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# Constitutional Discourse in the Dyer Anti-Lynching Bill Debate

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## Introduction

A black Georgia man is chained and tortured for half an hour. Onlookers gaze upon the scene with the curious excitement of a carnival attraction, which belies the absolute horror unfolding. The sharp slice of a knife robs him off his ears, fingers and genitals in a frenzied ritualistic bloodletting. The mob douses him with kerosene and flames consume him, starting at his legs. His desperate cries for a reprieve or alternatively, a quick death, go unheeded. His ravaged body makes one last desperate attempt to break free, but it cannot overcome the overwhelming wave of unknown white executioners that meets its thrashing with ravenous resolve. Sam Hose dies in grimacing agony after exhausting his spirit and strength. Before his charred body even cools, spectators slice it apart, keeping various body parts as perverse souvenirs.<sup>1</sup> This was a lynching in the American south.

While a scene like that is hauntingly breathtaking to outsiders, lynching was an accepted and celebrated practice in the south,<sup>2</sup> particularly from the end of Reconstruction to the early decades of the twentieth century. So accepted was this practice that newspapers reported lynching stories with a “sickeningly regular rhythm.”<sup>3</sup> Frederick Douglass lamented that “our newspapers are daily disfigured by its ghastly horrors.”<sup>4</sup> Perhaps the reason why lynching was so captivating was because it transcended ordinary murder to become no less than a spectacular display of twisted justice with deep cultural, societal, and political implications. In sum, it was a means by which to further marginalize African Americans, preserve the status quo, and protect the mythos of Southern Womanhood.<sup>5</sup>

As southern whites systematically meted out savage justice to African Americans and other targeted groups,<sup>6</sup> southern law enforcement officials often refrained from providing protection or refused to enforce any state mob violence statutes.<sup>7</sup> Some shared the mobs’ racist

attitudes while others were afraid of physical and perhaps political reprisals. Others did try to protect black prisoners but were simply overwhelmed by frenzied lynch mobs. Black citizens were thus left largely without the assurances of state protection. In light of this ubiquitous vulnerability, advocates like the National Association for the Advancement of Colored People (NAACP) called on Congress to pass its own anti-lynching law.<sup>8</sup> It would be a rough road, however, because in addition to the expected obstruction from racist congressmen, advocates also had to overcome arguments that a federal anti-lynching bill was unconstitutional. The most common constitutional argument opponents made was that it was the responsibility of state and local governments through their police powers, and not that of the federal government, to protect (or not protect) individuals' health and safety.<sup>9</sup> Unlike state and local laws, federal laws could only punish state actors who actively participated in the commission of a crime.<sup>10</sup> In order for lynching legislation advocates to gain any traction on a bill, they had to persuade lawmakers on both sides of the aisle that such a bill would not run afoul of the Supreme Court's jurisprudence on the state action doctrine. In the end, however, Congress never passed anti-lynching legislation.<sup>11</sup>

This paper examines the transformative role of legislative constitutionalism in the campaign and the debate on the Dyer Anti-Lynching Bill, which in 1922 was the first sustained effort at passing federal anti-lynching legislation. At its core, this paper is a defense of legislative constitutionalism as a way to refine the legislative process. This paper examines the ways in which constitutional discourse changed the dynamics of the anti-lynching campaign, refined lawmakers' arguments, and fostered a heightened consciousness of constitutional duties. Passing the Dyer bill was the advocates' first priority. To them, technical issues of constitutional doctrine distracted attention from the bottom-up nature of the campaign. This is reflected in the

narrative they constructed in the years preceding debate on the Dyer bill. Nevertheless, advocates needed to address the bill's constitutionality to assuage the concerns of lawmakers who strongly believed that congressmen should both make constitutional judgments and act upon them. The extent to which debates on the constitutionality of the Dyer bill actually motivated lawmakers to cast principled votes for and against the bill can be contested. For example, opponents relied heavily on the rhetorical firepower of racial and cultural arguments, as evidenced in their rants about the preservation of the status quo and protection of white women from ravishment by sexually-obsessed black men.<sup>12</sup> But whatever motivations these lawmakers had for using the Constitution as a measuring stick for passage cannot detract from the ways in which the floors of Congress became forums for constitutional debate.<sup>13</sup> The Dyer debate stands in history as an important example of legislative constitutionalism.

Part I of this paper describes the events leading up to the debate on the Dyer Anti-Lynching bill. Aside from providing historical context, Part I also develops the narrative of urgency – simply too many African Americans were being lynched and in such grotesque ways that Congress needed to take action and do so as soon as possible. It is this narrative of urgency that formed the spearhead of advocates' efforts, both to draw attention to the deeply concerning moral issues of lynching and to combat obstructionists' own use of racial and cultural arguments.

Part II analyzes the constitutional (doctrinal) question posed both in formal and informal discussions and the ways in which the question altered advocates' paradigm for passing the Dyer bill. Any debate on lynching legislation would undoubtedly include debate on its constitutionality, with critics assailing the bill for reaching private actions. This was not the type of discussion in which proponents of a federal bill wanted to engage. Both the NAACP and those in Congress that favored passage would have preferred that the ultimate constitutional

question be left to the Supreme Court. However, many congressmen pushed this issue by engaging in departmental review, where constitutional judgments are made within the context of the legislative process. This was particularly effective because opponents of the bill – both racist demagogues and those genuinely concerned with the underlying constitutionality of the bill – leveraged the seemingly unfavorable (for supporters) Supreme Court precedent on the state action issue. In order to successfully pass the Dyer bill, advocates needed first to meet these concerns directly. Although proponents of the bill would more effectively engage in constitutional discourse through emphasizing broader constitutional principles, departmental review nevertheless played an important role in transforming the debate – if only partially – into a constitutional one.

Part III analyzes the second level of constitutional discourse by locating strands of debate apart from the concrete legal issue of whether Congress had authority to pass federal anti-lynching bill. Understanding that they could not sustain the bill through creative interpretations of state action, advocates expanded the constitutional debate to focus on broader normative commitments including equal rights and citizenship.

Finally, Part IV discusses what emerges from the debate on the Dyer bill. First, the Constitution has immense power to elevate discourse. Part IV cites examples of dialogue from opponents of the Dyer bill that uncovers a “laundrying” dynamic within the debate, in which constitutional discussion sanitized otherwise racist policy arguments. Second, contrary to what Dyer bill opponents charged, those who favored pushing the constitutional question to the Supreme Court did not abrogate their duty to uphold the Constitution.

## **I. The Need for Federal Legislation: Constructing a Narrative of Urgency in the Lead-Up to the Dyer Anti-Lynching Bill**

Several anti-lynching bills had died in Congress since the turn-of-the-century, but by the end of the 1910s, supporters of a federal bill to combat lynching were the most optimistic they had ever been. They were hopeful that a series of events that shed light on the horrors of lynching and the growing moral crisis facing the U.S. if it continued to turn a blind eye to the plight of its black citizens would spur Congress into action. Escalating violence against African Americans sparked advocates to push harder than ever before for a federal anti-lynching bill. Through these experiences, advocates articulated a narrative of urgency: African Americans could no longer afford to live without increased federal protection, particularly in the Jim Crow south. They forged this narrative through increased publicity of the rampant bloodshed on the ground and sustained their resolve with a growing sense of militancy in the wake of World War I.

