seas or in a foreign country, and to vindicate his right whenever and wherever he is, and to challenge an assault upon it whether it be in a State in the North or in a State in the South." M. Clyde Kelly and Griffin also indicated they saw the responsibility, but that duty never was an integral factor in the debates as the opposition's consideration of it began and ended with a discussion of federal police power and state power over life, liberty, and property. Brief references to \textit{Slaughterhouse}'s distinction between state and national citizenship and the ob-
ligations owed by state and national government usually con-
cluded with uncategorical statements, such as,

If it is within the domain of national legisla-
tion to protect persons, then it is within the
domain of national legislation to protect pro-
erty. What have you left then in the States?
Nothing.111

Likewise, the House gave only slight attention to the
theory of equal rights in return for equal responsibilities.
Ohioan Israel M. Foster explained the theory he shared with
Fish, Dyer, and Madden.

... under the American spirit of fair play the
colored man should not be charged with the equal
burdens and the equal responsibilities of citi-
zenship in the time of war and at the same time
denied his guaranty of an equal protection of the
laws.112

The Thirteenth Amendment received little attention from
a Congress preoccupied with the Fourteenth Amendment. Goody-
koontz presented the article as one of several constitutional
provisions "that undertake to safeguard life and liberty and
freedom." Giving the amendment more attention in an exten-
sion of his remarks, Ansorge noted that with the Fourteenth
Amendment, the Thirteenth was "intended to safeguard the civil,
political, and even social rights of the Negro . . . ." Just
how, he explained, was apparent in the 1866 Freedman's Bureau
Bill and in the Civil Rights Act of 1866. Under the anti-
slavery amendment Congress could create "primary and positive
laws" to punish "any man whether acting as an officer of a
State government or its subdivisions or merely as a private
individual for . . . [attempting] to renew slavery or anything
that approximated it." So too could the federal government deal with state "negativity . . . in enforcing the law and treating all persons . . . fairly and without discrimination." Ansorge, revealing a rare grasp of constitutional issues, noted that Hodges and Powell had limited the usefulness of the Thirteenth Amendment. "[I]nterference to contract or holding property was not . . . an indicia of slavery to be within the Federal power."\(^{113}\)

* * * *

House passage of the Dyer bill was a major accomplishment but one calling for limited celebration since success in the House would be little more than a moral victory if Senate passage did not follow. In addition, there was a lingering after-taste of what Little labelled "a lot of pretty good oratory and pretty bad law about this constitutional question."\(^{114}\) Too often emotionalism and hope rather than realism determined the direction of what observers called "constitutional nothings" and "legalistic quibbling."\(^{115}\) Lawmakers with limited knowledge of constitutional realities turned to "friend[s]" for solutions to their dilemmas or mouthed pat phrases and made cliches out of disembodied judicial one-lines.\(^{116}\) Legislators over-simplified and generalized as they sought to discuss every probability and possibility, relevancy and tangential concern. "The world, the
flesh, and the devil" all received attention when the representatives opened the Pandora's boxes which both lynching and antilynching presented the nation.\textsuperscript{117}

Yet a nation, black and white, facing economic and labor unrest, hardly became aroused by a bill that directly affected so few of them and whose long-term implications were too distant and too hypothetical for alarm. The Dyer bill made the back page, as did most of the sixty-three lynchings in 1921. For the NAACP the victory itself was the primary concern. Apathetic legislators had responded correctly to the horrors of lynching and to the growing national importance of black votes. Whether or not the House had solved the constitutional dilemma did not matter. The future was in the Senate. As Storey explained to Dyer,

\begin{quote}
I think the contest in the House was in itself of great value to the cause for it helped to clarify public opinion. It indicated to the southern representatives that we are in earnest.\textsuperscript{118}
\end{quote}

For the NAACP, another campaign; from the House, only a sigh of relief that its difficult job was over.
NOTES

1Congressional Record, 67 Cong., 2 Sess., 1301, 1302 (Yates, Kelly, January 17, 1922). All references to the Congressional Record are to the Sixty-seventh Congress, second session, unless otherwise noted. All references to December dates are to December 1921; all references to January dates are to January 1922.

2Ibid., 1345 (Chalmers, December 19).

3According to Johnson, "Dyer himself is nervous. The others are willing to go to bat now, Dyer does not want to take any chances. He wants to play absolutely safe . . . ." Several weeks earlier Dyer had informed Johnson that he had "no doubt" the bill would pass. He also explained, however, that it would not do so before the first session ended on November 23. Johnson to Walter White, [December 1921], Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (Washington, D. C.), Group I, Series C, Box 76; Dyer to Johnson, November 9, 1921, ibid., Box 242. See also "Report of the Secretary," November 20, 1921, ibid. (Hereinafter all references to this collection are to NAACP Records.) The board of the NAACP voted in June that Johnson "spend as much time in Washington as possible during the present session . . . ." Minutes of the Board of Directors, June 13, 1921, ibid., Series C, Box 1 (microfilm reel 1). House Resolution 218 can be found in Congressional Record, 67 Cong., 1 Sess., 7060, 7063 (October 31, 1921).

4Eugene Levy, James Weldon Johnson: Black Leader, Black Voice (Chicago: University of Chicago Press, 1973), 244-45; Minutes of the Board of Directors, December 12, 1921, NAACP Records, Group I, Series A, Box 15. Johnson called Madden "long . . . a friend of the Negro and . . . now one of the most powerful figures in Congress . . . ." Johnson also talked with Representatives Nicholas Longworth of Ohio and William Rodenberg of East St. Louis and remained in "continuous correspondence" with Dyer and these House leaders. "Report of the Secretary," November 10, 1921, ibid. In June Johnson reported that Madden had agreed to "exert all his strength" in favor of the bill. "Report of the Secretary," June 9, 1921, ibid.
"Memorandum Re the Secretary's Trip to Washington December 12-21," NAACP Records, Group I, Series C, Box 338; White to Johnson, January 5, 1922, Box 77; Washington Post, December 19, 1921, Box 247; Levy, James Weldon Johnson, 246. The New York Times of December 21, 1921, reported that under the direction of Finis Garrett the Democrats forced Mondell and the Republicans into so "inextricable [a] position" that within two hours "... Mondell walked over to the Democratic leader and entered into negotiations." Ten minutes later, according to one rumor, "... a telephone message from the Democratic cloakroom to some unknown spot announced that "Mr. Garrett says it's all arranged. Tell the boys to come on over." Garrett had organized his party in an exodus from the chamber when he obtained a quorum vote, which he did not want. The vote showed 174 Republicans and four Democrats present. For the next vote "... Mr. Garrett stood in the open door of the Democratic cloakroom, smoking a cigar and surveying the field. The Democratic side was unoccupied, except that Representatives Sumners and Tillman alternated in standing on guard."
As reported by the New York Sun, December 27, 1921, Mondell used other business to break into the Dyer bill debate to prevent a filibuster from delaying action on appropriations bills. For example, on January 5, the House considered the Treasury appropriations bill; on January 4 the Democrats had forced the House into three hours of roll calls. After January 10 the Dyer bill was delayed by the Post Office appropriations bill. On January 24 Mondell met with Republican leaders; they decided to continue the bill on January 25 whether the appropriations bill had gone through or not. For other accounts, see New York World and New York Herald for January 26, 1921. Clippings from each of these newspapers are in NAACP Records, Group I, Series C, Box 248.

Congressional Record, 1744-45 (January 25).

Ibid.

Ibid.

Ibid., 1795-96 (January 26); NAACP press release, October 13, 1922, NAACP Records, Group I, Series C, Box 245. Eight Democrats who voted yes were Guy Campbell (Kansas), William Burke Cockran (New York), Thomas H. Cullen (New York), James A. Gallivan (Massachusetts), Ben Johnson (Kentucky), James M. Mead (New York), Charles F. O'Brien (New Jersey), and John W. Rainey (Illinois). The seventeen Republicans who voted no were Henry E. Barbour (California), Joe Brown (Tennessee), Wynne F. Clouse (Tennessee), Manuel Herrick (Oklahoma), Ira Hersey (Maine), Evan J. Jones (Pennsylvania), Patrick Kelley (Michigan), Caleb R. Layton (Delaware), Robert Luce (Massachusetts), John I. Nolan (California), Richard Wayne Parker (New Jersey), Alice M. Robertson (Oklahoma), Nicholas J. Sinnott (Oregon), C. Bascom Slep (Virginia), and William H. Stafford (Wisconsin). The four Republicans who voted "present" were James W. Dunbar (Indiana), Robert E. Evans (Nebraska), John W. Langley (Kentucky), and John Reber (Pennsylvania). Of those not voting, eighteen were Democrats and fifty-six were Republicans.

Congressional Record, 545 (Astell, December 19), 1010 (Tollman, January 10).

Ibid., 1774 (Sumners, January 26), 1429 (Sanders, January 19).

Ibid., 1378 (Bell, January 18). See views of Byrnes, 543 (December 19); Astell, 546 (December 19); Hersey, 1019 (January 10). Alone of the major parties, the Republican
took a stand on federal antilynching action in 1920: "We urge Congress to consider the most effective means to end lynching in this country which continues to be a terrible blot on our American civilization." The Socialists in 1920, however, did demand congressional enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendments "with reference to the Negroes" and "effective federal legislation . . . to secure . . . full civil, political, industrial and educational rights." Kirk H. Porter and Donald B. Johnson, comps., National Party Platforms, 1840-1964 (Urbana: University of Illinois Press, 1964), 168-82.

15 Congressional Record, 549 (Pou, December), 1013 (Tillman, January 10), 1715 (Linthicum, January 25), 1787 (Blanton, January 26), 468 (Buchanan, December 17). See views of Montague, 1306 (January 17); Drewry, 1306-7 (January 17); Bell, 1378 (January 18); Rankin, 1426 (January 19); Upshaw, 1548 (January 21); Lowrey, 1713 (January 25). Mississippi Representative Ross Collins suggested a "hidden purpose" of the bill was obtaining a tool for use against labor unions. 1135 (January 12). See also Pillsbury to Storey, January 27, 1922, Moorfield Storey Papers, Library of Congress, Manuscript Division, Box 2, for Republicans' partisan motives aimed at winning black votes; White to Storey, January 11, 1922, NAACP Records, Group I, Series C, Box 77, for White's admission that the desire for black votes likely "play[ed] a large part" in the House action.

16 Congressional Record, 1376 (Larsen, January 18), 543 (Byrnes, December 19), 1550 (Upshaw, January 21), 546 (Aswell, December 19), 1550 (Upshaw, January 21). See views of Drewry, 1706 (January 25); Hersey, 1020, A13364 (January 10, 24); Buchanan, 467 (December 17); Miller, 1360 (January 18); Driver, 1706 (January 25); Hawes, 1708 (January 25). Sumners pointed to troublemakers as being "a lot of professional agitators and white negroettes." 1783 (January 26). Hersey felt that the idea of equal protection's denial came from Tuskegee and NAACP propaganda. The Judiciary Committee had no other evidence than what these sources provided. 1371 (January 18). Lankford referred to "improper propaganda." 1551 (January 21). Upshaw believed blacks were "misled by the inflaming headlines and incendiary articles" in black papers to think that the bill would help them. 1551 (January 21). Sandlin attacked "ignorant or vicious agitators" who spread ideas of social equality. 1358 (January 18). The St. Louis Dispatch credited Dyer's desire for black votes for his interest in promoting the antilynching bill. Approximately 31 percent of St. Louis's voters were Negro by 1920. "Would the Dyer Bill Halt Lynching?" Literary Digest, June 10, 1922, 14; Levy, James Weldon Johnson, 239. See also White
to Hersey, January 13, 1922, NAACP Records, Group I, Series C, Box 76, White file.

17 Charles L. Knight to Johnson, February 1, 1922, NAACP Records, Group I, Series C, Box 76; White to Harold B. Allen, October 24, 1921 (copy), ibid., Box 77; Crisis, 23 (February 1922), 167, 22 (September 1921), 212; Levy, James Weldon Johnson, 258. The Chicago Defender of October 21, 1922, listed Democrats who voted for the bill in the House, information taken from an NAACP news release. On February 4, 1922, the paper listed Republicans voting against the bill. After the 1922 elections, the NAACP took credit for the defeat of several congressmen, including Delaware Republican Caleb Layton who voted against H. R. 13. Johnson reported that Layton's vote was the sole cause of his defeat. Since absentee ballots at the January 26 balloting also incurred the wrath of the NAACP, they were targets in the election.

18 Johnson to Storey, February 4, 1922, Storey Papers, Box 2; Johnson to New Jersey papers, press release, March 22, 1922, sent at request of William B. Brandon to Johnson, March 22, because of Brandon's primary battle against Richard W. Parker. NAACP Records, Group I, Series C, Box 244; Allan H. Spear, Black Chicago: The Making of a Negro Ghetto (Chicago: University of Chicago Press, 1967), 124, 199; Levy, James Weldon Johnson, 259; James Weldon Johnson, "Lynching--America's Disgrace," Current History, 19 (January 1924), 596-601; Crisis, 23 (January 1922), 106. Johnson reported that he "used a strategic move [in early January] by impressing upon Mr. Madden that colored voters were watching him and that of a statement which appeared in the New York papers on January 1 stating that he was going to give the right of way to the Appropriations Bill . . . ." "Report of the Secretary," January 6, 1922, NAACP Records, Group I, Series C, Box 338.

19 Congressional Record, 1020, 1019 (Hersey, January 10). See view of Reavis, 1286 (January 17); "Report of the Secretary," January 6, 1922, NAACP Records, Group I, Series C, Box 244; White to Storey, January 12, 1922; White to Hersey, January 13, 1922 (copy), ibid., Box 76. See also Burton to White, December 20, 1921, ibid. The reference to petty politics provided an ironic counterpoint to White's reference in the same letter to Hersey's belief that the bill was strictly partisan. Although "this factor [probably] does play a large part," White believed that a "broader conception of the sacredness of human life than Mr. Hersey possesses" was a greater factor.
20. White to Storey, January 11, 1922 (copy), NAACP Records, Group I, Series C, Box 77. White also took action against Reavis. He arranged for the NAACP branches in Lincoln, Beatrice, and Omaha, Nebraska, to "bring enough pressure, together with the surrounding towns with which they get in touch, to swing the heavy club on him." White to Johnson, January 6, 1922 (copy), ibid.

21. White to Johnson, January 11, 1922 (copy), ibid.; Congressional Record, 1789, 1020, 1019 (Hersey, January 26, 10).

22. Congressional Record, 1789 (Griffin, January 25), 1363 (Woods, January 18), 1302 (Yates, January 17). See views of Ellis, 1348-49 (January 18); Sanders, 1295 (January 17); Vaile, 1031 (January 10); Echols, A13376 (January 26). "What about the votes which the Southern Democrats expect to gain by the kind of opposition they are bringing against the measure? At least it can be said that the Republicans, if playing politics, are doing so on the side of law and order, common justice and common decency." Johnson to Mondell, January 26, 1922 (copy), NAACP Records, Group I, Series C, Box 76.

23. Congressional Record, 1703 (Driver, January 25), 789 (Dyer, January 4). See views of Tillman, 1014 (January 10); Reavis, 1289 (January 17); Larsen, 543 (December 19); Gilbert, A14456 (January 18); Kelly, 1032 (January 10). There was another side to the nonapplication of the bill to the North. The law, Hersey said, would draw federal marshals and other officers to the South and free blacks in urban areas "to hide up alleys and in crowded buildings and shoot up innocent men, women, and children . . . ." 1019 (January 10). Crisis, 23 (March 1922), 228, noted that there would be "no [chance of] repetition of the Tulsa riot" if the bill passed.

24. Congressional Record, 1783 (Sumners, January 26).

25. Ibid., 1024 (Hersey, January 10), 1776-77 (Sumners, January 26). See views of Aswell, 546 (December 19); Tillman, 1010 (January 10); Hersey, 1024 (January 10); Woods, 1362 (January 18); Moore, 1713 (January 25).

26. Ibid., 1293 (Hawes, January 17), 1378-79 (Brown, January 18), 1721 (Sisson, January 25). See views of Byrnes, 544 (December 19); Aswell, 545-46 (December 19); Stevenson, 1312 (January 17); Sandlin, 1358 (January 18); Jeffers, 1375 (January 18); Bell, 1378 (January 18); Hawes, 1290 (January 19); Rankin, 1426 (January 19); Sumners, 1530 (January 21); Larsen, A13369-70 (January 21).
27 Ibid., 459 (Buchanan, December 17), 1134 (Collins, January 12), 1783 (Sumners, January 26), 1706 (Driver, January 25), 1713 (Lowrey, January 25), A13356 (Gilbert, January 18), 1703 (Brand, January 25). See views of Woods, 1365 (January 18); Lankford, 1367-68 (January 18); Lea, 1367 (January 18); Hawes, 1291 (January 17). The most extreme racist speeches were made by Lowrey, 1713-14 (January 25), Rankin, 1426-28 (January 19), and Gilbert, A13355-57 (January 18).

28 Ibid., 1134 (Collins, January 12), 1743 (Sumners, January 25).

29 Ibid., 1427 (Rankin, January 19), 468 (Buchanan, December 17), 1367 (Tillman, January 18), 1721 (Sisson, January 18), 548 (Garrett, December 19), 1371 (Lankford, January 18), 1024 (Hersey, January 10), 546 (Aswell, December 19), 549 (Pou, December 19). See views of Buchanan, 458-59 (December 17); Ward, 1299 (January 17); Upshaw, 1549 (January 21); Quin, 1789 (January 26). When the southerners began to use rape arguments, Johnson "left the gallery and called Mr. Dyer from the floor and gave him certain figures to rebutt [sic] the rape charge." John- son also got the NAACP to send the legislators "complete statistics" on the relation of rape to lynching. "In the next morning [December 21] these complete figures were on the desks of the leaders." "Report of the Secretary," January 6, 1922, NAACP Records, Group I, Series C, Box 338.

30 Congressional Record, 1014 (Tillman, January 10). See also Lankford for an emotional diatribe, 1367-71 (January 18).

31 Ibid., 1717, 1716 (Griffin, January 25), A13365 (Hersey, January 24), 1371, 1369 (Lankford, January 18). See views of Stevenson, 1312 (January 17); Jeffers, 1375 (January 18).

32 Ibid., 1369 (Lankford, January 18), 1013, 1338, 1011 (Tillman, January 10, 18, 13), 1358 (Sandlin, January 18).

33 Ibid., 1346 (Gahn, January 18), A13270 (Shaw, January 5), 1311 (Bird, January 17). See views of Campbell, 553-54 (December 19); Dyer, 789 (January 4); Madden, 1009 (January 10); Mondell, 1699 (January 25).

34 Ibid., 787 (Dyer, January 4), 1285 (Burton, January 17), 1302 (Yates, January 17), 542-43 (Fess, December 19), 1008 (Madden, January 10).
35 Ibid., 1360, 1359 (Fish, January 18), 1365 (London, January 18), 1700 (Mondell, January 25), 1032 (Kelly, January 10). See views of Dyer, 788 (January 4); Sandlin, 1428 (January 19); Driver, 1703 (January 25); Bankhead, 1791 (January 26); Ansorge, A13374 (January 26).

36 Ibid., 1731 (Garrett, January 25), 1349 (Ellis, January 18).

37 Ibid., 1288 (Reavis, January 17), 800, 1775 (Sumners, January 4, 26), 1300 (Lanham, January 17), 1722 (Knight, January 25), 1715 (Linthicum, January 25), 549, 1528 (McSwain, December 19, January 21), 1376 (Larsen, January 18). See views of Ward, 1298 (January 17); Buchanan, 1466 (January 17); Woods, 1364 (January 18).

38 Ibid., 1306 (Montague, January 17), 1365 (London, January 18), 1277 (Burton, January 17), A13375 (Appleby, January 26).

39 Ibid., for various uses of Abraham Lincoln by the debaters: 1303 (Yates, January 17), A13269 (Shaw, January 5), 1030 (Taylor, January 10), A13374 (Ansorge, January 26), 1529 (McSwain, January 21), 1025 (Little, January 10), 1719 (Hardy, January 25), 1776 (Sumners, January 26), 1713 (Hardy, January 25), 1775 (Sumners, January 26). See views of Hersey, 1020 (January 10); Clouse, 1787 (January 26). When Sumners first attacked the "lynching" of the Constitution, he said, "... you both get ropes and they go after a nigger and you go after the Constitution." 800 (January 25, emphasis added). Garrett explained, "... I did not take an oath to support the Attorney General of the United States; I took an oath to support the Constitution of the United States." 1732 (January 25). Sumners added that even without adverse court decisions, Congress had to vote against the bill because "the Supreme Court is not the keeper of the congressional conscience." 801 (January 4).

40 Ibid., 1718 (Sisson, January 25). Confusion regarding constitutional interpretation led to some tense exchanges and references. See Collins against Campbell, Little against Reavis, McSwain against Burton, and Hersey against both Little and Burton. 1139 (January 12), 1287 (January 17), A13364 (January 24), 1732 (January 25).

41 Ibid., 1371 (Sinnott, January 18). Much simplification came with the emphasis on early cases. "More of these cases have been decided in the One hundred United States Reports than in any other," Little declared on January 10 (1025). Implied and direct claims that the bill's opponents had considered "every case passed upon by the Supreme Court . . .

that deals directly or indirectly with this subject" were not supported by the debates. 1137 (Collins, January 12).

42 Ibid., 1728 (Connally, January 25), 1700 (Mondell, January 25), 1744 (Volstead, January 25). Johnson com-
plained that he had yet, on January 6, to hear "a certain point constantly raised by the opposition squarely met."
Johnson to Storey, January 6, 1922, Storey Papers, Box 2.

43 Storey to Wells Goodykoontz, January 6, 1922, quoted in Congressional Record, 1008 (January 10); Storey to John-
son, January 9, 1922, NAACP Records, Group I, Series C, Box 76. Johnson aided Burton. With Cobb, Johnson checked case
references and then met with the congressman for two hours
at the latter's home on January 15. On January 17 Burton
addressed the House on the Dyer bill's constitutionality.
"Report of the Secretary," March 9, 1922, ibid., Group I,
Series A, Box 15.

44 Johnson to White, January 6, 1922, NAACP Records,
Group I, Series C, Box 76. Antilynching congressmen were
far from secure in their favorable evaluation of the Dyer
bill's constitutionality. According to Cockran, "... the
remedy... is by no means clear how it can be effectively
prevented without subverting the fundamental principles of
which this system of government is based." Cockran to T. H.
Evans, December 14, 1921, William Burke Cockran Papers, New
York Public Library, Manuscript Collection, Box 13.

45 Congressional Record, 1354 (Tyson, January 18), 1364
(Woods, January 18), 1305 (Montague, January 17), 1351-53
(Tyson, January 18), 1701 (Brand, January 25). See view of
Larsen, 1379 (January 18).

46 Ibid. See views of Campbell, 554 (December 19);
Kelly, 1032 (January 10); Fess, 543 (December 19).

47 Ibid., 1343 (Volstead, January 18). For the idea
of "concurrent" powers, see Fess, 543 (December 19); Goody-
koontz, 1017 (January 10).

48 Ibid., 796 (Dyer, January 4), 1732 (Little, Janu-
ary 25).

49 Ibid., 1744 (January 25).

50 See Reavis's January 17 conflict with Little. (1288)
Little said the voided statutes and indictments had failed to
specify a state denial. Dyer's bill "in its very inception
says that it only takes effect when the State has denied equal
protection." 1025 (January 10). Burton agreed about the ear-
lier defects, concluding that "... the Government needed a good lawyer." 1028 (January 10). McSwain noted that "an inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the States. It is not predicated on any such view. ... It applies equally to States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws ... ." 553 (December 19). See view of Volstead, 1343 (January 18).

\[51\text{Ibid.}, 1025 (Little, January 10).\]

\[52\text{Ibid.}, A13372 (Ansorge, January 25). In 1928 when Dyer explained the rationale behind his bills, he clarified what often was not clear in 1921-1922 about their equal protection base. "... when a state provides for and does prosecute those who do not conform to its other laws, but persistently fails to prosecute persons guilty of mob murder, it would seem that those, who because of race are especially in danger of mob violence, have been denied the equal protection of the laws." Leonidas C. and George C. Dyer, "The Constitutionality of a Federal Anti-Lynching Bill," St. Louis Law Review, 13 (May 1928), 186.\]

\[53\text{Congressional Record}, 1024 (Hersey, January 10), 1344 (Dominick, January 18), 1719 (Sisson, January 25). Few legislators made the dilemma as clear as did outside observers. The Nation announced that "the simple facts are that officers make all reasonable efforts to protect their prisoners except against mobs bent on lynching a Negro, and that murder in the South is punished as vigorously as elsewhere, except when murder takes the form of lynching." "The Anti-Lynching Bill," Nation, June 7, 1922, 664. Ida Wells-Barnett explained years earlier that for blacks and whites charged with crime "... the punishment is not the same for both classes of criminals." Wells-Barnett, On Lynching: Southern Horrors, A Red Record, Mob Rule in New Orleans (New York: Arno Press and New York Times, 1969), 96; Richard Spillane in the New York Commerce and Finance, quoted in Crisis, 16 (August 1918), 182, asked. "Does justice mean one thing when a white is concerned and another where a Negro is the party at issue in the South?"\]

\[54\text{For example, Louis Marshall had remarked in July on the "serious blunder" of emphasizing race. The anti-lynchers needed, he felt, to emphasize discrimination "in favor or against any part of the population of our country." Marshall to Johnson, July 27, 1921, NAACP Records, Group I, Series C, Box 242. Compare Isaac Siegel of New York who told the House that "the deductions to be made from the decisions}
so far is to the effect that the only time when use can be made of the amendment is when there is proof that there is discrimination solely on the grounds of race or color. There is no presumption that the discrimination [lynching] is on that ground." Congressional Record, 1350 (January 19). Note comment by McSwain when asked if he would amend the bill to apply to "whoever shall lynch or assist in lynching any person on account of race, color, or previous condition of servitude." 1528 (January 21). See Moores to White, May 17, 1918, on "very bitter prejudice against the negro existing in many members of Congress . . . ." NAACP Records, Group I, Series C, Box 70 (microfilm reel 5). Mary White Ovington questioned Arthur Spingarn about strategy. "Can [sic] a bill be framed that reads as though it were not so much for the Negro as for the honor of the United States . . . . I don't think that our representatives are ready to vote to punish white men because they have lynched black men." Ovington to Spingarn, February 8, 1921, Arthur Spingarn Papers, Library of Congress, Manuscript Division, Box 2.

55 Congressional Record, see views of Hersey, 1021, 1024 (January 10); Gilbert, A13356 (January 18).

56 Ibid., 1350 (Siegel, January 18), 1304 (Montague, January 17), 1349 (Wingo, January 18). Wingo wanted to know ". . . what . . . is the proportion of crime that causes the State to lose jurisdiction and gives it to the Federal Government?" (emphasis added)

57 Ibid., 547 (Ansorge, December 19, emphasis added). See view of Ansorge as presented January 25, A13371. Logic stretched to its limits proved an ever-present stumbling block for the broad bill. As Hersey noted, it was unreasonable to argue that because ". . . more Negroes are lynched than whites [it] is proof positive that the Negroes do not receive the equal protection of the laws." As he explained, "By the same logic, if . . . four persons are lynched, two Negroes and two whites, then . . . there would be equal protection of the laws." 1020 (December 19).

58 Ibid., 1364 (Woods, January 18), 1530, 1528 (McSwain, January 21). See views of Hersey, 1023 (January 10); Brown, 1380 (January 18). McSwain commented that "it has not been charged that all sheriffs in the State have habitually failed . . . ." 550 (December 19, emphasis added).

60 Congressional Record, 1353 (Tyson, January 18; emphasis added), 1719 (Sisson, January 25), 553, 1780 (Sumners, January 4, 26).


62 Congressional Record, 1137, 1139 (Collins, January 12), 1250 (Wingo, January 18).

63 Ibid., 1137 (Collins, January 12), 806 (Sumners, January 4), 1138 (Collins, January 12). Most congressmen generalized and simplified their definition of a state agent who acted with state authority and under state authorization. The result of their generalizations and simplifications was a failure to recognize the holes in their own presentations. For example, Connally explained, "A sheriff is a sheriff only when he is performing the duties of a sheriff. His act is the act of the State only when he is acting in behalf of and as the agent of the State." 1725 (January 25).

