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THE CONSTITUTIONALITY OF A FEDERAL ANTI-LYNCHING BILL

BY HON. L. C. DYER AND GEORGE C. DYER

It is not the purpose of the writers of this article to deal with the political aspects of the anti-lynching bill which for a number of sessions has been pending in Congress. However, it will be necessary to point out briefly the existence of a need for this legislation and its historical development to provide a background for an analysis of the legal problems involved.

For over fifty years the crime of lynching has been going on in this country, and only unsatisfactory results have been effected by responsible state authorities in attempting to check it. Either because of the neglect or inability of the states in prosecuting the mobs, which time after time have gone unpunished, has a necessity for some sort of federal regulation arisen. President Wilson, President Harding, and President Coolidge have all at various times stressed the importance of solving the problem of mob violence. Accurate figures of lynching are not obtainable, because many cases go unreported and are unknown outside the locality; but available figures show that in a large degree the efforts of the mobs have been directed against negroes. Since 1885, there have been 3221 negroes lynched and only 1045 white victims of mob violence. In 1927 all of those killed at the hands of lynchers were negroes.¹ Our heterogenous populace claims some 12,000,000 colored people and it must be admitted that their rights, guaranteed by the Constitution of the United States, are just as sacred as those of any person. It is highly incumbent upon our government to see to it that these rights are properly protected. If that protection is adequately given by the states individually, the matter need not be dealt with by Congress, but such has not been the case.

In 1926, when thirty persons were lynched, twenty-one were taken from officers and jails, and in 1927 twelve of the sixteen persons lynched were taken from the hands of the law.² Lynchings are often carried on with unbelievable cruelty and it is known that several innocent persons have been victims of this mob control. In 1926 one man was killed after the courts had acquitted him of the alleged crime.³

¹ World Almanac and Book of Facts for 1928, p. 327. The "FORUM," March, 1928, pp. 475-6.

² The "FORUM," March, 1928, pp. 475-6, summarizing a report submitted by the Tuskegee Institute.

³ World Almanac, *supra*.

Very few of the offenders have been discovered and prosecuted by the state officials. In only four instances in 1926, when thirty persons were lynched, were persons charged with being connected with lynchings indicted. Although there have been 4,266 lynchings in the United States since 1885, according to the Association for the Advancement of Colored People, in less than two dozen cases have guilty persons been prosecuted. To bring an end to such a deplorable condition, it is necessary that some authority based upon a broader public opinion should be brought into play. A bill now before Congress attempts to do this. It provides in brief that when a lynching is perpetrated and the state or county officers do not make reasonable efforts to prevent it or to punish the offenders, these officers shall be guilty of felony and upon conviction shall be punished by imprisonment for not more than five years, a fine of not over \$5,000, or both; that if the suspected parties to a lynching are not apprehended because of the neglect of state or county officers or if their trial is not likely, because of prejudice on the part of obtainable jurors, to result in conviction of those guilty, the federal court of the district shall have jurisdiction to try and to punish them according to state law; and that any county which is the scene of a lynching shall forfeit \$10,000 to the United States, recoverable in the district court.⁴

It has been said that the passage of a bill of this type will lead to undue centralization of governmental power and an undue interference with the sovereign rights of the states. However, the bill seems to reveal on its face that this fear is not well founded; for, except in the matter of fining the county, the measure specifically gives the states every opportunity and incentive to deal with the menace of mob violence before the Federal authority and power are brought to bear. The contention that the proposed legislation is unconstitutional because it is an exercise of the police power, which has been reserved to the states, cannot be sustained. Long ago the case of *Gibbons v. Ogden*⁵ laid down the doctrine that the Federal government, in the exercise of an express power, may use any appropriate power, even though in other connections such power has been reserved to the states. The Federal govern-

⁴ The full text of the bill is set forth in House Rep. 71, 68 Cong., First Session, pp. 16-17.

