Anti-Lynching Bill, 1921

ANTILYNCHING BILL.

October 31, 1921. — Referred to the House Calendar and ordered to be printed.

Mr. Dyer, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 13.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 13) to assure to persons within the jurisdiction of any State the equal protection of the laws, report the same back with the recommendation that the said bill do pass with the following amendment: Strike out all after the enacting clause and insert-

That the phrase "mob or riotous assemblage, " when used in this act, shall mean an assemblage composed of five or more persons acting in concert for the purpose of depriving any person of his life without authority of law as a punishment for or to prevent the commission of some actual or supposed public offense.

Sec. 2. That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage, such State shall by reason of such failure, neglect, or refusal be deemed to have denied to such person the equal protection of the laws of the State, and to the end that such protection as is guaranteed to the citizens of the United States by its Constitution may be secured it is provided:

Sec. 3. That any State or municipal officer charged with the duty or who possesses the power or authority as such officer to protect the life of any person that may be put to death by any mob or riotous assemblage, or who has any such person in his charge as a prisoner, who fails, neglects, or refuses to make all reasonable efforts to prevent such person from being so- put to death, or any State or municipal officer charged with the duty of apprehending or prosecuting any person participating in such mob or riotous assemblage who fails, neglects, or refuses to make all reasonable efforts to perform his duty in apprehending or prosecuting to final judgment under the laws of such State all persons so participating except such, if any, as are or have been held to answer for such participation in any district court of the United States, as herein provided, shall be guilty of a felony, and upon conviction, thereof shall be punished by imprisonment not exceeding five years or by a fine of not exceeding $5,000, or by both such fine and imprisonment.

Any person who participates in a mob or riotous assemblage that takes from the custody or possession of any State or municipal officer any person held by such officer to answer for some actual or supposed public offense and puts such person to death as a punishment for such

offense, or any person who participates in any mob or riotous assemblage that obstructs or prevents any State or municipal officer in discharging his duty to apprehend, prosecute, protect, or punish any person suspected of or charged with any public offense and puts such person to death as a punishment for such offense shall be guilty of a felony and on conviction thereof shall be imprisoned for life or for not less than five years.

Sec. 4. That any person who participates in any mob or riotous assemblage by which a person is put to death shall be guilty of a felony, and on conviction thereof shall be imprisoned for life or for not less than five years.

Sec. 5. That any county in which a person is put to death by a mob or riotous assemblage shall forfeit $10,000, which sum may be recovered by an action therefor in the name of the United States against such county for the use of the family, if any, of the person so put to death; if he had no family, then to his dependent parents, if any; otherwise for the use of the United States. Such action should be brought and prosecuted by the district attorney of the United States of the district in which such county is situated in any court of the United States having jurisdiction therein. If such forfeiture is not paid upon recovery of a judgment therefor, such court shall have jurisdiction to enforce payment thereof by levy of execution upon any property of the county, or may compel the levy and collection of a tax therefor, or may otherwise compel payment thereof by mandamus or other appropriate process; and any officer of such county or other person who disobeys or fails to comply with any lawful order of the court in the premises shall be liable to punishment as for contempt and to any other penalty provided by law therefor.

Sec. 6. That in the event that any person so put to death shall have been transported by such mob or riotous assemblage from one county to another county during the time intervening between his capture and putting to death, each county in or through which he was so transported shall be jointly and severally liable to pay the forfeiture herein provided.

In construing and applying this act the District of Columbia shall be deemed a county, as shall also each of the parishes of the State of Louisiana.

Sec. 7. That if any section or provision of this act shall be held by any court to be invalid, the balance of the act shall not for that reason be held invalid.

The prevalence in many States of the spirit which tolerates lynching, accompanied too often with inhuman cruelty, and the inability or unwillingness of the public authorities to punish the persons who are guilty of this crime, threaten very seriously the future peace of the Nation. Not only is lynching a denial of the right secured by law to every man of a fair trial before an established court in case he is charged with crime, not only does it brutalize the communities which suffer it by breeding a spirit of lawlessness and cruelty in the young people who see barbarities unpunished and uncondemned, not only does it terrorize important bodies of our citizens, but it inevitably leads the people whose rights are thus trampled upon to leave the regions where their lives, their families, and their property are in danger, and move to others where they can find peace and protection, thus disturbing the labor situation all over the country. It also blots our fair fame as a Nation, for we can not claim to be civilized until our laws are respected and enforced and our citizens secured against the hideous cruelties of which we are constantly furnishing fresh examples.

The people of the United States suffer justly under the grievous charge that they continue to tolerate mob murder. It is well known that the innocent, equally with the guilty, suffer the cruel inflictions of mob violence. Mobs have even invaded court rooms and prisons to seize and murder prisoners whose punishment had already been fixed. Uocal and State authorities frequently offer only the feeblest objection to the actions of the mob which is permitted to do its will unchecked. Rarely are the members of a mob sought out and prosecuted even when, undisguised and in full daylight, they have participated

in murder, and only in a few isolated cases has any lyncher ever been punished. Patriotic citizens throughout the country feel the shame which lynchings cast upon the Nation. The time has come when the United States can no longer permit the setting at naught of its fundamental law. We can no longer permit open contempt of the courts and lawful procedure. We can no longer endure the burning of. human beings in public in the presence of women and children; we can no longer tolerate the menace to civilization itself which is contained in the spread of the mob spirit.

The Republican Party, which received such a large majority at the last general election, adopted as a part of its platform at Chicago the following:

We urge Congress to consider the most effective means to end lynching in this country, which continues to be a terrible blot on our American civilization.

President Harding, in his first message to the Congress, on April 12, said:

Congress ought to wipe the stain of barbaric lynching from the banners of a free and orderly representative democracy.

Ex-President Wilson, on July 26, 1918, issued an appeal to the American people to stop lynchings. He said:

I therefore very earnestly and solemnly beg that the governors of all the States, the law officers of every community, and above all, the men and women of every community in the United States, all who revere America and wish to keep her name without stain or reproach, will cooperate, not passively merely, but actively and watchfully to make an end of this disgraceful evil. It can not live where the community does not countenance it.

Ex-Attorney General Gregory, May 6, 1918, in an address to the American Bar Association, said:

We must set our faces against lawlessness within our own borders. Whatever we may say about the causes for our entering this war, we know that one of the principal reasons was the lawlessness of the German nation—what they have done in Belgium, and in northern France, and what we have reason to know they would do elsewhere. For us to tolerate lynching is to do the same thing that we are condemning in the Germans.