64 Ibid., views of McSwain, 550 (December 19); Collins, 1138 (January 12).

65 Ibid., 1526, 1529 (McSwain, January 21). McSwain saw Ex parte Virginia as a rejection of a federal attempt "to force by congressional action the States to place both white and Negro jurors in the jury box." He ignored the question of whether jurors could be rejected simply because of their race. He explained that the state judge involved in Ex parte Virginia was convicted not of violating the Fourteenth Amendment but of violating a federal law prohibiting jury discrimination. McSwain also explained that the jury discrimination law (Section 4 of the 1875 Civil Rights Act) was unconstitutional and if that issue had ever come before the Supreme Court, the Justices would have rejected it. Therefore, "the decision Ex parte Virginia, like the house of the parable in the Bible, was built upon sand. It did not endure and fails in force and effect with . . . the Civil Rights cases . . . ." McSwain also distorted Vick v. Hopkins, announcing that it outlawed "unfair, discriminatory, partial, favorite-seeking, class-oppressing legislation." 1527-28 (January 21).

66 Ibid., 1736 (Little, January 25). See views of Ravis, 803, 1288-89 (January 4, 17); Brown, 1380 (January 18); Woods, 1363 (January 18). Brown agreed with the idea of fail-
ure to protect persons in custody; Woods could see some validity in official and county jurisdiction but not in federal jurisdiction over individuals; McSwain thought some reach to malefieant officers might be possible. 1529 (January 21).

67 Ibid., views of Hersey, 1022 (January 10); Montague, 1305 (January 17); Lea, 1366 (January 18); Burton, 1284 (January 17); Ex parte Virginia, 100 U. S. 339, 346 (1880); Yick Wo v. Hopkins, 118 U. S. 356, 373 (1885); Home Telephone and Telegraph v. Los Angeles, 227 U. S. 278, 287 (1913).

68 Congressional Record, 1284 (Burton, January 17), 1356 (Parker, January 18), 1529 (McSwain, January 21), 1727 (Connally, January 25). Sumners mentioned Ex parte Virginia and then dropped it before defining why it did not apply. Home Telephone and Telegraph he believed was nonapplicable since Los Angeles was a governing "unit" that could not shed its state identity. 805 (January 4). Collins claimed Ex parte Virginia held "exactly the contrary" to the theory that the Fourteenth Amendment applied to all state officers. 1337 (January 12).

69 Ibid., 1354 (Tyson, January 18). McSwain and Connally frequently cited a pre-Fourteenth Amendment case, Kentucky v. Dennison, 24 How. 66 (1860). See 1530 (McSwain, January 21); 1727 (Connally, January 25). See also Burton's attack on Barney, 1284 (January 17).

70 Ibid., views of Collins, 1138 (January 12); Tyson, 1354 (January 18); Sisson, 1719 (January 25); Ex parte "Western Maid," 257 U. S. 377 (1920). Compare the acts of a derelict officer "are the acts of the State just as much . . . as the act of an employee is the act of an employer, although it might not be ratified by the employer." According to this view, Sanders (Indiana) explained, "If a conductor of a street railway company ejects a passenger without any ground for ejecting him, he is not acting as his employer would have him act and not acting according to the rules, yet no one would claim that, acting thus, he would not be acting for the employer." 1296 (January 17).

71 Ibid., views of Tyson, 1353 (January 18); Connally, 1728 (January 25).

with state action; the last three discuss the expansion of "good faith" immunity and the reduced use of absolute immunity.

73 Congressional Record, 1305 (January 17).

74 Ibid., 1524 (McSwain, January 21). See views of Siegel and Wingo, 1349 (January 18); Sanders, 1429 (January 19); McSwain, 1530 (January 21).

75 Ibid., views of Volstead, 1340 (January 18); Little, 1741-42 (January 25); Sanders, 1429 (January 19).

76 Ibid., 1725 (Connally, January 25).

77 Ibid., 1341-42 (Volstead, January 18).

78 Ibid., 1021, 1024 (Hersey, January 10), 1287 (Reavis, January 17), 1528 (McSwain, January 21). See views of Collins and Sumners, 800 (January 4); Clouse, 1787 (January 26); Brown, 1380 (January 18). Woods said "Hodge" held that there was "no power . . . in the Federal courts to punish any citizen . . . for acts of violence committed against another." 1364 (January 18). Parker suggested that a measure clearly aimed at the state was the solution to the House's antilynching difficulties. He provided his own bill, one which did not, he said, make every criminal act or act of omission during a crime an act of the state. "If any State, through any of its officers or agents, shall deny to any person within its jurisdiction the equal protection of the laws, such officer or agent shall be guilty of a felony, and upon conviction . . . ." 1356 (January 18). See also Hawes's suggestion that ". . . no State, county, or municipality within a State should place upon its statute books an enactment which would--'deprive any person of . . . the equal protection of the law.'" 1294 (January 17).

79 Ibid., views of Sumners and Sanders, 1289 (January 17); Tyson, 1352 (January 18); Connally, 1725 (January 25). See Sinnott's long excerpts from Powell and Riggins, 1373 (January 18); McSwain on Wheeler, 1525 (January 21); Woods on Hodges, 1364 (January 18).

80 Ibid., 1026, 1737-38 (Little, January 10, 25), 1526 (McSwain, January 21). Little's excerpts from Ex parte Siebold takes a half page of the January 10 Congressional Record and a full page of the January 25 Record.

81 Ibid., 1026 (Little, January 10).
82 Ibid., 552 (McSwain, December 17), 1702 (Brand, January 25). See views of Hawes, 1294 (January 17); Collins, 1135-36 (January 12); Brown, 1300 (January 17). Woods said the Dyer bill seemed to have been based "on the theory" of Riggins. 1364 (January 18). On Riggins, see Sumners, 804 (January 4); on James v. Bowman, see Tillman, 1010 (January 10).

83 Ibid., 805, 802 (Sumners, January 4). See views of Sanders, 1429 (January 19); Sanders, 1289 (January 17). Woods said Section 5508 was "similar in some respects" to the Dyer bill provisions. 1363 (January 18). McSwain held that together Wheeler, Harris, and Cruikshank defined federal rights so as not to include freedom from physical force. 1289 (January 12). Connally simplified Cruikshank into a decision that held that Congress had no authority over "individual action in contravention of the rights of individuals." He did not distinguish between the rights of federal and state citizens. 1725 (January 25).


85 Congressional Record, 802, 1778 (Sumners, January 4, 26), 1702 (Brand, January 25).

86 See Chicago v. Sturgis, 222 U. S. 323 (1911); Lincoln County v. Luning, 133 U. S. 529 (1890); Hamilton County v. Michigan, 7 Ohio 109 (1857); Clyde Edward Jacob, The Eleventh Amendment and Sovereign Immunity (Westport, Conn.: Greenwood Press, 1972); Davis v. Gray, 16 Wall. 203 (1873); Cunningham v. Macon Railroad, 109 U. S. 203 (1883); Ex parte Young, 209 U. S. 123 (1907); Corpus Juris . . . (New York: American Law Book Company, 1918), XLV, 338-670. State mob violence liability statutes were not common during the early 1900s. Within a decade of the Dyer bill debate, however, they would be, and the courts upheld them as legitimate police power regulations. The courts held that the statutes' elimination as a defense the county's inability to prevent injury despite a good faith effort was not a due process violation. See Charles S. Mangum. The Legal Status of the Negro (Chapel Hill: University of North Carolina Press, 1940); Arthur W. Bromage, American County Government (New York: Sears Publishing Company, 1933).
87 Congressional Record, 1551 (Upshaw, January 21), 1366 (Lea, January 18), 1358 (Sandlin, January 18), 1548 (Upshaw, January 21), 1292 (Hawes, January 17). See views of Aswell, 545 (December 19); Tillman, 1010, 1012 (January 10); Hersey, 1020 (January 10); Reavis, 1288 (January 17); Lanham, 1300 (January 17); Lowrey, 1724 (January 25); French, 1793 (January 26). Gilbert injected into the discussion his theory that "... generally ... the entire family of a bad and vicious Negro is also bad and vicious." Al3356 (January 18). Ward referred to the county provisions as those "in whose fangs the poison mainly lies." 1298 (January 17). Compare the theory that counties were no more responsible for mob murder than were railroads when hoboes killed in the train yards. "The Federal Anti-Lynching Bill." Law Notes, 25 (February 1922), 202-3.

88 Congressional Record, 1353 (Tyson, January 18), 1727 (Connally, January 25), 1549 (Upshaw, January 21), 1293-94 (Hawes, January 17). See views of Sumners, 804 (January 4); Collins, 1135 (January 12); Reavis, 1288 (January 17); Husted, 1309 (January 17); Woods, 1364 (January 18).

89 Ibid., views of Dyer, 795 (January 4); Hersey, 1023 (January 10); Little, 1029, 1741 (January 10, 25); Volstead, 1339-40 (January 18); Ward and Foster, 1298 (January 17).

90 Ibid., views of Ansorge, 547 (December 19); Volstead, 1340-42 (January 18).

91 Ibid., views of McSwain, 550 (December 19); Collins, 1139-40 (January 12); Tyson, 1351 (January 18); Little, 1732 (January 25). The Reconstruction-era Court and the police power of the federal government are discussed by Sumners (1777, January 26) and McSwain (1525, January 21). Dominick claimed to be familiar with the "old case" of Barbier v. Connolly which "laid down the principle governing the police power of the States under the Fourteenth Amendment," but he referred to it as Barbour v. Connolly. 1344 (January 18).

92 Ibid., 1340 (Volstead, January 18). See views of Burton, 1284 (January 17); Ansorge, 547 (December 19); London, 1365 (January 18).


94 Congressional Record, 1351 (Tyson, January 18).

Burton specifically cited Hoke v. United States, 227 U. S. 308. See also his comments on the Civil Rights Cases. He admitted the latter "was one of the strongest arguments" against the Dyer bill, but in it Justice Bradley indicated that hanging without trial by a posse comitatus fell under the scope of the Fourteenth Amendment. 1283-84 (January 17). See comments by Goodykoontz, 1017 (January 10); Little, 1026 (January 10), quoting Ex parte Virginia and Virginia v. Rives.

Ibid., 795 (Dyer, January 4), A133-71-72 (Ansorge, January 25), 1352, 1355 (Tyson, January 18), 1355 (Parker, January 18). See views of Collins, 1137 (January 12); Montague, 1303 (January 17); McSwain, 1528 (January 21); Driver, 1703 (January 25); Sumners, 1775 (January 26). Burton noted that "where lynching occurs there is no due process of law, there is no due enforcement of law." 1285 (January 17). Volstead commented that "the constitutional question involved in the pending bill is whether it provides appropriate legislation." 1339 (January 18).

Ibid., 553 (McSwain, December 19), 1373 (Sinnott, January 18). See views of Hersey, 1021 (January 10); Collins, 1135 (January 12); Dominick, 1344-45 (January 18); Tyson, 1352 (January 18); McSwain, 1528 (January 21); Sumners, 1775-76 (January 26). Little's statement that "Congress merely seeks to enforce the law of Maine . . ." likely increased rather than reduced worries. 1732 (January 25).

Ibid., 1524 (McSwain, January 21), 802 (Sumners, January 4). See views of Hersey, 1021 (January 10); Collins, 1139 (January 12); Brown, 1380 (January 18). Brown speculated that ". . . Congress could, I suppose, correct the omission by enactment of a law where no law is provided by the State . . ." City of Chicago v. Pennsylvania Co., 119 Fed. 497 (1902) held that the size of a mob was immaterial.

Congressional Record, 545 (Aswell, December 19), 552 (McSwain, December 19, emphasis added). See views of Tillman, 1011-12 (January 10); Hersey, 1020 (January 10); Dominick, 1344 (January 18); Woods, 1364 (January 18); Connally, 1725 (January 25).

Ibid., 801 (Sumners, January 4), 1294 (Hawes, January 17).
Ibid., 1021 (Hersey, January 10), 1283 (Burton, January 17), A13770 (Ansorge, January 25), 1284 (Burton, January 17), 1718 (Griffin, January 18), 581 (McSwain, December 19), 1134 (Collins, January 21). Views of Larsen, 1377 (January 18); Drewry, 1307 (January 17); Hersey, 1010, A13364 (January 10, 34). Driver noted that antilynching arguments "revolve[d]" around Goff. 1703 (January 25).

Ibid., views of Upshaw and Campbell, 554 (December 19); Fess, 543 (December 19); Goodykoontz, 1016 (January 10); Bacharach, 1381 (January 18); Hawes, 1708 (January 25); Ansorge, A13371 (January 25).

Ibid., 1711 (Cockran, January 25), 1699 (Mondell, January 25). See views of Madden, 1008 (January 10); Montague, 1303 (January 17); Ansorge, 547 (December 19); Woods, 1364 (January 18). Woods and Ansorge suggested the need for an amendment. On December 23 Griffin explained through a letter to the editor of the New York World that "most of the men who are now whining about the proposal to enforce the Fourteenth Amendment galloped helter skelter into the arena to shout for a Federal law to enforce the Eighteenth Amendment. Really, it seems to be a question as to whose ox is gored." New York World, December 26, 1921, in NAACP Records, Group I, Series C, Box 248.

Congressional Record, 1722 (Knight, January 25), 1365 (London, January 18); 1716 (McBowel, January 25); Hammer v. Dagenhart, 247 U. S. 25 (1918). Little noted that even though "anytime any body brings up any proposition here there are 15 or 20 constitutional lawyers who rise to their feet to tell you that it is unconstitutional . . . . [O]nly thirty-five times out of thousands of bills that we have passed have then been so declared." Congressional Record, 1025 (January 10).

259 U. S. 20 (1922). See Newark Evening News, May 24, 1922: "The overthrow of the new child labor law and the upsetting of the taxing feature of the grain futures law as interference with the police powers of the states, give reason for the gravest doubt whether the anti-lynching bill could stand up in the court." In NAACP Records, Group I, Series C, Box 249.

Congressional Record, views of Volstead, 1340 (January 18); Burton, 1285 (January 17); Madden, 1009 (January 10).

Ibid., 1010 (Goodykoontz, January 10), 1717 (Griffin, January 25). Defining the various procedural "rights" offer-
ed additional troubles. For example, Burton felt jury trial was a constitutional due process requirement. 1284 (January 17). McSwain pointed him to Walker v. Sauvinet, 92 U. S. 90 (1876). 1524 (January 21).

109 Ibid., 1285 (Burton, January 17), 1779 (Sumners, January 26). See views of Sinnott, 1773-74 (January 26); Griffin, 1717 (January 25).

110 Ibid., 66 Cong., 3 Cong., 1842 (Classon, January 21, 1921); 67 Cong., 2 Sess., 1535 (McSwain, January 21). See views of Ansorge, Al3371 (January 25).

111 Ibid., 1017 (Goodykoontz, January 10). See views of Kelly, 1032 (January 10); Griffin, 1717 (January 25); 803 (Sumners, January 4).

112 Ibid., 1296 (Foster, January 17). See views of Dyer, 795 (January 4); Madden, 1296 (January 10); Fish, 1359-60 (January 18).

113 Ibid., 1015 (Goodykoontz, January 10), Al3371 (Ansorge, January 25). Sumners merely noted that neither the Thirteenth, Fourteenth, nor Fifteenth Amendments permitted legislation for the protection of one citizen for wrongs committed against him by individuals. 1779 (January 26).

114 Ibid., 1025 (Little, January 10).

115 Chicago Defender, February 4, 1922; White to Henry F. Arnold, October 26, 1922 (copy), NAACP Records, Group I, Series C, Box 245.

116 Congressional Record, 1702 (Brand, January 25).

117 Ibid., 1301 (Yates, January 17).

118 Storey to Dyer, February 3, 1922 (copy), NAACP Records, Group I, Series C, Box 76.
CHAPTER SEVEN

"ALL DRESSED UP AND NOWHERE TO GO":
THE SENATE BATTLE BEGINS, 1922

Is there no remedy?¹

When Representative Volstead's amended bill received House approval, the more optimistic observers had hope. Dyer told a mass meeting at New York's Town Hall on March 1 that the Senate's consideration of the bill would end in passage. A filibuster was not a threat; "... the Senate can make its own rules and can consider and vote upon legislation they see fit to do." Enactment was virtually inevitable, he implied to Storey.² Optimism also reigned in Illinois. In his reelection campaign tour, Chicago Representative Martin Madden relayed the words of President Harding: "'If the Senate of the United States passes the Dyer anti-lynching bill, it won't be in the White House three minutes before I'll sign it; and having signed it, I'll enforce it."³

Before the Senate could send the bill to Harding, however, the measure had to survive a second scrutiny by the Judiciary Committee. And despite the optimism its chances of survival in 1922 were slimmer than in 1921. Although Johnson worried about "the overwhelming number of constitutional lawyers in the Senate" who would demand stronger evidence of constitutionality than the House, his first concern was more specific.
Our great danger, it appears to me, is in having the Bill go to sleep in the Committee on the Judiciary. I believe, just as I believed about the House, that if we ever get the Bill reported out it will pass the Senate just as it passed in the House. The Senate might not be afraid to let it die in committee, but they would not have the temerity to kill it after it had reached the stage of debate.4

Johnson would soon change his assessment of Senate audacity. But in February 1922 his immediate concern was the Judiciary Committee. His evaluation of its roll in the antilynching effort was reasonable. In large part, Senator William E. Borah made it so.

As the most influential member of a five-man subcommittee evaluating the Dyer bill, the Idaho Republican quickly became a major barrier to successful Senate action. The pace and results of his subcommittee's investigation would affect whether and when the bill received a favorable committee report and when and if Senate consideration would occur. Winning Borah's support would influence everything either directly—in terms of an unfavorable report—or indirectly—in terms of the escape hatch his rejection of the bill might afford Senators looking for excuses palatable to black constituents. Strong arguments by Borah in favor of the bill's constitutionality would close much of that escape hatch. Borah's strong opposition to the bill, based on his self-proclaimed constitutional expertise, would help assure its disappearance. A constitutional reason for killing the bill or avoiding a vote on it could benefit political careers as well as the Republi-
can party's hope of cracking the Solid South.\(^5\)

But Borah was just the tip of the Judiciary Committee iceberg. Of the committee's ten Republicans and six Democrats, none was an NAACP "man." Four Senators were from southern or border states and none of the other twelve represented states with large black populations. No committee member, Borah included, had an interest in the Negro, except for Kentucky Republican Richard P. Ernst and Lee Slater Overman, a Democratic North Carolinian whose interest took the form of "open hostility."\(^6\) On the subcommittee assigned the task of evaluating H. R. 13 were Overman, a four-term Senator who also served on the Appropriations Committee, and John K. Shields, once chief justice of Tennessee's supreme court who in his second Senate term was also serving with Borah on the powerful Foreign Relations Committee chaired by Republican Senate leader Henry Cabot Lodge. Borah's fellow subcommittee Republicans included William P. Dillingham, a former governor of Vermont, who divided his committee responsibilities among several committees, including Privileges and Elections, which he chaired, and Finance. The other Republican was South Dakota's Thomas Sterling, who in his second Senate term was chairing the Civil Service Committee.\(^7\)

Borah, who had ambitions to chair the Foreign Relations Committee but who in 1922 chaired only the Committee on Education and Labor, dominated this group of Senate lawyers, all of whom had been born before the Civil War, except for Borah
himself, who was born in 1865. None of these apprentice-trained attorneys, men who matured during the Gilded Age of conservative judicial activism on behalf of property rights, held degrees from the law schools that had sought to supplement the traditional apprentice method of law study. Borah, Sterling, and Overman held college degrees; the last two had been educators. For ten years Overman was dean of South Dakota's college of law. Dillingham and Sterling had been county prosecutors, and Shields had served not only as a justice of Tennessee's supreme court for eleven years but as the state's chancellor for two.⁸

Johnson and White saw Borah as "a shrewd politician," "a power," and "not particularly interested in colored people."⁹ The Senator enjoyed the responsibilities of his office and his position as his state's only national political figure. Winning him over to new positions was difficult since, Johnson advised, he was ". . . unlike a large number of senators who will promise anything and agree with you on everything without the slightest intention of making good their words."¹⁰

Borah's receptiveness to the Dyer bill in early 1922, before he studied it, was no indication of where he stood and did not justify high hopes for winning his permanent support. At one point that spring Borah looked at the NAACP Secretary "squarely from under his shaggy eyebrows, . . . with that expression characteristic of him, which makes you uncertain as to whether he is in earnest or laughing at you
...," and recommended replacing the Dyer bill with an antilynching constitutional amendment, for which he volun-
teeered to draft the resolution. Whether the suggestion was primarily a result of a concern for secure constitutionality and the federal system or of an interest in burying federal antilynching action in a hopeless amendment process Borah did not say, and Johnson did not speculate years later when he recalled the incident. But in 1922 Borah was, according to Johnson, "still haunted by the ghost of states' rights."

This last analysis may have been too sweeping, but it was not inaccurate. Borah believed that the Civil War was a reaffirmation of the national government's "peculiar, ex-
clusive and supreme duty" to enforce the Constitution and to "find more effective means" by which to make the Constitution effective,12 but he had no interest in federal efforts on behalf of black rights and had not been able to support a pro-
posed suffrage amendment because it went against one of the "very foundation principles of the Republic--... discarded and worn, but vital and indispensable--... state rights for local affairs."13

In his messages to the NAACP, Borah hinged his support for the Dyer bill on what White recognized as "a big loop-
hole," constitutionality. Johnson responded with a cautious approach; few men were close to Borah and the Idahoan was "more or less a blunt man... not very susceptibel to soft-
soaping." Borah's "ambitions" and the unknown effect that
disenchanted black voters might have on his political goals offered the NAACP, immersed in a broad lobbying effort in the Senate, opportunity for whatever success Borah's personality seemed to close.14

Kelly Miller, who met with Borah on March 29, advised the NAACP that although the Senator had "grave doubts" about the bill's constitutionality he was still "open to evidence and argument." Therefore, Miller urged Johnson not to "waste . . . time" using statistics or political arguments. Borah had already defined his target and his alternatives. After hearing arguments on constitutionality, he would either push the bill "with his whole heart," let it wind its way to the Supreme Court on its own, or let someone else champion it before the Judiciary Committee and full Senate. What Borah demanded, explained NAACP legal adviser James Cobb, who also took part in the Miller-Borah meeting, was the minimum, "a reasonable doubt."15

On April 3 Borah himself defined his requirements. He told the NAACP Secretary that a verdict of unconstitutional "ends the proposition." But to arrive at a decision the subcommittee would first consider the briefs submitted to the House Judiciary Committee, the House debates, the "applicable" court decisions, and "any brief," suggestion, or argument the NAACP could provide. Diluting the optimism this invitation might encourage, Borah also emphasized that there was no rush involved; the NAACP had "ample time."16 As the days
of the Sixty-seventh Congress's second session slipped away, however, Johnson likely thought of all that needed to be accomplished if the Senate were to vote on the bill before the November elections. Even in March White called taking advantage of the reelection faced by a third of the Senators an "urgent necessity." Johnson too knew what opportunities were afforded by the reelection campaigns. His organization would bring "friendly yet firm" pressure and "nail them to that one issue" of lynching.17

Storey could apply at least some of that pressure. He was not effective against Lodge since the two had "not been on speaking terms for more than thirty years," the result of an 1884 clash over Lodge's support for James G. Blaine's presidential nomination and the two men's generally divergent political stands.18 But there was no ancient barrier between Storey and Borah. On February 8 the Bostonian was already seeking to convince the Progressive of the need for positive Senate action on the Dyer bill. The nation's image suffered as the "extraordinary brutality" continued, Storey explained, and the debates in the House had done little to mend it. Arguments by southerners in favor of lynching "demonstrated the hopelessness of expecting action" from the southern states. The nation owed blacks protection; the Republican party owed them a promise fulfilled; and Congress owed them a chance for the Supreme Court to make the final decision on constitutionality. The national government could not helpless-
ly "sit by" and let the "terrible evil . . . go on . . . ." 19

Borah's reply was formal and brief, and it likely bred much initial uncertainty. Promising to consider the bill sympathetically, Borah nevertheless emphasized that he could vote for H. R. 13 only if he had no constitutional doubts about it. He could not leave Congress's duty to the courts. "Somehow or other I have never been able to satisfy myself that I ought to do that." Borah had not yet begun his study of H. R. 13's constitutional base; the abhorrence of lynching he shared with Storey was all that guided him. 20

While Borah's concentration on constitutionality would not arouse Miller a month later, it immediately worried Storey who could never totally eliminate his own doubts. His response was to remind Borah of other reasons for antilynching action. Lynching, he told the Senator on February 14, was "a practical situation": twelve million loyal Americans were without protection.

. . . where allegiance is required, protection must be afforded. Thirty years' experience has demonstrated the fact that the southern states . . . will not perform their duty. . . . [N]ot only are they not disposed to stop lynching, but they approve of it. They say they do not. They profess to be shocked by the atrocities, but they do not lift their fingers to stop them . . . . 21

Practicality required a federal antilynching statute. The needs of the day demanded that "every man . . . give freedom the benefit of the doubt" and that the Court decide these doubts. The Supreme Court could view the Dyer bill's exten-
sion of protection favorably; it had reversed the Legal Tender Cases. The constitutional amendment idea offered no real help since too few states would support it.\textsuperscript{22} Seeing the racial "whirlwind" still threatening, Storey maintained that the country had to put lives and law ahead of "maintain[ing] an interpretation of the constitution." If the Bill of Rights prohibited federal denial of certain rights, why could not they, like the similarly "form[ed]" Thirteenth Amendment, allow "the United States to protect them"? If the peace of the United States protected "Chief Justice" Field from the state of California in 1889, why did it not "protect the meanest colored man"? "The Constitution is the same for both."\textsuperscript{23}

But if Storey could go against early Court decisions and sustain the Dyer bill on practical, humanitarian, and logical grounds, Borah could not. The earlier courts had interpreted the Fourteenth Amendment and that interpretation had to guide Congress and the contemporary Court. The Senator shared Wickersham's basic constitutional position. Even after reading the brief Storey submitted to the Committee, neither the ex-attorney general nor the Senator could overlook or overcome, as did Storey, constitutional operational meanings. Wickersham thought Storey said "everything that can be said in support of the bill," but the "extremely adroit, able presentation" could not overcome "a line of decision" from the Civil Rights Cases of 1883 to
United States v. Wheeler of 1921, the latter a unanimous decision that Storey did not mention. Without those decisions, Storey's brief, discussed below, worked magic; with them the Court had no reason to accept Storey's arguments and the Dyer bill. Try as he might, Wickersham could not believe any more than in 1921 that the Court would approve the bill. While he could urge that the Supreme Court be given an opportunity to prove him wrong, he could not add his name to any opinion supporting constitutionality. Nor could he hide his "grave doubt."²⁴

Borah admitted or discovered that he could do even less than Wickersham. In March Storey concluded that the constitutional issue "stuck in his [Borah's] crop." In May, after the Senator read Storey's brief, it was still there. Storey had attempted to make Borah feel it was "worth while to try the experiment," but the Idahoan never changed his view that constitutionality pure and simple was the only issue that should determine the fate of the Dyer bill. As Borah explained, without constitutional foundations, "it would be useless, insincere and hypocritical" to pass the bill."²⁵

By May 19, after six weeks of study, Borah had not discovered "even a shred of a principle upon which to hang this measure under the Constitution." There was "no authority whatever for the law." As he noted to the president of the NAACP's Detroit branch, there was probably no way the
federal government could deal with lynching without a constitutional amendment. If that evaluation were correct and if neither Storey nor Johnson would support an amendment, there was little hope of federal antilynching action in 1922. With Borah's holding to his refusal to violate his "conscience" and his "convictions" or to fall prey to "sheer politics or unseasoned desire" by doing "a vain and useless thing," the fate of the Dyer bill appeared increasingly bleak as the summer of 1922 approached. Only four months remained of the second session of the Sixty-seventh Congress, and the bill still had not passed Borah's scrutiny, much less that of the entire committee. The Senator appeared unshakable. He refused to be intimidated by suggestions that he was taking steps "as infamous as the Dred Scott decision." He refused to be moved by pure expediency or political ploys; as he continued to announce, only "authorities and decisions" could influence his verdict.26 As he later explained in a June 8 letter to his friend James T. Williams, editor of the Boston Transcript, he resented public pressure that ignored such factors as constitutional authority and responsibilities of office. Borah, who had by early June voted against the bill in subcommittee, criticized those who "called upon me year after year to prostitute my intellectual integrity in trying to pass bills which we have no authority to pass." However, in some contradiction, while Borah was denying congressional authority to pass the Dyer bill, he was explaining
that he would not kill the bill in committee but would let the Senate do with the measure what it willed. Either his opposition was not as total as he indicated or he suspected the full Senate would do with the proposal what it eventually did, his nonparticipation serving as a signal of his agreement with his colleagues' course of action.²⁷

Why did Borah equate, to whatever degree, a vote for the Dyer bill with a prostitution of his responsibility as a lawmaker and representative of the people? A June 8 Boston Transcript letter to the editor summarized his views. Beyond the central problem of constitutionality were the related problems of effectiveness and applicability. The Dyer bill "would not include . . . one lynching case in 5, perhaps not one in ten . . . ," and it would not be easy to enforce; therefore, enactment meant no real solution to the lynching problem. In fact, only one provision in the bill, Section Three, which covered negligent and derelict officers, would be "really important, or effective." To be truly effective, a law would have to "deal with the mob and the individuals composing the mob as individuals . . . ." The Dyer bill did not propose to do that, and Borah did not suggest that it should. Instead he moved on to an analysis of what an antilynching bill not resting on an antilynching amendment would mean for the federal system.²⁸

We have reached a point in our constitutional history where we must intelligently consider the proposition of redistributing the power between the State and the national government. It is
nothing less than a national disgrace to have a Congress constantly fighting with its self-respect on the one hand and a desire to meet the demands of the people on the other. And I should like to see this great question of whether or not we shall redistribute our powers openly and candidly and intelligently presented to the people. I have no doubt at all that, under the Constitution of the United States as it now stands, our attempt to deal with the lynching proposition would be a farce and another exhibition of lawlessness upon the part of Congress without anything gained in the end.29

Congress's attempts over twenty years to enact a child labor law had succeeded only in violating oaths in a "vain" cause. The nation needed a constitutional amendment if it wanted to place children under federal jurisdiction. But if it did, would not the national government then be responsible for "see[ing] that the child is properly educated" and that the citizen was safe from mob attack?