⁵ *Wheat*, 204. See also, *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281; *Wilson v. United States*, 232 U. S. 563, 58 L. Ed. 728, 34 Sup. Ct. 347; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 64 L. Ed. 194, 40 Sup. Ct. 106.

ment, in the exercise of an express power, may, therefore, exercise a power very similar to the police power of the states.

It is the purpose of this article to deal with the constitutionality of the proposed anti-lynching bill under the particular clauses of the first section of the fourteenth amendment, which read:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

The Supreme Court has on many different occasions pointed out that the fourteenth amendment constitutes a guaranty to each person within the jurisdiction of the several states that he shall be accorded certain fundamental rights. In *Strauder v. West Virginia*,⁶ the plaintiff, Strauder, a colored man, was indicted for murder and upon trial was convicted and sentenced, and his conviction was affirmed by the Supreme Court of the State. The case was taken to the United States Supreme Court on a writ of error to the Supreme Court of West Virginia, the chief assignment of error being that the prisoner was convicted without due process of law since the laws of West Virginia excluded the members of his race from jury service. The court held the state statute unreasonably discriminatory and a denial of the equal protection of the laws within the meaning of the first section of the fourteenth amendment. The court said:

This [the fourteenth amendment] is one of a series of constitutional provisions serving a common purpose; namely, securing to a race recently emancipated all the civil rights that the superior race enjoy. It was in view of these considerations that the 14th amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privilege of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality

⁶ 100 U. S. 303, 25 L. Ed. 664.

of legal protection, either for life, liberty, or property. A right or an immunity, whether created by the Constitution, or only guaranteed by it, even without any express delegation of power, may be protected by Congress.

The fourteenth amendment adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states on the fundamental rights which belong to every citizen as a member of society. Not only is the right of the equal protection of the laws recognized in the fourteenth amendment, but it is a right essential to the very nature of our government. The equality of the right of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens by securing adherence to this principle, if within its power. That duty was originally assumed by the states and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment secures but no more. The power of the national government is limited to the enforcement of this guaranty.⁷

In a discussion of the Constitutionality of this bill under the clause of the Fourteenth Amendment which forbids the abridging by the state of the privileges and immunities of citizens of the United States it is rather difficult to ascertain what are the privileges and immunities which are inherent in citizens of the United States. Fortunately, we are not without judicial construction on this point. The leading case on the subject is the *Slaughter House Cases*.⁸ The Supreme Court had no hesitation in confining the expressions "privileges and immunities" to those which are fundamental; 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 which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental rights are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the whole government may prescribe for the general good of the whole. Earlier cases are *Ward v. Maryland*,⁹ and *Paul v. Virginia*.¹⁰ Protection by the government

⁷ *United States v. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588; *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 8.

⁸ 16 Wall. 36, 21 L. Ed. 394.

⁹ 12 Wallace 418, 20 L. Ed. 449.

¹⁰ 8 Wallace 168, 19 L. Ed. 357.

and especially equal protection is a right which every citizen is entitled to enjoy.

Those rights and immunities which have been created by the Constitution of the United States or which are dependent for their existence upon that Constitution can be protected by Congress and it has the power in the legitimate exercise of its legislative discretion to determine for itself the form and manner of protection which it desires to invoke.¹¹ Congress, therefore, is the sole repository of the responsibility as guarantor of the fundamental rights previously referred to. The specific right which the proposed anti-lynching bill attempts to enforce is, in the words of the leading case of *Barbier v. Connolly*,¹² "that equal protection and security be given to all under like circumstances in the enjoyment of their personal and civil rights." Section 5 of the fourteenth amendment¹³ further directly empowers Congress to enforce the provision by appropriate legislation.