Lynch law is the most cowardly of crimes. Invariably the victim is unarmed, while the men who lynch are armed and large in numbers. It is a deplorable thing under any circumstances, but at this time, above all others, it creates an extremely dangerous condition. I invite your help in meeting it.

These and similar appeals have gone for naught. Lynchings continue. This is evidenced by many lynchings that have taken place this year. It is impossible to get data touching all these outrages. Many lynchings take place arid the facts never reach the public. I include a memorandum showing some of the very recent lynchings, to wit:

Lynching, 1921

Name	Date	Place	Manner of lynching
1. Jim Roland	Jan. 2	Mitchell County, Ga.	Shot.
2. Robert Lewis	Jan. 4	Meridian, Miss.	
3. Sam Williams	Jan. 6	Talbotton, Ga.	Hanged.
4. William Beard (white)	Jan. 13	Jasper, Ala.	Shot.
5. Alfred Williams	Jan. 24	Norlina, N.C.	Do.
6. Plummer Bullock	do	do	Do.
7. Henry Lowery	Jan. 26	Nodena, Ark.	Burned.
8. George Werner	Feb. 1	Port Allen, La.	Hanged.
9. _____	Feb. 4	Vicksburg, Miss. (near)	
10. Elijah Jones	Feb. 12	Ocala, Fla.	Do.
11. Ben Campbell	Feb. 10	Wauchula, Fla.	Do.
12. _____	Feb. 12	Odena, Ala.	
13. John Eberhardt	Feb. 16	Athens, Ga.	Burned.
14. Richard James	Mar. 13	Versailles, Ky.	Hanged
15. William Bowles	Mar. 14	Eagle Lake, Fla.	Do.
16. Browning Tuggle	Mar. 15	Hope, Ark.	Do.
17. Adolphus Ross	Mar. 19	Water Valley, Miss.	Do.
18. Arthur Jennings	Mar. 20	Hattiesburg, Miss.	Do.
19. Phil Slater	Mar. 22	Monticello, Ark.	Hanged.
20. Sandy Thompson	Apr. 4	Langford, Miss.	Do.
21. Rachel Moore	Apr. 9	Rankin County, Miss.	Do.
22. Tony Williams	Apr. 15	Rodessa, La.	Shot.
23. _____	Apr. 25	Carriere, Miss. (Picayune)	Hanged.
24. Roy Hammonds	Apr. 29	Bowling Green, Mo.	Do.
25. _____(white)	Feb. 6	Monroe, La.	Burned.
26. Berry Bolling (white)	May 7	Hunstville, Tenn.	Hanged.

27. Sam Ballinger	May 8	Starke, Fla.	Do.
28. Leroy Smith	May 11	McGhee, Ark.	
29. George Marshall	Apr. 15	Lauderdale, Miss.	Shot.
30. John Henry Williams	June 18	Moultrie, Ga.	Burned.
31. _____	do	Enid, Miss.	Shot.
32. Herbert Quarles	June 19	McCormick, S.C.	Do.
33. Louis Wimberly	June 20	Jackson, Miss.	Hanged.
34. “Red” Bilbro	June 29	Madison County, Miss.	Do.
35. Casey Jones (white)	July 23	Hattiesburg, Miss.	Do.
36. _____	Aug. 3	Lawrenceville, Va.	Do.
37. Alex. Winn	Aug. 15	Datura, Tex.	Hanged (body burned).
38. Walter Smalley	Aug. 16	Augusta, Ga.	Do.
39. Will Allen	Aug. 24	Chapin, S.C.	
40. William Anderson	Mar. 4	Baker County, Ga.	
41. _____	Jan.	Ga.	Shot.
42. _____	_____	Ga.	Hanged.
43. _____	_____	Ga.	Drowned.
44. _____(woman)	_____	Ga.	Do.
45. Mansfield Butler	Sept. 8	Aiken, S.C.	Shot.
46. Charlie Thompson	do	do	Do.
47. Gilman Holmes	Sept. 13	Columbia, La.	Hanged (body burned).
48. Ernest Daniels	Sept. 18	Pittsboro, N.C.	Hanged.
49. Edward McDowell	Sept. 19	McComb, Miss.	
50. Jerome Whitfield	Aug. 14	Jones County, N.C.	Do.
51. Ed. Kirkland	Oct. 24	Allendale, S.C.	Shot (body burned).
52. Sam Gordon	Oct. 25	Winneboro, La.	Hanged.

In the 30 years from 1889 to 1918, 3,224 persons were lynched, of whom 2,522 were Negroes, and of these 50 were women. The North had 219; the West, 156; Alaska and unknown localities, 15; and the South, 2,834, with Georgia leading with 386, and Mississippi following with 373. Yet in Georgia Negroes paid taxes on 1,664,368 acres, and owned property assessed at $47,423,499. Of the colored victims 19 per cent were accused of rape and 9.4 per cent of attacks upon women. In the year 1919, 77 Negroes, 4 whites, and 2 Mexicans were lynched. Ten of the Negroes were ex-soldiers; one was a woman. During 1920 there were 65 persons lynched; 6 were white and 59 were Negroes; 31 were hanged, 15 shot, 8 burned, 2 drowned, 1 flogged to death,' and 8, manner unknown; 24 were charged with murder, 2 assault on woman, 15 attack on woman, 3 insulting woman, 1 attempted attack on woman, 1 attack on boy, 1 stabbing man, and 3 assaulting man.

The Congress must provide the means of ending this cowardly crime. It is in punishing those who take part in it or who permit it. Congress has the power to enact this bill into law.

The fourteenth amendment to the Constitution provides that no State "_ shall deny to any person within its jurisdiction the equal protection of the laws," and further provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It is well settled by decisions of the Supreme Court of the United States that the denial forbidden is not alone a denial by positive legislation but that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. "

It is thus made the duty of the Congress under the Constitution to enact such laws as may be needful to assure that no State shall deny to any person within its jurisdiction the equal protection of the laws. Within the limits of the jurisdiction thus conferred the Congress has the right to exercise its discretion as to what laws or what means can best accomplish the desired end.

In nearly all cases of lynching the person put to death is taken by a mob from the sheriff, marshal, or other police officer of the State, whose failure to defend and protect him denies to him the equal protection of the laws.