### **A. *Racial Violence on the Ground***

The summer of 1919, dubbed “the Red Summer,” would be a particularly bloody one for African Americans. As former NAACP President Moorfield Storey remarked, the Red Summer was “the greatest period of interracial strife the nation had ever witnessed.”<sup>14</sup> Many factors contributed to the volatile atmosphere swirling about in 1919. White communities perceived a threat of violence from returning black troops who had just taken up arms in war, and this fear spread to African Americans in general.<sup>15</sup> Moreover, with the emergence of the Soviet Union, there grew a general fear that African Americans would be susceptible to potential communist overtures.<sup>16</sup> The dynamics of urbanization and northward migration was also greatly influential

in exacerbating racial tensions.<sup>17</sup> Southern blacks migrating into northern cities began to encroach upon fiercely protected ethnic-centered neighborhoods like the territorial Irish neighborhoods of Chicago, where rioting was particularly explosive.<sup>18</sup> What began as a dispute over the unwritten rules of segregated swimming on Lake Michigan on a hot July day in 1919 ended in one of the largest race riots to date. Five days of brutal violence left 38 people killed, 537 injured and over one thousand mostly black families homeless.<sup>19</sup>

Escalating racial violence afflicted the entire nation during the Red Summer. Omaha erupted in rioting in September 1919 as a mob set fire to a courthouse holding a black prisoner accused of rape.<sup>20</sup> The successful siege yielded another charred and bullet-riddled black body.<sup>21</sup> Like the flames that increasingly consumed the multi-story courthouse, violence spread throughout the downtown streets, as mob contingencies assaulted African Americans they happened to come across, including two on-duty police officers.<sup>22</sup> In Gary, Indiana, hundreds of white unionists attacked a group of 40 black strikebreakers in a stalled streetcar.<sup>23</sup> Much like the Omaha riot, the mob was not satisfied with the initial targets of its outrage. After the mob beat and dragged the black workers through the streets, they attacked others over eight city blocks, leaving behind a trail of broken and unconscious bodies.<sup>24</sup> So much violence had erupted throughout the country that Missouri Representative Leonidas Dyer, the federal lynching bill's namesake, compiled a lengthy list for his colleagues in the House of Representative of places where large scale episodes of racial violence occurred, spanning from Arizona to New York City.<sup>25</sup>

In the south, African Americans were still being lynched with bloodthirsty ferocity and frequency. In a particularly heinous act in 1918, a Georgia mob lynched Mary Turner, who was eight months pregnant. A lynch mob shot her husband in revenge for the death of a farmer, for



whom the husband worked, although it was likely the lynch mob killed the wrong man. Mary Turner persistently insisted upon her husband's innocence after he died. In angry response, a mob seized her, hung her upside down from a tree, and set her on fire. She burned to death. The mob was not satisfied and quickly turned its attention to Turner's baby, who the mob crudely removed from Turner as she burned. In a twisted act of utter cruelty, the mob kicked and stomped the defenseless baby to death.<sup>26</sup>

The NAACP was instrumental in publicizing horrific lynchings like Mary Turner's. Its stories and articles describing lynchings in graphic detail shocked even the most hardened supporters of anti-lynching legislation.<sup>27</sup> Not only did the NAACP report on lynchings, but they also reported on the apathy of state and local officials to the lynching problem. Mississippi Governor Theodore Bilbo insincerely declared that he was "utterly powerless" to stop a lynching in June 1919 because of the lack of resources and the spirited fervor of the lynch mob.<sup>28</sup> The NAACP's holistic strategy of focusing on racial violence and on the tepid to non-existent response reflected the two interdependent rationales for a federal bill: African Americans were being brutally lynched and the local authorities were doing nothing about it. Publicity generated by the NAACP reflected the bottom-up nature of anti-lynching legislation and the fight to pass it; technical questions of constitutional doctrine were necessarily secondary priorities to the conditions on the ground. The African-American experience of marginalization and victimization gave substance to the campaign to pass anti-lynching legislation as an effort to combat what was an affront to basic morality and decency.

Focusing on the nature of lynchings on the ground was also an important tactical move against opponents who would undoubtedly make arguments based on race and culture. Proponents of federal legislation knew that some lawmakers, particularly those from the south,

would speak out of fear and hatred toward African Americans. The Congressional Record would later confirm their foresight. Texas Representative Hatton Sumners, one of the main opponents of the bill in the House, began his attack by puzzlingly submitting to his colleagues that African Americans should be thankful for the institution of slavery because (notwithstanding its horrific and shameful history<sup>29</sup>) it brought their ancestors out of the “savagery of the jungle.”<sup>30</sup> His opening salvo continued by deriding African Americans as unsophisticated brutes who were to be feared for what they would do to women and children: “Somewhere in that black mass of people is the man who would outrage your wife or child, and every man who lives out in the country knows it.”<sup>31</sup> Sumners and his obstructionist colleagues would reinforce this theme of black brutality against southern white women throughout the debate, leaving little doubt as to their primary motivation for opposition. One of Sumners’ southern colleagues warned that violence against women and children would spread if Congress passed the Dyer bill. Representative John Elliot Rankin of Mississippi warned northern colleagues that “a vast number of innocent white women are outraged by Negroes in the South every year, and now this evil is creeping into the North. Your time is coming...”<sup>32</sup> But even unapologetic racists and obstructionists would have a difficult time convincing others that the brutal lynchings of Mary Turners across the south could be reconciled with notions of noble white men protecting white women’s purity.<sup>33</sup>

***B. Sustaining the Narrative of Urgency through Post-World War I Militancy***

While advocates pushed for a federal lynching bill in hopes of quelling the dramatic uptick in racial violence, they were sustained by a sense of militancy driven by the hypocrisy of U.S. foreign intervention in the face of degenerative mob violence on its own soil. National

leaders could no longer hide from the shame of fighting for freedom abroad while ignoring the depravation of freedom at home. The wholesale carnage of World War I brought the horrors of death and destruction into a heightened American social consciousness, which made tolerance of the barbarous acts of lynching that had become such an entrenched and celebrated act difficult to reconcile with democratic principles.<sup>34</sup> And certainly, a country concerned with the plight of Belgian children or the protection of the right to self-determination in Europe could not in good conscious ignore the welfare of its own citizens.<sup>35</sup> President Woodrow Wilson, the man who led the nation through war, was now receiving letters from concerned citizens that foreign nations would be closely watching America's response to the continued lynching of African Americans. One man wrote President Wilson that the foreign statesmen with whom he spoke on a regular basis argued that "the White man's lynching in this country scares other Nations of American rule."<sup>36</sup> Pointedly, the man asked, "Doesn't that seem reasonable?"<sup>37</sup> Even Wilson, criticized for his ambivalence on civil rights issues, could not ignore the lynching problem, particularly its implications for international relations. In a 1918 speech Wilson asked, "How shall we commend democracy to the acceptance of other peoples, if we disgrace our own by proving that it is, after all, no protection to the weak?"<sup>38</sup>