An examination of the facts shows that there has been and is now a two-fold denial of the equal protection of the law resulting from the existence of the lynching evil: the failure to afford protection to the victim, and the failure to prosecute the guilty parties. In the first place, the failure to afford protection is equivalent to a denial of the equal protection of the laws. Equal protection requires equal treatment of all persons and classes by each agency of the state in the exercise of its function. It requires not only equality in the law itself but also equality of administration. The doctrine that the denial of rights recognized by the fourteenth amendment need not be by legislation was laid down by the Supreme Court in *Saunders v. Shaw*.¹⁴

In *Louisville and N. R. Co. v. Bosworth*,¹⁵ the court defined the phrase, "denial of the equal protection of the laws," to mean a refusal to grant or a withholding of equal treatment. 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 make it

¹¹ *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 478; *In Re Quarles*, 158 U. S. 532, 39 L. Ed. 1080, 15 Sup. Ct. 959; *Prigg v. Commonwealth*, 16 Pet. 539, 1. c. 619, 10 L. Ed. 1060; *McCulloch v. Maryland*, 4 Wheat 316, 1. c. 419, 4 L. Ed. 579.

¹² 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. 357.

¹³ "The Congress shall have power to enforce, by appropriate legislation the provisions of this article."

¹⁴ 244 U. S. 310, 61 L. Ed. 1160, 37 Sup. Ct. 640.

¹⁵ 230 Fed. 191, 207.

incumbent upon the courts, state and federal, to prevent discrimination and to secure equal treatment.¹⁶ In *Yick Wo v. Hopkins*,¹⁷ an officer who had the right to license laundries refused to license Chinese, and it was held that the conviction of Yick Wo for operating a laundry without a license was void. The court said:

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 to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. 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 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.

This fundamental principle has been further enunciated by the Supreme Court in *Ex parte Virginia*,¹⁸ *Chy Ling v. Freeman*,¹⁹ *Soon Hing v. Crowley*,²⁰ *Henderson v. Mayor of New York*,²¹ *Ex parte Young*,²² and *Neal v. Delaware*.²³

As noted above, the failure to prosecute those who take part in lynchings is the second form of denial of the equal protection of the laws to the victims. By failing to prosecute the wrongdoers, the officials are denying to those who may be subject to similar outrages that protection which comes from the punishment of crime. It is generally acknowledged that the purpose of criminal law enforcement is not merely the punishment which is meted out to the individuals—not merely an “eye for an eye or a tooth for a tooth”—but is the prevention of others from committing similar outrages on society. Hence, when a state provides the means 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. State and county officers do not attempt to suppress this crime as they

¹⁶ *Terrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 Sup. Ct. 402.

¹⁷ 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. 1064.

¹⁸ 100 U. S. 339, 25 L. Ed. 676.

¹⁹ 92 U. S. 275, 23 L. Ed. 550.

²⁰ 113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. 730.

²¹ 92 U. S. 259, 23 L. Ed. 543.

²² 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441.

²³ 103 U. S. 370, 26 L. Ed. 567.

do other offenses, and this lax inequality of protection is the very heart of mob violence. Mr. Charles C. Hyde forcefully remarks in regard to the lynching of foreign subjects by American mobs:²⁴ "A denial of justice has usually been apparent, for the offending circumstances have commonly revealed gross neglect on the part of local authorities either to prevent what occurred or to prosecute the wrongdoers." In *United States v. Blackburn*,²⁵ we find in the charge to the jury that "by equal protection of the laws, spoken of in the indictment, is meant that the ordinary means and appliances which the law has provided shall be used and put in operation 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 wilfully 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." Hence we see there is a denial of equal protection, not only to victims of the mob violence, but also to the race in danger of mob violence and who suffer as a result of inadequate and inefficient law enforcement.

To summarize, it may be said that it is state action of a particular character that is prohibited by the fourteenth amendment. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation, but simply gives it power to provide modes of relief against state legislation or state inaction of the kind referred to. Until some state law has been passed, or some state action through officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity; for the prohibi-

²⁴ *International Law as applied by U. S.* (1922) Vol. 1, pp. 516-522.