In Ex parte Virginia (100 U. S., 339, 346) the Supreme Court in an unanimous opinion by Mr. Justice Strong, speaking of the prohibitions of the fourteenth amendment, says:

They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative,, its executive, or its judicial authorities. It can act in no other A r ay. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons; and to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons w r ho are the agents of the State in the denial of the rights which were intended to be secured. (See also the very recent cases of Home Telephone Co. v. Los Angeles, 227 U. S., 278, 290; Buchanan v. Worley, 245 U. S., 60, 77.)

A distinguished southern judge has given this definition:

By “equal protection of the laws” is meant equal security under them to everyone in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed on all others under like circumstances.

The Supreme Court of the United States says of this provision:

When the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the laws 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 an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

In another case the same court said:

An actual discrimination against a Negro, on account of his race, by officers intrusted with the duty of carrying out the law is as potential in creating a denial of equality of rights as a discrimination made by law.

Article I, section 8, of the Constitution gave the Congress the power “to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States,” as well as “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,” but it was not until long after the adoption of the fourteenth amendment that our courts construed “insurrections” to include mobs and riotous assemblages. Under these two provisions quoted there can be no doubt whatever as to the power of Congress to define and punish the crime of lynching.

One can not conceive a more humiliating or shameful admission to be made by a Government claiming to be a sovereign State than the confession that it is without the power to make good the guaranty in its Constitution that no person snail be deprived of life, liberty, or property without due process of law. It is nevertheless the fact that in almost numberless instances our State Department has so stated in official communications to civilized nations like France, Spain, China, Italy, and Great Britain.

The Congress has appropriated and the Government has paid to other Governments no less a sum than $792,499.39 to compensate the murder by lynching of their citizens by American mobs; and there are now with the Department of State unadjusted claims to a large amount for similar murders of Austrians, Greeks, Japanese, and Italians. Every diplomatic letter sent by our foreign office to another nation with regard to these claims has stated that the Federal Government is impotent to protect strangers within our borders and seeks to lay the blame on the State governments under which the lynchings have occurred. Every such letter admits the dereliction of Congress in not enforcing the guaranties of the fourteenth amendment and adds to the appeal to Congress to delay action no longer in enacting the legislation in contemplation when the fourteenth amendment was adopted in 1868.

This sum of $792,499.39 was paid for less than 100 lives of foreigners taken by mobs. The inquiry is pertinent that if we have paid $800,000 for less than 100 murdered foreigners, how much has the country lost by the murder of 3,307 Americans killed by mobs since 1889?

The bill reported by this committee seeks to prevent lynchings as far as possible; (1) by punishing State and municipal officers who fail to do their duty in protecting the lives of persons from mobs; (2) to punish the crime of lynching; and (3) to compel the county in which the crime is committed to make compensation.

Section 5 extracts from the county in which a person is lynched a penalty of $10,000, recoverable in an action directed to be brought by the district attorney in the name of the United States for the use of the dependent family, if any, and if there be no dependent family, for the use of the United States.

Such provisions are common in State legislation and are justified as to citizens lynched by the fact that the penalty makes it to the interest of every taxpayer of the county to prevent the lynching.

This section does nothing more than adopt the South Carolina and Ohio laws, imposing a penalty on the county in which the laws against lynching have failed of enforcement; and such laws have been held constitutional in both States by their respective supreme courts, the law of South Carolina in Brown v. Orangeburg County (55 S. C., 45; 32 S. E., 764); and the Ohio law in Commissioners v. Church (62 Ohio St., 318). The committee can find no stronger argument for this remedy for an admitted evil than in the following words from the opinion of the Supreme Court of South Carolina:

It has been held that statutes making a community liable for damages in cases of lynchings, and giving a right of recovery to the legal representatives of the person lynched, are valid on the ground that the main purpose is to impose a penalty on the community, which is given to the legal representatives not because they have been damaged but because the legislature sees fit thus to dispose of the penalty. Such statutes are salutary, as their effect is to render protection to human life and make communities law-abiding.

Hon. Guy D. Goff, assistant to the Attorney General of the United States appeared before the committee on July 20 with reference to this bill. His statement, in part, is as follows:

This bill seeks to confer upon the Federal courts jurisdiction to enforce the law and maintain the peace of the United States, which is nothing more than the so-called police power of the United States. You are familiar with that "excursion," if I may so term it, of the Supreme Court into the field of Federal police power. It was first announced in Gibbons v. Ogden (9 Wheat., 202), and has found definite application in the so-called white-slave cases. I recall those decisions distinctly because at that time I was engaged as an attorney for the United States in the interpretation and enforcement of the white-slave law. In Gibbons v. Ogden supra: Chief Justice Marshall (at p. 202) said: "It is obvious that the Government of the Union in the exercise of its express powers * * * may use means that may also be employed by a State in the exercise of its acknowledged powers. ' ' In the case which held the white-slave law constitutional, Hoke against the United States (227 U. S., pp. 308 and 309), the court said:

"While our dual form of Government has its perplexities, State and Nation having different spheres of jurisdiction, we are one people and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

"The white-slave traffic act is a legal exercise of the power of Congress under the commerce clause of the Constitution and does not abridge the privileges or immunities of citizens of the States or interfere with the reserved powers of the States, especially those in regard to regulation of immoralities of persons within their several jurisdictions."

"In Hoke v. United States (227 U. S., 308, 323), speaking expressly of the power of Congress over interstate transportation, it was said "the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

And in Wilson v. United States (232 U. S., 563, 567), speaking of the white slave law, which was held constitutional, the court said:

"As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce."

In Seven Cases of Eckman's Alterative v. United States (239 U. S., 510, 515) it was said:

"Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means, necessary but convenient to its exercise, because these means may have the quality of police regulations."

And an even more direct statement to this effect is:

"Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; * * * Gloucester Ferry Co. v. Pennsylvania (114 U. S., 196, 215), citing Cooley's Constitutional Limitations, 732."

In other words, when necessary for the proper exertion of its express powers, Congress may use exactly the same means which the State may use for the exertion of its own powers. This is no new doctrine. In Gibbons v. Ogden, supra, it was said:

"It is obvious, that the Government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State."

And again, in the very recent case, Hamilton v. Kentucky Distilleries Co. (251 U. S., *146, 156) (decided December, 1919), involving the constitutionality of the war time prohibition act, Mr. Justice Brandeis, speaking for the court, stated the principle thus:

"That the United States lacks the police power, and that this was reserved to the States by the tenth amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose."