In other words, all those and many other subjects and propositions with which Congress is urged to deal are not within the competency of Congress as the Constitution now stands. If the people . . . have made up their minds to deal with all these matters through the Congress, then why not give the Congress the power to do so rather than urge a course which involved the very lowest form of constitutional immorality.

. . . [T]o my mind, the most intolerable and destructive lawlessness with which a constitutional government must deal is the lawlessness of those sworn to uphold the Constitution and the laws of the land--the lawlessness of legislators of Congress, of the courts and of editors . . . . [T]hat the Congress should disregard the Constitution and leave the Supreme Court . . . alone to protect it . . . . [I]t is so utterly shameless, so utterly intolerable, that it is startling that it should even be spasmodically urged.30

The Dyer bill, Borah continued, summarizing the view of
many of his colleagues, dealt not just with mob murders, county fines, and malfeasant officers but with "the gravest constitutional problem which we as a people could have presented," "a change in our whole theory and structure of government." If Congress took any action in 1922, it needed to be not on ending lynching but on ending the practice of placing Congress "where it is to be constantly and chronically usurping power."\(^{31}\)

Explaining that the theory upon which the Dyer bill stood "would destroy absolutely our dual system of government," Borah joined Democrats Overman and Shields on May 23 in presenting to the Judiciary Committee an adverse oral report on H. R. 13.\(^ {32}\) Both Johnson and White looked beyond the issues of effectiveness and constitutionality to explain this demonstration of Borah's "good and hard" opposition to the Dyer bill. They attributed at least some of it to the hostile relationship between Borah and Lodge, both Republicans but one a progressive and the other a party regular. White and Johnson believed that Borah's natural tendency to oppose everything Lodge supported was enhanced by the Idahoan's desire to create an issue which would help defeat the Massachusetts conservative in his reelection bid. Second in line for the chairmanship of the powerful Foreign Affairs Committee,\(^ {33}\) which was still recovering from the Borah-Lodge battle over the League of Nations, Borah had much to gain by creating a situation that would permit voters to link Lodge with a broken party pledge. In discussing his subcommittee's report
with the NAACP, Borah himself seemed to support the conclusions drawn by the two black leaders. He announced that he would do all to save the life of a Negro threatened by a mob but would do nothing "to pull anybody's political chestnuts out of the fire." As Johnson reported to the NAACP board, Borah had ". . . the advantage of having what would be to his personal advancement lie in the same line with what he considers to be his duty," granting that he was sincere in his opposition to H. R. 13's constitutionality.34

Lodge's involvement with antilynching seemed beyond his control. If Borah did not make it so, the NAACP did. Both played on his 1922 political troubles. Lodge's reelection race was the most difficult he ever faced. Massachusetts was no longer safely Republican, and Lodge was an old man in a young man's party, a member of the Administration's party facing the traditionally dangerous off-year election reaction, and the holder of unpopular positions on the prohibition and soldiers' bonus issues. The four-term Senator faced a tough fall primary battle against political enemy Joseph H. Walker and the prospect of an equally difficult November campaign.35

Dyer told a Boston audience in May that Lodge's failure to work for the antilynching bill required Massachusetts to refuse him a fifth term, and the NAACP's Boston branch joined the national officials in exerting constant pressure on the Republican leader. The pressure worked, and in May Lodge
agreed to present an NAACP petition to the Senate.\textsuperscript{36} That month the Senate Republican leader also pressured Borah into releasing the Dyer bill from subcommittee. After speaking to a National Equal Rights League delegation led by outspoken black militant William Monroe Trotter, Lodge relayed instructions to Borah. The Idahoan did not mention Lodge to the Trotter group when it visited him after the order, but to Johnson, who was upset that the NERL took credit for the bill's release and blamed the NAACP for the delayed report,\textsuperscript{37} he indicated a second explanation for his timing. He had delayed the report because he lacked the briefs the NAACP had promised him, but Lodge's order for an immediate report affected the nature of the evaluation given H. R. 13. As Johnson reported to the NAACP, "no further comment on this point is necessary for those who know the political relations between Senators Lodge and Borah."\textsuperscript{38}

Whatever the cause of Borah's decision, Johnson was determined that the full committee not follow his lead and fulfill the numerous predictions that the subcommittee's report doomed the bill in the Senate. When the committee did not act immediately on the subcommittee's report but decided to delay its decision for two weeks, Johnson had his chance. The NAACP hoped to build on the sympathy some members of the committee had for the bill by providing briefs and testimony to supplement those Borah studied. Anxious that the committee not only send the bill to the Senate but that it accompany it
with a favorable report, the NAACP realistically recognized a need for what White called "some marvelous changes in the present aspect"; therefore, if the committee wanted a revised or amended bill, the organization was amenable. So was Dyer. He explained his position to committee chairman Knute Nelson. Dyer saw no reason for rejecting a bill that the House Judiciary Committee declared to be constitutional and that the full House had accepted. But whatever the Senate did, it should act without delay. Action was mandatory. Twelve blacks died at the hands of mobs in a twenty-two day period in May; five of the victims died at the stake. No investigation, arrest, or trial followed any of the murders.39

While explaining that he could not take part in any "miserably, cowardly shifting of responsibility" and that "it would be a wholly futile thing" to pass the measure, Borah nevertheless assured the NAACP leaders that he would not go to the opposite extreme and "adopt dilatory tactics to defeat it." The Senator offered to "try to find a way to make this legislation adequate as well as constitutional," but as the NAACP knew, Borah opposed the bill—-for whatever reason—and his fellow Senators understood that fact.40 Therefore, Borah's offer of aid was of little real use. Convincing Lodge to secure the measure's safe trip through committee was more important to the NAACP.

Throughout June the NAACP's pressure on Lodge continued.
On June 14 Johnson repeated to the Republican Senator what he had said in a June 12 press release.

American citizens in those [southern] states where lynching prevails . . find themselves in the anomalous position of being residents in states which refuse to guarantee them trial by due process of law when accused of crime and citizens of a government which confesses its inability to do so.41

Johnson, a self-styled constitutional neophyte but also a talented propagandist and lobbyist, saved his attack on Borah's abandonment of the Negro for the press release.42 With Lodge, Johnson discussed Borah's rejection of the bill as though it represented a surprising and baffling about-face from the Idahoan's early spring position.43 Johnson then asked Lodge to consider the general effect an adverse report would have. A rejection of the bill would be a "license to mobs." It would have a "psychological" impact on Negroes and a "very bad" political effect since it represented a rejection of the Republicans' 1920 platform "pledge."44

Johnson did not note what might happen if the bill passed since action came first and improvements later. But Borah had already noted the problems of constitutionality, enforceability, and applicability, and others had reached similar, if not so thorough, conclusions on their own. Solicitor General James Beck, for example, dreaded the assignment of defending the Dyer bill, once a law, before the Supreme Court. For Beck the child labor law had been an "impossible piece of legislation" whose unsuccessful trip to the Court
had "taxed" his "ingenuity" enough. He had no desire to take on the problems of federal antilynching legislation.45

Other critics found analogies in other legislation. W. M. Bridges, editor of New York's Challenge Magazine, questioned "the sanity and soundness" of a bill unsupported by "culture" and found that its federal enforcement would be no better than that of the Sherman Antitrust Act and the Mann Act. Even if there were some serious attempts at enforcement, the Dyer bill would "stop lynching if a shovel standing on edge will stop the ocean's edge."46 D. E. Tobias, editor of New York's Independent Weekly, was baffled. How could Johnson believe that the federal government would even attempt to enforce the bill? He pleaded with Johnson "not [to] mislead the public"; he asked him to abandon any hope that the Supreme Court would accept federal authority over a local crime or congressional power "to override State Rights."47

Tobias also challenged Johnson's reliance on Storey's brief. The "pamphlet" revealed "signs of a senile (old age) state of mind." "[L]egally and as a matter of cold facts, Mr. Storey fails to show that he has a grasp of the problem . . . ," placing unreasonable emphasis on newspaper accounts of lynchings. However, Storey's brief deserved better than Tobias's evaluation. Although it showed numerous signs that subjectivity and logic overrode objectivity and legal realities, the brief was an important weapon in the NAACP's June battle in the committee and was one of two the committee re-
printed in its final report. Unlike Dyer, who cited newspaper stories as if they ended all argument, Storey knew his goal was not so easy to reach.48

The Bostonian actually devoted only one-quarter of his brief to statistics, examples, and newspaper excerpts. The rest dealt with state failure, the impossibility of solving the lynching problem through constitutional amendment, and the constitutionality of the Dyer bill. Since there were too many racially prejudiced states to make amendment a feasible alternative, there were, Storey concluded, only two paths the nation could take: it could enact federal legislation or it could allow mob murder to continue. If the former was not a viable choice, the nation would be announcing it could "impose burdens, but it can not defend rights. It can tax, but it can not save the taxpayer." Storey rejected this view and, as he had in the past, looked to three sources for a federal antilynching power. If Storey were senile, he had been so for several years, and so had his antilynching allies. His brief was little more than a deeply felt traditional re-statement of arguments based on the Fifth and Fourteenth Amendments and the "peace of the United States."49

As he had long done, Storey demanded that the Fourteenth Amendment be read "to accomplish its purpose, not to defeat it." Taking Ex parte Virginia's definition of "state" and Woodrow Wilson's 1918 pronouncement that lynching "cannot live where the community does not countenance," Storey con-
cluded that the state restricted by the amendment was broad. In fact, if "for years" the community, with power to hire and fire officials, "acquiesces" when those officers did not enforce the laws to protect all classes equally, the entire schema was a denial of equal protection by the "state." The state did not have to authorize its officers' misuse of power--be it active or nonactive--as long as they were acting "within the scope" of power. 50

Congress could take "appropriate" action against state denial in only two ways, Storey explained. The federal government could "step into the gap... and give that protection" denied by the state and its officers and citizens, or it could follow state examples and exact county liability. Either remedy was available because the words of the Fourteenth Amendment empowered Congress to act as it thought necessary and appropriate after studying problems before it. 51

Still unwilling to accept that Congress's power to carry out its duties and to keep "the peace" had limits, Storey advised that the "peace of the United States" that protected federal officers discharging duties also extended to citizens killed by mobs "in violation of the fundamental rights which are secured to every citizen." Without analyzing what these "fundamental rights" were and what the courts had said about their protection, Storey took logic another step. According to Wells v. Nickles (1881), Congress could protect timber and punish thieves who stole it from federal forests.
Has the United States a right to protect a tree, and no right to protect a man? Has it no interest in one-fifth of its people, potential soldiers, actual tax-payers, men and women, the best asset a nation can have? We should be slow to admit a tree is more valuable in the United States than an American citizen. . . . Could Congress have passed laws to protect the slaves [as property working on public projects] and punish those who attacked them in the Federal courts . . . ? Were negroes as slaves entitled to protection which is denied to them as freemen, or would such a law have been sustained only because the attack interfered with work prosecuted by the United States?

Must we admit that property is more sacred . . . than human life, . . . that there is a peace of the United States for the judge or the marshal, and none for the private citizen. 52

Storey's third remedy was one he had deemphasized a few months earlier. He felt that the Fifth Amendment was a potential weapon. The Supreme Court, which had frequently reversed itself, would not permanently leave the amendment—"an assertion of fundamental rights" of citizens—as a restriction only on the national government. And as the Court explained in Prigg v. Pennsylvania, United States v. Reese, Strauder v. West Virginia, and United States v. Cruikshank, constitutionally created rights and immunities were protected as congressional discretion determined. The expressed grant of power in the Fourteenth Amendment was helpful but not necessary. 53

The opposition's case against these arguments was weak, Storey concluded. James v. Bowman, as well as other cases, 54 did state that Congress could only "'see that the States do not deny'" equality of rights and that Congress did not have
flexibility of enforcement; however, when states denied what the Fourteenth Amendment said they could not, "Congress must act." And as the Court in the Civil Rights Cases acknowledged, Congress could even do so in advance of the denial. 55

If Tobias took these arguments to be proof of senility, the critical Pillsbury, one of the brief's first readers, thought them to be the best defense possible—as did Wicker-sham—but they were imperfect for reasons other than those Tobias indicated. Seventy-one years old, Pillsbury faced the same charge of senility as Storey, but his age did not permit him to gloss over what he believed were the brief's two basic flaws: excessive length and conflict with "settled construction." Reconstruction-era Justices, men with "memories of slavery, the war, and the War Amendments," would have treasured the brief, Pillsbury announced, but unfortunately for Storey, "that court has disappeared and will never be seen again." The Court of 1922, however, might be reached by a theory Pillsbury proposed; no court had yet "directly" rejected it. Merely a recapitulation of his old position, Pillsbury's theory began with the state's duty to protect. If a state passed a law to protect only whites, it had "only omitted" to protect blacks. This omission was a denial of equal protection; "omission, from whatsoever cause, to ex- tend [protection]—failure to extend it—is no less a breach of they duty than acts of denial." Therefore, "omission . . . to enforce protection is as fatal in its consequences as omission
to legislate for it . . . ."56

When, on May 31, Storey took Borah up on his request for additional constitutional arguments that might change his mind, the NAACP president reflected not Pillsbury's criticisms and suggestions but his own continuing concerns. He still thought that no constitutional argument could overcome doubts about the Dyer bill. His new presentation, therefore, was not what Borah had in mind. Storey pleaded that Congress allow the courts to make the final decision on the bill. Since men were fallible, Borah included, and since lynching demanded "some efficient steps," a trip to the Supreme Court would work no harm and perhaps do much good. The Senate Judiciary Committee could refine the measure by deleting questionable provisions or by assuring separability of its provisions when they came under judicial scrutiny. Regardless, "no man should be so confident in his own opinion as to insist that a bill so strongly supported should be defeated and no opportunity given to test the power of the government in this vital matter."57

Borah responded with continued faith in his infallibility as a constitutional interpreter. He had no "reasonable doubt" about the Dyer bill, but he did have doubts about what the continued dispensing of "ineffective and inefficient remedies" to Negroes accomplished.58 Storey replied with an answer of sorts. Congress was not "bound" as Borah said it was, and challengers of doubtful law violated no conscience and no oath
by sending a bill to the courts. The Senate had the "right to construe this [Fourteenth] amendment for itself and to challenge the Supreme Court . . . to change its position." As for the bill's possible effectiveness, if the federal government could act against and destroy the Ku Klux Klan of Reconstruction, "why not lynching?"59

Borah had the answer. His mind was as unchangeable as he said the Court's was,60 and Storey's failure to deal with all the cases Borah thought relevant led the Senator to conclude confidently that ". . . they were not subject to [an alternative] explanation." Any congressman who voted for the bill while doubting its constitutionality and any editor who urged that vote were "'lawless brothers of those who . . . take the law into their own hands and join the mob.'"61

While the Storey-Borah correspondence entered the summer of 1922, the NAACP continued its campaign to convince the other members of the Judiciary Committee that the Dyer bill was constitutional or, at least, that it deserved a full Senate airing. This campaign included new briefs.62 The most notable of these was one submitted by a new antilynching recruit.63

Herbert Stockton, a member of a New York law firm, prepared a brief in June after writing both Borah and White and learning the nature of the constitutional arguments. From Borah he learned that the Civil Rights Cases ended all questions. The Fourteenth Amendment did not cover "'individual
invasion of individual rights"; "... every textbook writer and ... every decision of the Supreme Court so far as I know" announced it as law. Stockton could check for himself in Hodges and Powell and in the works of Charles Collins and William Guthrie.64

With these theories in mind and with NAACP encouragement, Stockton prepared arguments which Johnson believed "impressed Senator Borah more than any of the [other] briefs submitted to him."65 If they did it was probably only because Stockton, much more readily than Storey, accepted laws as LAW--at least for the foreseeable future--and attempted to fight under restraints imposed. Storey's was an argument that brushed aside adverse decisions because of the demands of humanitarianism, necessity, and logic. Storey could not make himself "take the law as the Supreme Court has held it," preferring instead to "attack" it and place the Court in a position where it had to "support intolerable practices which disgrace the nation" or reverse itself. "[T]he judges realize that they have gone too far and . . . they can overrule or distinguish the authorities on which our opponents rely." For Stockton laws were applicable to a situation or they were not. He preferred to work within the system; his was the approach of the practicing attorney.66

Despite his differences with Storey, Stockton's basic position was similar to the Bostonian's. They agreed that no one could be certain whether the Dyer bill would survive
judicial scrutiny. "[T]he Court can hold the Bill constitutional on sound reasoning if it wants to," Stockton explained to Borah. Considering "the peculiarly artificial restrictions of our Constitution," no one could write a better measure than H. R. 13, and no one should say what the judiciary would do with the measure. Passing the statutory dilemma to the Court was neither taking a coward's way out nor violating a congressman's oath. Passage would put the nation on alert that Congress opposed the "bloody sport" and would reduce chances of both "race war and mob rule." However, the bill would not, "even if upheld to the last comma and enforced fearlessly," singlehandedly end lynching. Only a changed public opinion--the result of "publicity, education, example," and more rural police--could do that.67

Stockton's June 5 brief began with a clearing away of the "irrelevant" line of court decisions and the misconceptions about the bill. First, the proposed statute did not "invoke the rights" of national citizens but rather those of state citizens. As a result, United States v. Wheeler, central in Wickersham's pessimistic analysis, did not apply. The case served only as a point of reference to clarify what the Dyer bill attempted to do and why it differed from similar but unconstitutional measures. H. R. 13 relied on "federal authority to enforce the limitation on the states . . ."; the Dyer bill struck at state action while the government's action against the Wheeler mob, as well as against the Powell
mob, had not. With this interpretation, Stockton also eliminated from consideration United States v. Harris, James v. Bowman, and Logan v. United States. Similarly, he eliminated in varying degrees, Hodges, Slaughterhouse, and the Civil Rights Cases. Insofar as each dealt with the Thirteenth Amendment, they were unrelated to the Dyer bill, which had no basis in that bill.

Stockton then shifted to consideration of the Fourteenth Amendment's applicability to state denial of equal protection. He sought to explain how the Dyer bill, as appropriate action under the amendment, could reach individuals. His first step was to assert the obviousness of a denial of equal protection in lynching cases.

You know and I know, everybody, even the individual members of the Supreme Court know that the victims of lynching mobs do not get the equal protection of the State's law, that State and County officials do not try to prevent this crime as they try to prevent other crimes. This is susceptible of overwhelming convincing demonstration [which should be shown to the committee]. . . . in graphic detail . . . , so that this record can be brought before the Supreme Court when it passes on the constitutionality of the law.

. . . [The bill] is in accord with the fundamental purpose of this Amendment for the Federal Government to take action to ensure the Negroes particularly, equal protection; their plight was the cause of the Amendment's being adopted, their plight now is the occasion of this legislation.70

Unlike the privileges and immunities clause, the Fourteenth Amendment's equal protection clause did not prohibit only legislation. It imposed "an obligation to enforce all State laws in existence so that all persons . . . enjoy equal
protection from them." Stockton thought the Supreme Court might expand this definition even further than it had in such cases as Vick Wo v. Hopkins by adopting the view of the federal judge in United States v. Blackburn. That jurist had defined denial of equal protection to include a willful failure, "'well known to the community at large,'" to "'fer-ret out and bring to trial . . . offenders because of the victims being colored.'" In presenting this theory of state denial through nonlegislative means, Stockton also referred, with appropriate quotations, to the standard line of cases, from Ex parte Virginia to Home Telephone and Telegraph. 71

Unlike Storey in his brief, Stockton went beyond defending the Dyer bill and suggested changes to strengthen it. He proposed a change in the wording of Section One to disassociate the bill from the rights of national citizenship. 72 Within the month he would suggest further adjustments, but on June 5 he announced that the bill needed no other change in order to withstand judicial scrutiny, that is, as long as the courts agreed with him on which cases were controlling. As he pointed out—and as Moores and Goff had missed—Section Two's presumption of state denial from a failure or refusal to defend did not "arise merely from failure actually to prevent or punish the taking of life, which might be held unreasonable, but from failure to provide and maintain protection." 73

Stockton was not worried about provisions on official and county liability. Virginia v. Rives's acceptance of re-
moval as a method of enforcing the Fourteenth Amendment supported Section Four's federal court trial for state officers. While county fines were "stern measures" that might involve a "power to destroy," they were constitutional tools created at Congress's discretion. Appropriately, therefore, he merely noted that the provision on fining counties that mobs traversed deserved no special attention; if the basic county fine for lynching was appropriate, so too was the other provision. Sections Seven and Eight on treaty aliens and separability were within expressed federal powers and "unexceptionable," respectively. 74

Advice from Storey soon led Stockton to give these evaluations additional consideration. They also affected the bill that emerged from the committee on June 28. Albert Cummins, the President pro tem of the Senate, who first contacted Stockton on June 10, introduced himself as a committee member "deeply interested" in H. R. 13. Stockton's letter-brief to Borah had impressed the Ohio Republican more than anything else he had read or heard on the bill's constitutional vane. 75

Cummins, who was "exceedingly anxious . . . to find some way to reach . . . the members of the lynching mob [itself] . . . ," considered most of H. R. 13 to be "appropriate and unobjectionable," but he found serious problems with Sections Three and, particularly, Four. The failure of state officers to protect, the key to Section Three, was a difficult
point on which to base the provision since "probably" 90 percent of southern lynching victims had not been taken from official custody. Section Four's procedure seemed neither "constitutionally sound" nor "right as a matter of policy." Cummins admitted the need for federal court jurisdiction over lynching cases, but he found a problem in constitutionally creating that jurisdiction. The Senator did not think the provisos that created federal jurisdiction as a result of local prejudice and state failure to prosecute were "synonymous with the terms of the Constitution." In addition, he doubted the constitutionality of an ex parte determination of jurisdiction on "any sort of a showing." Could Stockton "review further" the section's jurisdictional elements?76

The New York attorney could. Four days later he relayed his findings to Cummins and included suggestions from Storey as well. On the whole, Stockton reached the conclusion Cummins wanted him to reach, that the bill was "synonymous with the terms of the Constitution, that is the denial by the State of the equal protection of the laws." Since only the courts could act against state laws and since Congress could not force state officers to protect anyone, it was left to the national government to remedy "the failure of the state or county officials to apprehend or prosecute . . . by giving jurisdiction . . . to the District Court." Stockton also acknowledged the validity of Cummins's concerns. The ex parte application endangered the entire section, and he sug-
gested rephrasing to bring the provision in line with the jurisdictional sections of the Judicial Code. On the other hand, Stockton explained that the jury bias clause was little different from change of venue based on local prejudice. 77

Stockton recommended changing the phrase, "to make all reasonable efforts," to "fail, neglect or refuse to proceed with due diligence to apprehend, prosecute or punish such participants." He also passed on to Cummins but disagreed with several Storey recommendations. Besides proposing a variation of the Stockton rephrasing, Storey made two suggestions: that Section Four end with a proviso, "but evidence that all reasonable effort used to apprehend the guilty parties may be admitted in defense"--which Stockton labelled "unnecessary"--and that change of venue be a remedy for local prejudice. Disagreeing with the latter suggestion, Stockton explained that the federal government had unique "investigatory powers" and the power to bring "pressure ... on local prosecuting officers." Even if change of venue existed, removal from state to federal courts in lynching cases would still be necessary and inevitable. 79

Stockton also made light of Storey's reference to "earlier civil rights statutes." These, especially the civil liability provisions of the 1871 Enforcement Act, were "not helpful" and would not be "very fruitful" weapons against lynching. Section 5508 was more relevant to mob violence, but it only protected the rights of national citizens. 80
While Cummins and his committee sought to take advantage of these suggestions, Stockton sent his analysis to another interested observer, Louis Marshall. Sounding much like the House debaters of a few months past, Marshall responded he knew the horrors of lynching firsthand. A mob's murder of Leo Frank soon after Marshall presented his case to the Supreme Court had led the defender of Jewish rights to "do whatever it lay in my power to do, to assist in putting an end to so monstrous an iniquity as lynching."
However, he had reached a decision counter to Stockton's.

Great as that [lynching] evil is, it would not . . . equal that which would follow the usurpation by the Congress of the United States, of power which it does not possess under the Constitution. An evil precedent is apt to lead to others until the Constitution itself may ultimately be destroyed . . . . Indeed the pursuit of such methods would amount to the lynching of the Constitution . . . . [Because the antily lynching goal was an admirable one, it was] the more essential to consider the possible consequences of an extreme interpretation of the Constitution. Under our dual system of Government the police power is lodged in the States and not in the Federal Government . . . . The State has plenary power and jurisdiction to deal with this crime . . . .

The Fourteenth Amendment did not empower the federal government to enact such laws as H. R. 13. Using conspiracy theories to reach mobs was "far-fetched and reasons in a vicious circle, and if indulged would open the door to all manner of perversions of the equal protection clause." Congress could reach only the state. This entity included those who turned prisoners over to mobs; it did not include those who
did not act. If the warden of Frank's prison had cooperated with the mob and turned Frank over to it, he would have been in line for federal prosecution. "[T]he test lies in differentiating between affirmative action and non-action or failure to act." In addition, Congress could not fine counties where such action or nonaction took place, regardless. Marshall's explanation of why not was no better than Stockton's for why; he asserted that congressional legislation was "unnecessary" since states already had county liability provisions. 82

Reacting to this critique, Stockton attempted to explain to Marshall why federal antilynching action was a necessity and not an unconstitutional assertion of federal power. Southern mob rule was possible because small counties pressured law enforcement officers to acquiesce to mob justice; therefore, "from the point of view of political policy," the "largest political division . . . [should] act in cases of mob passion." In terms of constitutional policy, the Fourteenth Amendment had expanded federal power even "far[ther] beyond the point" to which the Dyer bill needed to extend. Using a conspiracy technique to reach the critical targets gave the government additional flexibility. If the federal government could reach Marshall's cooperative prison warden, it could reach those who, by conspiring with him, became "principal[s] in the commission" of a crime that Congress prohibited under the Fourteenth Amendment. As for the type of official nonaction Congress could prohibit,
. . . I do not follow you as to non-action not constituting a denial of equal protection. If I remember Ames' or Beale (which was it?) in my law school days, a failure to act is not actionable if there is no duty to act on the part of the tort feasor. But there are many cases of criminal negligence and it seems to me extreme to say that a State policeman can stand on the corner and arrest every white man who shoots a white man, and fail to arrest every white man who shoots a negro, and yet not be denying as a representative of the State, the equal protection of the law to the negroes.