²⁵ Fed. Case, No. 14,603.

tions of the amendment are against state laws and acts done under state authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises.²⁶ The authority vested in Congress to pass "corrective" or "remedial" legislation is the authority from which the anti-lynching bill emanates.

Many of the provisions of the measure relate to actions directed against neglectful state and municipal officers. Thus it is provided that the state or municipal officers who fail in their duty shall be criminally liable.²⁷ The fourteenth amendment operates not only as to the state in its entirety but with equal force on the officials of its subdivisions. It is doubtless true that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. The Constitutional provision, therefore, must mean that no agency of the state or officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.²⁸

In *Raymond v. Chicago Traction Company*,²⁹ the Supreme Court said: "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 of the instrumentalities by which the state acts, and so it has been held that, whoever by public position under a state government deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition." Hence we see that it has

²⁶ Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 18.

²⁷ Sec. 3, par. 1: "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 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."

²⁸ *Virginia v. Rives*, 100 U. S. 313, 1 c. 318, 25 L. Ed. 667; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Home Telegraph & Telephone Co. v. Los Angeles*, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. 312.

²⁹ 207 U. S. 20, 1 c. 35, 52 L. Ed. 78, 28 Sup. Ct. 7.

been well settled by our courts that the amendment applies with full weight to the most obscure in the states' government machine.

It has been equally well settled that the Federal Government in enforcing the equal protection of the laws can act directly upon those holding public office whose official acts of neglect or wanton failure constitute the denial of the constitutional right of equal protection.

In *Ex parte Virginia*,⁸⁰ the petitioner was arrested and held in custody under an indictment found against him in the District Court of the United States for the Western District of Virginia. The indictment alleged that he, being a judge of the county court of Pittsylvania County of that state, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as jurors certain negro citizens of said county, solely on account of their race, color, and previous condition of servitude. The petitioner, being in custody, presented his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the District Court. The court held the act of Congress, under which the petitioner was convicted, constitutional and denied the petition for a writ of *habeas corpus*. The court said: "Congress is authorized to enforce the prohibition by appropriate legislation. . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of Congressional power . . . such legislation must act upon persons not upon the abstract thing denominated the state, but upon the persons who are the agents of the state in the denial of the rights which were intended to be secured."

Another question immediately arises out of the proposition just related, *i. e.*, whether or not the fourteenth amendment can reach the acts of state officers if they are not within the scope of the power conferred upon them by the state. Under this amendment the Federal Judicial power can redress and punish wrongs committed by a state official whether he has misused the authority given him or not. The state acts and becomes responsible when it places an official in the position by reason of which he is able to withhold protection or prosecution. It is entirely irrelevant to inquire into authorization by the state of the commission of the wrong. The amendment applies to every person

⁸⁰100 U. S. 339, 1. c. 345-47, 25 L. Ed. 676.

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 his powers and that it deals with such a contingency.

This point was decided in *Home Telegraph & Telephone Company v. Los Angeles*.³¹ In this case Los Angeles had passed a confiscatory ordinance, in violation of the Constitution of California and of the fourteenth amendment. It was contended that the action of the city as not within the limits of its authorization was not state action. The court held the contrary and said the fourteenth amendment "provides for a case where one who is in the possession of state power uses that power to commit some wrong which by the amendment is forbidden, even though the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer." The amendment contemplates the possibility of state officers abusing the powers conferred upon them by doing wrongs prohibited by the amendment.

By the unanimous opinion of the judges in the case of *Logan v. U. S.*,³² the law may be regarded as established that Congress has the power of protecting by proper legislation all rights and privileges given or guaranteed by the Constitution. The character and type of the right will determine the method employed. The object may be attained by regulatory means, by the imposition of penalties, or by the authorizing of suits by the injured party, or it may be by all of these together. One method of enforcement may be applicable to one fundamental right and not applicable to another.³³

In the light of the decisions rendered and the construction of the fourteenth amendment by the courts as given in the foregoing discussion, the provisions of the bill as to the criminal liability of the states' officers seem to be in harmony with the Constitution.