We had a somewhat hazy comprehension of the police powers of the State and the corresponding rights of the Federal Government. This line of cases holds that there is a Federal police power. Now, if there is a Federal police power, it must be by virtue of some power conferred on the Federal Government by our Constitution. It was conferred in the White Slave cases by the commerce clause. I assume, therefore, in this argument that there is such a Federal police power, a concomitant, as it were, to preserve law and order, and to see that the laws are equally enforced, and to see that no man is denied or deprived of the common right to enjoy life, liberty, and property, and that such rights are conferred upon the Federal Government by the fourteenth amendment to the United States Constitution.

A case, which has caused some discussion, is the ease of James v. Bowman, 190 United States, page 127. I refer to this case, first, because it may be cited in contradiction of the underlying principles of the statement I have made. This case involved the fifteenth amendment to the United States Constitution. It grew out of an indictment in the State of Kentucky, based upon section 5507 of the Revised Statutes of the United States, which sought to punish anyone who attempted to interfere with a person going to or from the polls, or intimidate those who sought to exercise their prerogative to vote as they saw fit. The

Supreme Court held that the indictment was improvidently conceived and said that the fifteenth amendment, which reads—

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude "— was an amendment which prohibited the State but did not reach the individual. Such was the underlying principle which controlled and which differentiates this case from the other cases. Mr. Justice Brewer wrote the opinion and, in addition to holding that the fifteenth amendment was a curb upon the Federal and State Governments, expressly said that it did not in any sense relate to individuals. He recognized the undoubted existence of the police power of the State and, in the last lines of the decision, remarked that the act was unconstitutional because it was too broad in its terms:

"Congress, he concluded, has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the Nation is directly interested, or in which some mandate of the National Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms, and in these terms beyond the power of Congress, and change it to fix some particular transaction for which Congress might have legislated, if it had seen fit."

The court recognized the rule with which we are all familiar, that while a statute may be constitutional in some provisions and unconstitutional in others, the courts will hold it constitutional if they can separate, without destroying the purpose of the statute, the unconstitutional from the constitutional: or, if you prefer, that where a statute can not be separated or resolved into its constituent parts without committing judicial legislation, the courts will not, under such circumstances, attempt to hold the statute constitutional, but will declare it unconstitutional and deny the application of a comity rule of the judiciary, which strives to sustain legislation wherever possible. This case, as I say, recognized that where an inhabitant of a State attempted to interfere with the exercise of a general right which did not relate to a Federal election, that he was not guilty of violating this act. But I must draw this conclusion and emphasize it: I do not think the court attempted to decide that if the same acts so attempted under the broad general terms of the law, .which the court felt constrained to hold as beyond the authority of Congress, had been attempted or accomplished in a specific general Federal election, that such acts would not have been a violation of the fifteenth amendment to the United States Constitution, obviously a law meeting the facts of such a situation would be constitutional. In Ex parte Virginia, 100 U. S., 339, 346, construing the provisions of the fourteenth amendment, it was said:

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

In view of that interpretation and merely for the purposes of convenience and accuracy, permit me to refer expressly to the amendment:

"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 person within its jurisdiction the equal protection of the laws."

Justice Brewer in the Bowman case, referring to the leading case of Ex parte Virginia, supra, gives to the fourteenth amendment, clearly and unequivocally, this interpretation: That no State shall deprive any person—not as a mere abstract entity, but through its legislative, its executive, or its judicial functions—of life, liberty, or property. In other words, the fourteenth amendment to the Constitution of the United States, in so far as it guarantees to the people of this country life, liberty, and property, means that the legislative department of a State shall in no sense encroach upon such common rights; it means that the

executive department—that is, any person empowered with the enforcement of legislative acts, be it a governor, sheriff, or police official, acting under the municipal law of a State—shall not deny to any person the rights which the fourteenth amendment pronounces shall be preserved, nor deny to any person the equal protection of the laws of that State.

The learned justice also quotes from the very important case of United States v. Cruikshank (92 U. S., 542, 554). He adopts the statement:

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights -which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of 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."

The State can deny this right through an executive officer as readily as it can through a legislative or a judicial act. If a State, acting through its highest judicial officers, denies this right, there is a direct appeal, if the record has properly raised the point, to the Supreme Court of the United States. If the legislative department denies the right, we know, of course, how the right is preserved and enforced.

The mere fact that the Congress of the United States has never affirmatively, so far as I have been able to find, invaded the field, and by appropriate legislation under this constitutional provision sought to restrain the executive officers of the States from denying this right is no reason why Congress should not now take such appropriate action as will tend to protect their and similar rights. Therefore, without citing additional authorities, I unhesitatingly make this deduction:

Wherever the Constitution has delegated to Congress certain rights and duties, which Congress is permitted or bound to enforce and to carry out, the extent to which Congress may go in thus enforcing rights or fulfilling duties within the limitations prescribed by the Constitution is sufficiently great to permit of the exercise of a Federal police power, and the exercise of this Federal police power is neither repugnant to nor superior to the police power of the State. Each is concurrent with the other. Thus, if in the proper use of its taxing power, or in the constitutional regulation of commerce, or in the establishment of war-time rules, it becomes necessary to resort to measures which partake of the nature of or are, in fact, equivalent and similar to the police regulations of a State, Congress has the right to adopt such measures and to enforce them. How appropriately might the quotation from Gibbons v. Ogden be paraphrased to fit any of the express powers of Congress? Is it not a logical step to adopt this principle of constitutional law to the fourteenth amendment as to any other provision? If it be so applied, and if the aforementioned opinion be so paraphrased, is it not correct to say, -with the great Chief Justice—

"It is obvious that the Government of the Union, in the exercise of its express powers, that, for example, of providing to all citizens equal protection of its laws, may use means that may also be employed by a State in the exercise of its acknowledged powers."

In a word, it has been definitely established that there is a Federal police power; that Congress can invoke this power within the limits and according to the provisions of constitutional limitations; and that Congress having so invoked the power can enforce it to the fullest extent. If the State, in the mind of Congress, denies this right because all legislation assumes the existence of an evil to be corrected, then Congress, having legislatively determined that fact (and the courts will not consider whether Congress was or was not justified, but will assume because of Congress having passed appropriate legislation that the States have denied the rights in question), obviously, Congress possesses the authority under the fourteenth amendment and under the interpretation which the courts have given it to go forward and

say that since the States of this country have denied to many people within their borders because of race and nationality the right to be protected in their property, in their lives, and their liberty, and have also denied them the equal protection of the laws, a necessity exists that not only justifies but compels adequate and appropriate legislation to the end that the people of our several States may enjoy and be secure in those rights which the organic law guarantees them.