In essence, the continued violence against African Americans gave advocates the words to speak while the contradiction of U.S. military intervention abroad and the treatment of African Americans at home gave advocates the tone in which to speak. The war was driven by hopeful promises of a better life, both internationally and domestically, and the continued hopelessness of African Americans in the post-war era awakened within them "strong currents of resistance to white oppression."<sup>39</sup> These feelings were especially resonant when returning black soldiers who served the country in war were disrespected and even lynched in their own country. Many of the

seventy reported lynchings in 1919 were of returning black servicemen.<sup>40</sup> The war showcased that African Americans just as much as any other Americans made great sacrifices for the war effort, and white Americans began to fear that their service would be used as a fulcrum upon which to leverage greater rights.<sup>41</sup> The unimaginable treatment such veterans received in their own country and the tepid if not cold response advocates received from national leaders sparked a more outward militancy within the black community. W.E.B. DuBois powerfully wrote in an editorial in *The Crisis* that, “We (African Americans) *return from fighting. We return fighting.*”<sup>42</sup>

By 1921, the wheels were rapidly turning for a debate on a federal anti-lynching bill. Representative Leonidas Dyer of Missouri would be its standard bearer. Dyer was spurred to action in large part because of the East St. Louis riot that occurred in 1917, which left over one hundred people killed and injured.<sup>43</sup> In pertinent part, the Dyer bill defined a “mob” as the assemblage of five or more individuals; made it a felony for any person to engage in mob action that leads to the death of an individual; made it a felony for a state or local law enforcement official to fail to protect an individual in their custody; and levied a fine against any county in which an individual is lynched.<sup>44</sup>

## **II. The Transformative Role of the Constitutional Question**

Dyer bill advocates knew that they not only had to overcome the racist arguments southern obstructionist lawmakers would inevitably use, but also persuade lawmakers across the entire political spectrum that a federal bill would not be unconstitutional. Advocates understood that the constitutional basis was shaky, but they had no choice but to accept the challenge because so many black citizens lived precariously under the specter of lynching. Addressing

whether Congress had authority to pass legislation that imposed criminal liability on private actors transformed – if only partially – the debate into a constitutional one. The most frequently invoked constitutional basis for grounding anti-lynching legislation was the Fourteenth Amendment, which applied to state and local governments in the individual states. Section 5 of the Fourteenth Amendment allowed Congress to enforce equal protection and due process rights.<sup>45</sup> However, prosecuting lynchings at the hands of private individuals posed a state action problem.

The Supreme Court's jurisprudence on the constitutionality of federal Reconstruction-era laws presented unfavorable prospects for Dyer bill advocates. In *United States v. Cruikshank*,<sup>46</sup> the Court held that the Fourteenth Amendment did not authorize the Enforcement Act of 1870 to reach private actors.<sup>47</sup> Although not expressly stated in the Court's opinion, the facts of the case were all too familiar to advocates: a mob murdered almost three hundred African Americans in an attempt to nullify their recently-cast votes.<sup>48</sup> The Court declared that while the Fourteenth Amendment protects citizens from any deprivation of due process or equal protection rights by the state, it did not grant additional rights to individuals against one another.<sup>49</sup> According to the Court, protection from harm from other individuals is the province of the individual states, flowing from a republican form of government.<sup>50</sup> The Court struck down another Reconstruction-era federal law when in *United States v. Harris*,<sup>51</sup> it invalidated the so-called Ku Klux Klan provision of the Civil Rights Act of 1871, which made it illegal for two or more persons to conspire or go in disguise to deprive an individual of their equal protection rights.<sup>52</sup> The Court again framed state action as affirmative acts committed by state officials.<sup>53</sup> The Court would subsequently reinforce these holdings through later cases.<sup>54</sup>

Opponents of the bill capitalized on this unfavorable precedent by insisting upon addressing the constitutionality of the bill within the legislative process. Many members of Congress expressed a deep concern with the constitutionality of a bill that allowed federal law enforcement officials to regulate private acts.<sup>55</sup> Despite the seemingly bleak precedent, the NAACP and the congressional sympathizers to their lynching cause needed to engage the question of constitutionality, indeed agonize over it, if they expected to see any positive movement on the bill. In this way, a problem framed primarily as social now became constitutional. Driven by the narrative of urgency, advocates wrestled with the legal question of whether Congress had constitutional authority to pass the Dyer bill. To address those concerns, advocates adopted a doctrine of state *inaction* or more accurately, a doctrine of state action through state inaction. Albert E. Pillsbury, an NAACP lawyer and its leading expert on the constitutional question, explained the argument: “forbidding the state to deny equal protection is equivalent to requiring the state to provide it.”<sup>56</sup> In essence, the argument was that the failure of law enforcement officials to protect African Americans from lynch mobs was essentially state action. Indeed, this argument was written directly into the bill.<sup>57</sup>

Some leaders of the movement nevertheless expressed reservations and outright pessimism about the strength of their constitutional arguments. Pillsbury, who once argued that inaction was action for constitutional purposes, became increasingly pessimistic about the Dyer bill’s prospects. He confided to James Weldon Johnson, the first African American Executive Secretary of the NAACP, that the organization should expect the Dyer bill to be bogged down in congressional committees.<sup>58</sup> Pillsbury was not the only sympathizer to express concerns. Former Attorney General George W. Wickersham and Louis Marshall, president of the American Jewish Committee, who the NAACP sought for an endorsement of the bill’s

constitutionality, expressed concern that the Dyer bill could not overcome constitutional attacks.<sup>59</sup> But even as these informal counsels to the NAACP expressed their doubts, the NAACP was undaunted in finding support from other prominent individuals.<sup>60</sup> And ultimately, the NAACP pressed ahead in advocacy of the Dyer bill regardless of concerns related to its constitutionality.