The next section to be considered is that which provides that members of a mob who conspire with officials to lynch any person are guilty of a felony.³⁴ To sustain the constitutionality of these particular parts

³¹ 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. 312.

³² 144 U. S. 263, 36 L. Ed. 429, 12 Sup. Ct. 617.

³³ *U. S. v. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588.

³⁴ Sec. 3, par. 2: "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, shall be guilty of a felony, and those who so conspire, combine, or confederate with such officer shall likewise be punished by imprisonment for life or not less than five years."

it is only necessary to apply the principles of law relating to conspiracies. All conspirators are regarded as principals. Hence, the United States can reach the individuals who took part in the lynchings even though they would not be amenable to federal powers if there had been no active conspiracy with state officials. Sec. 5440 of the Revised Statutes as amended by Act May 17, 1879, c. 8, 21 Stat. 4,⁸⁵ reads as follows: "If two or more persons conspire either to commit any offenses against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court." In *United States v. Lyman*,⁸⁶ the court held that to constitute the crime of conspiracy, the object of the unlawful agreement must be the commission of some offense against the United States in the sense only that it must be some act made an offense by the laws of the United States. Hence, since the Anti-Lynching Bill, in its provisions relating to state officers, makes those that conspire with the lynchers guilty of a felony, it seems clear that any conspirators with state officials who are made criminally liable under the proposed bill can themselves be made criminally liable thereunder. Upon the same principle an act providing punishment for any two or more persons conspiring to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States was held constitutional.⁸⁷

Congress, as has been pointed out, may enforce the prohibitions of the fourteenth amendment whenever they are disregarded by either the legislative, the executive, or the judicial department of a state. The mode of enforcement is left to its discretion. It may enforce the prohibition by authorizing the removal of a case from a state court in which it is disregarded into a federal court where it will be enforced. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of government. Its constitutionality has never been seriously doubted. A cause may be removed from a state to a federal court where it arises under the Constitution and laws of the United States as well as where it arises be-

⁸⁵ U. S. C., Tit. 18, sec. 88.

⁸⁶ 188 U. S. 445, 47 L. Ed. 539, 23 Sup. Ct. 349.

⁸⁷ Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. 152; U. S. v. Waddell, 112 U. S. 76, 28 L. Ed. 673, 5 Sup. Ct. 35; *Motes v. U. S.* 178 U. S. 458, 44 L. Ed. 1150, 20 Sup. Ct. 993.

tween citizens of different states, and it is for Congress to say at what time the right shall be invoked and at what stage of the proceedings a case may be removed. Congress may authorize removal before or after judgment and regulate the method, and it may prescribe a rule of limitations for removal which shall be binding on both state and federal courts.³⁸

The provisions in Section 5 of the bill for a fine upon the county in which a lynching takes place find ample precedent. The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. It is recognized in the beginning of the police system of Anglo-Saxon people. The hundred, a very early form of subdivision, was held answerable for robberies committed within its boundaries. By a series of statutes beginning possibly in 1285, in the Statutes of Winchester,³⁹ coming on down to the 27th Elizabeth, c. 13, the Riot Act of George I,⁴⁰ and the act of 8 George II, c. 16, we find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. The inflicting of a penalty on a county where a lynching occurs, is an appropriate method of enforcing the provisions of the bill; for the county is a political subdivision of a state created for the purpose and charged with the duty of enforcing the law. It is that part of the state which is guilty of failure to enforce the fourteenth amendment when a person has been killed by a mob. Statutes of a similar character have been enacted by several of the states and held valid exertions of the police power.⁴¹ The Supreme Court of the United States in *Chicago v. Sturgis*,⁴² has also upheld the validity of such penalties. The duties and obligations thus entrusted to the local subordinate government is by this enactment emphasized and enforced

³⁸ *Boom Company v. Patterson*, 98 U. S. 406, 25 L. Ed. 206; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Martin v. Hunter*, 1 Wheat. 304, 1 c. 350, 4 L. Ed. 97.