We have, as you know, a great many instances where a State takes jurisdiction before the Federal Government and where the Federal Government may have and take concurrent jurisdiction. Those are the cases where the same act is a crime against separate sovereignties. If one government proceeds to punishment before the other, the other, the punishment of the first government is generally pleaded as "an equitable defense" in criminal law to the imposition of a penalty by the other sovereignty, and I think that would be a case presenting possibly the situation you suggest. If congress saw fit to pass a law which came within the meaning, as the courts have defined that meaning, of the fourteenth amendment, that then the courts could not conduct an inquiry as to whether Congress was justified in deciding what is generally termed a legislative fact. Congress, as we know, can take affirmative action or not upon many questions within its jurisdiction. I recall, as you will, the law relative to bankruptcy. A few years ago we had no national bankruptcy law, merely the State insolvency laws The mere fact that Congress sees fit to decide that the time has come, within the life of this country as a sovereign Nation, to determine in favor of the affirmative exercise of a power which it has permitted to lie dormant is not to be questioned after Congress has so acted. Neither is the existence of the power to be questioned, merely because of congressional inaction, default, or neglect.

The Supreme Court, speaking through Mr. Chief Justice Waite, in the case of the United States against Cruikshank (92 U. S., p. 542), said, addressing himself to a very exhaustive consideration of the fourteenth amendment:

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law."

And from denying to any person within its jurisdiction the whole protection of the laws.

"But this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The duty of protecting all of its citizens in the enjoyment of rights was originally assumed by the States, and it still remains there. Will you please note this:

"The only obligation resting upon the United States is to see that the States do not deny the right."

My conclusion is this: Must the Congress of this country sit supinely by when it knows that a State, either affirmatively or negatively, is denying that right? If the State omits to give or withholds protection through motives of indifference or inability, is the guaranty performed and the duty of the Federal Government discharged? In a word, is the fourteenth amendment meaningless because of State negativity? I hope not, and I think not. The Congress of the United States clearly is charged under the Constitution, as interpreted by the Supreme Court, with the duty of seeing that the States do not neglect this right. Then, if the Congress of the United States decides that the States have, by omission, neglect, incapacity, or local prejudice, if you please, failed to insure and secure to every citizen within those States the full protection of the laws and the right to life, liberty, and property, then does not the obligation arise to protect these rights?

We are all familiar with that state of affairs where if the Congress of the United States—and it has recently decided it—concludes as a matter of fact that a republican form of government does not exist in

a State because the State has not the means or the instrumentalities by which such forms of government are recognized and protected, that it, the Congress of the United States, has the right to go into that State and see that a republican form of government is maintained and preserved. It was done only recently, as you know, in the State of West Virginia, and a committee of the Senate of the United States, merely upon a determination of the legislative fact that a republican form of government did not exist there, invaded the State to see whether the State was properly enforcing its laws under its constitution and the Constitution of the United States.

If a State omits affirmatively to legislate upon such questions it has denied this protection by not taking affirmative action; if it takes affirmative action and does not enforce that action, or if it says it will take no action because, within the judgment of the State, no action along those lines should be taken, then I say the Federal Government can say to that particular State, "You have denied negatively " "You have failed to give," "You have defaulted," if I may so phrase it, "to the citizens of these States the protection that the Constitution of the United States as interpreted by the Supreme Court, says they are entitled to receive. "Now I contend that under the general police power, the Federal Government may go in, and, side by side with the States, as it does in bankruptcy, aid the States in securing the protection which for any reason the local governments can not give.

The Federal Government was given the power to curb the States in these particulars—and the States reserved the correlative right to so "police" its citizens that in maintaining order it would not deprive any person of life, liberty, or property. And if it fails to preserve these rights—and the Congress concludes, that such rights are denied the people and that they are deprived of due process of law—no matter the cause—then are we to be told that these guaranties can not be enforced by appropriate legislation.

Section 5 of the fourteenth amendment says:

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

This has received special consideration in Logan v. United States (144 XT. S., 263, 293), where Mr. Justice Gray stated its meaning to be:

"Every right created by arising under or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain its object."

There is a limitation, however, in the amendment itself upon the power of Congress. The clause of the amendment under consideration provides that Congress may enforce the provisions of the amendment by "appropriate legislation," and the right to judge what is appropriate legislation rests with the lawmaking body of the Government— that is, with Congress.

Mr. Justice Lamar, in United States v. Sanges, said:

"The provision of the fourteenth amendment authorizing Congress to enforce its guaranties by legislation means such legislation as is necessary to control and counteract State abridgment."

The Supreme Court of the United States has held that Congress would have no right to provide for the enforcement of the provisions of this amendment in the following cases:

"When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States: when no one of its departments has deprived any person of life, liberty, or property without due process of law or denied to any person within its jurisdiction the equal protection of the laws: when, on the contrary, the laws of the

State as enacted by its legislative and construed by its judicial and administered by its executive departments recognize and protect the rights of all persons the amendment imposes no duty and confers no power upon Congress."

But by implication when a State has been guilty of violating any of the above provisions then Congress may provide for the enforcement of the provisions of the amendment.

In Ex parte Virginia, supra, Mr. Justice Strong stated the rule to be:

"Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. 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."

In McCray v. United States (195 U. S., 27), the authorities are reviewed and reference is especially made to ex parte McCardle (7 Wallace, 506), where the court said:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

The courts have no right to question the expediency or the reasonableness of legislation. In Treat v. White (181 U. S., 264), the court said:

"The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy not. It is enough that Congress, in this legislation, has imposed a stamp duty upon this one, and not upon the other."

When Congress determines upon the question what its legislative judgment should be, that Congress takes into consideration not the facts which exist in some one State, to the exclusion of facts existing in another State, but that Congress takes into consideration what is the greatest good for the greatest number.

Congress must be charged sometimes with altruism when it legislates upon any great question; Congress must not be charged with having taken into consideration conditions in one State to the exclusion of conditions in another, because if it did it would be guilty of penalizing a State where, possibly, the legislation would not affect the individuals of that State, for the benefit of the greater number of the people of the United States.

The words "necessary and proper " have been held as endowing the Federal Government with every authority the exercise of which may in any way assist.the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. In United States v. Fisher (2 Cranch, 358), decided in 1804, Chief Justice Marshall declared:

"It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress might possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution."