The cautiousness of those close to NAACP leadership was well-founded for opposition lawmakers were well prepared to attack the constitutional grounding of the Dyer bill. For example, Representative John R. Tyson of Alabama directly attacked the NAACP's position by arguing that the Fourteenth Amendment prohibited state action and not non-action.<sup>61</sup> Tyson was concerned with the possibility that because a federal lynching bill would compel state law enforcement officials to affirmatively act, laws could be passed imposing positive duties in other contexts by extending the logic of the advocates' argument.<sup>62</sup> Implicitly, Tyson expressed his belief that the U.S. Constitution is a charter of negative rights and not of positive rights.<sup>63</sup> Tyson's colleague from Virginia, Representative James Woods, was more pointed in his opposition. After citing several Supreme Court cases, he concluded that "nowhere can it be shown in any case that the scope of the (Fourteenth) amendment has been extended so as to apply to acts of mere omission on the part of the States."<sup>64</sup>

What emerged in debate was departmental review, in which members of Congress expressed constitutional judgments about the bill through their rhetoric and debate.<sup>65</sup> Some lawmakers urged their colleagues to not only express constitutional judgments but also act upon them. Representative Woods, who would eventually vote against the Dyer bill,<sup>66</sup> invoked President Abraham Lincoln and argued that rather than shirking the constitutional issue, a lawmaker sworn to uphold the Constitution must act upon the judgment he has made through his

vote.<sup>67</sup> Woods also argued that a lawmaker's vote should be based on principle and should not be swayed by officials in other branches, including the President.<sup>68</sup> Woods' articulation of a representative's duties was in line with a strict form of departmentalism, which holds that each branch is to be completely sovereign in its ability to make constitutional judgments.<sup>69</sup>

But it was not just opponents of the Dyer bill that were engaging in departmental review. Supporters of the bill, even as they faced unfavorable precedent and an improbable chance that their position would later be adopted by the Supreme Court, still engaged in departmental review because its necessary criterion is simply that the actor make their own constitutional judgment, even if it is not in line with Supreme Court precedent.<sup>70</sup> In his opening remarks, Republican Senator Samuel Shortridge, the Dyer bill manager in the Senate, asserted his right to engage in departmental review:

I have the right, as have you, to interpret the Constitution according to my view, paying heed to the interpretations that have been placed upon it by the Supreme Court, and also bearing in mind that, whatever my interpretation may be, it may be found to be erroneous by that other body set up by the Constitution; for I believe with Marshall and with a great line of great judges who have adorned the Supreme Court of the United States to say and determine that our conclusions are utterly null and void, that whatever we may think is not the law; 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 enact given legislation nor am I embarrassed at all by decisions which have gone before me.<sup>71</sup>

Representative Frederick W. Dallinger tried to turn the tables on opponents of the bill by bringing to bear his own reading of Supreme Court precedent that he argued supported Congress' authority to pass the Dyer bill. Citing *Ex parte Virginia*,<sup>72</sup> Dallinger remarked that it was clear that the Supreme Court's precedent actually supported passage of the Dyer bill.<sup>73</sup> Even as lawmakers reached at times diametrically opposed positions, the important thing to note from the Dyer debate is that lawmakers on both sides were now deeply engaged with issues of constitutionality.



Departmental review was working even beyond the halls of Congress. Senator Shortridge's colleague Republican Senator Willam Borah was one of the most ardent defenders of departmental review. Although generally sympathetic to the plight of African Americans, Borah took immense pride in his reputation as a constitutional expert,<sup>74</sup> and any bill like the Dyer bill that authorized the federal government to prosecute state law enforcement officials or private citizens not prosecuted by the state would come under his scrutiny. Moreover, Borah chaired the powerful Senate Judiciary Committee, which would need to report favorably on the bill before it could go to the floor of the Senate for formal debate.<sup>75</sup> The NAACP knew that his support was instrumental to the bill's passage and made several unsuccessful attempts to win his vote before formal debate began. But unlike Walter White and NAACP leadership, Borah wanted Congress to make its own assessment of the bill's constitutionality. Borah told Moorfield Storey that he would not "support a measure he thought unconstitutional merely to bring the question to Supreme Court review."<sup>76</sup> Throughout the first half of 1922, Borah persistently maintained his view that the bill was unconstitutional, declaring, "it may be a perfectly vain thing to pass this particular measure."<sup>77</sup> While Borah would later scale back his position, his persistence on the doctrinal question is reflective of the role of constitutional discourse to shape debate.

Although the NAACP had earlier prepared to answer critics' charges about the Dyer bill's unconstitutionality, they preferred to leave the issue to the Court. Its leaders understood that congressmen would challenge each other on the constitutional question and that there was a good chance the constitutional debate would slow the bill down. For the NAACP, the bill was a matter of life and death for countless numbers of African Americans that it simply could not afford to concede the debate because of the reservations of some congressmen. Viewed in this

light, the NAACP's paramount concern was the bill's passage, not necessarily whether the bill could be reconciled with the seemingly unfavorable Supreme Court precedent. This does not mean that the NAACP was not concerned with constitutional fidelity; it simply had a different vision of institutional capacity to interpret the Constitution. Understanding that it could never fully relieve itself of its constitutional burden, NAACP leaders sought to ensure that the arbiter of the bill's constitutionality was the institution that was the most competent to do so: the Supreme Court. Walter White argued that even if the Court were to strike the bill down, the champions of reform will nevertheless have gained leverage on an amendment to the Constitution.<sup>78</sup>

The nature of the campaign had changed as sympathetic and non-sympathetic legislative actors debated the bill's constitutionality in-depth. No longer was the NAACP and its congressional sympathizers using only the narrative of urgency to push for passage, but it engaged in constitutional debate, even if it did not necessarily want to. This was made possible because lawmakers injected their own constitutional judgments into the debate, strongly influencing the line of advocacy the NAACP and its supporters in Congress took. But invariably, discourse on constitutional legalisms can never fully eviscerate policy concerns; legislative constitutionalism is necessarily a combination of policy and law. Therefore, reliance on Supreme Court precedent and technical legal arguments cannot constitute the entire story. Interestingly, even as the NAACP and the supporters of its cause in Congress tried to push the ultimate determination of the bill's constitutionality to the Court, they were nevertheless engaging in constitutional interpretation. The Dyer bill fit perfectly within their vision of the Constitution as a guarantor of broader normative commitments.

### III. A Second Level of Constitutional Discourse

As the previous sections have shown, the debate on the Dyer bill was not monolithic. To contend that the debate was only about racial and social policy would ignore the debate that actually unfolded. Lawmakers debated the issue of lynching by talking about the Constitution. They did not just talk about it either. They presented case law and made legal arguments, so much so that the Congressional Record reads at times like a transcript from an oral argument before the Supreme Court. More importantly, lawmakers' insistence on engaging in constitutional discourse altered legislative advocacy. However, to frame the debate as one solely of constitutional legalisms would belie the Dyer bill's *raison d'être*. Distilling the debate down to the concrete legal question of whether Congress has constitutional authority to pass the Dyer bill would silence the advocates' narrative of urgency. The definition of constitutional discourse must therefore be extended to reflect the true nature of the debate. The definition must encapsulate the ways in which lawmakers spoke about broader constitutional principles. This section seeks to describe the manifestations of this second level of constitutional discourse.