³⁹ 13 Edw. I, C. 1.

⁴⁰ 1 Geo. I, C. 1.

⁴¹ *Darlington v. Mayor, etc., of N. Y.*, 31 N. Y. 164; *Faubia v. New Orleans*, 20 La. Ann. 410; *Dale County v. Gunter*, 46 Ala. 111; *De Kalb v. Smith*, 47 Ala. 407; *Countey v. Clarendon County*, 101 S. C. 141, 85 S. E. 228; *Brown v. Orangeburg Co.*, 55 S. C. 45, 32 S. E. 764; *Atchinson v. Terine*, 9 Kan. 350; *P. C. C. & St. L. Ry. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022; *Commissioners v. Church*, 62 Ohio St. 318, 57 N. E. 50; *County of Allegheny v. Gibson, etc.*, 90 Pa. St. 397.

⁴² 222 U. S. 313, 56 L. Ed. 215, 32 Sup. Ct. 92.

by imposing upon the local community absolute liability for losses of life, liberty, or property resulting from the violence of such public tumults. The validity of the section of the anti-lynching bill providing for the imposition of fines is certain.

The authority for the constitutional validity of Section 7 of the bill, dealing with mob violence against foreigners,⁴³ is found in the treaty power of the Federal Government. The power of Congress to make all laws "necessary and proper" for carrying into execution the powers vested in the government of the United States includes the power to enact such legislation as is appropriate to give effect to any stipulations which it is competent for the President, by and with the advice and consent of the Senate, to insert in a treaty with a foreign power.⁴⁴ Obviously, when the United States has accepted toward foreign powers responsibility for the acts or omissions of local state agents, it should be given power to act directly against those taking part in lynchings, when, as has been shown, the agents in the various localities have proven themselves unable or unwilling to do so. This section of the bill is constitutional independently of the fourteenth amendment.

In *Moore v. Dempsey*⁴⁵ the case went to the Supreme Court on an appeal from an order dismissing a writ of *habeas corpus*, the ground of the petition for the writ being that the proceedings in the state court of Arkansas, whereby the appellants, five negroes, were convicted of murder, although a trial in form, were such only in form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without due process of law. The court reversed the order and restored the writ of *habeas corpus*, holding that the district court must determine whether the facts alleged as to the trial being dominated by the mob were true. Mr. Justice Holmes said:

"In *Frank v. Mangum*,⁴⁶ it was recognized of course, that if in fact a trial is dominated by a mob so that there is an actual inter-

⁴³ "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 conviction for crimes under the laws of the United States."

⁴⁴ *Neely v. Henkel*, 180 U. S. 109, 1. c. 121, 45 L. Ed. 448, 21 Sup. Ct. 302.

⁴⁵ 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. 265.

⁴⁶ 237 U. S. 309, 1. c. 335, 59 L. Ed. 969, 35 Sup. Ct. 582.

ference with the course of justice, there is a departure from due process of law; and that if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law. We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.”

This recent case is important because it shows that the Federal courts will act to preserve and make good to injured parties their constitutional rights under the fourteenth amendment. Likewise, it is quite reasonable to suppose that the courts actuated by the same principles, will uphold as appropriate legislation a law designed to safeguard the rights afforded by the amendment.

The foregoing argument shows that the bill under discussion, designed to “insure the equal protection of the laws and to punish the crime of lynching,” is “appropriate” legislation within the meaning of the fifth section of the fourteenth amendment and is that form of “corrective” or “remedial” legislation which is authorized by the wilful or negligent failure of the states or their officials to conform to the prohibitions of the fourteenth amendment.