Take the condition that exists in this country to-day. There is not a State—of course, this is a mere truism—that has not a law against murder. New, in the act which bears the name of your distinguished chairman there are provisions which confer jurisdiction upon the Federal Government to prosecute assault® upon officers engaged in the enforcement of that act. There is a question in the minds of many people whether or not that act should not have conferred upon the .Federal Government the right to prosecute cases of murder. It does concede the right to prosecute assaults. Now, I have in mind a case where men living in a certain State shot down, as they claimed in self-defense, the officers of the law who came to search their premises for intoxicating liquor. These men have been tried twice for murder in the State court and the juries have disagreed. The law has not been popular in that State. Now, suppose the condition which exists in the State to which I refer were found to exist in other States of the Union. It is only an easy step to the psychology of our people. We know that the way the people of one State of this Union view a given state of facts is likely to be the view entertained in other sections of the country, unless you should give the facts a political coloring, which this act does not because it would be based upon the Constitution, and apply to all—red, white, and black—citizen, alien, resident, and inhabitant. Now, in view of the general knowledge of the so-called unpopularity everywhere of this law, Congress could pass a law conferring upon the Federal courts the right to punish murder wherever officers enforcing that law were assaulted and killed.

If Congress did that, who could question the judgment of Congress? I do not see who could run "along the highway" and say Congress was not justified in doing this because in the New England States or in the Southern States they do not shoot down men so engaged. I do not think we should or that we could make it in any sense a sectional question, because we are all the same people; we all entertain the same views of life in the final, ultimate analysis. Our late World War demonstrated that. We forgot our politics; we were American citizens for the once, and we forgot that we had ever been Democrats and Republicans. We met the same situation in the same way. There may be differences depending upon temperament or environment, because after all we are initially the products of the conditions that started us, brought us up and pushed us forward in this great fight in life, but when all of that is ironed out we are the same. So I say, that when you find conditions existing in one State you can conclude legislatively as well as actually that if the same "cause irritant" makes its appearance in the other State you will find the same conditions in its train.

The fact that such acts carried a penalty might in their deterrent effect prevent just such crimes. If a mob, in defiance of law, destroys property or commits arson, is the taxpayer without remedy, because the authorities were ignorant?

In Crandall v. Nevada (6 Wallace, 35) the court discusses and classifies some of the distinctively Federal rights. It is said to be the right of the citizen, protected by implied guaranties of the Constitution, "to come to the seat of government to assert any claim he may have upon the Government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign countries are conducted, to the subtreasuries, land offices, and courts of justice in the several States. "

And in the Slaughter-house Cases (16 Wallace, 36, 79) it is said:

"Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign Government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peacefully assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is said that a citizen of the United States can, of his own volition,

become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."

In Maxwell v. Dow (176 U. S., 581) the court in its majority opinion announced that the mere fact that a certain privilege was granted against Federal infringement did not operate to make such privileges distinctively Federal in character. In that case Justice Harlan delivered one of his famous dissenting opinions based upon the proposition that the privileges and immunities enumerated in the first eight amendments of the Constitution belong to every citizen of the United States. However, in the course of the majority opinion delivered by Mr. Justice Peckham the language of the court In re Kemmler (136 U. S., 436, 448) was repeated and approved. It will be observed that the decision turns upon the question whether the trial of a person accused as a criminal by a jury of only 8 persons instead of 12 was an encroachment by the State upon those fundamental rights inhering in citizenship and which the State governments were created to secure. The court said:

"The fourteenth amendment did not radically change the whole theory of the relations of the State and Federal Governments to each other, and of both Governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty, and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National Government and granted or secured- by the Constitution of the United States."

Obviously, if the State by direct legislation abridged any of these rights, the act would encroach on the privileges protected. The State would then positively violate the Federal provisions. But does the State not violate and render meaningless the provisions of the amendment by neglecting to legislate, refusing to enforce its laws, or by allowing its laws and its officials to drift into a condition of utter helplessness and indifference? Are "citizens" and "persons" to be thus deprived of life, liberty, and property when the people of the States have clothed the Federal Government with power to see that they, the States, do not deny such rights, and have expressly empowered the Congress and directed it "to enforce" such commands by appropriate legislation?

We quote some additional authorities as to the constitutionality of the antilynching bill submitted by Hon. Merrill Moores.

The case of James v. Bowman (190 U. S., 127) is not in point as to the proposed antilynching bill, for the reason, in addition to those stated by Col. Goff, that it concerns a statute based solely on the fifteenth amendment, while the proposed bill is based on the fourteenth amendment, which is totally different in its provisions.

The fourteenth amendment guarantees that no State "shall deny to any person within its jurisdiction the equal protection of the laws," a guaranty equivalent to one that each State shall secure to every person within its jurisdiction the equal protection of the laws.

The fifteenth amendment is as follows:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." To enforce this provision Congress enacted Revised Statutes 5507, to punish "every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by bribery or threats ?? etc.

Certain men were indicted under this statute for bribing colored voters of Kentucky not to vote at a congressional election. The court held that under the amendment providing that the right of citizens to vote shall not be denied or abridged on account of race, color, etc., the Congress could not pass a statute punishing election bribery of Negroes. It is hardly worth while discussing the propriety of this decision, in view of the fact that it has no bearing at all on the questions at issue.

The fourteenth amendment forbids the withholding of the equal protection of the law by any State to any person within its jurisdiction. This bill simply provides that the State governments shall treat all persons within their jurisdiction alike in discharging the highest function of government, the protection of life and liberty of the governed.

The first principle stated in the Declaration of Independence is as follows:

“We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. "

In framing the Constitution, our fathers, recognizing that governments are instituted among men to secure the rights of life, liberty", and the pursuit of happiness, stated in the preamble its purpose to be to form a perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

With these principles as their purpose, all the State governments were established and the principles are restated in every State constitution. .

The fourteenth amendment is simply declaratory of the principle that a State in which life, liberty, and property are not protected for every person within its boundary does not perform the first and greatest function of government—the protection of the personal rights of the governed. It is for this purpose that all State officers are chosen and paid. It is for this that taxes are collected and the States policed.

It goes without saying that in a civilized government like ours if any person is assaulted, beaten, maimed, or lynched by a mob, some officer whose sworn duty it is to enforce the law's has been derelict in his duty and has violated his official oath. The often-quoted words of Mr. Justice Matthews in the Yick Wo case are in point as to the moral liability of the State for the dereliction of its officer:

“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 an unequal hand so as 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. ” (Yick Wo v. Hopkins, 118 U. S., 356, 373.)