Before proceeding, it is important to set forth a critical assumption underlying this discussion: Americans, both now and in 1922, would be unsatisfied with a result of the debate on an anti-lynching bill that is solely premised on discrete constitutional legalisms. Professor Richard Primus begins with this assumption in his analysis on the lessons learned from the Senate debate to seat Hiram Revels, the first African-American senator ever to serve in the United States Senate.<sup>79</sup> Much like the debate to seat Revels, the debate on the Dyer bill brought to light very deep cultural, political and certainly racial issues. As the previous sections have shown, it would be disingenuous to submit that only constitutional doctrine was motivating the

congressmen to make the types of arguments they did. Having addressed this assumption, and building upon the ways in which doctrine transformed the debate on the Dyer bill into an unmistakably constitutional issue, this section argues that the debate paints a picture of legislative constitutionalism that took into account both doctrinal considerations and commitments to broader normative principles such as equality and citizenship.<sup>80</sup>

Dyer bill advocates could not have been comfortable with the Supreme Court's rulings on the state action doctrine. The Dyer bill would have imposed liability on state and local government officials for their failure to protect individuals, not for any affirmative acts to deprive citizens of their constitutional rights. The bill was seemingly in tension with the Court's precedent. Therefore, advocates needed to engage in constitutional discourse in ways that took into account other sources of constitutional legitimacy besides jurisprudence. As the previous section showed, advocates indeed made arguments based on jurisprudence even as the driving force behind their support for the bill was the absolute urgency of the situation on the ground. The force of their doctrinal arguments was blunted, however, by their opponents repeated assertions that the state needed to affirmatively act to deprive citizens of their rights in order for the act to fall within the Fourteenth Amendment's purview. Advocates responded by melding the narrative of urgency with notions of equality and citizenship. In doing so, they engaged in a second level of constitutional discourse, premised on an interpretation of the Constitution as a protector of equality.<sup>81</sup>

Advocates believed that the Constitution was a document for all people, not simply for those in superior positions in society or who had representatives in law enforcement. The Constitution was thus an equalizing force for justice. This broader understanding of the

Constitution animated the advocates' responsibility as lawmakers to uphold the Constitution. On that point, Representative Hamilton Fish remarked,

“I have sworn to support the Constitution of the United States, and on that account, if for no other reason, it would be my sacred duty as a Member of the House of Representatives to vote for a drastic antilynching bill to protect the rights and lives of American citizens everywhere in the United States and put an end to lawlessness, which threatens the administration of justice.”<sup>82</sup>

Advocates used the theme of constitutional justice to inform all matters of interpretation, even the thorny issue of reconciling an ostensibly overreaching bill with Supreme Court jurisprudence. Conceding that the Senate must first decide whether the federal government has the authority to pass the Dyer bill, Senator Shortridge nevertheless reminded his colleagues that what the Senate was “calling upon the Government to do is, by a firm and just exercise of every legitimate power conferred upon and residing in the Federal Government, to safeguard the right to life, liberty, and property.”<sup>83</sup>

The call for constitutional equality was closely linked with the principles found in the Declaration of Independence. Advocates argued that it would be incumbent upon them to pass the Dyer bill in order to satisfy the commitments of both the Constitution and the Declaration of Independence. Republican Representative Theodore Burton of Ohio remarked,

“The most striking feature of both the Declaration of Independence and the Constitution of the United States and its amendments is *equality*, the right to life, liberty, and property, the *absence of all discrimination*. These are great American ideas, and without their enforcement our Government does not fulfill the promise of its founders or the hopes of the present.”<sup>84</sup>

Motivated by the spirit of both the Constitution and the Declaration, Burton called upon his colleagues to frame their understanding of the Dyer bill in light of the new age of equality following World War I. Burton advised, “We should enter that era with new ideals as to equality, as to liberty, as to the sacredness of human life.”<sup>85</sup> The response Burton got from a

colleague opposed to his position reveals the way in which opponents of the Dyer bill also debated constitutional issues around broader normative commitments. For Representative Charles Frank Reavis of Nebraska, Burton's call to interpret the Constitution in light of the new era of post-war equality was nothing more than a call to disrespect the Constitution. Said Reavis, "nor do I believe that changing conditions should be so persuasive as to induce the membership of the House, sworn as we are to uphold the Constitution, to ruthlessly ravish it."<sup>86</sup> Although Reavis was opposed to the Dyer bill, he did not want to talk about its constitutionality from the standpoint of precedent.<sup>87</sup> Rather, like Burton, he appealed to the higher principles found in the Constitution. But unlike Burton, his context for broader constitutional understanding was neither equality nor justice for all Americans, but rather the Constitution as the supreme symbol of a republican government. Reavis emphasized to his colleagues that the United States "assumed no power which the people did not voluntarily grant."<sup>88</sup>

Closely related to the issue of constitutional equality is the ideal that the Constitution recognized African Americans as bona fide citizens of the United States. The post-Civil War period brought about the Fourteenth Amendment, which very clearly states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States..."<sup>89</sup> Yet despite the Constitution's seemingly unquestionable language on birthright citizenship, there were still many who did not accept African Americans as bona fide citizens of the United States. Much like Professor Primus' account of the debate to seat Hiram Revels, the record of the Dyer bill debate shows that lawmakers wrestled immensely with concepts of citizenship. Southern opponents argued that the Dyer bill would impede the process of citizenship African Americans were still actively engaged in. Even as the Constitution conferred birthright citizenship upon African Americans in the postbellum age, southern

opponents of the Dyer bill believed that African Americans were still not citizens in the fullest sense. According to the opposition stalwart Hatton Sumners, “millions of black people were turned loose as they were – with a responsibility they were not fitted to meet.”<sup>90</sup> The argument went that the Dyer bill would force African Americans to rely heavily upon the federal government for support, which would stunt their civic growth and relationship with their supposed southern benefactors. Representative Woods of Virginia fiercely echoed this sentiment. He believed that Reconstruction taught the everyday African-American man that “his advancement would come by governmental donation rather than as a result of his own industry, thrift, and individual merit.”<sup>91</sup> According to Woods, like Reconstruction-era laws, the Dyer bill would encourage African Americans to again look upon the federal government for assistance. Implicit in this argument was the ever-present fear that with greater federal protection, African Americans would be more emboldened to assert their civil rights.

Advocates had a much different understanding of the implications of citizenship upon the debate. They believed that the Dyer bill would further the cause of citizenship, not impede it. By their very status as citizens, African Americans were entitled to the full protection of the laws of the United States. With every hanging black body, the federal government was taking another regressive step in the abrogation of its duties to protect its citizens. The crucial question for advocates was animated by the militant spirit that came from the post-World War I experience: how could the nation expect African Americans to take up arms in war and yet do nothing about the countless deaths occurring on its very soil? Republican Representative and soldier Hamilton Fish of New York chided his colleagues in the House of Representatives for failing to take into account the service and sacrifice of black troops, some of whom he commanded during World War I.<sup>92</sup> He implored his colleagues to “consider the appalling fact that there have been men

who wore the uniform [that have been] lynched by citizens of Georgia.”<sup>93</sup> For advocates, citizenship was the natural disposition of African Americans. They need not prove any more, and even if more was required, it was already satisfied on the bloody battlefields.

#### **IV. Lessons from the Dyer Debate**

Having described the transformative role of the doctrinal question and the ways in which constitutional discourse encompassed broader normative commitments, this paper now addresses what emerges from the Dyer debate. First, the Constitution has the power to elevate discourse. Just about everyone professes to hold the Constitution in high esteem.<sup>94</sup> Both sides of the debate anchored their arguments in the constitutional dock to legitimize their policy views. The previous section described how advocates clung onto broader constitutional principles when faced with unfavorable Supreme Court precedent. This section argues in part that racist demagogues, on the other hand, used the Constitution to make their speeches about the inferiority of African Americans more palatable. The second lesson that emerges from the debate on the Dyer bill is that opponents were incorrect in casting Dyer bill advocates as unfaithful to their duty to uphold the Constitution. Advocates who believed that the bill should not be held up in Congress because of its constitutional uncertainty still remained faithful to their charge by engaging in departmental review and by expressing their belief that the Supreme Court possessed the ultimate authority to make constitutional judgments.