This critical point made, Stockton then ignored the differences between various national government powers and justified coexistent state and federal laws on county liability.

I should suppose that the principle to be applied would be the same as that applied in the exercise of the Commerce power where, though the State may have acted, the Federal Government can still act and its law where inconsistent supersedes the State's law. Where it is not inconsistent both, as I understand it, may stand side by side. If the State thinks this is an excessive penalty for a Coutny it could repeal its own statute.

If his arguments did not convince Marshall or Borah, Stockton had an effect on the committee through Cummins, whose changes in Section Four became part of H. R. 13 when the Judiciary Committee favorably reported the bill on June 28. According to Lodge less than a week before Senate Report 837 became public, the committee's evaluation was "not what is called an unfavorable report; it is simply bringing the bill before the Senate for action, with a statement of the views of the committee as to the Constitutional question."

It was, however, more than that. An eight-to-six majority presented a clearly favorable but unsigned report. It was
also less than that since there appeared to be considerable uncertainty regarding the bill among the eight Republicans who made up the majority. The committee's vote, except for Borah's negative ballot by proxy, followed party lines, but the eight-man majority was apparently far from united on what that support meant, upon what it rested, and what it implied about the Dyer bill's constitutionality. 86

While the NAACP and Borah had long disagreed about the reasons for the latter's quite public opposition, the reasons for Lodge's support--his push of the committee--were equally blurred but much less public. With NAACP pressure continuing, Lodge had informed Storey and Johnson on June 23 that he felt "strongly the need of legislation," that he had "done all I could to get action," and that he would "continue to press the bill." With the report public, the New York World announced that Lodge's pressure resulted not from a support of the antilynching cause but from "the desperate political situations" of the Massachusetts Senator and his friends, Senator Joseph S. Frelinghuysen, who was running for reelection in New Jersey, and Albert Beveridge, who was attempting a political comeback in Indiana's Senate contest. "Some showing" would "propitiate and hold the Negro vote." Going through "the form of attempting" to pass the bill would help guarantee a hold on crucial black votes. 87

Looking past Lodge, the press noted that Samuel Shortridge of California was the only committee member who believed
the Dyer bill was constitutional. Shortridge's fellow Senators made the same charge. Kenneth McKellar of Tennes
see asked the Republicans on November 28, "Aside from . . . [Shortridge], what lawyer on the other side of the Chamber says the measure is constitutional?" When only Shortridge rose in response, McKellar repeated his request, and Democrat Lee Slater Overman, who had served on the Borah subcommittee, pressed further.

. . . I should like to ask the Senator if a majority of the Republican members of the committee, in
ccluding the leading lawyers on the committee, in voting to report the bill did not state that they had grave doubt about the constitutionality of the measure?

Mr. SHORTRIDGE. That may be so.

Mr. OVERMAN. Is it not so?

Mr. SHORTRIDGE. It is as to one or two Senators on the committee, certainly.

Mr. OVERMAN. If I recollect right, the Senator . . . and the Senator from South Dakota [Mr. Ster-
ling] . . . were the only ones who said that the bill was constitutional . . . .

Cummins also sought to explain the committee's vote to his colleagues.

It is not true that all but two members of the Judiciary Committee were of the opinion that the proposed law was constitutional. This is the fact: There were various phases of the question which met with very great opposition of some members of the Judiciary Committee. A good many members of that committee were of the opinion that Section 4 of the bill was of very doubtful constitutionality as it passed the other House and that was also true as to the section . . . relating to the liability of municipalities for crimes of this sort. I am sure that a majority of the Senators who are members of the Judiciary Committee, however, are of the opinion that the bill as it has been reported to the Senate is constitutional.
This explanation proved insufficient for his Democratic colleagues who attempted to exploit the Republicans' constitutional doubts.

Mr. OVERMAN. . . . some four of the Senators reserved the right to vote against the bill on the floor of the Senate because it was unconstitutional . . . .

. . . . My recollection is that the Senator said about his amendment, 'If anything will make it constitutional this will do it; but I will always have a doubt about it.'

Mr. CUMMINS. No; I do not think I said that. I recognize that there are some questions that lie near the border line, and it is quite impossible to bring lawyers' minds as a whole into uniform judgment with regard to that matter; but I never expressed any doubt about the constitutionality of section 4 as it was amended.91

Cummins attempted to explain that his major concern had been procedural safeguards; his criticism of form had not been a rejection of substantive constitutionality. He also attempted to quiet other misconceptions about the bill, for example, that the committee supported it not only while doubting its constitutionality but "to help Lodge, or at his suggestion."

As he told Stockton,

. . . . I did more to get the bill through the committee than any other man, and I never had any conference with Senator Lodge about the matter. . . . [H]e favored the bill but I do not believe that he did anything more than to indicate his attitude; and it was absolutely certain that the members of the Judiciary Committee who voted to report it did so because they believed it ought to pass.92

Regardless of motives, the Dyer bill the committee sent to the full Senate was very similar to what had arrived from the House. Sections Four and Five contained the only changes
as the committee presented a replacement for the local prejudiced state failure clause of Section Four and a qualifier for the county liability provision of Section Five.93 The new Section Four provided for federal trials for "those who participate" in a lynching,

... provided, That it shall be charged in the indictment that by reason of the failure, neglect, or refusal of the officers of the State charged with the duty of prosecuting such offense [by officers and mob members] under the laws of the State to proceed with due diligence to apprehend and prosecute such participants the State has denied to its citizens the equal protection of the laws. It shall not be necessary that the jurisdiction allegations herein required shall be proven beyond a reasonable doubt, and it shall be sufficient if such allegations are sustained by a preponderance of the evidence.

In the new Section Five, a county was liable for the $10,000 forfeiture,

... if it is alleged and proven that the officers of the State charged with the duty of prosecuting criminally such offense under the laws of the State have failed, neglected, or refused to proceed with due diligence to apprehend and prosecute the participants in the mob or riotous assemblage ... .94

The committee's report, submitted by Shortridge, was largely a reprint of various briefs. Explaining why the report included not only Storey's and Stockton's briefs but also Moores', Goff's, and Daugherty's presentations to the House, Shortridge noted that the House report set "forth so fully the situation which the proposed legislation seeks to remedy, and the grounds upon which the bill is based, that we feel we can do no better than to incorporate the same as a
part of this report." Only in concluding the report did
the Californian attempt to present his committee's opinion.
The majority had decided, from "different processes of rea-
soning," that H. R. 13 was "constitutional and should pass."
It was appropriate legislation against the affirmative denial
and failure to act that the Fourteenth Amendment prohibited.
With it Congress could "protect those rights to life, liber-
ty, and property . . . guaranteed by the Constitution . . . ."
With it Congress could correct a national problem. The na-
tional government would not use the statute to subvert or invade
the states or to usurp their responsibilities; Congress sought
only to aid the states in assuring that American citizenship
was not only a "badge of honor" but a "shield of protection."95

Despite that bugle call, the Senate had to decide if
election pressure, honor, duty, and patriotism required a
vote on the Dyer bill or a death by neglect. If the Senate
postponed a vote until after the election, its members could
largely ignore both NAACP reminders of black voting strength
in such states as Indiana, Illinois, Michigan, New York, and
Pennsylvania and black disillusionment with Republicans who
broke party promises. A post-election vote meant at best,
according to White, only a "slight chance" of an antilynch-
ing victory. At worst, it meant starting over again when
the Sixty-eighth Congress met in March 1923.96

When the New York Tribune reported on July 7 that Re-
publican Senate leaders had caucused the previous day and de-
cided to abandon the Dyer bill, Lodge denied the charge. He told Johnson that those at the "entirely informal" meeting at his home had not even mentioned the bill. He added to Butler Wilson of the NAACP's Boston branch that "... nobody, as far as I know, thinks of suggesting that it should be abandoned." But even if Lodge's statement were true, the NAACP knew that abandonment of the bill, which was a politically troublesome and low priority party measure, was always possible and could easily be achieved informally. Senators could take advantage of the legitimate legislative rush during the closing weeks of the session. As Senator James E. Watson explained, "sheer lack of time" could prevent consideration of the bill, which took a back seat to the tariff and veterans' bonus bills. Cummins warned the NAACP that tariff, adjusted compensation, and merchant marine subsidies had "the right of way." Harding also cautioned blacks that the road in the Senate was a tricky one, that "... the tariff and bonus bills threaten to take up all of the time."

Storey, vacationing in Maine, feared that the Tribune report had been more accurate than not and that GOP strategy did not include pushing the measure to passage. Overcoming that lack of interest, particularly when the Senators seemed to care for black votes more than black lives, would be difficult. "The [Fordney-McCumber] tariff bill has the right of way and can hardly be displaced to pass our bill unless the Re-
publicans are in dead earnest." Furthermore, with "the sea-
son getting late," there were other issues blocking considera-
tion. Senators who wished to avoid discussing the important
veterans' bonus and ship subsidy bills could extend the dis-
cussion of the tariff measure. The pressure was on the NAACP
to push the Senate to action.

We must get it passed before the election if at
all. Nothing can be expected at the short ses-
sion [beginning December 4], and our main weapon,
the Negro vote, will be gone.

The only course for us to adopt is to push.
The vote is needed by the party and if the bill
is not even brought to a vote, many Republicans
will be beaten. By all means build a fire under
Lodge. . . . He feels sure of success now, I
think, but he is [word omitted], I believe, and
the Negro vote in Massachusetts is large, if it
can be kept together.

Our policy is to unite that vote there and
elsewhere in the announced resolve to vote against
every Republican who does not do his bit to pass
the bill. The Republicans have an overwhelming
majority, and unless they use their power and keep
their promise, they are not our friends.99

In 1920 the NAACP had heard that the Republicans' two-
vote majority was "too small" for them to push through an
anti-lynching bill, but after the Republican sweep of 1920,
which increased the Senate majority to twenty-two, the GOP
still would not act on its own. Therefore, as White explain-
ed to the newcomer, Stockton,

The situation is this: The Republican Party has
a majority of more than twenty in the present
Senate. If it wishes to do so, it can pass the
bill within two weeks. Our task is to create that
wish on the part of the Party . . . showing them
the nationwide demand for this legislation.100

With this strategy in mind and while the press of legis-
lative business and campaigning occupied the Senators, the NAACP continued its publicity and lobbying efforts. Johnson publicized the petition in support of the Dyer bill that Lodge had presented to the Senate on May 6. Collected with some difficulty, the appeal included the names of twenty-four governors, eighty-eight churchmen, thirty-nine mayors, forty-seven jurists and lawyers, two former U. S. attorneys general, twenty college presidents and professors, and thirty editors. With White following "the procedure" used in the House fight and "pounding away as hard as we can," Senators received figures on custodial lynchings. They learned that only ninety-nine of two hundred twelve lynch victims from 1919 through 1921 had been taken from custody. They received newspapers accounts of lynchings, copies of Thirty Years of Lynching, "An American Lynching," and other NAACP publications. They were asked by Johnson why lynchers encouraged each other by saying "'The Sheriff said it would be all right; that he would offer no resistance.'" They learned that Belgian, French, and Czechoslovakian newspapers printed accounts of American lynchings.

In an August 11 press release, the American Bar Association's position in favor of federal antilycling action became an NAACP weapon. At its annual meeting in San Francisco on August 10, the ABA, still small and voluntary, urged "'that further legislation should be enacted by Congress to punish and prevent lynching and mob violence.'" This had
been the recommendation of the ABA’s Special Committee on Law Enforcement, which had held hearings in New York, Chicago, and Washington that spring and early summer. The NAACP’s use of this recommendation and endorsement was part of its overall strategy of convincing Senators, at least twenty-one of whom were ABA members, that with the "legal opinion of the country overwhelmingly in support of ... constitutionality," the "excuses on the score of constitutionality which the Senate and individual Senators have advanced as a reason for delay in passing the measure" did not carry much weight.¹⁰³

While Johnson and White worked,¹⁰⁴ the responsibility of leading the Senate to a vote over the Democratic obstructionists fell to Shortridge, although the NAACP would not cease pressuring Majority Leader Lodge. The NAACP had considered Kansas Republican Charles Curtis "the ideal man to lead the fight," and in January 1922, Johnson had contacted Arthur Capper, Curtis's fellow Kansas Senator, to see if he could convince Curtis to take the job. Capper, a member of the NAACP's board of directors and president of its Topeka branch, was unsuccessful in his mission, if indeed he accepted it.¹⁰⁵ By the end of March, the NAACP had received word that as Republican Whip, assistant floor leader, and member of the Appropriations and Finance Committees, Curtis, Herbert Hoover's future vice president, did not have the time for the assignment. Curtis would continue to intercede for
the antilynchers, attempting to work out "trade[s]," but
the responsibility for leading the floor fight fell to
California's first-term, sixty-one year old junior Senator.
His support for the bill in committee and his "fighter"
personality had gained NAACP attention. With his "heart
. . . in the legislation," Shortridge was an obvious choice
among the half-hearted antilynchers in the Senate, but Short-
ridge's parliamentary skills and his admiration for grand
and gallant traditions of the past cancelled out the value
of his fighting spirit. 106 He was not the ideal floor leader.
That he was the best the NAACP could recruit is indicative of
the party support the antilynching bill had. As Johnson later
recalled about the Senator who had the fate of the Dyer bill
in his hands,

My heart sank as I thought of the gap between a
Bo rh a nd a Shortridge. Mr. Shortridge, as a
Senator, was rather pompous of style; he seemed
to have schooled himself in the graces of the
statesman of a former generation. I judged that
Daniel Webster was his model, for in speaking he
employed the Websterian tone, and even wore his
right hand in the bosom of his long coat. 107

This dedicated but flawed leader began his public
responsibilities on September 21. Three weeks earlier, on
August 30, the Senate Steering Committee placed the Dyer
bill on the Senate calendar, and on the twenty-first, with
the tariff and bonus bills through the Senate and the ship
subsidy bill set aside, Lodge "gave orders" to Senators Cur-
tis and Watson to take up the bill at two o'clock. At that
time, with President pro tem Cummins presiding, Shortridge
rose. Only then, apparently, did the Democrats realize that this was the day the Republicans set for their attack. Whatever advantage that surprise gave the antilynchers, however, was quickly lost when Shortridge yielded the floor to allow Republicans Charles McNary of Oregon and Francis E. Warren of Wyoming to conduct some routine Senate business. Mississippi Democrat Pat Harrison, a first-term Senator with House experience, used the brief delay well. He raised a point of order on Warren's resolution, and after considerable parliamentary discussion Commins determined that Harrison and not Shortridge had the floor. Aided by numerous quorum votes and motions for adjournment, Harrison held the floor for two hours, but even with the roll calls Shortridge was able to regain the floor, move for consideration of H. R. 13, and speak briefly but grandly on the bill, the nation, and Senate responsibilities. 108

Shortridge, denying that he held "any feeling of personal hostility" toward the obstructionist Senators, explained that his goal was an open, objective discussion. He had no intention of taking an unjust, sectional, or dangerous position; he abhorred the idea of the Senate's becoming a sectional battleground. Shortridge wanted only to hear "elaborate arguments" on a bill he believed to be constitutional. He sympathized with fellow Judiciary Committeeman Shields who applauded the Californian for not including in the committee's report "the vicious, unfounded assaults . . . made by
Moorfield Storey . . . against certain Southern States and their governors and their judicial and executive officers."

Shortridge also explained that he wished to "make no assault upon the legal rights of the States . . . ." He wanted to "attack no quasi sovereignty of States," only to aid the states. Amidst grand devotionals to "my Government, my one Federal Government, my one National Government," Shortridge sought to protect both state and nation by presenting the simple arguments of the Judiciary Committee's report. He believed that the report presented a view of the Dyer bill's Fourteenth Amendment base which proved the measure's nonthreatening power. Although he claimed that the bill had other constitutional foundations, the Californian nevertheless agreed that H. R. 13 was on solid constitutional ground as a result of the Constitution's delegation of a type of joint responsibility. If states could or would not protect "right to life, liberty and property which are guaranteed by the Constitution" in both the Fifth and Fourteenth Amendments, Congress could help them. The aim was "not to crush" but to "save those things for which government is organized . . . ." If the Constitution guaranteed life—and Shortridge could not doubt that it did and that everyone agreed with it—and if the states failed in that guarantee "either by affirmative action of by nonaction," Congress could act.
Senators had a "constitutional right . . . to interpret the Constitution," Shortridge explained. The Supreme Court might declare the Senate's work

. . . utterly null and void . . . ; but at this stage of matters in legislation I claim the right to consider a question ab initio, and to determine in my mind, and for the Senate to determine, whether Congress has the power to exact given legislation . . . . I am not embarrassed by them [previous Court decisions] in my interpretations. Though their reasoning may overwhelm me, though their conclusions may be different from mine, yet as a Senator I am not to be foreclosed or estopped by having a decision of the Supreme Court presented before me.111

Senators might amend the Dyer bill to cover northern mobs, but whatever they decided was part of their general legislative responsibility.

Senators would consider first the question of the power of the Federal Government to deal with the subject matter; then, second, . . . whether this is appropriate legislation; and then . . . .

. . . . there would remain the question of policy as to whether this legislation would be helpful to the several States . . . .112

Explaining that he was "willing to stay right here until this bill, if taken up, is disposed of . . . ," Shortridge concluded with the hope that the Senate would "enter into a gentleman's agreement" to debate the bill for "two or three days, each side, if there be sides." Under that plan, " . . . we could come to a vote on the measure certainly within a week." But, indicating that he too was surprised by the sudden action on the bill, Shortridge gallantly agreed "to be guided by the wisdom of others" as to how much time the Senate, eager to adjourn, devoted to H. R. 13.113
Without a quorum—and only twenty-seven Senators answered their names—there was no opportunity for consideration of Shortridge's motion. His few words in praise of the bill were all the antilynchers got on September 21. The next day Congress adjourned, despite the protest of West Virginia Republican Howard Sutherland. Although anxious to return to his home state to campaign for reelection, Sutherland argued that lives came before campaigning. He could not see that either a desire for adjournment or doubts about constitutionality should prevent implementation of needed "drastic measures." Unwilling to argue constitutionality, the former editor, government worker, and businessman merely reminded his colleagues that "able lawyers [frequently] inveigh pending measures on the ground that they are unconsti-
tutional, only to have these measures reviewed by the court of final resort and declared to be constitutional."\(^{114}\)

No one responded to Sutherland's appeal and the second session of the Sixty-seventh Congress ended. Reaction to this failure was predictable. Johnson recounted later that he "felt that a bit of stupid courtesy had cost us the opportu-
tunity of having the bill taken up . . . ." Storey immediate-
ly looked beyond Shortridge. The Bostonian "did not like the fact that so many of the persons supposed to be our active supporters did not take enough interest to remain in their seats when the bill was called . . . ."\(^{115}\) Shortridge shared this frustration about his party's failure to back him.
As he noted to Lodge on October 6,

. . . friends of the bill who were in the Senate and saw and knew the situation should have remained there,--I have in mind certain gentlemen who left to "keep dinner engagements." I hope my remarks served to placate many who are so deeply interested in this bill and who were disposed to think we were indifferent to its fate.

The Californian noted, in particular, Lodge's "forced departure when I was making an earnest effort to bring up the Dyer bill. . . . Call you this a backing of your friends?"116

Disappointed by the Republicans' apathy and the legislative setback, the NAACP nevertheless found tools available for use prior to and after the fall elections. For example, Johnson's report of the bill's treatment in the Senate received full coverage in the Crisis. That recapitulation included the names of the eleven Senators who answered an earlier roll call but not the roll call during the parliamentary fight to sustain Shortridge's right to the floor. In addition, the story included the names of "those Republican Senators who stayed through to the end of the fight . . . ." These included Capper and Curtis, as well as Shortridge.117

The Crisis article and a press release that provided the same account were simply continuations of an adjusted strategy of dropping "all legal and ethical arguments" and relying "solely upon political pressure." They were warnings that the NAACP had not conceded defeat and that Negroes had a strong interest in what their Senators did after the elections.
The Republican leaders in the Senate state that the only unfinished business on the program of the Steering Committee are the Liberian Loan Bill and the Anti-Lynching Bill. They have given promises that these two measures will be taken up and finally disposed of at the opening of the next session and before any other legislation is considered.

... We must hold the [Republican] Party and hold the President and hold the Republican majority in the Senate strictly to these promises, and if the enactment of anti-lynching legislation is not fulfilled before the passing of this Congress on March 3, 1923, we should consider all of these promises as broken.

There was still life in the Dyer bill. The Sixty-seventh Congress would meet again.
NOTES

1 Houston Informer, September 30, 1922; Moorfield Storey to William E. Borah, February 4, 1922, William E. Borah Papers, Library of Congress, Manuscript Division (Washington, D. C.), Box 106. Many of the letters cited in this chapter—particularly those in the NAACP collection—are carbon or retyped copies of originals. The assumption is that the originals were sent and received; therefore, no effort has been made to note which letters are copies and which are not.

2 Crisis, 23 (April 1922), 263; Dyer’s Town Hall speech, Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Group I, Series C, Box 243 (hereafter cited as NAACP Records); Dyer to Storey, February 1, 1922, ibid., Box 76.

3 Chicago Defender, February 18, 1922, 1.


5 See Sue White to Walter White, February 3, 1922, NAACP Records, Group I, Series C, Box 243; Crisis, 24 (May 1922), 25. Crisis noted that "... no stronger man could be found in the Senate to champion the bill than Senator Borah and if he can be induced to make the sort of fight for the bill that he is capable of making, its passage may be looked upon as assured." The NAACP saw him as "without doubt the most commanding figure in the United States Senate, and if he undertakes the championing of the bill there is little doubt that he can put it through." Minutes of the Board of Directors, March 13, 1922, NAACP Records, Group I, Series A, Box 15.

out that the committee Democrats were all southern and his efforts would thus have been "useless." New York Times, May 30, 1922, 18. Crisis noted that although none of the Senators was from a state with a large black voting population, ". . . Senators Borah, Dillingham and Sterling have all expressed themselves as being in favor of Anti-Lynching Legislation and as willing to support the Dyer bill if the committee is satisfied as to its constitutionality." Crisis, 24 (May 1922), 25.


8Ibid.


11Johnson, Along This Way, 369; "Report of the Secretary," June 8, 1922, Storey Papers, Box 2. Borah also told Storey that he considered a joint committee "to work out what we believe will be a constitutional measure." Borah to Storey, June 1, 1922, ibid.

12Congressional Record, 69 Cong., 1 Sess., 7439 (Borah, April 14, 1926); Ashby, Spearless Leader, 253. Borah was one of three on a subcommittee which framed the Eighteenth Amendment. He believed it would help dry states stay dry, protecting them from wet states that took advantage of the
gaps in the federal system left by the federal government's absolute power over interstate commerce. Borah to editor, Boston Herald, June 20, 1931, cited in ibid., 25.

13 Congressional Record, 63 Cong., 2 Sess., 4959 (Borah, March 17, 1914); "Report of the Secretary," June 8, 1922, Storey Papers, Box 2. White later noted that Borah was the most conspicuous example of "several Western senators who were regarded as liberals on economic questions but who have been among the most injurious to the Negroes' cause." White, A Man Called White: The Autobiography of Walter White (Bloomington: Indiana University Press, 1948), 170-71. According to White, Borah, by the 1940s, "persistently and consistently used his oratory and reputation as an authority on constitutional law to oppose federal anti-lynching laws and other legislation of that character."

14 White to Rivera, March 5, 1922; Johnson to Whitfield McKinley, March 33, 1922, both in NAACP Records, Group I, Series C, Box 244. Years later, in 1926, with his eyes set on the 1928 presidential race, Borah expressed his pleasure at winning southern supporters. He believed he needed a southern base to strengthen his presidential appeal. Raymond Robins to Salmon O. Levinson, June 30, 1926, in Ashby, Spearless Leader, 256.

15 Miller to Johnson, March 29, 1922; Cobb to Johnson, March 29, 1922, both in NAACP Records, Group I, Series C, Box 244; Minutes of the Board of Directors, May 8, 1922, ibid., Series A, Box 15.

16 Borah to Johnson, April 3, 1922, Borah Papers, Box 106; "Report of the Secretary," March 9, May 2, 1922; Minutes of the Board of Directors, May 8, 1922, both in NAACP Records, Group I, Series A, Box 15.

17 White to Rivera, March 15, 1922, NAACP Records, Group I, Series C, Box 244; Johnson to New York branch secretary, March 7, 1922, ibid., Box 76.

18 Storey to Johnson, February 6, 1922, NAACP Records, Group I, Series C, Box 76. Johnson asked Storey to "endeavor to center pressure" on Lodge and Thomas Walsh, the other Massachusetts Senator, "by inducing influential persons in the State to telegraph or write them . . . ." These writers could point out the black's need for equal protection, the mob's threat to national law and order, America's tarnished national reputation, and "political expediency." Johnson to Storey, February 4, 1922, Storey Papers, Box 2. See Garraty, Lodge, 80.
Storey to Borah, February 8, 1922, Borah Papers, Box 787. See Storey, "The Negro Question: An Address Delivered before the Wisconsin Bar Association . . . June 27, 1918" ([New York: NAACP, 1918]). Compare "Report of the Secretary," March 9, 1922, NAACP Records, Group I, Series A, Box 15: Thomas Blanton and Thomas Sisson were "actually in favor of mob rule" and "in utter defiance of anything that the Federal Government might propose to do." The Philadelphia American, November 5, 1921, agreed even before the debates began, using as the base for its decision the minority report. The minority, the paper reported, was "a prollynching advocate, and no . . . true representative" of its authors' constituents. "This is the first time so far as we know where men in Congress have deliberately advocated mob violence in general." Ibid., Series C, Box 247.

Borah to Storey, February 9, 1922, Storey Papers, Box 2.

Storey to Borah, February 14, 1922, Borah Papers, Box 106.

Support for a constitutional amendment if the bill failed did not die in others. Milwaukee attorney George E. Morton believed that the bill's advocacy "let the South understand that the Fourteenth Amendment really means something and . . . [served] warning that if the Constitution does not cover such cases that the sentiment is such that it can easily be made to do so by an amendment which does not seem to be so difficult as it once was." Morton to Storey, March 16, 1922, Storey Papers, Box 2. Morton might have been alone in his faith.

Storey to Borah, February 14, 1922, Borah Papers, Box 106.

Wickersham to White, April 13, 21, 1922, NAACP Records, Group I, Series C, Box 80; White to Wickersham, March 23, April 15, 1922, ibid., Box 77; Wickersham to White, April 18, 19, 1922, ibid., Box 244. See also Wickersham to Johnson, February 10, 1922, ibid., Box 76, on the possibility of the NAACP's using to its advantage Wickersham's constitutional doubts. See also Johnson to Storey, March 16, 1922, Storey Papers, Box 2; Wickersham to Storey, April 21, 1922, ibid., where after saying that the Court deserved a chance to check the act, Wickersham commented, "It seems to me that the constitutionality of this bill cannot be sustained. I wish I could feel differently, but I cannot."
25 Storey to Johnson, March 16, 1922, NAACP Records, Group I, Series C, Box 76; Borah to Keywood Broun (telegram), May 18, 1922, Borah Papers, Box 106. Borah commented, "... I do not want to pass a measure whose death has been decided before it has been enacted." Borah to H. L. Bradford, May 23, 1922, ibid.

26 Borah to Ernest H. Gruening, May 19, 1922; Borah to W. Hayes McKinney, May 22, Borah Papers, Box 106; McKinney to Johnson, May 25, 1922, NAACP Records, Group I, Series C, Box 244.