This language has been quoted wdth approval by the same court in construing a cigarette law of Tennessee unequally enforced. (Austin v. Tennessee, 179 U. S., 343, 350.)

It has also been followed in its reasoning in the Los Angeles Gas Works case. (Dobbins v. Los Angeles, 195 U. S., 223, 240.)

It was again quoted and followed in the Wisconsin Salvation Army case. (Re Garrabad, 84 Wis., 592-3; 36 Amer. St., 952, 953; 19 L. R. A. 858, 864.)

It was followed again in the trial of Caleb Powers, where in a community almost equally divided in politics, Powers being on trial on a charge of the murder of a political opponent, no member of the political party with which Powers was identified was drawn on the jury in three successive trials. (Commonwealth v. Powers, 139 Fed. 452, 461. See also in re Orozco, 201 Fed. 106, 117.)

The Supreme Court of the United States has repeatedly stated that the last clause of the first section of the fourteenth amendment guarantees the equal protection of the laws by the States to all persons within their jurisdiction. The common definition of a guaranty is "an agreement by one person to answer to another for the debt, default, or miscarriage of another. " Mr. Justice Story thus defined it:

"A guaranty is the collateral undertaking by one person to be answerable for the payment of some debt or the performance of some duty or contract for another person, who stands first bound to pay or perform. " (2 Story, Contracts, 5th ed., 319.)

Under the Constitution the States, by ratifying the fourteenth amendment, have bound themselves to perform and discharge the duty of affording to all persons within their respective boundaries the equal protection of the laws, and the Federal Government has guaranteed the performance. The duty to perform is a positive, affirmative duty of equal protection. Wherever this duty is not performed, regardless of the excuse, there is a breach by the State of the contract, and the obligation falls on the guarantor, the Federal Government to assure performance.

The Supreme Court has laid down the rule of construction as to guaranties that "the words of the guaranty are to be taken as strongly against him (the guarantor) as the sense will admit." (Drummond v. Prestman, 12 Wheat., 515, 518.) If this is the rule as to the guarantor, it goes without saying that it is also binding on the principal debtor.

The general rule as to the liability of private corporations for torts committed by agents within the scope of their authority (briefly and well stated in 10 Cyc., 1205, 1222) certainly furnishes an analogy where a constitutional guaranty had been given by State and Nation for performance by the State. As to cases in point there is a paucity of authority, due to the fact that neither State nor Nation may be sued without its consent. There are, however, cases fully in point.

The State of New York, having constructed or acquired certain canals, consented to be sued as to claims "for damages sustained from the canals, from their use and management, or arising from the neglect of an officer in charge, or from any accident or other matter connected therewith, " excluding however, " claims arising from damages resulting from the navigation of the canals. " In Rexford v. State (105 N. Y. 229), Rexford, while navigating a canal boat on the Erie Canal, left his boat at Syracuse to obtain a clearance, and, returning to his boat, was severely injured by the fact that the agents of the State had negligently permitted a ladder to become unsafe. The court held the State liable for the negligence of the officers charged with the duty of keeping the canal and its appurtenances in order.

For a stronger case in point, see Gibney v. State (137 N. Y., 1; 19 L. R. A., 365). See also as to the liability of a State for the negligence of an officer or agent; Green v. State (73 Calif., 29); Chapman v. State (104 Calif., 690; 43 Amer. St., 158); note to Houston v. State (42 L. R. A., 65-69); 36 Cyc., 882 n. 16.

These cases are all to the effect that where a State consents to be sued in tort it becomes liable as a private corporation for the negligence of an officer or agent as to acts within the line of his duties.

As to the right of the United States to sue a State or a county there can be no question. (United States v. North Carolina, 136 U. S., 211; United States v. Texas, 143 U. S., 621; United States v. Michigan, 190 U. S., 379; Lincoln County v. Luning, 133 U. S., 529.)

Originally a State might be sued by a citizen of another State. (Chisholm v. Georgia, 2 Dali., 419.) 1 , ;\ t \

This decision led to the adoption of the eleventh amendment, which provides:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

It will be noted that this amendment takes away the right neither of the United States nor of any other State to sue a State, but simply restricts the rights of citizens of other States to bring suits.

As to the constitutionality of statutes imposing a penalty upon counties or municipalities for lynching or mob violence, the following additional authorities are submitted: Dale County v. Gunter (46 Ala., lll); De Kalb v. Smith (47 Ala., 407); Cantey v. Clarendon County (101 S. C., 141); Atchisons. Twine (9 Kans., 350); Cherryvale v. Hawman (80 Kans., 170; 23 L. R. A. (N. S.), 645); P., C., C. & St. L. Ry. Co. r. Chicago (242 lll., 178: 44 L. R. A. (N. S.), 358); 11 Cyc., 500, 501.

To summarize the argument it would appear that the United States, by the joint action of the States, has guaranteed that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

It further appears that every State maintains a system of policing the State for the protection of life, liberty, and property, and that in certain of the States the equal protection of the law is, and for years has been, denied. There can be no question that the denial to persons of a class of the equal protection of the laws, by officers of or under the State charged with their equal enforcement, is the act of the State, and that the failure of the State, through its officers, to give the equal protection of its laws to a class must justify the intervention of the United States under the fourteenth amendment to carry out its guaranty of equal protection.

In bringing this brief reference to authorities to a conclusion it is proper again to refer to two propositions of law laid down by the Supreme Court as to constitutional questions, the first-quoted being in the words of Mr. Justice Bradley and the second in those of Mr. Chief Justice Marshall:

"We hold it to be an incontrovertible principle that the Government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." (Ex parte Siebold, 100 U. S., 371, 395.)

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional." (McCullough v. Maryland, 4 Wheat., 316, 421.)

Department of Justice,

Office of the Attorney General,

Washington , D. C., August 9, 1921.

Hon. A. J. Volstead,

Chairman Committee on the Judiciary ,

House of Representatives.

My Dear Mr. Volstead: I beg to acknowledge receipt of your letter of the 26th ultimo, transmitting a copy of House resolution 13, to secure to persons within the jurisdiction of every State the equal protection of the laws and to punish the crime of lynching, and inviting suggestions and recommendations with a view to making the bill more effective or to avoid possible constitutional objections.