The Congressional Record reveals what many probably expected from an explosive debate on anti-lynching legislation: some lawmakers were primarily motivated by racist sentiments. The Congressional Record reveals more, however. What is particularly elucidating to the debate is the fact that some lawmakers began with race and not the Constitution. That



reveals a tension in their position that the alleged unconstitutionality of the Dyer bill was both necessary and sufficient to vote it down. This suggests that a “laundering” dynamic was at play during the debate. This section does not seek to generally ascribe racist motivations to any lawmaker opposed to the Dyer bill for constitutional reasons. Rather, this section seeks to locate strands of racist argumentation that are closely tied to opposition on constitutional grounds.

Opponents of the Dyer bill had a compelling constitutional case. Supreme Court jurisprudence had consistently found that the state action doctrine prevented Congress from enforcing equal protection and due process rights through Section Five of the Fourteenth Amendment. Federalism concerns were omnipresent in the debate, and opponents fomented fear about an overreaching federal legislative body. And yet, opponents of the Dyer bill brought more to the debate than constitutional law and doctrine. Not surprisingly, many brought their racist beliefs to bear, forged through years of cultural rearing in the Jim Crow south. And for some, it was prejudice and not law that motivated their opposition to the Dyer bill. The juxtaposition of thinly-veiled or simply blatant racist attacks and the invocation of the Constitution’s ultimate power to determine a lawmaker’s vote strongly suggests that the latter was being used to launder the former. On this point, Representative Anthony Griffin was particularly insightful: “It is marvelous how keen we become in the interpretation of the Constitution when some impeding law threatens to tread on our prejudices.”<sup>95</sup>

The strongest evidence from the Congressional Record that the Constitution was being used to sanitize otherwise racially-motivated comments was that race and not the Constitution was the starting point for debate. Representative Hatton Sumners began by proclaiming that his opposition to the bill was because it would “increase mob violence by encouraging the crimes which are the most provocative of mob violence...”<sup>96</sup> The crime Sumners was referring to was

the often-invoked crime of rape committed by supposedly savage black men with a proclivity for white women and children. No member of Congress could condone lynching without threat of condemnation or ridicule,<sup>97</sup> but they could certainly oppose the crimes that led to acts of lynching, which were almost invariably committed by supposedly sexually-charged black men. So long as it was tied to the rape of white women, lynching could always be justified.<sup>98</sup> Sumners began by referencing news stories of black men raping white women and by proposing hypotheticals where black men, not white men, would take a “little white child and [drag] her off into seclusion where no voice can hear and no hand can help...”<sup>99</sup> It is only later in his introduction where Sumners stated his opposition to the bill because it was unconstitutional. Sumners later apologized to his House colleagues “for not having proceeded at once to the discussion of the constitutional questions involved.”<sup>100</sup>

Others joined Sumners in his racist attacks on African Americans. Representative Thomas U. Sisson of Mississippi gave perhaps one of the most memorable speeches throughout the entire debate. On the day the House voted on the bill, Sisson engaged in a blistering attack on those who supported the bill. Not surprisingly, his attack was premised on race. Sisson assailed supporters for being “traitors to the white race.”<sup>101</sup> After further attacking his Republican colleagues for “destroying [the] white civilization,” he accused them of “selling [their] white birthright for a mess of black pottage.”<sup>102</sup> So heated was the debate at that point that Sisson remarked that Representative Henry Cooper of Wisconsin was “just as idiotic as any man” he knew.<sup>103</sup> But even as Sisson breathed fire into the waning moments of the debate, he nevertheless brought it back to the Constitution. Sisson asked his colleagues if through their affirmative vote they would “drive this knife to its hilt into the already bleeding heart of the Constitution of our fathers?”<sup>104</sup>

Sisson's language evokes powerful images while at the same time providing a telling glimpse into his contingency's belief that they held the constitutional high ground over Dyer bill advocates. Sisson closed by asking his colleagues if they would stab the heart of the Constitution. Sumners began debate by accusing supporters of the bill of lynching the Constitution.<sup>105</sup> Sisson, Sumners, and the rest of the obstructionist bloc were incorrect, however, in their portrayal of Dyer bill advocates as being unfaithful to their duty to uphold the Constitution. Advocates also engaged in departmental review by asserting their independent judgments about the Dyer bill's constitutionality. Their judgments were just not premised on the same sources of constitutional legitimacy as those of Dyer bill opponents. While opponents invoked precedent, Dyer bill advocates channeled the broad principles found in the Constitution.

Much criticism arose from the fact that advocates did not want the bill bogged down in Congress because of constitutional disputes. Opponents accused the advocates of negligently shirking their responsibilities as learned lawyers and members of Congress in the face of unfavorable precedent.<sup>106</sup> Yet, it cannot be said that advocates who supported the bill did not make constitutional judgments. Recall Representative Fish's earlier statement in support of the Dyer bill – he had a duty to uphold the Constitution and for him the Constitution required that Congress enact the Dyer bill so as to advance justice and protect the lives of all Americans. That itself is a constitutional judgment. That others can reasonably disagree with his interpretation of the Constitution does not render his judgment void.

The thrust of Dyer bill opponents' indictment against its supporters was likely that they ignored judicial supremacy. In the face of such overwhelming precedent, how could any reasonable legislator still support the bill? Professor Mark Tushnet argues that where legislation is reasonably distinguishable, a legislator's apparent rejection of a court's constitutional

interpretation is not inconsistent with judicial supremacy.<sup>107</sup> This is essentially how advocates proceeded in their arguments. Senator Shortridge's assertion that he had a right as a legislator to interpret issues *ab initio* was his implicit assertion that the Dyer bill is in fact unlike the Reconstruction-era statutes the Court had so consistently struck down. In the House, Representative Burton sought to distinguish the Dyer bill from previous congressional efforts at protecting minority rights by casting lynching as a special evil. According to Burton, lynching was neither the ordinary case of the exercise of the police power nor was it the ordinary case of murder or robbery.<sup>108</sup> It was actually nothing short of anarchy.<sup>109</sup> And perhaps the ultimate proof that advocates believed in judicial supremacy was their insistence that the Supreme Court have the final say on the constitutional question.<sup>110</sup>

### **Conclusion**

Ultimately, Congress did not pass the Dyer bill. Voted out of the House of Representatives after an impassioned debate, the Dyer bill met its demise in the form of parliamentary tactics and expected southern filibustering in the Senate.<sup>111</sup> Yet despite Congress' failure to pass the Dyer bill, the debate revealed the rich textures of legislative constitutionalism. Constitutional discourse transformed the debate on a bill born from the bloodstained soil of the American south. Although the legislative process can never be purged of policy considerations, even as technical issues of constitutional interpretation and doctrine permeate the debate, the experience of the Dyer debate reveals that the Constitution does more to turn legislative cogs than what the legislative process may reveal today. The Dyer debate reveals that the Constitution has the power to transform campaigns and refine arguments. It also showed that constitutional discourse within the legislative process encourages legislative actors to think

deeply about their role as lawmakers even if they can reasonably disagree with each other about what that role is. Popular constitutionalism has been reinvigorated in recent movements,<sup>112</sup> and Congress should follow suit by rediscovering and reclaiming legislative constitutionalism.

