



NOTE

Crimes of Omission: State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era

Magdalene Zier*

Abstract. After more than a century of failure, Congress now stands closer than ever to making lynching a federal crime. As the pending legislation acknowledges, at least 4,742 people were lynched in the United States between 1882 and 1968, but Congress continually declined to pass any of the nearly 200 bills introduced during those decades.

Although Black Americans had faced lethal racial terror before, during, and immediately following emancipation, the rate of lynching rose significantly in the 1890s as Redemption and Jim Crow segregation took hold. States had the authority to prosecute violent crimes, but many had made clear that they had no will to prevent or punish lynch mobs. Activists worked to expose the savagery of lynching as an apparatus of racial violence and to revive the public and legislative concern for Black lives that seemingly died during the retreat from Reconstruction. Proponents of anti-lynching legislation faced the challenge of convincing Congress that it had the authority under the Fourteenth Amendment's Enforcement Clause to prosecute individuals, not only state actors, in particularly egregious circumstances.

This Note centers on one particularly promising proposal: the Dyer Anti-Lynching Bill. Introduced in 1917, the ambitious Dyer Bill was the first to clear the House, and it soon incited controversy in the Senate and heated debate in the public press. Many Americans—Black and white, Northern and Southern, Democrat and Republican—had something to say about the Dyer Bill.

Scholars, however, have since said relatively little. Few treatments of the anti-lynching movement capture the enduring constitutional significance of this legislative campaign. Likewise, legal commentary on the Enforcement Clause of the Fourteenth Amendment too often omits this period, skipping from the Reconstruction era to the civil rights movement of the 1950s and 1960s.

* J.D. Candidate, Stanford Law School; Ph.D. Student, Stanford University Department of History. I am grateful for the suggestions and support of numerous Stanford faculty, including James Campbell, Allyson Hobbs, Amalia Kessler, Robert Gordon, Jane Schacter, and, especially, Norman W. Spaulding. Thank you also to Joshua A. Mensah and the editors of the *Stanford Law Review* for dedicating their time and energy to this Note.

This Note offers a novel reading of the Dyer Bill's development and demise, challenging the standard narrative about how members of Congress and their constituents regarded the Fourteenth Amendment in the Jim Crow era and about Black citizens' fidelity to the Republican Party. Upending the assumption that Americans in the first half of the twentieth century considered the Fourteenth Amendment a dead letter for achieving racial justice, this Note reveals a country actively concerned with the amendment's promise and possibilities. Long before the 1964 Civil Rights Act and even the New Deal, the Dyer Bill debates prompted politicians and the public to consider the scope of state action and of Congress's unique prerogatives under the Fourteenth Amendment's Enforcement Clause. The Dyer Bill's history holds lasting lessons for assessing Congress's obligations and political parties' incentives to address ongoing issues of racial injustice.

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Introduction

After more than a century of failure, Congress now stands closer than ever to making lynching a federal crime. In the final days of 2018, the Senate unanimously approved the Justice for Victims of Lynching Act.¹ On February 26, 2020, the House joined in support, passing the Emmett Till Antilynching Act.² As the still-pending legislation acknowledges, at least 4,742 people were lynched in the United States between 1882 and 1968, but Congress failed to pass any of the nearly 200 anti-lynching bills introduced during the first half of the twentieth century.³ Seven presidents petitioned Congress to end lynching, and the House even passed three promising bills, but the Senate never budged.⁴ In 2005, the Senate issued an apology for its particular complicity.⁵ Deeming that symbolic gesture insufficient for genuine “repentance” and “reconciliation,” in 2018 the Senate’s three Black members revived the push for a federal anti-lynching law that had begun more than a century earlier.⁶

The first push for federal anti-lynching legislation can be traced to the turn of the twentieth century and the organizing efforts of Black leaders. Although Black Americans had faced lethal racial violence before, during, and immediately following emancipation, the rate of lynching rose significantly in the 1890s.⁷ As Radical Republicans retreated from Reconstruction, Southern whites reasserted their supremacy, imposing Jim Crow segregation and