27 Borah to Williams, June 8, 1922; Borah to Bradford, May 23, 1922; Borah to Gruening, May 19, 1922, Borah Papers, Box 106.

28 Borah, letter to the editor, Boston Transcript, June 8, 1922, ibid.

29 Ibid.

30 Ibid. See also New York Times, June 12, 1922; Senator James W. Wadsworth, Jr., to Johnson, August 9, 1922, NAACP Records, Group I, Series C, Box 245. Wadsworth largely agreed with Borah, informing Johnson that "the Congress has gotten into the very bad habit, in recent years, of deliberately passing bills which a large share of the membership believe to be unconstitutional and relying upon the Supreme Court to declare them null and void. This is a demoralizing practice. It excites among the ignorant hostility toward the Supreme Court... ."

31 Borah, letter to the editor, Boston Transcript, June 8, Borah Papers, Box 106.


33 Johnson to Herbert Seligmann, [May 23, 1922?], NAACP Records, Group I, Series C, Box 244. As White explained, Lodge was Republican leader of the Senate and leader of the regular Republicans. Borah was a leader of the insurgent, progressive wing. White believed Borah knew that Senate failure of the bill would work against Lodge. His defeat, as well as that of North Dakota's Porter McCumber, second in seniority on the Senate Foreign Relations Committee, meant Borah would chair the powerful committee in the Sixty-eighth Congress. White to Angell, June 16, 1922, ibid.

34 "Report of the Secretary," June 8, 1922, Storey Papers, Box 2; Minutes of the Board of Director, June 12, 1922, NAACP Records. Group I, Series A, Box 15.
35 See Garraty, Lodge, 408-14.

36 Congressional Record, 67 Cong., 2 Sess., 6480 (May 6, 1922). He also presented a Massachusetts resolution to the Judiciary Committee, ibid., 6627 (May 10, 1922); Minutes of the Board of Directors, June 12, 1922, NAACP Records, Group I, Series A, Box 15; Baltimore Afro-American, May 19, 1922; St. Louis Argus, May 10, 1922, both in ibid., Series C, Box 249. For Lodge's support of anti-lynching, phrased most cautiously and generally, see Lodge to Johnson, December 11, 1919, February 10, 18, April 26, May 11, 1922, ibid., Box 68. In his May 11 letter, Lodge reaffirmed that "I have always been opposed to lynchings . . .," and "I expect to vote for the anti-lynching bill when it comes before the Senate . . . ."

37 Controversy developed when Trotter took matters into his own hands and went to see both Lodge and Borah. Johnson believed Trotter only wanted "to scoop" the NAACP by "getting the bill reported out when the NAACP had failed to get it done." While Trotter did encourage the bills' report, Johnson thought the result was "the wrong kind [of report] . . . . We are now working hard to pull the bill out of the mud and save it. We are fighting for a favorable report--failing that a postponement. We may have to settle for a compromise measure. But an unfavorable report now would be a catastrophe." Johnson to [?], May 21, 1922, ibid., Box 244. In a May 29 press release, "N.A.A.C.P. Secretary Rectifies Trotter Statement on Dyer Bill," ibid., the organization noted Trotter's "false implication" that the NAACP was responsible for the bill's delayed report. Trotter responded on June 1 that he had merely reported Borah's explanation for the delay, that "lawyers whom you had secured to prepare briefs had not sent them in. He sought to place the responsibility on these lawyers." Trotter to Johnson, June 1, 1922, ibid. The NAACP's Branch Bulletin explained that Johnson had convinced Borah to receive briefs being prepared by Storey, William Lewis, and Butler Wilson. But "when a report without delay was insisted on, as he had not the opportunity to wait for the briefs, he sided with Senators Overman and Shields . . . ." Johnson then rescued the bill "after great difficulty" from an adverse final report, obtaining a two-week delay. VI (June 1922), 1. See also Minutes of the Board of Directors, June 12, 1922, NAACP Records, Group I, Series A, Box 15; Johnson to William H. Levi, May 26, 1922, ibid., Series C, Box 244. St. Louis Argus, July 7, 1922, noted that an unfavorable vote by the full committee had been expected and that both the NAACP and the Equal Rights League deserved "great credit" for the favorable return. Trotter's biographer believes Trotter's prodding of Lodge offended Borah
who opposed "hasty action." This offense then led to his opposition to the bill. Stephen R. Fox. The Guardian of Boston: William Monroe Trotter (New York: Atheneum, 1970), 242. See note sent by Captain Fred W. Moore to Chief of Military Intelligence, June 19, 1918, that Trotter wanted to "be a saviour of his own race rather than be under obligation to white men." Trotter had a "rather childish egotism and desire to get into the limelight, particularly before his own people . . . ." Records of the War Department General and Special Staffs, Record Group 165, National Archives, Washington, D. C., #10218-153-7.

38"Report of the Secretary," June 8, 1922, Storey Papers, Box 2.

39White to Norman Angell, June 16, 1922; Dyer to Knute Nelson, May 31, 1922; White to Lodge, June 4, 1922, NAACP Records, Group I, Series C, Box 244; New York Tribune, May 26, 1922, and Newark Evening News, May 24, 1922, ibid., Box 249. Speculation, fueled by Borah, was that the Senate and House Judiciary Committees would meet in joint session and draft a substitute. See New York Evening Journal, May 26, 1922, ibid., Box 249.

40New York Call, May 27, 1922, ibid., Box 249; Cobb to Spingarn, June 28, 1922, Spingarn Papers, Box 2. Spingarn wrote Cobb that "Borah's statement is obviously an attempt to drag a herring across the trail . . . ." June 15, 1922, ibid. Cobb had written Spingarn the previous day that Borah's Transcript letter was merely laying "a smoke screen." Cobb to Spingarn, June 14, 1922, ibid.

41NAACP press release, "Attack Borah's Stand on Anti-Lynching Bill," June 12, 1922; Johnson to Lodge, June 14, 1922, NAACP Records, Group I, Series C, Box 244.

42Johnson said that explanations that allowed the national government to protect Americans in Mexico but not in Mississippi was "hair-splitting and sophistry." It was shocking to use "a maze of judicial decisions" to modify or to nullify the Fourteenth Amendment as Borah had done. NAACP press release, "Attack on Borah's Stand," ibid.

43Johnson to Lodge, June 14, 1922, ibid. Johnson apparently believed Borah was "inclined to report the Bill favorably" until the May 18-25 "crisis"; his attitude change was linked to Lodge's order. So Johnson reported to the NAACP board. Minutes of the Board of Directors, June 12, 1922, ibid., Series A, Box 15.
44 Johnson to Lodge, June 14, 1922, ibid., Series C, Box 244.

45 Beck to Borah, July 17, 1922, Borah Papers, Box 106.

46 Bridges to Johnson, May 29, 1922, NAACP Records, Group I, Series C, Box 244. Bridges believed that beneath all issues of constitutionality were "political and economic considerations." Dred Scott proved that point, although the more recent judicial rejection of the child labor act was the freshest reminder that the "Fourteenth Amendment . . . is a poor man's law but a rich man's club." The Senate was the spokesman and protector of those club members.

47 Tobias to Johnson, May 29, June 22, 1922, ibid. In June Tobias accused the NAACP of ignoring Dyer's H. R. 13 in favor of Ansorge's H. R. 4378 until Dyer spoke at a Harlem public meeting with Ansorge and Hamilton Fish, Jr. Then the NAACP "got on the Dyer Bill band wagon and has gone joy-riding the Dyer Bill ever since." Until that time, the organization was only interested in the $100,000 which went with an investigating committee, Tobias asserted.

48 Tobias to Johnson, June 22, 1922. Johnson had sent the Storey brief to Borah in early May. Storey to Borah, May 19, 1922, Borah Papers, Box 106.

49 Moorfield Storey, Brief in Support of the Dyer Anti-Lynching Bill. Submitted to the Committee on the Judiciary, United States Senate (New York: NAACP, [1922]).

50 He was "within the scope" of power as long as that power placed him in the position to commit the wrong in the first place. Ibid.

51 Ibid.


53 Ibid. On May 19 Storey added to his Fifth Amendment argument by pointing to Brandeis's dissent in Gilbert v. Minnesota, 254 U. S. 336, regarding "incorporation" of the First Amendment's free speech guarantee. Storey reasoned that if free speech were a privilege and immunity of national citizenship before the Fourteenth Amendment or even the Constitution were written then so too had been rights of life, liberty, and property. If the former were protected by the national government, so too were the latter. Storey to Borah, May 19, 1922, Borah Papers, Box 106.
54 He cited the Civil Rights Cases, United States v. Harris, and Ex parte Virginia.
55 Ibid.
56 Pillsbury to Storey, April 5, 1922, Storey Papers, Box 2.
57 Storey to Borah, May 31, 1922, Borah Papers, Box 106.
58 Borah to Storey, June 1, 1922, Storey Papers, Box 2.
59 Storey to Borah, June 5, 1922, Borah Papers, Box 106.
60 According to White, Borah was "flat-footedly" against the bill. White to Angell, June 16, 1922, NAACP Records, Group I, Series C, Box 244.
61 Borah to Gruening, June 6, 1922; Borah to Storey, June 21, 1922, Borah Papers, Box 106.
62 White reported that five briefs, including Storey's and Stockton's, were prepared; however, only these two seem to have been used by the Senate or to have survived. White to Lodge, June 14, 1922, NAACP Records, Group I, Series C, Box 244. See also Butler Wilson to Johnson, May 23, 1922, ibid. on his having sent a brief to Borah and having returned James Cobb's brief to him. Wilson said his theory, independently arrived at, was the same as Pillsbury's. "That under the due process of the law clause of the 14th Amendment omission by the State was a breach of the Constitution." For what appears to be Cobb's theory, see his June 21, 1922, letter to Lodge, ibid., Box 63. Cobb asserted that the Constitution placed national citizenship above state and guarantees "each and every one of its citizens due process of law and the equal protection of the law. . . . without any let or hindrance by the state." Relying on the powers referred to in Prigg v. Pennsylvania--those of the national government to protect federal rights--Cobb argued that congressional power to protect slavery, which the Constitution only indirectly referred to, permitted Congress to protect what the Constitution directly guaranteed. "Slavery . . . was created by municipal law; while the right to life and liberty, and the equal protection of the law is a natural right and it is the moral duty of the Government to uphold and protect such rights." As citizens of a nation, Americans gave allegiance in exchange
for protection. The courts had long spoke of "reciprocal obligations." "It is no answer . . . to say that the same [protection for citizens] falls within the domain of the political power of the state" since the Court had never ruled that Congress could not act when states "either directly or indirectly" violated constitutional rights. The Court could not say the national government had no power to protect its citizens, "to carry out its part of the bilateral contract . . . ."

63 Stockton first sought information on membership in the NAACP in March 1922. White to Stockton, March 29, 1922, April 4, 1922, ibid., Box 77. Arthur Spingarn asked him to join the Legal Committee in July, which he agreed to do. Spingarn to Johnson, July 6, 11, 1922, ibid., Box 74; Spingarn to Stockton, July 6, 11, 1922; Stockton to Spingarn, July 10, 1922, all in Spingarn Papers, Box 2. Stockton became a member of the NAACP board of directors in December, 1922. Minutes of the Board of Directors, ibid., Group I, Series A, Box 15.

64 Stockton to White, May 11, 1922, NAACP Records, Group I, Series C, Box 75; Borah to Stockton, May 12, 1922, Borah Papers, Box 106, and Storey Papers, Box 2.

65 Johnson to Wilson, June 14, 1922, NAACP Records, Group I, Series C, Box 244. Spingarn told Stockton that "your brief and your suggested amendment was one of the most potent single factors in procuring the favorable report of the Subcommittee of the Judiciary of the Senate . . . ." Spingarn to Stockton, July 6, 1922, Spingarn Papers, Box 2.

66 Storey said that Stockton's advice on how to handle the argument was "the true position in advising a client." Storey to Stockton, June 7, 1922, NAACP Records, Group I, Series C, Box 76.


68 Stockton to Borah, June 5, 1922, Storey Papers, Box 21.

69 Ibid., 2.

70 Ibid., 2-3.
Ibid., 3-7 (emphasis added); Saunders v. Shaw, 244 U. S. 317, 329 (1917); Tarrance v. Florida, 188 U. S. 519, 520 (1903); Yick Wo v. Hopkins, 118 U. S. 356, 373 (1885). According to Stockton, the state acts through its officers and their discriminatory administrative acts are those of the state; mobs who help them are "conspiring with the State itself . . . ."

Stockton to Borah, June 5, 1922, Storey Papers, Box 21. He suggested changing "'to persons within the jurisdictions of the several States, or to citizens of the United States' . . . ."

Ibid.

He erroneously referred to these sections as Sections Eight and Nine. Ibid.

Cummins to Stockton, June 10, 1922, NAACP Records, Group I, Series C, Box 244.

Ibid.

Stockton to Cummins, June 14, 1922, Storey Papers, Box 2.

Stockton to Cummins, June 28, 1922, NAACP Records, Group I, Series C, Box 244.

Stockton to Storey, June 28, 1922, Storey Papers, Box 2; Stockton to Johnson, June 28, 1922, NAACP Records, Group I, Series C, Box 244.

Ibid.

Marshall to Stockton, July 21, 1922, NAACP Records, Group I, Series C, Box 75.

Ibid.

Stockton to Marshall, July 21, 1922, ibid.

85Antilynching Bill; Dyer to Johnson, June 26, 1922 (telegram); Johnson to Dyer, June 27, 1922, both in NAACP Records, Group I, Series C, Box 244; New York Times, July 29, 1922. In his letter to Dyer, Johnson said the Cummins change was "very largely" due to Stockton whose brief Johnson had sent to the Senator.

86Lodge to Storey, June 23, 1922, Storey Papers, Box 2; Lodge to Johnson, June 23, 1922, NAACP Records, Group I, Series C, Box 69. See New York Tribune, July 1, 1922, ibid., Box 249.

87Lodge to Storey, June 23, 1922, Storey Papers, Box 2; Lodge to Johnson, June 23, 1922, NAACP Records, Group I, Series C, Box 69; New York World, July 1, 8, 1922, ibid., Box 244; Brooklyn Daily Eagle, May 24, 1922; New York Evening Journal, May 26, 1922; New York Tribune, July 1, 1922, all ibid., Box 249. The Tribune credited Lodge with pushing the bill through but said he did so strictly "for reasons of politics in Massachusetts." Lodge's Democratic rival, Joseph Walker, claimed Lodge was responsible for the bill's delayed and then stalled consideration. Chicago Defender, September 7, 1922.

88Sterling wrote Cobb in May that "'While I feel the bill should be rewritten, the more I study it the more I an inclined to believe that in its essential features it's Constitutional.'" Cobb to Sterling, May 29, 1922, NAACP Records, Group I, Series C, Box 244. The New York Times, May 24, 1922, reported that Sterling was "inclined" to believe the bill was constitutional but that it should be tested in the courts. The New York World, of the same date, repeated this report and noted that Dillingham was "said to regard" the bill was unconstitutional. Both in NAACP Records, Group I, Series C, Box 249.

89Congressional Record, 67 Cong., 3 Sess., 334 (November 29, 1922).

90Ibid., 400 (November 29, 1922).

91Ibid.

92Cummins to Stockton, July 19, 1922, NAACP Records, Group I, Series C, Box 75.

93Section five also contained one additional and minor change. Action in counties "shall" rather than "should" be brought by federal attorneys in the amended bill.

94Antilynching Bill, 1; New York Times, June 30, 1922.
Antilynching Bill, 4, 31-32.

White to Stockton, August 22, 1922; White to Storey, July 15, 1922, NAACP Records, Group I, Series C, Box 77; White to D. W. Sherrod, August 7, 1922, ibid., Box 245; Johnson to White, April 8, 1922, ibid., Box 338; Washington Tribune, September 16, 1922, ibid., Box 249.

The New York Tribune, July 7, 1922, states that Lodge, Porter McCumber, James Watson, Frank Brandegee, Charles McNary, Medill McCormick, and Frank Kellogg, among others, informally "mapped out" a plan which killed the Dyer bill and the ship subsidy bill and which jeopardized the veterans bonus bill. The NAACP tried to exert "tremendous pressure" on Lodge so he would not "dare delay action of the measure." White to Bruce T. Bowens, July 13, 1922, NAACP Records, Group I, Series C, Box 245. See also [White] to Worcester (Mass.) Telegram, July 17, 1922; Johnson to Lodge, July 7, 1922; Johnson to Shortridge, July 7, 1922 (telegrams); Lodge to Johnson, July 11, 1922; Shortridge to Johnson, July 7, 1922 (telegram), ibid. The NAACP wired Lodge, McCormick, Shortridge, Watson, Calder, Dyer, and Cummins. On July 7, Calder wired back that he had not attended the meeting. Minutes of the Board of Directors, July 19, July 10, 1922, Storey Papers, Box 2.

Levy, James Weldon Johnson, 256-57; Storey to Johnson, July 12, 1922 (draft?), NAACP Records, Group I, Series C, Box 76; Watson to Johnson, July 8, 1922, ibid., Box 245; Baltimore Afro-American, August 25, 1922, ibid., Box 249; Cummins to Stockton, July 19, 1922, ibid., Box 75. See Lodge to Trotter, May 11, 1922, quoted in Fox, Guardian of Boston, 241-42, that ". . . it would be very difficult to lay the tariff aside to take up the anti-lynching bill." On August 9, Shortridge, Watson, and Calder all believed there was ". . . no hope at all of getting the Bill up until the tariff was passed and probably not until after the Bonus Bill was disposed of." "Report of the Secretary," September 7, 1922, NAACP Records, Group I, Series A, Box 15.

Storey to Johnson, July 12, 1922 (draft?), NAACP Records, Group I, Series C, Box 76; White to Mrs. Amos M. Booker, April 21, 1922, ibid., Box 338.

Johnson to Storey, November 15, 1922, Storey Papers, Box 2; NAACP, press release, May 3, 1922, NAACP Records, Group I, Series C, Box 244; NAACP, press release, July 4, 1922, ibid., Box 245; White to Stockton, April 7, 1922, ibid., Box 77; C. C. Davis to White, February 26, 1922, ibid., Box 338. See Johnson's comment that "if the leaders of the Republican party wish to see the Bill pass, they can do it
with little trouble." Johnson to [White?], April 8, 1922, ibid.; Johnson, *Along This Way*, 367-68.

101 *Congressional Record*, 67 Cong., 2 Sess., 6480 (May 6, 1920). St. Louis attorney Charles Nagel could not sign the memorial because he believed the bill would crowd the courts, require additional judges, and in general be impractical, as well as lead to centralization. But he wanted to make clear that he "wanted to understand, and hoped to help." Nagel to Johnson, April 27, 1922, NAACP Records, Group I, Series C, Box 244. The Bishop of Bismarck, North Dakota, refused to add his name since there was already "too much centralization of the government going on . . . ." As the Catholic official explained, "More Christianity is needed in the South, not more laws." Vincent Wehrh to NAACP, February 13, 1922, ibid., Box 243. Woodrow Wilson claimed to be "interested in all measures calculated to rid our country of the disgrace of lynching . . . .," but he did not "feel at liberty at present to exert any influence in matters of national legislation." John R. Bolling to NAACP, March 22, 1922, ibid., Box 244. Mississippi Governor Lee M. Russell called the bill "vicious" and "the most pernicious piece of Legislation ever promulgated in the last 20 years in the United States Congress." Russell to Johnson, February 13, 1922, ibid., Box 243.

102 The NAACP had earlier sent copies of *Thirty Years of Lynching* and Storey's brief to all Senators. Johnson to "All Senators," May 23, 1922; Johnson to Florence Kelly, May 27, 1922; Johnson to Cummins, June 28, 1922, NAACP Records, Group I, Series C, Box 244; White to Johnson, August 22, 1922; White to Storey, August 21, 1922; White to Stockton, August 22, 1922, ibid., Box 77; NAACP, press release, July 14, 1922; Beveridge to Johnson, August 5, 1922; Johnson to Watson [and Calder], September 17, 1922, ibid., Box 245; "Report of the Secretary," May 2, 1922; Minutes of the Board of Directors, ibid., Series A, Box 15; Johnson to Shortridge, July 10, 1922, Records of the United States Senate, Record Group 46, National Archives, Washington, D. C., bill file for H. R. 13; Johnson to Senator Frank B. Willis, June 27, 1922, Records of the United States House of Representatives, Record Group 233, National Archives, bill file for H. R. 13. See "public relations campaign" mapped out by Edward L. Bernays. Bernays to Arthur Spingarn, September 11, 1922, Spingarn Papers, Box 2.

103 William T. Francis to W. E. B. Du Bois, [February 23 or 24, 1922]; Johnson to Wade Ellis, April 5, 1922, NAACP Records, Group I, Series C, Box 244; Johnson to White [August 30, 1922]; NAACP, press release, August 10, 1922, ibid., Box 245; "Report of the Secretary," May 2, September 7, 1922,
ibid., Series A, Box 15. W. B. Swaney of Chattanooga chaired the ABA's Committee on Law Enforcement. Serving with him were Charles Whitmore of New York, Wade H. Ellis of Washington, Judge Marcus Kavanaugh of Chicago, and Charles W. Farnham of St. Paul. Hearings took place in Washington (May), Chicago (April), and New York (June). The NAACP emphasized that the ABA's members included Chief Justice William Howard Taft, Secretary of State Charles Evans Hughes, and former New York Governor Charles S. Whitman. The release also made note of the NAACP's role in obtaining the recommendation, detailing Johnson's March and April appearances before the committee. See Crisis, 24 (August 1922), 261; "Report of the Special Committee on Law Enforcement," Report of the Forty-Fifth Meeting of the American Bar Association (Baltimore: Lord Baltimore Press, 1922), 424-32.

104 Johnson's strategy involved imaginative appeals. He explained to Shortridge that pushing the bill ahead of the tariff was "good Party strategy" which could work since it might appeal to Democrats who "would no doubt welcome the opportunity to make a speech against the bill . . . for home consumption." In financing all the NAACP appeals, whether they were of standard fare or of a more unique variety, the NAACP spent thousands of dollars. In February Johnson told Wickersham that the organization had spent $35,000 in ten years and needed a continuing treasury of $10,000. The Association, however, was down to $553.91. Six months later Johnson told Arthur Spingarn that the NAACP had spent $40,000 "to arouse public opinion and to further Federal legislation." By mid-September 1922, the NAACP had a $1908.98 deficit. The Association received matching funds, offered in two $2500 contributions, from the American Fund for Public Service, Inc., based in New York. It also received a Stockton suggestion that if it could supplement its already "excellent publicity department[']s] . . . effective work" and spend $100,000 on publicity the Dyer bill might pass the Senate. Since "the forces of opposition can center on the Senate more than on the House, and the country as a whole is not worked up . . ." an extra campaign was necessary. Johnson to Shortridge, August 7, 1922, NAACP Records, Group I, Series C, Box 245; Johnson to Wickersham, February 4, 1922, ibid., Box 154; Johnson to Spingarn, September 15, 1922; Roger N. Baldwin to Spingarn, September 23, October 1922, Spingarn Papers, Box 2; White to Emily L. Osgood, October 25, 1922, NAACP Records, Group I, Series C, Box 154; Stockton to Johnson, August 4, 1922 (sent September 4), ibid., Box 75.

105 Johnson to Capper, January 30, 1922, NAACP Records, Group I, Series C, Box 76; Capper to John Shillady, January

108. Johnson, Along This Way, 369; Congressional Record, 67 Cong., 2 Sess., 10378 (September 1922).

109. Congressional Record, 67 Cong., 3 Sess., 13082-84. Shields explained that he had not read Storey's brief "except that portion of it which is copied in the report . . . ," which meant he had not read those "vicious, unfounded assaults" about which he complained. See also White to Stockton, August 22, 1922; White to Storey, August 21, 1922, NAACP Records, Group I, Series C, Box 77; New York World, August 31, 1922, ibid., Box 249.

110. Congressional Record, 67 Cong., 3 Sess., 13084.

111. Ibid.

112. Ibid.

113. Ibid.

114. Ibid., 13129.

115. Johnson, Along This Way, 37; Storey to Johnson, October 13, 1922, NAACP Records, Group I, Series C, Box 76; New York Senator Calder, soon to be unexpectedly defeated in the November elections, announced to a Negro audience in Albany on September 29 that the Republicans "did everything we could to pass the Dyer bill before Congress adjourned . . . ." He then went on to discuss other ways that the Party had worked "in your interest and in the interest of the American people." Brooklyn Standard Union, September 29, 1922, ibid., Box 246.

116. Shortridge to Lodge, October 6, 1922, quoted in Zanigrando, NAACP Crusade Against Lynching, 68.


118. Johnson to Storey, November 15, 1922, Storey Papers, Box 2; NAACP, press release, September 29, 1922, NAACP Records, Group I, Series C, Box 245; Crisis, 25 (November 1922), 26.
CHAPTER EIGHT

WITH A WHIMPER:

DEATH IN THE SENATE, 1922

The Dyer Anti-Lynching Bill is dead; 1 long live the next anti-lynching bill!  

Henry Cabot Lodge outran his Democratic and Prohibitionist challengers in the November 7, 1922, elections, but the race was a close one. Out of 821,000 votes cast, Lodge's margin of victory was only 7345. For Democrats in other states the closing of the polls brought better news, particularly in light of their overwhelming defeat in 1920. The debacle of 1922 cut the Republicans' Senate majority from twenty-two to six and their House majority from 167 to fifteen. States from New Hampshire to Oregon fell to the Democrats, Farm-Laborites, and progressives who now, under the leadership of Robert La Follette, held the balance of power. 2

Prohibition accounted for some of the urban decisions, while the agricultural depression hurt the Republicans in the Midwest. The Dyer bill apparently influenced few votes as "the vast majority of white Americans" remained "wholly ignorant of even the most fundamental and obvious facts about the Negro and his problem" and blacks, "en masse," knew little how to pressure for reforms. 3 Other issues outweighed antilynching, so that Dyer won and Volstead lost, Lodge and Madden won, and London and Ansorge lost. The seven
House Democrats who voted for H. R. 13 won; nine of the fourteen House Republicans who voted against it and who ran for reelection also won. The NAACP might attribute the defeat of Delaware Republican Caleb R. Layton and New Jersey Republican Richard Wayne Parker to their votes against the House bill and to "colored votes," but the antilynching issue and the backlash against those who took a position on it—or who sidestepped it—was a drop compared to the wave built up by prohibition, the tariff, and recession. Both defenders and opponents of the Dyer bill enjoyed victory and experienced defeat as the nation turned out regular Republicans for an essentially programless collection of Democrats, progressive Republicans, and Farm-Laborites.

With the election over, whatever hopes the NAACP had of using black voting strength as a lever was also largely gone. The 1924 election was too far away to be a realistic weapon. The antilynchers' concern, therefore, became the convincing of the lame-duck Republican Senate to push the bill through the special two-week session beginning November 20 or the record-setting fourth session of the Sixty-seventh Congress to begin December 4. Convincing the legislators to bring up the measure, as the Republican leaders had promised to do, was possible. Shortridge, at least, was eager. But convincing them to push it through, over, and around the inevitable obstacles was another proposition entirely. The Senate would be receiving an important Administration-backed
but much-opposed ship subsidy bill from the House and had numerous appointments to confirm, including that of Minnesota's Pierce Butler to the Supreme Court. In addition, various congressional blocs had their own special interests, including impeaching Attorney General Daugherty, reopening the bonus question, blocking a $5 million loan to Liberia, and organizing and exerting progressive strength. At best, the NAACP could only hope for and struggle to create antilynching fervor in Republican Senators, a majority of whom "assured" their support.

To that end, the NAACP bought a one-page ad in nine major daily newspapers to proclaim "THE SHAME OF AMERICA." The ad listed the legal-constitutional supporters of the Dyer bill and encouraged readers to "telegraph your Senators today . . . ." The goal was "an avalanche of telegrams on the Senate which will give supporters of the Dyer Bill sufficient backbone to offset the well organized filibuster opponents . . . ." The organization had "to arouse the great mass of Americans who are ignorant and apathetic."