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<sup>1</sup> “Sam Hose,” 1899 in CHRISTOPHER WALDREP (ed.), *LYNCING IN AMERICA: A HISTORY IN DOCUMENTS* 96 (2006).

<sup>2</sup> Although lynching is inextricably linked to the American south, it was not an exclusively southern practice. For examples and analyses of lynching throughout the U.S., see generally MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCING AND AMERICAN SOCIETY, 1874-1947* (2006).

<sup>3</sup> WALDREP, *supra* note 1, at 1.

<sup>4</sup> Frederick Douglass, Address of January 9, 1894 on the Lessons of the Hour in *The Frederick Douglass Papers at the Library of Congress*, available at <http://memory.loc.gov/cgi-bin/ampage?collId=mfd&fileName=26/26001/26001page.db&recNum=3>

<sup>5</sup> See generally PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN* (2002).

<sup>6</sup> Although lynching victims are generally imagined as African Americans, lynch mobs also targeted members of other racial, religious and social groups. A prominent example is the lynching of Leo Frank, a Jewish-American businessman convicted of murdering a thirteen-year-old employee, Mary Phagan. After a series of appeals, including to the U.S. Supreme Court, Georgia Governor John M. Slaton commuted Frank’s death sentence to life imprisonment. Outraged, a lynch mob calling itself the Knights of Mary Phagan broke into Frank’s cell, transported Frank to a wooded area, and hanged him from a tree. *Id.* at 207-213.

<sup>7</sup> Christopher Waldrep identifies three general types of anti-lynching laws: 1) laws that held communities responsible for property damage (e.g. Massachusetts, 1839), 2) laws that punished those who broke into jails to injure or kill prisoners, and 3) laws that subjected sheriffs or their deputies to termination from their positions if they failed to defend prisoners against lynch mobs (e.g. Kansas, 1903). WALDREP, *supra* note 1, at 134-135.

<sup>8</sup> William B. Hixon, *Moorfield Storey and the Defense of the Dyer Anti-Lynching Bill*, 24 *NEW ENG. Q.* 65 (1969).

<sup>9</sup> “The attempt to punish the individuals is the invocation of the exercise of the police powers by the Federal Government never delegated to it by the States.” 62 *CONG. REC.* 1,351 (statement of Rep. John R. Tyson).

<sup>10</sup> *Id.*

<sup>11</sup> In 2005, the U.S. Senate passed a resolution by voice vote formally apologizing for its repeated failure to pass anti-lynching legislation. Sheryl Gay Stolberg, *N.Y. TIMES*, June 14, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9C01E5DC1F38F937A25755C0A9639C8B63>.

<sup>12</sup> 62 *CONG. REC.* 1,426 (1922) (“A vast number of innocent white women are outraged by Negroes in the South every year...”) (Statement of Rep. John E. Rankin); see also *id.* at 798 (“That day will never come – there is no necessity for anybody mistaking it – that day will never come in any section of the United States when you will put a black man in office above the white man.”) (Statement of Rep. Hatton Sumners).

<sup>13</sup> Richard Primus, *The Riddle of Hiram Revels*, 119 *HARV. L. REV.* 1680, 1693 (2006) (“It cannot be the case, however, that a debate must traffic only in pure principled argument to qualify as constitutional interpretation...”).

<sup>14</sup> Hixon, *supra* note 8, at 70.

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<sup>15</sup> JAN VOOGD, RACE RIOTS AND RESISTANCE: THE RED SUMMER OF 1919, 27 (2008).

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 41.

<sup>18</sup> DRAY, *supra* note 5, at 255.

<sup>19</sup> *Id.*

<sup>20</sup> VOOGD, *supra* note 15, at 109-110.

<sup>21</sup> *Id.* at 110.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 70.

<sup>24</sup> *Id.*

<sup>25</sup> VOOGD, *supra* note 15, at 5.

<sup>26</sup> Stephen Graham, “Mary Turner Lynching” in WALDREP, *supra* note 1, at 197.

<sup>27</sup> DRAY, *supra* note 5, at 246.

<sup>28</sup> DRAY, *supra* note 5, at 257.

<sup>29</sup> He acknowledges that this supposed benefit inuring from slavery was not immediate. According to Sumners, it only took a “few generations” of dehumanizing slavery for African Americans to attain the heightened level of civility that he ascribes to them. However according to Sumners, African Americans would never be civilized enough to “stand upon a plane of social equality” with the white man. 62 CONG. REC. 798 (1922) (statement of Rep. Hatton Sumners).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 799.

<sup>32</sup> *Id.* at 1,426 (Statement of Rep. John E. Rankin).

<sup>33</sup> *See* DRAY, *supra* note 5, at 246.

<sup>34</sup> *Id.* at 258.

<sup>35</sup> ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, 34 (1980).

<sup>36</sup> J.E. Boyd to President Woodrow Wilson, November 19, 1920 in WALDREP, *supra* note 1, at 225.

<sup>37</sup> *Id.*

<sup>38</sup> Woodrow Wilson, A Statement to the American People *in* An American Time Capsule: Three Centuries of Broad­sides and Other Printed Ephemera, available at [http://memory.loc.gov/cgi-bin/ampage?collId=rbpe&fileName=rbpe24/rbpe241/24101800/rbpe24101800.db&recNum=0&itemLink=r?ammem/rbpebib:@field\(NUMBER+@band\(rbpe+24101800\)\)&linkText=0](http://memory.loc.gov/cgi-bin/ampage?collId=rbpe&fileName=rbpe24/rbpe241/24101800/rbpe24101800.db&recNum=0&itemLink=r?ammem/rbpebib:@field(NUMBER+@band(rbpe+24101800))&linkText=0).

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<sup>39</sup> ZANGRANDO, *supra* note 35, at 53.

<sup>40</sup> DRAY, *supra* note 5, at 247; *see also* VOOGD, *supra* note 15, at 82-97 (detailed account of several notorious lynching involving black servicemen).

<sup>41</sup> Much of the fear was driven by rumors of black soldiers sleeping with white women in Europe during their service. Having tasted this freedom in Europe, some argued, African Americans would now want this same freedom in America. DRAY, *supra* note 5, at 247.

<sup>42</sup> W.E.B Du Bois, "Returning Soldiers," *The Crisis*, XVIII (May, 1919), p. 13, *available at* <http://www.yale.edu/glc/archive/1127.htm>.