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1. Justice for Victims of Lynching Act of 2018, S. 3178, 115th Cong. (as passed by Senate, Dec. 19, 2018); see also Cat Schuknecht, *Legislation to Make Lynching a Federal Crime Clears Historic Hurdle in Congress*, NPR (Dec. 21, 2018, 4:37 AM ET), <https://perma.cc/ML7K-SVS3>; Tal Kopan, *Sen. Kamala Harris’ Anti-Lynching Bill Caught in Police Reform Fight*, S.F. CHRON. (updated June 23, 2020, 6:58 PM), <https://perma.cc/N5WC-7KP6>.
 2. Emmett Till Antilynching Act, H.R. 35, 116th Cong. (as passed by House, Feb. 6, 2020). Although the Senate and House bills have similar goals, the House’s bill is titled differently and therefore must return to the Senate for a final vote before proceeding to the President’s desk. See Claudia Grisales, *“It’s About Time”: House Approves Historic Bill Making Lynching a Federal Crime*, NPR (Feb. 26, 2020, 7:18 PM ET), <https://perma.cc/9E75-2VRN>.
 3. S. 3178, § 2(4), (8), (11); see also EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 4, 40 tbl.1 (3d ed. 2017), <https://perma.cc/RWN8-TW9P> (tabulating 4,084 “racial terror lynchings” committed against racial minorities in Southern states between 1877 and 1950).
 4. See S. 3178, § 2(9)-(11); S. Res. 39, 109th Cong. (2005).
 5. S. Res. 39.
 6. S. 3178, § 2(14)-(18); Sandra E. Garcia, *3 Black U.S. Senators Introduce Bill to Make Lynching a Federal Hate Crime*, N.Y. TIMES (June 29, 2018), <https://perma.cc/ZD92-3H9S>.
 7. See Douglas O. Linder, *Lynchings: By Year and Race*, FAMOUS TRIALS, <https://perma.cc/FD4H-SS2N> (archived Dec. 15, 2020); David Victor Baker, *Female Lynchings in the United States: Amending the Historical Record*, 2 RACE & JUST. 356, 360 tbl.2 (2021).

initiating a reign of racial terror.⁸ Activists like Ida B. Wells worked to expose the savagery of lynching as an apparatus of racial violence, to debunk the pervasive myth that lynch mobs avenged the rape of white women, and to revive the public and legislative concern for Black lives that seemingly died during the retreat from Reconstruction.⁹

States had the authority to prosecute violent crimes, but many had made clear that they had no will to penalize perpetrators of lynchings and other anti-Black acts.¹⁰ Against the backdrop of late-nineteenth-century Supreme Court decisions constraining the Fourteenth Amendment, early federal legislative efforts failed, including Representatives Moody and Hoar's noteworthy proposals.¹¹ But such initial efforts heightened awareness of lynching and pushed Americans to see "Southern horrors"¹² as a national problem. In 1908, after a deadly race riot rocked Springfield, Illinois, an interracial group of activists joined forces to combat racist violence and soon created the National Association for the Advancement of Colored People (NAACP).¹³ While other groups, like the National Equal Rights League, also contributed to the anti-lynching crusade, the NAACP emerged as the most prominent force behind the cause, especially when it came to Washington, D.C., politics.¹⁴

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8. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974).
 9. See generally IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* 13-15 (n.p., New York Age Print 1892); CRYSTAL N. FEIMSTER, *SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING* 47-55 (2009) (tracing the origins of the rape myth that was used to justify lynching and mask sexual violence against Black women). For more on Wells's life and activism, see generally PAULA J. GIDDINGS, *IDA: A SWORD AMONG LIONS* (2008).
 10. See IDA B. WELLS, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892-1893-1894*, at 8 (Chicago, Donohue & Henneberry 1895) ("[A]s evidence of the absolute impunity with which the white man dares to kill a Negro, the same record shows that during all these years [of the late nineteenth century], and for all these murders[,] only three white men have been tried, convicted, and executed."); see also MANFRED BERG, *POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA* 153 (2011) (finding that less than 1% of lynchings committed after 1900 resulted in a criminal conviction); Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 HARV. L. REV. 707, 710 (1902) (calling for federal intervention in light of states' routine violation of the Fourteenth Amendment through "acts of omission").
 11. See Adam Burns, *Without Due Process: Albert E. Pillsbury and the Hoar Anti-Lynching Bill*, 11 AM. NINETEENTH CENTURY HIST. 233, 235-38, 241 (2010).
 12. WELLS, *supra* note 9.
 13. See PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 5-6 (2009). For a general history of the NAACP's founding and early efforts against lynching, see ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* (1980).
 14. In 1921, the NAACP subsumed the National Equal Rights League, which had been fighting for Black liberation since the 1860s and had joined early Dyer Bill lobbying efforts. See HANES WALTON, JR., SHERMAN C. PUCKETT & DONALD R. DESKINS, JR., *THE*
footnote continued on next page