The NAACP also considered the possible conversion of LaFollette's Progressive bloc through the lure of "the value of the Colored vote to the Republican organization which the Progressives want to capture." In addition, the organization wanted to neutralize Borah by appealing to his political self-interest and his goals in the 1924 presidential election. The latter proved possible; the former did not.
On November 30, three days into the Southern Democratic filibuster that greeted H. R. 13, James Weldon Johnson described the hurdles between the antilynchers and success.

. . . the crisis on the bill has no relation to the facts about lynching; indeed, the facts about lynching have up to this time played an almost negligible part in the whole Senate fight. We are up against a filibuster, the most ruthless and determined that has been planned and carried out since the attempt to break the Force Bill [of 1890]. . . . The only hope lies in encouraging, spurring or clubbing the Republicans [to] meet the Democratic challenge and face the filibuster until the 4th of March, if necessary.

What hope existed was not in the Progressives but in the regular Republicans, but with them

The outlook is rather dark . . . . If we can only prevent the Republicans [from] abandoning the bill on the terms laid down by the Rebels, we still have a chance.11

It was a big "if." The Southern Democrats' "terms" were stiff—total abandonment of the Dyer bill or a complete shutdown of the Senate—and they made no secret of their opposition to the antilynching bill or of the strategy they were using to prevent not just its passage but its consideration. As Alabaman Oscar Underwood, Senate Democratic leader, explained on November 28,

We are not disguising what is being done on this side of the Chamber. It must be apparent, not only to the Senate but to the country, that an effort is being made to prevent the consideration of a certain bill, and I want to be perfectly candid about it. . . .

. . . I want to say right now to the Senate that if the majority party insist on this procedure they are not going to pass the bill, and they are not going to do any other business . . . until we have an understanding about this bill.12
Underwood, praised by the less zealous members of the Republican majority for his frankness and candor, even explained how the filibuster would work. Unlike previous filibustering Senators who relied on long-winded orations, "... we will have roll calls and move adjournments day and night. We can alternate between roll calls and motions to adjourn." Actually, Underwood's small group of allies did not have to bore themselves with repetitious roll calls and motions to adjourn. Their opponents frequently engaged them in lengthy discussions about filibustering tactics, committee considerations and methodology, and generalities about antilynching constitutionality. The southerners were never reluctant to yield for questions, and frequently the Republicans seemed to be involved in a cooperative effort, however unintentionally. Even at a one-hour party caucus after Underwood's announcement, thirty-one Republicans did not appear, greatly diluting the significance of a twenty-seven-to-one vote to defy the Democrats.13

While the New York World admiringly labelled the filibuster "restful action," the New York Times was so impressed and entertained by the filibuster that it complimented its actors for putting on a far from "dull" show. The filibuster was, the paper observed, "the liveliest affair of the kind" in over thirty years, as well as "one of the most scientifically conducted . . . ," serving to stop the Dyer bill while also alerting Harding to the Democrats' strength.14
The Southern Democrats' skillful roadblocking and its reception by the public frustrated and angered the NAACP.

It has been an amazing and disappointing thing to me [wrote Walter White] that but few newspapers have seen the significance of the attitude of the filibusters. Here was a group of men who committed mob violence on the floor of the United States Senate and the people of the North sit down tamely and accept the insolence of Underwood and his group without an audible protest against it.\textsuperscript{15}

Frustrating too was the Republican party's apathetic and listless efforts against the shut-down. No more than a handful of Senators acquitted themselves well in the stalemate they indirectly helped to create by their uninspired efforts and by their failure in months and years previous to change the Senate cloture rules.\textsuperscript{16} The token Republican backing for the Dyer bill in the Senate was not surprising, however; even the House vote in January seemed a clear reflection not only of a concern for reelection but also of a faith in the Senate's rejection of the measure. The 231 House Republicans, as a group, were no more devoted to antilynching than were the sixty Senate Republicans. The timing and the rules of the game were simply different. The Democratic Senators, such as Underwood, Kenneth McKellar of Tennessee, Pat Harrison of Mississippi, and Thaddeus Caraway of Arkansas, willingly took public responsibility for the bill's inevitable defeat, knowing their position gave the Republicans the opportunity to shift the blame, to clear "their own skirts" by allowing the Democrats "'to put themselves on record,'"
as Johnson saw it. The entire Senate defeated the bill, but some Senators did so actively and some passively—resembling the denial by nonaction that the Dyer bill sought to punish in lynchings cases. As the New York Times described November 28, the second day of the Senate stoppage,

The numerous record votes during the day seemed to indicate that many Republicans were not "very angry" because of the filibuster. As a matter of fact, it is known that many of them are opposed to the legislation. If it can die as a result of the filibuster, these Republicans will shed no tears.

The day the filibuster ended, December 4, the Times repeated its earlier evaluation, saying it was "doubtless true that the Republicans in the Senate were not sincerely and wholeheartedly in favor of the Anti-Lynching bill." The NAACP knew what understatements these evaluations were. Although it admitted a mistake in "thinking that Mr. Lodge was a truthful man . . . ," the organization was scarcely fooled by the political propaganda of the Republicans, such as that which Lodge presented when the Republican caucus finally, officially, and publicly abandoned the bill. He denied making any promise to withstand the filibuster's pressure, and he explained how commendable and responsible was the caucus's decision to sacrifice the Dyer bill so that Senate business—ship subsidy, agricultural credit, appropriations, and confirmations—could proceed. The party "very reluctantly" had performed its "duty."

Walter White evaluated the defeat as the inevitable re-
sult of apathy not duty.

. . . the majority of the Republicans were apathetic to the point of cowardice. If Lodge, Curtis and Watson had had even a modicum of genuine interest in the Dyer bill could any sane man imagine them sitting down and accepting tamely the disgusting tactics of the filibuster? . . . [W]e were fighting the opposition of the Southerners, the apathy of Northern Senators and the treachery of colored men. 20

Moorfield Storey lamented to Johnson on December 9, "The truth is Republican senators as a rule were not in earnest and we have the battle to fight against . . . ." 21 He did not believe President Harding's secretary, George B. Christian, when he consoled Johnson by placing all blame in the lap of the Democrats and on the Senate cloture rule.

. . . colored citizens will justly place the responsibility . . . where it belongs, to wit, upon the Democratic minority whose filibustering under the existing Senate rules would not only prevent the passing of the Anti-Lynching Bill but in so doing defeat the entire legislative program for the session . . . to the benefit of no one . . . . As you know, the President recommended the Anti-Lynching Bill to Congress. The Republican House passed it. The Republican majority in the Senate has labored earnestly and sincerely, last summer and now, to bring about its enactment. The bill is blocked by the Senate filibuster. 22

Johnson also could not believe Christian's claim that Harding had "made every effort in behalf" of the Dyer bill. But in August when the President publicly deplored violence in the rail strike that crippled the nation, he also derided the "deplorable" situation in

. . . American communities where even there are citizens, not to speak of public officials, who
believe mob warfare is admissible to cure any situation . . . I wish the Federal Government to be able to put an end to such crimes against civilization and punish those who sanction them. 23

In September his support of the Dyer bill, according to Christian, had been as strong as ever despite the constitutional doubts those around him displayed. Harding would not let "some uncertainties as to what the court might finally decide . . ." affect his belief that the situation demanded federal action. Only days before his party abandoned the bill in December Harding reportedly made it clear that he would say or do nothing to counter the Democrats' attack. As he told a committee from the National Press Association,

I believe the Dyer Bill should be made the law of the land. . . . See the Senators. They are the ones who must pass the measure. I have been doing all that I can. I have sent Congress a message on it, spoken in approval of it and written letters in support of it. 24

Borah, in his own way, recognized the flaw in the theory of Democratic responsibility. "[T]hose [Republicans] . . . who were supporting [the Dyer bill] . . . had little faith in it and therefore naturally didn't feel the interest that they would have felt had they had more faith in the effectiveness of the measure." 25 Crisis editor W. E. B. Du Bois also saw who deserved a vituperative reprimand. His proposed editorial was so strong Johnson had to modify it. The NAACP Secretary suggested that Du Bois not say that "'The Republicans did not intend to pass the Dyer Bill.'" Johnson recommended "'They were not willing to put
up the fight necessary . . ." as a better choice. Du Bois should say the Republicans "'wished to ignore us'" rather than it was "'a great political party filled with men who despised us, hated us.'" The libelous phrase "'dishonest politician'" had a safe substitute in "'office holding politician.'" Calling Harding a "'jelly-fish'" showed disrespect for the office as well as for the man who temporarily held it.26

Johnson's modifications did not mean that he felt any differently about the Republican "betrayal," as he labelled it, than did the more volatile Crisis editor. In fact, on December 5 he "quite freely" discussed with Senator Watson "the lukewarmness, apathy and what could not be otherwise interpreted than the insincerity of the Republicans . . . ."

To the NAACP board of directors, he reported that only Shortridge, Walter Edge of Vermont, Frank Willis of Ohio, and Harry S. New, the defeated Indiana party regular, had shown any "determined aggression."27 All had spoken during the filibuster--as had Cummins, at some length, but Johnson did not cite him. As the NAACP knew, the interest of Shortridge, Willis, and New was nothing new. In June Willis had told the Judiciary Committee he believed the party had committed itself to act against lynching.28 His primary loss to Albert Beveridge behind him, New had announced in June that he was "willing to take the chance of voting for anything . . ." to end lynching even if others had constitu-
tional doubts about it. As a layman he had picked the experts he would follow, and in September the Harding ally reaffirmed his stand. He was sticking with the Dyer bill.29

Elaborating in a press statement, Johnson reported that other Republicans had verbally supported carrying on the Senate battle until March 4. George W. Pepper29 and David Reed, both of Pennsylvania, Frank Gooding of Idaho, Charles McNary of Oregon, 31 and Arthur Capper of Kansas were the exceptions when "the mass of Republican senators displayed no particular interest in the bill." Other than the "sincere and earnest" effort of Shortridge and speeches by Willis and New, no other Republican "opened his mouth in actual support," Johnson said, again ignoring the contributions of Cummins. Johnson prophesied that blacks would not forget that "the Southern Democrats roared like a lion and the Republicans lay down like a scared 'possum.'" He did not predict what political course Negro voters would take, but he implied that the Republicans, already the victims of the 1922 election disaster, could not count on Negro votes if they were unwilling to represent the blacks' interests. Nor could the GOP count on the NAACP's giving up the antilynching fight. As Johnson pointed out a week earlier in both an open letter to the Senate and a press release, there had been four lynchings between the Senate abandonment of the bill on December 4 and December 12. Mobs had tortured one of those four and burned another at the stake. Blood of the four and
of those still to die was on the hands of the Senate obstruc-
tionists, southern filibusters, and Republican cowards. The
NAACP was not through. 32

Despite the Republicans' December 4 hand-washing and
Johnson's disgust with their predictable disinterest and
cowardly retreat from implicit and explicit promises, the
Senate filibuster achieved some success. At the very least,
it indicated that some congressmen had an understanding of
some of the constitutional subtleties involved in a federal
antilynchng bill based on the Fourteenth Amendment's equal
protection clause. The week of stalemate also served warning
that the Southern Democrats would continue, at least for the
foreseeable future, to manipulate or ignore legitimate argu-
ments, analogies, and theories and to avoid substantive is-
sses that worked against local rule and white supremacy.
Some of the Democrats' strategy grew out of the nature of
the debate--an inability to "understand" a fellow Senator
helped to use up valuable time. Neverthel. .s, despite the
innocent and intentional misunderstandings, some antilynch-
ing Republicans refused to be lured into convoluted and con-
fused explanations similar to those provided by Moores and
Goff, among others. The Senators seldom discussed specific
case law, but they did, sometimes inadvertently and accident-
ally it seemed, occasionally touch on the fundamental base
of a federal antilynching statute, something for which John-
son gave neither Shortridge nor, particularly, Cummins due
credit. The Senate "debates" were too brief and too informal to be comparable to what went on in the House, but they deserve more attention than the defeated NAACP gave them. Future antilynching campaigners could, if they wished—and sometimes they did—learn something from the arguments of Shortridge and Cummins, as well as from the filibustering Democrats.\textsuperscript{33}

The first week of the filibuster, Monday, November 27, hinted at what the week had in store.\textsuperscript{34} After Shortridge moved that the Senate consider H. R. 13, Harrison pointed out that the motion was debatable. This break led Democrats Henry L. Meyers of Montana and Robert L. Owen of Oklahoma to make a "few remarks" on the visit of France's Georges Clemenceau. During and following these comments, the Senators indicated their presence in three quorum votes. Adjournment quickly followed a five-minute executive session.\textsuperscript{35}

The precision and the skillful organization of Monday afternoon was repeated Tuesday when the Senators met at noon, with Shortridge seemingly helpless against the southern assault. The day's detours began immediately. The first action was a quorum roll call requested by Harrison. The second stall came with the clerk's reading of the Senate journal for November 27. Rather than allow the traditional dispensing of that time-consuming chore, the southerners required the whole record to be read. When that was done, Harri-
son sought to have the names of Senators "present" for the quorum votes added to the record. Each addition required a separate motion, a separate vote. Intermittent quorum votes and motions for adjournment interrupted Harrison's amending process and helped lengthen the overall project. Then came Harrison's motion to include the hometown of every North Dakota citizen who had signed Senator Edwin F. Ladd's petition in support of wheat price stabilization. Following these imaginative, almost humorous dilatory activities came Underwood's statement explaining their purpose, why the Senate would not be conducting any business whatsoever on the substantive problems before it. As he reminded his listeners, under the rules of the Senate "15 or 20 or 25" of its members could completely shut down business. 36

Edge, an officeholder for most of his adult life and New Jersey's governor during World War I, responded to Underwood's announcement with praise for his candor, as well as with a layman's view of the constitutional issues involved with federal antilynching powers. Forced to choose between two conflicting views, he, like New, had decided to turn the uncertainties and complexities over to the Supreme Court "for review." He wished to do so in part because of the hopelessly tangled issues involved in the Dyer bill and because the national government could not "sit supinely by and make absolutely no effort" to use its power to enforce the laws. If Congress could legislate to save the economy,
it could help the states by legislating to save lives. The Senate could not avoid the noncommittal discussion of the issue "when we know perfectly well" that states failed in their duties; "the feeling in some sections" of the country should not force the Senate by its silence to condone mob rule. But if the opposition would not permit a vote, Edge "want[ed] to go on record . . . as absolutely in favor of some method [of federal action] . . . ."37

Tennessee's Kenneth McKellar's response copied the techniques used almost a year earlier in the House. McKellar reminded Edge that New Jersey had "one of the most remarkable examples of unpunished crime up to this date . . . ." Avoiding the issue of equal protection by stressing imperfect protection, the Tennessean next accused Edge of being "willing to wink at the Constitution or trespass upon it or to take it with a grain of allowance." McKellar later returned to this subject and asked if it were ". . . possible that we are going to do as the Senator from New Jersey suggests, namely, treat the Constitution as a scrap of paper?" This standard oversimplification soon gave way to McKellar's demand that all Judiciary Committee members who believed in the bill's constitutionality rise. Shortridge's defense of his lone stance and his criticism of McKellar's equating murder with lynching served only to irritate the Tennessean, who later admitted that he had "not [yet] examined the language [of the bill] carefully . . . ." When Shortridge re-
ferred to McKellar's need for lessons on "some of the fundamental principles of our Government," the insulted Democrat, an 1892 graduate of the University of Alabama's law department, pronounced that the Californian "would be the last Senator . . . to whom I would go." 38

This brief confrontation was not the first of the anti-lynching struggle, 39 and it was not the last as McKellar concentrated on California's racial policies, Shortridge's view of racial equality, and the absurd concept that "all men are created equal." While this three-pronged attack allowed McKellar to discredit Shortridge to some extent, 40 it also allowed him to present another stereotypical argument.

I know a great deal more about the colored race than does he. I was born and reared amongst them, I have a great liking for them, I believe that equal and exact justice ought to be done to them; . . . I do not believe in lynching any more than does the Senator from California; . . . but we can only uphold the laws by standing for the Constitution and for law all along the line. We are recreant to our duty when we are willing here to set aside our Constitution for the benefit of some particular or pet measure . . . . 41

McKellar's attack also allowed Shortridge to present a summary of the Dyer bill's constitutional base and to suggest the possibility of its judicial acceptance.

With great respect for the Senator from Tennessee . . . speaking as a lawyer, and with due reverence for the Constitution, and having in mind all the decision upon the fourteenth amendment to the Constitution and the many decisions which have a bearing upon this problem, I say finally and with respect for the Supreme Court of the United States, I think they have emasculated the fourteenth amendment by one, and perhaps by two of their decisions.
I think, however, that the decision which I have in mind are not controlling and that the features of this bill will be found to be in harmony with the Supreme Court's decisions, yet this proposed legislation is within the four corners of the letter and the spirit of the fourteenth amendment.\textsuperscript{42}

Shortridge did not develop this argument in any detail, but during McKellar's interrogation regarding an unpunished California murder—which the Tennessean treated as he had done the New Jersey killing—and under Caraway's probing the next day, he did elaborate. Regarding McKellar's distortion of the equal protection theory, Shortridge responded,

\begin{quote}
I answer the Senator that where a man is deprived of his life or his liberty or his property without due process of law, or where he is denied the equal protection of the laws by a State of the Union—be it my own, California, or yours, Tennessee—\textemdash—in such case, where the State is incompetent, or where it neglects, fails, or refuses to protect the citizens of the United States and to insure to him the equal protection of the laws . . . . . . . I think the Constitution empowers the Congress . . . to legislate along the lines of this bill.\textsuperscript{43}
\end{quote}

To McKellar's questions about adding a time limit to the definition of state denial, Shortridge referred to the amended Section Four. He refused to be tangled in precise answers for "suppositional [i.e., hypothetical] case[s]." McKellar thereupon dropped the subject and moved on to more emotional, subjective ones.\textsuperscript{44}

Briefly rejoining the debate the next day to support Cummins, Shortridge, who was more focused in his argument than he had been in September, presented a theory of congressional discretion similar to that Goff had explained to the
House Judiciary Committee. Shortridge based his theory on three sources, the Fourteenth and Fifth Amendments and Article I, Section 8. The Californian's special interest was a blending of the Fifth Amendment and the "necessary and proper" clause. He requested that the Senators consider the former with "thoughtful minds to its language," which was not directed against any government entity but was "an affirmative declaration of certain rights and immunities of a citizen of the United States." Article I, Section 8's delegation of "necessary and proper" power plus the Fifth's definition of rights created the equivalent of the Dyer bill. Caraway's queries about the purpose of the fifth section of the Fourteenth Amendment slowed but did not halt Shortridge. Caraway could not see a need for that provision if Shortridge's theory about the Fifth and the "necessary and proper" clause was correct. Shortridge's hedging response was an admission that he held a unique view of the Fifth Amendment and that he believed that the Fourteenth alone— even, he argued, without the enforcement power delegated by the fifth section— provided "ample" congressional antilynching power. But here again he had to admit that his views were not those of other constitutional interpreters. In particular, the Supreme Court had "pretty well emasculated and pretty well ignored" the Fourteenth Amendment. Nevertheless, he predicted that the Court would decide in favor of the Dyer bill.\textsuperscript{45}

Shortridge's flawed familiarity with the operational
meaning of the Constitution also involved citizenship rights.
Shortly after Caraway challenged the accuracy of the Cali-
fornian's statement that "... there is a very clear dis-
tinction between United States citizenship and State citi-
zenship," Shortridge presented an optimistically broad view
of the rights of national citizens. In doing so, he blurred
the judicially constructed lines between fundamental and
federal rights.

... there is such a thing as United States citi-
zenship. If that be so, then my position is that
that citizenship carries with it the right to life,
to liberty, and to the possession of legally ac-
qured property. If that be so, I further contend,
I hold ... that this Government, this Nation,
speaking through the Congress set up and established
by the people through their Constitution, can pass
such legislation as will protect the national citi-
zenship in all these rights.

Ah, but you say that this is invading the rights
of the States. Oh, no; it is not. ... [I]f a
State through nonaction denies the protection, or
if the State ... shall be overrun, its machinery
of government broken down, and its people deprived
of life or liberty or property without due process
of law, then my doctrine applies, that this Federal
Government ... can protect the humble, the weak,
the poor, the white, the black, whoever is within
that territory denominated a State having American
citizenship and claiming and entitled to the pro-
tection of the laws of the land. That is my view,
that is my doctrine, and that is the view or doc-
trine of this proposed legislation.46

As the "Shortridge Doctrine" demonstrated, Pillsbury need
not have worried that the Dyer bill's reach to "all per-
sons" undermined its real source of power, the protection
which a national government owed its citizens. If the Judi-
 ciary Committee hearings of 1921 and 1922 and the debates in
both House and Senate accurately reflected congressional views, Pillsbury was virtually alone even in noticing the bill's coverage of persons as opposed to citizens.

Other than the Shortridge Doctrine, Wednesday, November 29, offered little different from the preceding day. Almost half the Senate's sixty-one Republicans had met the previous night and decided to continue their "fight," and the Southern Democrats were more than willing to continue theirs. Underwood again explained to his fellow legislators the filibusters' terms.

... if the majority expect to keep that measure hanging over and then lay it aside in order to pass appropriation bills, they must know perfectly well that the filibuster is going to continue on the appropriation bill, and those bills are going to be slaughtered.

... we are not going to deny that we are filibustering. We want the country to know exactly what we are doing, and I am doing it because I think it is the only way to expedite the public business. If the Dyer bill is not off the floor of the Senate and an understanding reached in reference to it, or it is passed, you can not pass your supply bills this winter...48

But why not stop the Dyer bill and allow other legislation to pass through?

If we agree that we are merely going to fight the Dyer bill, and let the majority lay it aside and transact such business as they want to transact, they will have it as a bumper against anything we may want to do. We will be gagged and stopped from any work during the session, and they can go ahead with what their leadership determines is business of prime importance; and therefore we will be the only ones to get the crushing.49

The only exception Overman voluntarily made in his proscription
on Senate action was the ship subsidy bill, scheduled to arrive from the House before the third session ended. That measure was a "fundamental" piece of legislation "going to the freedom of our State governments and the liberties of our people." Perhaps Overman's willingness to make this exception grew out of some knowledge of the fate in store for the subsidy bill. The Harding Administration's push of the bill encountered a counterpush which led to a filibuster. That shutdown, which lasted seventy-five days from December 11, 1922, to February 28, 1923, set a Senate filibuster record.50

Their attention still on the Dyer bill on November 29, Overman's allies followed their unchanged strategy by seeking more amendments to the Senate journal. They also yielded to Ohio Republican Frank Willis who read part of the journal from the previous day in order to make a point about Democratic methods. His goal, he explained, was not to delay business further but instead to emphasize that the filibuster was preventing even the discussion of the Dyer bill. The southerners later thanked Willis for his contribution to their filibuster.51

The delays, however, did more than waste time; they directed some Senators occasionally toward an important point.52 After listening to southerners compare unpunished lynchings to frequent northern murders, Indianan James Watson explained that
... however many of lynchings may occur in the North, whether there be few or many, whether there be one or a thousand, we are entirely willing that [federal] legislation shall be enacted to prevent them in the future....

While however many may occur in the South, whether few or many, they are unwilling that any [federal] legislation of this kind shall be passed to prevent that crime in the future....

This accurate appraisal led to a Caraway counter-accusation.

... this bill... does not propose to punish anybody for the peculiar kind of lynchings you have in your section. You say that if a man is lynched for having committed a crime, then the Federal Government shall have jurisdiction, but if you kill him because he wants to work in a mine, or as you did in Indiana when you had your negro riots, that is all right.... That is the result of the language of your bill.... [Y]ou lynch a man simply because he is black, as they did in Springfield, Ohio, and as they have done in Illinois, as they did in East St. Louis, or, as they did in Marion, Ill., kill him because he wanted to work. But you want to make it a crime to kill a negro who assaults a woman; but it is no offense, under this bill, if you kill 40 men who simply want to make a living for their wives and children. That is the difference between the two sections.53

Caraway did not agree with New, who in gaining the floor was able both to allege and to deny that lynching was a "sectional matter" and to charge that the Arkansan was "begging the question." Instead, Caraway expanded his argument to explain why there would be no amending of the Dyer bill to broaden its coverage to northern riots. Southerners had, Caraway announced, every reason to believe the antilynchers "... would make the bill conform to what the purpose of the bill was, merely a stab at the South and to excuse any offenses that may be committed in the North." Besides, he ar-
gued, while the Fifth Amendment dealt with a citizen's right not to be denied life or liberty without due process, "... the Constitution never intended to say that it guaranteed that many would not be murdered." 54

Like McKellar, Caraway, who had captured national headlines with his charges against Attorney General Daugherty that summer, 55 revealed no understanding of the Dyer bill's equal protection base. Like his House colleagues he sought no middle ground in his evaluation of the bill's racial target.

... 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 the bill and handed it to the proponents of it. These people had but one idea... , 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 in the South. 56

Also like his House allies, Caraway found politically partisan motives tied to the racial ones. Written to repay "a political debt," the bill carefully avoided application to "States of Senators who are its proponents." He elaborated,

This bill... is merely an instrumentality of certain associations situated in New York, whose officers are white men who are working for a salary, to arouse the negroes and make it profitable to wage a contest in the Congress to have the Federal Government invade the sovereign states. I do not accuse the committee of having been a party to it, but it has been imposed upon. Those men so wrote the bill that it would not affect the peculiar manners of lynching people in California or Iowa but would reach those people in Arkansas and in Georgia. 57. ... That is the language of the bill... .

While Cummins could not say who had framed H. R. 13, he
could say that its initiators were Negroes interested in self-protection. Attempting to turn back Caraway's repeated denouncements of the bill's unequal application, the Iowan followed Shortridge's example and explained, however unsuccessfully and inaccurately, that the proposal covered all instances of mob action involving "a failure on the part of the public authorities of the community in which the act was committed to enforce the law." Caraway's correction ignored Cummins's omission of the equal protection restriction and concentrated on his failure to discuss the phrase "to prevent the commission of some actual or supposed public offense." But if the Arkansas Democrat refused to balance his argument, Cummins soon adjusted his. When Caraway complained that the "only logical" way to create a more inclusive, less sectional bill was to make murder in general a federal offense, Cummins pointed to the Fourteenth Amendment and its provisions on due process and equal protection. Congress could not extend federal jurisdiction to all murders although it could, under the Fourteenth, go beyond the limits it set in H. R. 13, particularly in Cummins's amended Section Four. Later, when Caraway directed the discussion back to this point, Cummins presented the theory behind the bill as clearly as had anyone.

Mr. CARAWAY. Let me ask the Senator another question. The Senator said that under the fourteenth amendment it is not within the power of Congress to prohibit certain crimes. Will the Senator point out the class of crimes to which he
refers?

Mr. CUMMINS. Any case where the evidence was sufficient to prove to a reasonable man that the person accused had been denied the equal protection of the law by the State or through some instrumentality of the State.

Upon further probing, Cummins elaborated.

What I said was that it would be very unwise and even impossible for the Federal Government to enter the State . . . and punish crimes committed there unless it was shown that the State . . . had abandoned or abdicated its duty with respect to certain persons or a certain class of people and crimes.59

When Caraway continued to denounce the bill for not applying to most northern riots, Cummins succumbed and noted that although not all mob actions were covered the bill was "uniform in its application." Echoing Ohio Representative Simeon Fess, newly elected to the Senate, Cummins simply stated that if proscribed lynchings occurred most often in the South it was not a fault of the bill. However, Caraway's sectionalism did not give an inch. While he replied readily that he opposed the bill because it would be used predominantly in the South, he argued also that southerners did not lynch blacks because of their race but that northerners did. The Arkansan explained that only southern blacks guilty of "some offense" were lynched. He did not explain why guilty whites were not.60

The Cummins-Caraway "debate" changed the mind of neither Senator. But after surviving Caraway's barrage of subjectivity, Cummins encountered another set mind, that of Lee Slater
Overman. One of the Alabaman's interests was the Judiciary Committee's decision on the Dyer bill. The committee had revealed it had doubts, as Overman, a member of the committee, knew. What he wanted to discuss on November 29 was not what those doubts were but that they existed in the first place and that the committee of Senate lawyers which reported the Dyer bill favorably did so with multiple reservations not expressed in its report.