While under the statutes governing my office I am not authorized to give an official opinion to your committee relative to the bill, my interest in securing to persons within the jurisdiction of every State the equal protection of the laws, especially with reference to lynching, is so great that I feel warranted in submitting to you as my personal and not official opinion certain thoughts which have occurred to me as the result of a somewhat hasty examination of the bill.

As pointed out by Col. Goff in his statement before your committee, the first seven sections, providing for the removal of cases under certain conditions to the Federal courts, and providing for the punishment of persons obstructing or resisting officers of the United States, are in effect, but elaborations of existing law. They appear to be well drafted and within the competency of Congress to enact.

Considerable discussion has taken place as to the constitutionality of the proposed legislation, it being contended that the fourteenth amendment gave Congress power to legislate so as to prevent a denial of the equal protection of the laws by the States and not as to acts of individuals not clothed with State authority. In support of this proposition the following cases have been cited: United States v. Cruikshank (92 U. S., 542); Virginia v. Rives (100 U. S., 313); Ex Parte Virginia (100 U. S., 339)- Civil Rights Cases (109 U. S., 3); United States v. Harris (106 U. S., 629); James v. Bowman (190 U. S., 127); Hodges v. United States (203 U. S., 1); United States v. Wheeler (254 U. S., 281).

Col. Goff has very thoroughly gone over this question in his statement before your committee, and ! heartily.concur in the views he there expressed. It will be observed that in the cases above cited the court holds that the State may act through its legislative, its judicial, or its executive authorities, and the act of any one of these is the act of the State. This is concisely set forth in the opinion of the court in Ex Part© Virginia (100 U. S., 339, at 346):

“We have said the prohibitions of the fourteenth amendment are addressed to the States. They are, ‘No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.’ They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State and is clothed with the State’s power his act is that of the State. This must be so or the

constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Of course if the act of one of these agencies of the State is a denial of the equal protection of the laws, since the act of such agent is the act of the State itself, such act is within the prohibitions of the fourteenth amendment to the Constitution. The authorities above cited hold that a statute that prohibits the act of an individual, irrespective of any action by the State or its officers, is beyond the power of Congress to enact under this fourteenth amendment. To my mind there can be no doubt that negativity on the part of the State may be, as well as any act of a positive nature by such State, a denial of the equal protection of the laws and thus be within the prohibition of the fourteenth amendment so as to give Congress power to act with reference to it. That such was in the mind of the court when pronouncing the decisions above cited is clearly shown by the following excerpts from the opinion of the courts speaking through Mr. Justice Bradley in the Civil Rights cases, supra, at pages I3 and 14:

"In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen but corrective legislation; that is to such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which are by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

"An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the States. It is not predicated on anv such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence and lays down rules for the conduct of individuals in society toward each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities."

And again, at page 23:

"Many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the posse comitatus without regular trial: or denying to any person or class of persons the right to pursue any peaceful avocations allowed to others."

My examination of the proposed legislation causes me to believe that all of its provisions are predicated upon some action—either negative or positive—upon the part of the States and that therefore the same is wholly within the competency of Congress to enact.

Section 10 imposes a penalty upon every county in which an unlawful killing occurs, and section 11 imposes a like penalty on every county through which the victim may be carried before being put to death. While the question whether the United States may penalize an instrumentality of a political subdivision of a State may cause some doubt, it is at least an open one so far as the decisions of the Supreme Court are concerned. There has been conferred on Congress the power by appropriate legislation to enforce the prohibitions of the fourteenth amendment and the imposition of penalties is a well-established means of enforcing the laws, and is so recognized by numerous decisions of all courts

and is no doubt an appropriate method of so enforcing the law. This being true and the States having consented by their adoption of the provisions of the Constitution and its amendments to such enforcement of the law by the Federal Government, it would seem there could be but little question of the power of Congress to provide for such penalties.

Section 12 and section 13 provide for the punishment of State and municipal officers who fail in their duty to prevent lynchings or who suffer persons accused of crime to be taken from their custody for the purpose of lynching. These sections seem to me to strike at the heart of the evil, namely, the failure of State officers to perform their duty in such cases. The fourteenth amendment recognizes as pre-existing the right to due process of law and to the equal protection of the law and guarantees against State infringement of those rights. A State officer charged with the protection of those rights who fails or refuses to do all in his power to protect an accused person against mob action denies to such person due process of law and the equal protection of the laws in every sense of the term. The right of Congress to do this is fully sustained by the decision of the court in Ex Parte Virginia, supra. (See pp. 346, 347.) * .

Section 15, providing for the punishment of unlawful acts committed against citizens or a subject of a foreign country, meets a long-standing need which has been expressed by a number of Presidents. In Missouri v. Holland (252 U. S., 416) the court has upheld the power of Congress to enact laws necessary and appropriate to the effectuating of treaties.

I am, in a separate letter, to which is attached a copy of the proposed bill, calling attention to some slight modifications that I am taking the liberty to suggest, most of them being directed to matters of clarity in such proposed legislation.

Yours, very truly,

H. M. Daugherty, Attorney, General.

H. Rept. 452, 67-1-2

VIEWS OF THE MINORITY.

This bill, in the judgment of the minority, is without constitutional warrant. It is definitely and directly antagonistic to the philosophy of our system of government, and within the limit of its effectiveness, if it should be held constitutional, would be destructive of that system.

If enacted and operative it would not add to the protection of person or the general efficiency of government, or strengthen the relationship between the Federal Government and the States. On the contrary, this proposed intervention of the Federal Government directed against local power, supplanting and superseding the sovereignty of the States, would tend to destroy that sense of local responsibility for the protection of person and property and the administration of justice, from which sense of local responsibility alone protection and governmental efficiency can be secured among free peoples.

This bill, challenging as it does the relative governmental efficiency of the States and the integrity of purpose of their governmental agencies, placing the Federal Government, as it does, in the attitude of an arbitrary dictator assuming coercive powers over the States, their officers, and their citizens in matters of local police control, would do incomparable injury to the spirit of mutual respect and trustful cooperation between the Federal Government and the States essential to the efficiency of government.

As a precedent, this bill, establishing the principles which it embodies and the congressional powers which it assumes to obtain, would strip the States of every element of sovereign power, control, and final responsibility for the personal and property protection of its citizens, and would all but complete the

reduction of the States to a condition of governmental vassalage awaiting only the full exercise of the congressional powers established.

Hatton W. Sumners.

Andrew J. Montague.

James W. Wise.

John N. Tillman.

Fred H. Dominick.