<sup>43</sup> 62 CONG. REC. 787 (1922) (statement of Rep. Leonidas Dyer).

<sup>44</sup> 62 CONG. REC. 1,292-1,293 (1922).

<sup>45</sup> U.S. Const. Amend. XIV, § 5; *See generally* Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan* (unpublished draft).

<sup>46</sup> 92 U.S. 542 (1875).

<sup>47</sup> *Id.* at 554-555.

<sup>48</sup> BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 144 (2009).

<sup>49</sup> Cruikshank, 92 U.S. at 554-555; *see also* *Virginia v. Rives*, 100 U.S. 313 (1879) (the provisions of the Fourteenth Amendment reference state action exclusively, not actions committed by private individuals).

<sup>50</sup> *Id.* at 555.

<sup>51</sup> 106 U.S. 629 (1883).

<sup>52</sup> *Id.* at 641.

<sup>53</sup> *Id.* at 639.

<sup>54</sup> *See e.g.* *Hodges v. U.S.* 203 U.S. 1, 14 (1906) ("that the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held are restrictions upon state action, and no action on the part of the state is complained of.").

<sup>55</sup> *See e.g.* 62 CONG. REC. 1,363 (1922) (Statement of Rep. James Woods).

<sup>56</sup> Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 HARV. L. REV. 707, 710 (1902).

<sup>57</sup> Section 2 of the Dyer bill stated that any state or government entity that failed, neglected, or refused to provide protection to any person in its jurisdiction "shall...be deemed to have denied to such person the equal protection of the laws of the State." 62 CONG. REC. 1,292 (1922).

<sup>58</sup> DRAY, *supra* note 5, at 263.

<sup>59</sup> ZANGRANDO, *supra* note 35, at 60.

<sup>60</sup> *Id.*

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<sup>61</sup> 62 CONG. REC. 1,351 (1922).

<sup>62</sup> *Id.*

<sup>63</sup> MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* xii (2008).

<sup>64</sup> 62 CONG. REC. 1,364 (1922).

<sup>65</sup> “[E]ach department [of the national government] is truly independent of others, and has an equal right to decide for itself... the meaning of the constitution in cases submitted to its action.” Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *available at* [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_18s16.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html).

<sup>66</sup> 62 CONG. REC. 1,795 (1922).

<sup>67</sup> *Id.* at 1,363 (“The fact it is unconstitutional ought to deter us from its passage, regardless of the fact that it is inexpedient and will be ineffective.”).

<sup>68</sup> *See Id.* (Emphasizing that appeals from Presidents Woodrow Wilson and Warren Harding to deeply consider the implications of lynching were simply appeals to the public; Congress was not obligated to listen to Wilson or Harding.).

<sup>69</sup> *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 234-235 (1994).

<sup>70</sup> *See id.* at 2220-2221.

<sup>71</sup> 62 CONG. REC. 13,084 (1922).

<sup>72</sup> 100 U.S. 339 (1879).

<sup>73</sup> 62 CONG. REC.

<sup>74</sup> ZANGRANDO, *supra* note 35, at 65.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 60 (“we will then have gained a point... [to be used] in securing an amendment to the Constitution.”).

<sup>79</sup> Primus, *supra* note 13, at 1703.

<sup>80</sup> There were certainly more principles that lawmakers invoked during the debate. For example, federalism was a pervasive theme for opposition lawmakers from the south. The debate also brought to light the contrasting constitutional regimes engaged in debate, with southern lawmakers coalescing around the principles of the Tenth Amendment while supporters of the bill clung strongly to the Fourteenth Amendment for support. Bearing in mind the impracticability of discussing all potential constitutional principles that arose in debate, this paper focuses on the principles of equality and citizenship.



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<sup>81</sup> Equality is a component of Professor Mark Tushnet’s “thin Constitution,” which is the Constitution’s fundamental guarantees of equality, freedom of expression, and liberty. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11 (1999).

<sup>82</sup> 62 CONG. REC. 1,359 (1922).

<sup>83</sup> *Id.* at 13,085.

<sup>84</sup> *Id.* at 1,277 (emphasis added). Abraham Lincoln believed that the Constitution was a vindication of the principles found in the Declaration of Independence. It was the “picture of silver” around the “apple of gold.” TUSHNET, *supra* note 81.

<sup>85</sup> 62 CONG. REC. 1,285 (1922).

<sup>86</sup> *Id.* at 1,286.

<sup>87</sup> *Id.*

<sup>88</sup> 62 CONG. REC. 1,286 (1922).

<sup>89</sup> U.S. Const. Amend. XIV.

<sup>90</sup> 62 CONG. REC. 798 (1922).

<sup>91</sup> *Id.* at 1,362.

<sup>92</sup> *Id.* at 1,359.

<sup>93</sup> *Id.*

<sup>94</sup> See Christopher W. Schmidt, *The Tea Party and the Constitution* (2011), available at [http://works.bepress.com/christopher\\_schmidt/29](http://works.bepress.com/christopher_schmidt/29).

<sup>95</sup> 62 CONG. REC. 1,717 (1922).

<sup>96</sup> *Id.* at 797. Sumners proposed this hypothetical for why the Dyer bill would encourage more crime: “Suppose... the Federal Government takes them (lynchers of an African American accused of rape) away in the face of public sentiment and places them in the Federal penitentiary, and then has a tax of \$10,000 levied against the county for the benefit of the rapist’s family, a part of which sum might go to buy that family an automobile to ride by the home of the innocent victim, do you think, as a matter of common sense, with such a policy you could long prevent a condition in that country like those which developed in East St. Louis, Omaha, and Chicago?” *Id.*

<sup>97</sup> See *id.* at 1,286 (1922) (Representative Clouse: “Of course, on the question of lynching, no Member of the House, I presume, would offer any defense to it.”).

<sup>98</sup> Representative Thomas U. Sisson of Mississippi remarked that no southern man could condone lynching. However, “as long as rape continues, lynching will continue.” *Id.* at 1,721.

<sup>99</sup> *Id.* at 797.

<sup>100</sup> 62 CONG. REC. 799 (1922).

<sup>101</sup> *Id.* at 1,1718.

<sup>102</sup> *Id.*

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<sup>103</sup> *Id.* at 1,721.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 798.

<sup>106</sup> 62 CONG. REC. 797 (1922)(Rep. Hatton Sumners: “This bill has incorporated therein provisions which no lawyer in this House or elsewhere can defend and but few, if any, have reputations so poor or so well established that they will hazard them in the attempt.”).

<sup>107</sup> TUSHNET, *supra* note 81, at 17.

<sup>108</sup> 62 CONG. REC. 1,294 (1922).

<sup>109</sup> *Id.*

<sup>110</sup> “It will be up to the Supreme Court *finally* to pass on the constitutionality of the antilynching bill and not the eminent constitutional lawyers of the House. *Id.* at 1, 359 (emphasis added) (statement of Rep. Hamilton Fish).

<sup>111</sup> ZANGRANDO, *supra* note 35, at 70-71.

<sup>112</sup> *See e.g.* Schmidt, *supra* note 95.