Overman asserted that in committee Cummins had been "the most pronounced in declaring this bill unconstitutional" and that even after writing a revised Section Four the Iowan retained "grave doubts." Overman also alleged that "some four of the Senators" who voted in favor of the bill "reserved the right to vote against the bill on the floor... because it was unconstitutional." Cummins did not reject the second allegation, but he both doubted it and questioned its significance. Senators could, he noted, vote as they pleased. And he could remember but one reservationist during the Dyer bill vote. Cummins also qualified the first allegation. Section Three, he felt, was constitutional. Sections Five and Six on county liability were doubtful. Section Four had been very questionable until the committee amended it, adding the provision detailing a "plenary procedure to determine" whether a state denied equal protection. "As a whole" the bill was constitutional despite the "two or three" doubtful sections. And, he told Caraway, he had no hesitancy in
voting for a measure about whose constitutionality he did not hold total faith.\textsuperscript{61}

This last announcement led to a second discussion of Supreme Court infallibility. Overman expounded on the "crime" of not resolving doubts "in favor of the Constitution," but Cummins cautioned against demanding and expecting clear-cut constitutional questions and answers. In a classic understatement, the Iowan explained that "the Supreme Court has more than once been a little vague . . . in its decisions upon great public issues . . . ." Uncertainty led Cummins to make decisions "not only upon . . . how . . . I think this matter ought to be decided, but how . . . I think the Supreme Court . . . will ultimately decide it . . . ."

In November 1922 that decisionmaking process led him to support a favorable vote on the Dyer bill. When Cummins added that he also saw nothing wrong with a federal child labor act, Caraway accused him of breaking the law and tainting his vote. The courts had already decided that such laws were unconstitutional. When Cummins countered by questioning Caraway's vote for an income tax after the Court had rejected it, the Arkansan explained his inconsistency by noting that "there were four dissenting opinions there, and we thought they were correct when so many had dissented." Cummins did not counter by citing others who had complained and were complaining about the ease with which the Supreme Court overrode congressional will. He did not mention, and may not have known
about, the bill proposed by Caraway's fellow Democrat and anti-Dyer bill colleague, John McSwain, to limit judicial vetoes.62

The death of Illinois Representative James R. Mann during the Thanksgiving recess led to an abbreviated Senate session on Friday, December 1. The Senators met only long enough for Underwood to make it clear that the filibuster was continuing.63 No Senator was surprised the next day, Saturday, December 2, when Harrison expressed great concern that the journal did not include the name of the clerk who had read the summary on November 29.64

As the special session drew toward its December 4 adjournment, the Democrats of the Senate, rather than relying on roll call votes, took the path charted by their brethren in the House. For the first time, with the exception of Caraway's brief references to the NAACP and the tangential complaints about the Dyer bill's failure to cover northern racial crimes, a Senator gloried in sectional and racial diatribes. Senator Overman castigated the GOP for appearing to use the antilynching bill "to corral the negro vote." Since "the negro vote is just as apt to vote the Republican ticket as rain is to roll off a duck's back," its sponsors clearly intended to use the measure "for partisan purposes in the North." Their plans, however, had gone awry; "... the very Senators ... who were candidates for reelection and who were most active in trying to get this bill reported out of
the committee and placed upon the calendar in order to hold
the negro votes in their States have, every one of them,
gone down to defeat." 65

Overman also explained that the happy, equal, and pro-
tected southern black was not interested in the Dyer bill and
that the measure would lead "some poor devils" to assume the
federal government had given them "a license . . . to commit
awful crimes." If the antilynchers issued this license, his-
tory would repeat itself. After Reconstruction the Republi-
cans had come to repent their legislative sins; so too would
they repent enactment of the Dyer bill. Rather than reach
that point, the GOP should remember the allegedly hateful
and hated Thaddeus Stevens, author of "most of the acts in-
tended to humiliate, to oppress, and to degrade the South."
Overman felt that the reconstructionist's acts of hate made
him an unimpeachable source on how the Senators should inter-
pret the Fourteenth Amendment. 66

Congressmen who doubted their own views on that arti-
cle's allocation of federal power could rely on the single
Stevens statement that Overman provided, as well as on Over-
man's emphasis on one word in that statement: "'This amend-
ment . . . allows Congress to correct the unjust legislation
of the States so far that the law which operates upon one
man shall operate equally upon all.'" They could also turn
to Cooley's analysis of Congress's responsibility when it con-
sidered possibly unconstitutional legislation. They could
read Lincoln, as the House had been wont to do in January. 67

When Cummins questioned Overman's reading of Stevens's position and reminded Overman that if Stevens had limited the Fourteenth Amendment as indicated, "the Supreme Court has overruled him many times," the North Carolinian simply replied, "We will see about that." But neither he nor the rest of the Senate did. The Dyer bill soon died, and in the time remaining in its life, discussion of its judicially defined Fourteenth Amendment base was limited to what Overman provided and to the generalities Shortridge used in his response. For Overman, federal legislation in areas reserved for the states could never exist; the Fourteenth Amendment provided no breach in the armor of Tenth Amendment protections. Besides, legislation without public support was pointless.

The passions are such that you can not stop it. You can not stop it by a Federal Court, you can not stop it by bayonets, you can not stop it in any way.

If that were the case, why should the Dyer bill become law?

Do you want to frighten our people and make them hate the Federal court? Do you want to let the colored man know that he has a license to commit these crimes? What is the purpose of it? . . .

I want some one to tell me what the purpose of the bill is, what good it will do, what it can accomplish, what can be accomplished through the Federal court if the State court can not accomplish anything? 68

Calmly using up time, Overman then read from Ex parte Riggins, United States v. Powell, Hodges v. United States, and United
States v. Harris. His "analysis" of these cases was slightly more than a summary of history and a synopsis of general rules they laid down. 69

In presenting his final argument, Overman again failed to consider the exact points involved in the constitutional arguments surrounding H. R. 13, but he provided Shortridge an opportunity to end the "debates" with an antilynching statement. The New York Times had pronounced that the Republicans would use the ship subsidy bill to justify abandoning the Dyer bill, 70 but if that was their plan they had yet to carry it out, and Shortridge's speech was not intended to be the closing argument it turned out to be.

\[ ... \]

When Overman demanded specific examples of states' enacting or failing to enact laws which, through action or nonaction, denied citizens equal protection, Shortridge pronounced the existence of

\[ ... \] hundreds and thousands of cases; and when I say that, I wish to be understood as saying and meaning, I think there have been monstrous crimes committed, ... lynchings, and that there has been no punishment of those guilty of those crimes. Answering the Senator's question directly, I have said, and I repeat, that even though the laws of a given state may denounce lynching, the State laws
have not been enforced, and the men guilty have
not been punished, and there have not been that
diligence, that apprehension, that pursuit, that
prosecution, that conviction, that punishment
which ought to have occurred.72

Monday, December 4, brought no more questions or cita-
tions, only confirmation of Sunday headlines—"Filibuster
Kills Anti-Lynching Bill" and "Caucus Abandons Anti-Lynching
Bill"—and of a Sunday report that "the Dyer Anti-Lynching
Bill is dead" although nine Republicans had wanted to con-
tinue the fight.73 Underwood, prepared to continue the fili-
buster, forced from Lodge a second public acknowledgment of
the southerners' victory. When he questioned Lodge about
the need to continue the dilatory tactics, the Massachusetts
Republican confirmed what he had told the press the previous
day. His party "would not press the bill further at the
coming session [to begin December 4 at noon] or at the session
which is now expiring." After Underwood offered "no apolo-
gies" for the filibuster and a promise to renew it if neces-
sary, Lodge explained the thinking behind the GOP's decision.

... I believe the bill is right in principle and
ought to pass; but the question before the confer-
ence was simply whether we should allow the fili-
buster to go on until the 4th of March with no re-
sult. The bill could not pass, as it would be im-
possible to change the rules now; and the conference
decided that they would not press the bill further
... .73

* * *

Without organized Republican support, H. R. 13 would
not rise from the ashes a second time during the Sixty-Seventh Congress. The decision of the party caucus made resurrection impossible, no matter how loudly or strongly the NAACP complained and threatened reprisals at upcoming elections. The half-hearted Republican effort had successfully sidestepped the barriers erected by the NAACP out of northern black voting strength and the image of murdered Negroes. H. R. 13 was dead; "... long live the next anti-lynching bill."
NOTES

1 Nation, December 13, 1922, 650.


3 "Election by Disgust," 540; New York Times, November 8, 9, 1922; Burner, "Democratic Party," in History of American Political Parties, 1820. Not everyone suffered from being a supporter of the Harding Administration, thus demonstrating the varying influences on the 1922 races. For example, Republican Congressman Simeon Fess of Ohio won his race for the Senate against the incumbent, Democrat Atlee Pomerene,
while running on a platform of "Stand by the President."
New York Times, November 8, 1922, 4. See White to Storey, November 22, 1922, NAACP Records, Group I, Series C, Box 77. (See footnote 1, Chapter Seven, for practice in regard to citing letter copies). Storey's support for the Dyer bill and Lodge's half-hearted efforts in favor of H.R. 13 seemed not to dull Storey's hostility toward the Massachusetts Senator. Storey supported Lodge's Prohibitionist opponent. Garraty, Henry Cabot Lodge, 413. Huthmacher does not mention the Dyer bill as a factor in Lodge's race. Huthmacher, Massachusetts People and Politics, 59. James Weldon Johnson's biographer, Eugene Levy, explains that the Republican defeat "had nothing to do with the Dyer bill; rather, the depression of 1921-22, prohibition enforcement, rumors of scandals in the Harding administration, and a reaction against the Fordney-McCumber tariff all combined to drag down the Harding wing of the GOP."
Levy, James Weldon Johnson, 259. See also Leonard Butler to NAACP, December 23, 1919, on how "Negroes, en masse, know little about legislation" and even "less about their representatives . . ." NAACP Records, Group I, Series C, Box 338. Contrary to this position is that of Walter White who believed the Dyer bill was an issue in the primary in Michigan where black voters numbered seventy-five thousand and where Senator Charles Townsend acknowledged he monopolized those votes as a result of his "unequivocal support" for the Dyer bill and his opponent's opposition to it. White to Stockton, October 5, 1922, ibid., Box 77. See also White to Storey, October 19, 1922, ibid.; Johnson to [White?], April 8, 1922, ibid., Box 338. Dyer won 26,228 to 6784; Lodge, 41,130 to 406,776; Little, 41,482 to 34,816; Hersey, 18,641 to 11,997; Fish, 34,633 to 20,831; and Wurzbach, 19,083 to 15,760. Losers included Volstead, 28,918 to 11,027; Calder, 995,421 to 1,276,667; London, 5900 to 11,027; and Ansorge, 32,053 to 32,393. See Official Congressional Directory: 68th Congress, 2d Session, Beginning December 1, 1924 (Washington, D. C.: Government Printing Office, 1924), 151-58.

Losers were from Tennessee, Oklahoma, New Jersey, Wisconsin, and Delaware. Stemp of Virginia and Brown of Tennessee declined to run. Reavis had become special assistant in the Justice Department investigating fraud cases. New York Times, May 26, 1922, 1.

NAACP press release, November 10, 1922, NAACP Records, Group I, Series C, Box 246. Levy, who speculates that the black vote might have been a key factor in a close election, finds that the NAACP did play an active role in the defeat of Caleb Layton in Delaware and Richard Wayne Parker in New Jersey. Levy, James Weldon Johnson, 259.
According to the New York *Times*, most observers believed Harding had called the session primarily to obtain passage of the ship subsidy bill before the Sixty-eighth Congress's Democrats arrived. The bill had much opposition, however, even in the Republican party. *Times*, November 10, 20, 1922. See New York *Tribune*, November 8, 1922; New York *Call*, November 20, 1922; New York *Evening Post*, November 24, 1922, all in NAACP Records, Group I, Series C, Box 250; White to Stockton, October 13, 1922, ibid., Box 77; New York *Times*, December 5, 14, 1922.

*Crisis*, 24 (August 1922), 264.

New York *Times*, November 23, 1922, 19. The ad appeared in nine daily papers on November 22, as well as in the Nation on December 6. Due to a delay in the confirmation of the Times ad, it did not appear in that paper until the twenty-third. White to Storey, November 22, 1922, NAACP Records, Group I, Series C, Box 77. Total circulation of the publications was 1,993,883 (newspapers) and 31,000 (Nation). White to Storey, December 11, 1922, ibid. Apparently the idea for the "full page advertisement" for "crystallizing a dormant opinion" came from Edward L. Bernays's public relations campaign strategy. See Bernays to Spingarn, September 11, 1922, Spingarn Papers, Box 2. See also Johnson to George G. Peabody, October 11, 1922, NAACP Records, Group I, Series C, Box 154; Johnson to Spingarn, September 13, 1922, Spingarn Papers, Box 2.

Stockton to Johnson, November 16, 1922, NAACP Records, Group I, Series C, Box 75; White to Johnson, November 29 (telegram), 27, 28, 1922, ibid., Box 246. In his November 26 letter to Johnson, Stockton asked his supervisor (both of them being in Washington on behalf of the Dyer bill lobby) if "the administration forces are prepared with material for speeches to offset the Southerner's filibuster; have you material for the Progressives if they enter the fight?" Only one Progressive in the Senate, Arthur Capper, strongly favored the bill, and he was on the NAACP board of directors. Most NAACP lobbying was aimed at the party regulars, such as Lodge, Watson, Calder, George Pepper, David Reed, Charles Townsend, and Howard Sutherland. Levy, James Weldon Johnson, 258. After the Republicans abandoned the bill, White continued to see the Progressives as a possible tool. He suggested their "going over Lodge's head and forcing consideration" so as to "capitalize" on black resentment and obtain for the Progressives sole credit for enactment of the bill. White to Johnson, December 5, 1922 (telegram), NAACP Records, Group I, Series C, Box 77.

Johnson to White, November 30, 1922, NAACP Records, Group I, Series C, Box 246.
11 Ibid.


13 Congressional Record, 332 (November 28, 1922); New York World, November 29, 1922, NAACP Records, Group I, Series C, Box 250. T. H. Caraway consumed time thanking those Republicans he believed cooperated, however unintentionally, with the filibuster. 406 (November 29).


15 White to Storey, December 11, 1922, NAACP Records, Group I, Series C, Box 77.

16 The cloture rule under which the Senate operated in 1922 hardly deserved the name. Adopted in 1917 following the success of "a little group of wilful men, representing no opinion but their own"—according to Woodrow Wilson when the Senate blocked passage of a measure to allow the president to arm merchant ships—the new cloture rule made stopping unlimited debate easier than in the past. At least seventy-five Senators favored the merchant ship bill, which the House passed after only three hours of debate, but the measure died in the Senate in March 1917. On March 8, by a 76-to-3 vote, the Senate enacted a new cloture rule, Rule XXII. Under it a motion signed by sixteen Senators to close debate could prompt a vote on the question, "Is it the sense of the Senate that the debate shall be brought to a close?" A two-thirds vote of those present in favor of ending debate would do so, limiting each Senator to no more than one hour speaking on the pending measure, amendments and motions. "No dilatory motion, or dilatory amendment, or amendment no germane shall be in order." The rule was first used to stop a filibuster against the Treaty of Versailles, 78-16, on November 15, 1919. Limiting the effectiveness of the cloture rule were its application to debate on a "measure," as opposed to a "motion," and its permitting an hour's speaking time to each Senator. See William S. White, Citadel: The Story of the U. S. Senate (New York: Harper and Brothers, 1957), 60, 63; Lindsay Rogers, The American Senate (New York: Alfred A. Knopf, 1926), 176-81; George H. Haynes, The Senate of the United States: Its History and Practice (2 vols., New York: Russell & Russell, 1928), 102-5.
17 Levy, James Weldon Johnson, 264; Johnson, Along This Way, 371. "The members of the majority party do not have to take the responsibility. We are willing to take the responsibility . . . ." Congressional Record, 332 (Underwood, November 28, 1922).

18 New York Times, November 28, 1922, 6; December 4, 1922, 16.

19 White to Storey, December 11, 1922, NAACP Records, Group I, Series C, Box 77; Lodge to Johnson, December 4, 1922, ibid., Box 246; "Statement re political reaction of Colored People on abandonment of Dyer Anti-Lynching Bill," [December 1922], ibid.; New York Times, December 3, 1922, 11. Watson explained that the bill could not justify a Republican confrontation with the Democratic filibusters. He predicted Republicans would change the cloture rules and pass the Dyer bill before the 1924 elections. The Washington Post disagreed since the " . . . large progressive group which has as a rule opposed limitation of debate" would play a large role in the next Congress. The Post also explained that Lodge, Curtis, and Shortridge met before the caucus and the Californian "agreed . . . to have the fate of the bill . . . decided by a majority caucus." Watson to Johnson, December 4, 1922, NAACP Records, Group I, Series C, Box 246; "Report of the Secretary," December 11, 1922, ibid., Series A, Box 15; Washington Post, December 3, 1922.

20 White to Davis, December 18, 1922, NAACP Records, Group I, Series C, Box 246; White to Johnson, December 5, 1922, ibid., Box 77. The NAACP had obtained a copy of a November 23 letter from Perry Howard to Delaware Senator T. Coleman DePont which attacked the NAACP for urging Negroes to vote other than a straight Republican ticket. The organization released the letter December 8. Levy, James Weldon Johnson, 263. On November 29 White wrote Storey, "I quite agree with you that the friends of the Dyer bill in the Senate are not so determined as its opponents. If the Northern Republican and Democratic Senators allow themselves to be bulldozed . . . it is going to be one of the biggest disgraces that America has ever known. If the Northern Senators just had backbone enough to take a definite stand, the presumption of these defenders of lynch law in the Senate could be broken." White had found much the same during the House battle. White to Storey, November 29, 1922; White to Harold B. Allen, January 10, 1922, NAACP Records, Group I, Series C, Box 77. See also James Cobb to Johnson, December 19, 1922, ibid., Box 63, in which Cobb suggests that the Justice Department ought to consider the "pernicious activity of Mr. Howard in this matter. . . . [I]t
would soon become known to the traitors in our race that they could not get away with such matters; and if they do not fall in behind the Association to help out, they would at least keep Hands Off." Cobb did not say what Howard had done that warranted Justice Department action.


22. George B. Christian, Jr., to Johnson, December 8, 1922, ibid., Box 63; "Report of the Secretary," December 11, 1922, Storey Papers, Box 2.

23. Crisis, 24 (August 1922), 264.


25. Borah to Miller, December 16, 1922. Johnson reported that "once or twice during the fight, I caught a glimpse from Senator Borah. This time [when Underwood announced the filibuster] I felt sure he was laughing at me, and somewhat maliciously." Johnson, Along This Way, 371.

26. "Memorandum from Mr. Johnson to Dr. DuBois," December 18, 1922, NAACP Records, Group I, Series C, Box 246; Crisis, 25 (January 1923), 104.


30. "Statement re political reaction of Colored People on Abandonment of Dyer Anti-Lynching Bill," [December 1922], NAACP Records, Group I, Series C, Box 246. On May 20 Pepper expressed interest in antilynching, particularly in the Dyer bill's constitutionality and the effects it would have if enacted. He urged Johnson to consult the "large body of intelligent opinion" among blacks and to consider whether the bill would do "more harm than good." Pepper to Johnson, May 20, 1922, ibid., Box 244.


33. See Dyer to NAACP, [December 1924?], in Norfolk Journal and Guide, in Calvin Coolidge Papers, Library of Congress, Manuscript Division, Series 1, #93, microfilm reel 64: "... our only difficulty is with the Senate .... [T]he failure ... is due entirely and absolutely to the United States Senate. The best way is for the Senate to take this matter up themselves .... When they have passed it, the House will do likewise again without delay." In 1928 Dyer repeated this evaluation, explaining to Johnson that the House could pass a bill "without difficulty" but that the Senate would not even consider it. Therefore the NAACP should concentrate on the Senate. "[T]rain your guns upon the Senate ...." Dyer to Johnson, January 18, 1928, NAACP Records, Group I, Series C, Box 64.

34. The Senate convened on November 20 but adjourned early that day for the funeral of Georgia Senator Tom Watson. On November 21 the Senators heard Harding's message. Their work began the next day.

35. Congressional Record, 67 Cong., 3 Sess., 288, 289 (November 27, 1922). On three quorum votes, 61, 48, 51 were present. Ibid., 291, 297, 298.
36 Ibid., 325-32 (November 27, 1922; quotation is on page 332). Quorum votes showed 63, 66, 54 present. Ibid., 325, 327, 330, 331.

37 Ibid., 333 (November 28, 1922). See LaFollette's speech in the Senate on the need for a constitutional amendment to limit the Court's judicial veto. Ibid., 67 Cong., 2 Sess., 9074-82 (June 21, 1922).

38 Ibid., 67 Cong., 3 Sess., 333-35 (November 28, 1922).

39 Ibid., 337-38. For House tensions, see ibid., 67 Cong., 2 Sess., 1139, 1287, 1732 (January 12, 17, 25).

40 "[H]ow easy it is for the Senator from California to come here and talk about the rights of colored people in other men's States, when in his own legislation has already deprived a very large population in that State of the fundamental right to own lands in the State . . . . Should not his charity begin at home . . . ?" Ibid., 67 Cong., 3 Sess., 338 (November 28).

41 Ibid., 335.

42 Ibid.

43 Ibid., 336.

44 Ibid.


46 Ibid., 408.


48 Congressional Record, 390.

49 Ibid., 391.

50 Ibid., 392. The ship subsidy bill called for the sale of ships worth $3 million (and built by the United States) to private companies, which would pay only a small part of their original cost, approximately $200 million. The government would also lend the new owners $125 million for reconditioning and pay $750 million over ten years for operating costs. The filibuster against the much-opposed measure was led by the "Fram-bloc." Haynes, The Senate of the United States, 412-13; Greenbaum, Robert Marion La Follette, 201-2; Rogers, The American Senate, 174-75; Thelen, Robert M. La Follette and the Insurgent Spirit, 174.
Congressional Record, 397. Perhaps Willis's greatest time-consuming contribution was a lengthy discussion with McKellar about the latter's statement that there was a greater proportion of lynchings in the North than in the South.

Mr. CUMMINS. If Senators would let us get to the bill--

Mr. McKELLAR. You are right at it now.
Mr. CUMMINS. I know, but out of order.
Mr. McKELLAR. Yes, but we are talking about it just the same as if we were in order. Ibid., 405.

Ibid., 398.

Ibid., 399-400. No one else specifically alluded to this right.

Caraway accused Daugherty of obtaining a pardon for a criminal for a fee. This "crime" occurred before Daugherty became attorney general. See New York Times, May 1922.

Congressional Record, 400.

Ibid., 409.

Ibid., 401-2.

Ibid., 404.

Ibid., 402-3.

Ibid., 401, 405, 403, 404.

Ibid., 405-6; 67 Cong., 2 Sess., 860 (January 6, 1922). Compare Harry Hawes's speech against giving Congress power to override the Supreme Court. Ibid., 67 Cong., 4 Sess., 7016-17 (December 28, 1922). In the Sixty-seventh Congress there were other proposals for limiting the Supreme Court's power of judicial review; these proposals suggested requiring a minimum number to void a bill, for example, at least seven Justices (out of a Court of nine) would have to agree an act was unconstitutional. See Mildred R. Senior, comp., The Supreme Court: Its Power of Judicial Review With Respect to Congressional Legislation, Selected References (Washington, D. C.: Division of Library Science, George Washington University, 1937).

Congressional Record, 67 Cong., 2 Sess., 438 (December 1, 1922).
Ibid., 441 (December 2).

Ibid. Overman declined to say "whether or not their advocacy" caused the defeat of Senators Joseph S. Frelinghuysen of New Jersey, William M. Calder of New York, Joseph France of Maryland, and Charles Townsend of Michigan. Nor did he comment on Lodge's victory in Massachusetts. New York Times, December 3, 1922.

Congressional Record, 441-44.

Ibid. (emphasis added).

Ibid., 444.

Ibid., 444-47.


Congressional Record, 447.

Ibid., 448.


Nation, December 13, 1922, 650. Johnson explained that although Shortridge had not voted to kill the Dyer bill and was interested in attempting to bring up another vote on the measure he would need "a dozen or so determined senators" to support him. "Report of the Secretary," December 11, 1922, NAACP Records, Group I, Series A, Box 15.
CONCLUSION

Edward Little warned the NAACP that the antilynching effort would resemble abolitionism. Passing a federal antilynching bill would be "a matter of long delays, repeated failures and ultimate success." While accurately describing the antilynching campaign in general, this evaluation was incorrect in regard to the "ultimate success" of the federal program.¹

A blend of failure on the national level and success on the local followed the 1922 Senate defeat, particularly during the remainder of the decade. The NAACP did not drop federal legislative action from its program, but it deemphasized it until the 1930s as it concentrated on state reforms. The several states which adopted antilynching and antimob laws during the 1920s and early 1930s indicated the goal that the NAACP sought in lieu of or as a supplement to federal action. However, at no time did antilynching disappear as a congressional problem. Dyer continued to propose bills, all virtually identical to H. R. 13 and all less successful than their predecessor, and the NAACP continued to appear before Judiciary Committees to advocate federal legislation. But the emphasis, as well as the nation's attention, was elsewhere.²

After abandoning H. R. 13, the Republicans who had failed
to exhibit the crusading zeal, determination, or interest for which the NAACP hoped, continued to appeal to and win the Negro bloc vote. In his first annual message after assuming the presidency in 1923, Calvin Coolidge indicated he was continuing past presidential policy. He announced that Congress should "exercise all its power of prevention and . . . punishment against . . . lynchings, . . . for which [Negroes] . . . furnish a majority of the victims . . . ."

Congress did not respond. Neither did the Republican legislators act when their party's 1924 platform

... urge[d] the congress to enact at the earliest possible date a federal anti-lynching law so that the full influence of the federal government may be wielded to exterminate this hideous crime.

... The president has recommended the creation of a commission for the investigation of social and economic conditions [which cause lynching] and the promotion of mutual understanding and confidence.

By 1928 the party's position was a stereotypical recommendation for antilynching legislation by 1932, the Republicans did no more than pledge to continue being "the friend of the American Negro" and the supporter of his "equal opportunity and rights." 3

The black, who did not cut his Republican ties until Franklin Roosevelt's second term and then to become a Democrat, not an independent, also repeated the past during the remainder of the twenties. Alfred C. Bradshaw asked Coolidge, as Negroes had once asked Wilson, to become a twentieth-century Lincoln and "... free the colored race from the most
horrid and brutal death through mob violence and lynching." J. G. Robinson, editor of the A. M. E. Church Review, encouraged the Republican president to "issue a pronouncement—a specific one—... [on] the horrors of lynching...."

So too did the NAACP. In 1927 Johnson and Ovington looked beyond the states to the presidency and asked Coolidge for a "public utterance" of condemnation and a call to Congress for an antilynching law. 4

Although no president until Harry Truman in 1947 took a leadership role in the antilynching campaign, lynching declined during every twentieth century president's administration, including Harding's and Coolidge's. From fifty-seven in 1922, the numbers fell to thirty-three in 1923, to sixteen in 1927, to eight in 1932. Some lynching experts and observers, including Johnson and investigator James Chadbourn, credited the drop in part to a fear that a continuation of high rates would force federal action. Others, including the New York Times, the New Republic, and NAACP director Ovington, cited publicity and education campaigns and more determined law enforcement efforts. 5 The figures rose briefly during the Depression—to a high for the decade of twenty-eight in 1933—and new efforts for federal legislation met the rise. The greatest success came in 1937. The House passed the Democratic sponsored Gavagan bill, but its Senate counterpart died during a filibuster as Borah continued to complain that a federal law was "openly, flagrantly" uncon-
stitutional and "a clear invasion of the rights of the states . . . ." With the return of economic good times came a return of declining lynching figures and declining interest in federal legislation, although Nazi and then communist propaganda which publicized the United States' lynching history briefly stirred federal antilychners during the forties. Truman's civil rights package, which included a permanent Fair Employment Practices Commission and abolition of the poll tax as well as an antilychning law, was part of the national response to these pressures and to the idealistic United Nations charter. The Southern Democrats' defeat of most of the package, including the antilychning proposal, reflected the continuing influence of familiar political and social factors.

Both racial lynching and unsuccessful congressional antilychning efforts, therefore, had long histories. The failure of the antilychners of 1917-1922 is not surprising in light of this history. Failure also seemed probable, if not inevitable, in 1917-1922; contemporary attitudes and conditions and a reverence for tradition provided, in effect, a crystal ball.

The NAACP used three major weapons in pushing the Sixty-sixth and Sixty-seventh Congresses to act: the emotions which the images of lynchings produced, the black's growing northern population, and the Constitution's "guarantee" of the right to life. But their opponents used the last
weapon also. With it they overwhelmed the congressional antilynchers. The Constitution failed to detail specific federal antilynching authority or a federal right not to be killed. Broadened by the southerners' racism and the northerners' mix of apathy and interest, constitutional barriers prevented the NAACP from taking advantage of what the Crisis speculated might have been, due to the large Republican majority in the Sixty-seventh Congress, the most "favorable opportunity" to enact a federal antilynching law. 8

Fifty years of judicial illuminations and shadings had provided both sides of the 1917-1922 debate with strong weapons. Exploitation of that arsenal had depended on both the skillful use of its holdings and the skillful disregard of its limitations and its empty shelves. And exploitation was necessary. A constitutional foundation was the sine qua non for both sides. It provided a legitimacy and a security without which neither side could collect allies, righteously refuse to compromise, and appeal to constituents. Even though the bill's opponents were arguing in defense of local rule and the bill's proponents had the goal of saving lives, the former were, in a sense, arguing against human life and the latter against federalism. Antilynchers had to prove that federal action was not a threat to the states, that it was, in fact, an instrument for safeguarding the country. On the other side, opponents of federal action would have lost much of their legitimacy if they lacked a constitu-
tion and a body of judicial interpretations that supported their personal, political, sectional, and racial biases. They would have lost a respect and an audience that were crucial to their success against H. R. 13 and to the possible permanent undermining of a federal antilynching program based on the authority and precedent of 1922. Storey accused the southern legislators of "not [being] afraid to stand before the world as maintaining the unspeakable barbarism of burning men and women and alive ... ." But if the legislators were unafraid to take a prolynching stand it was because they were appealing to a racist nation and they could drape that racism in a secure, acceptable ideal--constitutional federalism. Constitutional federalism was just one of the reasons for the antilynchers' defeat, but it was a critical one in 1922, as it would be later, when legislators who found they could not rely as heavily as had their predecessors on racist theories looked for other arguments with which to oppose antilynching bills.

In many ways the early federal antilynchers to whom later legislators looked were both behind and ahead of their times. The national government had rejected the Reconstruction views embodied in the Fourteenth Amendment and its enforcement statutes upon which the antilynchers relied. Not until twenty years after the Dyer bill's defeat did the federal government try, as it had in Riggins and Powell at the turn of the century, to indict lynch mobs under the enforcement statutes.
Not until then would the Supreme Court expand the definition of state action to include a broad range of state sanction. Even then, however, the Court continued to avoid the issue upon which the antilynchers depended so heavily--state non-action. In addition, as Victor W. Rothen, chief of the Justice Department's new Civil Rights Section, noted in 1943, "Many of the rights we now regard as secured by the Constitution were at that time unrecognized . . . ." The Supreme Court had broadened and was continuing to expand the definition of "due process." This expansion gave Rothen and the antilynchers of the forties a new premise for federal antilynching action, ending exclusive reliance on equal protection arguments. By the 1940s the Court defined pre-trial police brutality as a due process violation. Private action that deprived a man of his day in court also joined state denial of due process as a federally prohibited act. 10

Portraying lynching as a denial of due process was a logical step with which Judge Jones in Riggins agreed, but in the twenties denial had to be by an active state which sanctioned denial by individuals, and there was no judicial support for equating failure to protect with state sanction. Before the Supreme Court had taken even its first steps in broadening due process definitions and incorporating the Bill of Rights guarantees into the Fourteenth Amendment, the early antilynchers had to depend on equal protection arguments. Yet because they needed to parry
their opponents' racist appeals they mishandled that choice. Antilynchers often lost sight of the fact that their announced goal was not legislation to guarantee a federal right to be safe from mob murder but rather legislation to prevent and punish state failure to act against the lynching of Negroes. The nation's racism helped blur their vision. Dealing with a nation and a body of lawmakers locked in the grip of racism, the congressional antilynchers could make only hesitant use of the racial motive behind lynching. Their strategy involved deemphasizing the racial factor in an "it's so obvious we don't need to get into it" argument, supplemented by a "lynching is a crime that could affect everyone" theory.11 America's racism complicated the antilynchers' limited constitutional attack, denying them use of the most obvious line of attack. In addition, they complicated their own plans by attacking lynching at all points--state action and nonaction, county and state, officials and private individuals, blacks and whites, citizens and aliens, courts and juries. The antilynchers further complicated their strategy by oversimplifying it, as Representative Burton did when he considered the House debate.

Many Members of the House have made a distinction between that part [of H. R. 13] which operates upon the mob made up of individuals and that part which operates upon the agents of the State, consider- ing the latter of more approved validity. I am not sure that the difference is so vital.12 There was only gradual awareness that a massed effort against
one target might achieve more than an all-out general at-
tack on an entire line. Because the antilynchers attempted
to do and explain much for which they lacked the precise
thinking, the support, and the skills, Representative Her-
sey surmised that their constitutional presentation "must
have been very disappointing to those who hoped that they
might point out somewhere a hook upon which to hang a hope
for the passage of this bill." It was disappointing for
many, but even those legislators whom Hersey praised as
acquitting themselves well in opposing the Dyer bill's con-
stitutionality hardly earned high marks for their efforts.
The lack of constitutional expertise, the existence of na-
tional and personal prejudices, and the restrictions of in-
complete and adverse operational meanings affected the law-
making of all debaters. Nevertheless, there were moments of
clarity, precision, insight, and sensitivity in argument
and theory that revealed some understanding of operational
meanings, original intent, and future interpretations.

A month before Hersey made his evaluation Minority
Leader Finis Garrett made a prediction about the upcoming
debate on H. R. 13. He lamented that the measure "... was
so repugnant in its policy and repulsive in its real effect
... as to render it almost impossible to discuss it in
terms of dignity, to say nothing of moderation ... ." But
with dignity and pettiness, the Sixty-seventh Congress argued,
analyzed, oversimplified, and generalized about a federal
power and a potential federal statute. If in the process
congressmen confused themselves and settled only what they
knew before they began—that, according to Congressman Grif-
fin, "... Federal offenses are triable by Federal courts"—
their efforts revealed the complexities of traditional con-
stitutional federalism in a "modern" changing nation. Con-
stitutional debates were common in Congress, as Senator Borah
and Representative Dowell noted in their references to the
child labor law. But antilynching injected them into a
new area of federal lawmaking. Like Storey, some congress-
men concluded that there were acceptable constitutional
theories upon which federal antilynching legislation could
be based and that the time had come for Congress to test
those theories with a law which would end the states' com-
placency and acquiescence when mobs murdered Negroes. Lynch-
ing was not "mere murder," they explained; state nonaction
was not "mere neglect." A nation's obligation to its citi-
zens and America's obligation to make equality real obligated
Congress to find and use the powers it had without creating
a nightmare of ruined federalism. If it did, Congress could
make the dream of a lynchless American come true.
NOTES

1Little to NAACP, no date, quoted in Crisis, 23 (January 1922), 106.


For the evaluation of the antilykening bills which Dyer proposed in 1923 and 1925, see House Committee on the Judiciary, Antilykening Bill: Report to Accompany H. R. 1, 68 Cong., 1 Sess., January 19, 1924; House, Subcommittee on the Judiciary, To Prevent and Punish the Crime of Lynching, Hearings on S. 121, 69 Cong., 1 Sess., February 16, 1926. H. R. 1, the 1923 bill, received a favorable committee report but no House action.

Bradshaw to Coolidge, November 30, 1923; Robinson to Coolidge, June 29, 1927; Johnson and Ovington to Coolidge, January 29, 1927, Calvin Coolidge Papers, Library of Congress, Manuscript Division, Series 1, #93B (microfilm reel 64).


July 28, 1945 (Congressional Record, 79 Cong., 1 Sess., 8189-90) announced that the organization would promote international respect for human rights and fundamental freedoms, including freedom from racial discrimination and that members bound themselves to cooperate in achieving U. N. goals. Some antilynching bills after the United States became a member of the United Nations cited the Charter as a basis for federal legislation against lynchings. See House, Committee on the Judiciary, Mob Violence and Lynching: Report to Accompany H. R. 5673, 80 Cong., 2 Sess., March 23, 1948, H. Rpt. 1597 (Serial 11210). American concern about adverse publicity resulting from the United States' civil rights problems was legitimate. The chief of the State Department's Division of Research for Europe reported in 1950 that Pravda and Soviet radio were widely publicizing lynchings and "mass Negro pogroms." More relevant to the non-Russian world were the considerations of the United Nations' Commission on Civil Rights in 1947 and its Social, Humanitarian, and Cultural Commission in 1948. The civil rights commission heard NAACP charges against American racial discrimination met by a Soviet proposal that there be a U. N. investigation. In 1948 the Soviet representative to the second commission referred to southern lynchings. See Congressional Record, 81 Cong., 2 Sess., 2906 (March 7, 1950); Berman, Politics of Civil Rights, 66.

8Crisis, 24 (May 1922), 25.

9Storey, "Lynching," [article dated December 6, 1922,] NAACP Records, Group I, Series C, Box 76.


Congressional Record, 67 Cong., 2 Sess., 1284 (Burton, January 17, 1922).

Ibid., Al3364 (Hersey, January 24, 1922); Frank Coleman, "Freedom From Fear on the Home Front," Iowa Law Review, 20 (March 1944), 415-29.

Congressional Record, 67 Cong., 2 Sess., 548 (Garrett, December 19, 1921), 1717 (Griffin, January 25, 1922), 1716 (Dowell, January 25, 1922); Borah, letter to the editor, Boston Transcript, June 8, 1922, Borah Papers, Box 106.
APPENDIX A

Dyer's original H. R. 13: A bill to assure to persons within the jurisdiction of every State the equal protection of the laws, and to punish the crime of lynching.

Be it enacted, etc., That whenever any criminal prosecution shall have been instituted or any warrant of arrest shall have been issued, or any arrest shall have been made, or attempted, with the purpose and intent of criminal prosecution, in any State court, against any person within the jurisdiction of the State, whether he be a citizen of the United States or not, and such person shall appeal, as hereinafter provided, for the protection of the Government of the United States upon the ground that he has reasonable cause to apprehend that he will be denied the equal protection of the laws by the State within whose jurisdiction he is, or by any officer or inhabitant of such State, such person shall be entitled to the protection of the courts and officers of the United States to the end that the protection guaranteed by the Constitution of the United States may be given.

Sec. 2. That any person within the jurisdiction of any State charged with a felony or other crime who shall file with the clerk of the district court of the United States within whose jurisdiction he is a duly verified (?) petition showing (1) that he is charged with, or has been arrested for, the alleged commission of, or participation in, some felonious or criminal act, the nature of which shall be set out in his petition; (2) that he has reason to apprehend that, because of his race, nationality, or religion, which shall be specifically stated in his petition, the petitioner is likely to be denied the equal protection of the laws, either by the courts, the officers of the law, or other inhabitants of the State within whose jurisdiction he is; and (3) that some other person or persons of his race, color, nationality, or religion, within the jurisdiction of the State, charged with an offense similar to that with which the petitioner is charged, have been put to death without trial or brutally assaulted or otherwise maltreated, or have been denied trial by due course in the courts of such State, upon similar charges, because of the race, color, nationality, or religion of such person or persons, he shall be entitled to and shall receive the protection of all officers of the United States. The duly verified petition above described may be verified and filed either by the person in jeopardy as above described or by another person in his behalf. Upon the filing of such petition with the clerk of such court it shall be the duty of such clerk to issue forth-
with to the marshal a warrant commanding him to bring the
body of such petitioner into court for hearing upon such
petition.

Sec. 3. That it shall be the duty of the marshal
upon receipt of such warrant to arrest and detain the pe-
titioner and to protect him from assault or injury; and in
case such petitioner is in the custody of any State or mu-
cipal officer, sheriff, marshal, constable, bailiff,
jaider, warden, policemen, or other officer or person,
upon a warrant to hold petitioner for prosecution in any
State court for felony or other crime, such marshal shall
take such petitioner from such State official receipting
to him for the body of the petitioner.

Sec. 4. That when said petitioner shall have been
brought into court he shall be entitled to a summary hear-
ing upon his petition, and, in case he has been taken from
the custody of any State officer he shall, in event his pe-
tition is not sustained, be surrendered by the marshal to
the State officer from whom he had been taken; and if he has
not been taken from the custody of any State or municipal or
other officer, he shall, in the event his petition is not
sustained, be set at liberty, and the costs of the proceed-
ings shall be taxed against him. In case the petition is
sustained by the court, the petitioner shall be remanded to
the custody of the marshal for protection until petitioner
may be tried in the proper district court of the United States
upon such indictment, information, or other charge as may
have been or may be made or returned against him, and for the
purpose of such trial such district court shall have and pos-
sess jurisdiction to try and determine any and all proceed-
ings upon indictment or information which may be removed
from any State court under this act.

Sec. 5. That the removal of criminal prosecution pro-
vided in this act shall conform in all respects to removals
in other cases provided for by sections 31 and 32 of the act
entitled "An act to codify, revise, and amend the laws relat-
ing to the judiciary," approved March 3, 1911.

Sec. 6. That section 140 of an act entitled "An act
to codify, revise, and amend the penal laws of the United
States," approved March 4, 1909, is hereby amended so as to
read as follows:

"Sec. 140. Whoever shall knowingly and willfully ob-
struct, resist, or oppose any officer of the United States,
or other person duly authorized, in serving or attempting to
serve or execute any mesne process or warrant or any tule or
order, or any other legal or judicial writ or process of any
court of the United States or United States commissioner, or shall assault, beat, or wound any officer or other person duly authorized, knowing or having reason to believe him to be such officer or other person duly authorized in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process, shall be fined not more than $10,000 and imprisoned not more than 10 years."

Sec. 7. That section 141 of the act of 1901 law referred to is hereby amended to read as follows:

"Sec. 141. Whoever shall rescue, or attempt to rescue, take, or abduct from the custody of any officer or person lawfully assisting him any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or shall, directly or indirectly, aid, abet, or assist any person so arrested to escape or to be taken or abducted from the custody of such officer or other person, or shall harbor or conceal any person for whose arrest a warrant or process has been issued, so as to prevent his discovery and arrest, after notice of knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and in case the taking or rescue of any such person in custody as aforesaid shall be followed by the killing of the person so taken from custody, all persons engaged in such taking or abduction or killing or in any way contributing thereto shall be guilty of murder and shall be punished as provided in section 275 of the act to which this act is amendatory. Any person charged with the murder of a person taken from the lawful custody of any officer of the United States or that of any other person duly authorized may be indicted for murder and tried in the district court of the United States for the district in which the offense charged was committed."

Sec. 8. That the putting to death within any State of any person within the jurisdiction of the State by a mob or riotous assemblage of three or more persons openly acting in concert, in violation of law and in default of protection of such person by such State or the officers thereof, shall be deemed a denial to such person by such State of the equal protection of the laws and a violation of the peace of the United States and an offense against the same.

Sec. 9. That every person participating in such mob or riotous assemblage by which such person is put to death, as described in the section immediately preceding, shall be guilty of murder and shall be liable to prosecution, and, upon conviction, to punishment therefor, according to law, in any district court of the United States having jurisdiction in the place where such putting to death occurs.
Sec. 10. That every county in which such unlawful putting to death occurs shall be subject to a forfeiture of $10,000, which may be recovered by action therefor in the name of the United States against such county for the use of the dependent family, if any, of the person so put to death; and if none, for the use of the United States, which action shall be brought and prosecuted by the attorney of the United States for the district in which such county is situated in any district court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of judgment therefor, such court shall have jurisdiction to enforce payment thereof by extent of levy of execution upon any property of the county, or may compel the levy of execution upon any property of the county, or may compel the levy and collection of a tax therefor, or otherwise compel payment thereof by mandatory or other appropriate process; and every officer of such county and every other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment according to law as for contempt and to any other penalty provided by law therefor. For the purposes of this section and the one immediately following the District of Columbia shall be deemed a county, as shall also each of the parishes of Louisiana.

Sec. 11. That in the event any person so put to death who shall have been taken from a State or municipal officer in one county by a mob, or riotous assemblage of three or more persons, shall have been taken in one county and transported to another before such killing shall have taken place, each and every county through which such murdered person shall have been transported during the time intervening between his capture by such mob or riotous assemblage shall be jointly and severally liable to the forfeiture hereinabove provided; and in the event such person shall have been taken from one State to another between his taking and killing, the forfeiture above provided shall be enforced in both State jurisdictions by separate and distinct actions in the several Federal jurisdictions.

Sec. 12. That every State or municipal officer having the duty or power of preservation or conservation of the peace at the time and place of any such putting to death as described in section 8 hereof, who having reasonable cause to believe that the same is being or is to be attempted, neglects or omits to make all reasonable efforts to prevent the same, and every State or municipal officer having the duty or power omits to make all reasonable effort to prosecute to judgment under the laws of such State all persons participating in such mob or assemblage as hereinabove described,
except such, if any, as have been or are held to answer therefor in a district court of the United States as here-
inabove provided, shall be deemed guilty of an offense against the United States and shall be liable to prosecu-
tion therefor in any district court of the United States having jurisdiction in such place, and upon conviction thereof shall be punished by imprisonment not exceeding five years, or by fine not exceeding $5,000, or by both such fine and imprisonment.

Sec. 13. That every State or municipal officer having the custody within a State of any person charged with or held to answer for any crime or offense, who suffers such person to be taken from his custody by a mob or riotous as-
semble of three or more persons openly acting in concert, in violation of law, with the purpose of putting to death or inflicting bodily violence upon him in default of protec-
tion of such person by such State or the officers thereof, shall be deemed guilty of an offense against the United States and shall be liable to prosecution therefor in any district court of the United States having jurisdiction in the place where the same occurs, and upon conviction there-
of shall be punished by imprisonment not exceeding five years, or by fine not exceeding $5,000, or by both such fine and imprisonment.

Sec. 14. That in any prosecution for any of the of-
fenses defined herein, and in any action for the forfeiture imposed as herein provided, every person who has participated in lynching or in the putting to death of or of the infil-
tion of great bodily violence upon any person without author-
ity of law, and every person who entertains or has expressed any opinion in favor of lynching or in justification or ex-
cuse thereof, or whose character, conduct, or opinions have been or are such as, in the judgment of the court, may tend to disqualify him for the impartial and unprejudiced trial of the cause, shall be disqualified to serve as a juror; and the attorney of the United States in such action or prosecu-
tion shall be entitled to make full inquiry thereof and to produce evidence thereon; and every person who refuses to answer any inquiry touching his qualifications on the ground that he may thereby criminate himself shall be disqualified as aforesaid.

Sec. 15. That any act committed in any State or Territ-
ory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citi-
zen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a like crime.
against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory, and within the period limited by the laws of such State or Territory, and may be prosecuted in the courts of the United States, and, upon conviction, the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.
APPENDIX B

H. R. 13 as amended by the House Judiciary Committee:

Be it enacted, etc., That the phrase 'mob or riotous assemblage,' when used in this act, shall mean an assemblage composed of five or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.

Sect. 2. That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage, such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person the equal protection of the laws of the State, and to the end that such protection as is guaranteed to the citizens of the United States by its Constitution may be secured it is provided:

Sec. 3. That any State or municipal officer charged with the duty or who possesses the power or authority as such officer to protect the life of any person that may be put to death by any mob or riotous assemblage, or who has any such person in his charge as a prisoner, who fails, neglects, or refuses to make all reasonable efforts to prevent such person from being so put to death, or any State or municipal officer charged with the duty of apprehending or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all reasonable efforts to perform his duty in apprehending or prosecuting to final judgment under the laws of such State all persons so participating except such, if any, as are or have been held to answer for such participation in any district court of the United States, as herein provided, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment not exceeding five years or by a fine of not exceeding $5,000, or by both such fine and imprisonment.

Any person who participates in a mob or riotous assemblage that takes from the custody or possession of any State or municipal officer any person held by such officer to answer for some actual or supposed public offense and puts such person to death as a punishment for such offense, or any person who participates in any mob or riotous assemblage that obstructs or prevents any State or municipal officer in discharging his duty to apprehend, prosecute, protect, or punish any person suspected of or charged with any public offense and puts such person to death as a punishment for such of-
fense, shall be guilty of a felony, and on conviction thereof shall be imprisoned for life or for not less than five years.

Sec. 4. That any person who participates in any mob or riotous assemblage by which a person is put to death shall be guilty of a felony, and on conviction thereof shall be imprisoned for life or for not less than five years.

Sec. 5. That any county in which a person is put to death by a mob or riotous assemblage shall forfeit $10,000, which sum may be recovered by an action therefor 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; if he had no family, then to his dependent parents, if any; otherwise for the use of the United States. Such action should be brought and prosecuted by the district attorney of the United States of the district in which such county is situated in any court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of a judgment therefor, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may compel the levy and collection of a tax therefor, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty provided by law therefor.

Sec. 6. That in the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time intervening between his capture and putting to death, each county in or through which he was so transported shall be jointly and severally liable to pay the forfeiture herein provided.

In construing and applying this act the District of Columbia shall be deemed a county, as shall also each of the parishes of the State of Louisiana.

Sec. 7. That if any section or provision of this act shall be held to be invalid, the balance of the act shall not for that reason be held invalid.
APPENDIX C

Volstead's January 25, 1922, amendment to H. R. 13 and the "Dyer bill" as passed by the House:

Be it enacted, That the phrase 'mob or riotous assemblage,' when used in this act, shall mean an assemblage composed of three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.

Sec. 2. That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person the equal protection of the laws of the State, and to the end that such protection as is guaranteed to the citizens of the United States by its Constitution may be secured it is provided:

Sec. 3. That any State or municipal officer charged with the duty, or who possesses the power or authority as such officer to protect the life of any person that may be put to death by any mob or riotous assemblage, or who has any such person in his charge as a prisoner, who fails, neglects, or refuses to make all reasonable efforts to prevent such person from being so put to death, or any State or municipal officer charged with the duty of apprehending or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all reasonable efforts to perform his duty in apprehending or prosecuting to final judgment under the laws of such State all persons so participating, except such, if any, as are or have been held to answer for such participation in any district court of the United States, as herein provided, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment not exceeding five years or by a fine of not exceeding $5,000, or by both such fine and imprisonment.

Any State or municipal officer acting as such officer having under authority of State law in his custody or control a prisoner, who shall conspire, combine, or confederate with any person to put such prisoner to death without authority of law as punishment for some alleged public offense, or who shall conspire, combine, or confederate with any person to suffer such prisoner to be taken or obtained from his custody or control for the purpose of being put to death
without authority of law as a punishment for an alleged public offense, shall be guilty of a felony, and those who so conspire, combine, or confederate with such officer shall likewise be guilty of a felony. On conviction the parties participating therein shall be punished by imprisonment for life or not less than five years.

Sec. 4. The district court of the judicial district wherein a person is put to death by a mob or riotous assemblage shall have jurisdiction to try and to punish, in accordance with the laws of the State where the homicide is committed, those who participate therein, provided it is first made to appear to such court that the officers of the State charged with the duty of prosecuting such offense under the laws of the State fail, neglect, or refuse to apprehend or punish such participants, or that the jurors obtainable for service in the State court having jurisdiction of the offense are so strongly opposed to such punishment that there is no reasonable probability that those guilty of the offense can be punished in such State court. A failure for more than 30 days after the commission of such offense to apprehend, the persons guilty thereof shall be prima facie evidence of such failure, neglect, or refusal.

Sec. 5. That any county in which a person is put to death by a mob or riotous assemblage shall forfeit $10,000, which sum may be recovered by an action therefor 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; if he had no family, then to his dependent parents, if any; otherwise for the use of the United States. Such action should be brought and prosecuted by the district attorney of the United States of the district in which such county is situated in any court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of a judgment therefor, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may compel the levy of execution and collection of a tax therefor, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty provided by law therefor.

Sec. 6. That in the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time intervening between his capture and putting to death, the county in which he is seized and the county in which he is
put to death shall be jointly and severally liable to pay the forfeiture herein provided.

Sec. 7. That any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory, and within the period limited by the laws of such State or Territory, and may be prosecuted in the courts of the United States, and, upon conviction, the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

Sec. 8. In construing and applying this act the District of Columbia shall be deemed a county, as shall also each of the parishes of the State of Louisiana.

That if any section or provision of this act shall be held by any court to be invalid, the balance of the act shall not for that reason be held invalid.
APPENDIX D

H. R. 13 as amended by the Senate Judiciary Committee:

Be it enacted, That the phrase 'mob or riotous assemblage,' when used in this act, shall mean an assemblage composed of three or more persons acting in concert for the purpose of depriving any person of his life without authority of law as punishment for or to prevent the commission of some actual or supposed public offense.

Sec. 2. That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage, such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person the equal protection of the laws of the State, and to the end that such protection as is guaranteed to the citizens of the United States by its Constitution may be secured it is provided:

Sec. 3. That any State or municipal officer charged with the duty or who possesses the power or authority as such officer to protect the life of any person that may be put to death by any mob or riotous assemblage, or who has any such person in his charge as a prisoner, who fails, neglects, or refuses to make all reasonable efforts to prevent such person from being so put to death, or any State or municipal officer charged with the duty of apprehending or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all reasonable efforts to perform his duty in apprehending or prosecuting to final judgment under the laws of such State all persons so participating except such, if any, as are or have been held to answer for such participation in any district court of the United States, as herein provided, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment not exceeding five years or by a fine of not exceeding $5,000, or by both such fine and imprisonment.

Any State or municipal officer acting as such officer under authority of State law, having in his custody or control a prisoner, who shall conspire, combine, or confederate with any person to put such prisoner to death without authority of law as a punishment for some alleged public offense, or who shall conspire, combine, or confederate with any person to suffer such prisoner to be taken or obtained from his custody or control for the purpose of being put to death without authority of law as a punishment for an alleged
public offense, shall be guilty of a felony, and those who conspire, combine, or confederate with such officer shall likewise be guilty of a felony. On conviction the parties participating therein shall be punished by imprisonment for life or not less than five years.

Sec. 4. That the district court of the judicial district wherein a person is put to death by a mob or riotous assemblage shall have jurisdiction to try and punish, in accordance with the laws of the State where the homicide is committed, whose who participate therein: Provided, That it shall be charged in the indictment that by reason of the failure, neglect, or refusal of the officers of the State charged with the duty of prosecuting such offense under the laws of the State to proceed with due diligence to apprehend and prosecute such participants the State has denied to its citizens the equal protection of the laws. It shall not be necessary that the jurisdictional allegations herein required shall be proven beyond a reasonable doubt, and it shall be sufficient if such allegations are sustained by a preponderance of the evidence.

Sec. 5. That any county in which a person is put to death by a mob or riotous assemblage shall, if it is alleged and proven that the officers of the State charged with the duty of prosecuting criminally such offense under the laws of the State have failed, neglected, or refused to proceed with due diligence to apprehend and prosecute the participants in the mob or riotous assemblage, forfeit $10,000, which sum may be recovered by an action therefor 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; if he had no family, then to his dependent parents, if any; otherwise for the use of the United States. Such action shall be brought and prosecuted by the district attorney of the United States of the district in which such county is situated in any court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of a judgment therefor, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may compel the levy and collection of a tax therefor, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty by law therefor.

Sec. 6. That in the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time
intervening between his capture and putting to death, the county in which he is seized and the county in which he is put to death shall be jointly and severally liable to pay the forfeiture herein provided.

Sec. 7. That any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory, and may be prosecuted in the courts of the United States, and upon conviction the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

Sec. 8. That in construing and applying this act the District of Columbia shall be deemed a county, as shall also each of the parishes of the State of Louisiana.

That if any section or provision of this act shall be held by any court to be invalid, the balance of the act shall not for that reason be held invalid.
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