Hope for passage peaked on the heels of World War I. Following race riots in East St. Louis in 1917,¹⁵ Republican Congressman Leonidas Dyer introduced the most ambitious anti-lynching proposal to date.¹⁶ Dyer had built his career as a progressive attorney in St. Louis, championing reforms like anti-usury laws. Elected in 1910 to represent Missouri's Twelfth District, which had a majority-Black population, Dyer was one of his party's staunchest advocates for racial justice.¹⁷ Dyer was white; there were no Black members of Congress between 1901 and 1929.¹⁸ His contribution to the cause coincided with a surge in anti-Black violence and mass mobilization against it. Rates of lynching spiked following World War I, as white Americans lashed out at Black veterans who had served on the front lines and Black communities who had made strides on the home front.¹⁹ The infamous Red Summer of 1919 saw white supremacist violence erupt in more than three dozen cities across the country.²⁰ Americans could not ignore the racial terror overtaking the nation, and organizations like the NAACP took advantage of the public's attention by recruiting members, soliciting donors, and crafting legislative proposals.²¹

The Dyer Anti-Lynching Bill empowered the federal government to prosecute any individual who participated in a lynching and any law-

AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY 191-214 (2012); Christi M. Smith, *National Equal Rights League (1864-1921)*, BLACKPAST (Dec. 18, 2009), <https://perma.cc/2VEH-6DH5>; see also *Asks Early Consideration and Passage of the Dyer Anti-Lynching Bill. Every Congressman Finds Petition on Desk When Congress Opens*, DALL. EXPRESS, Dec. 18, 1920, at 4 (describing the National Equal Rights League's outreach to Congress in support of the Dyer Bill).

15. Allison Keyes, *The East St. Louis Race Riot Left Dozens Dead, Devastating a Community on the Rise*, SMITHSONIAN MAG. (June 30, 2017), <https://perma.cc/6AP2-QFQT>.
16. H.R. 11279, 65th Cong. (1918); see also 56 CONG. REC. 6,176-77 (1918) (statement of Sen. Leonidas Dyer); James H. Chadbourn, *Lynching and the Law*, 20 A.B.A. J. 71, 75-76 (1934).
17. For brief biographies of Dyer, see *The Congressional Directory: Author of Anti-Lynching Bill; Honorable L. C. Dyer, Representing the Twelfth District of Missouri*, 1 CONG. DIG. 17, 17 (1922); and *Anti-Lynching Legislation Renewed*, U.S. HOUSE REPRESENTATIVES: HIST. ART & ARCHIVES, <https://perma.cc/27YV-WQDG> (archived Feb. 6, 2021).
18. See IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RSCH. SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2018, at 4 (2018), <https://perma.cc/53DU-WBWE>.
19. See David A. Davis, *Not Only War Is Hell: World War I and African American Lynching Narratives*, 42 AFR. AM. REV. 477, 477-78 (2008); Vincent Mikkelsen, *Coming from Battle to Face a War: The Lynching of Black Soldiers in the World War I Era 97-149*, 213 tbl.3 (Apr. 23, 2007) (Ph.D. dissertation, Florida State University), <https://perma.cc/5V9B-4B56>.
20. The term "Red Summer," coined by James Weldon Johnson, refers to the exceptionally high rates of mob violence and government surveillance of radical politics that erupted in the hot months of 1919, on the heels of World War I. CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA 13 (2011).
21. SULLIVAN, *supra* note 13, at 79-100.

enforcement officer who failed to intervene.²² In addition to these criminal provisions, the bill also authorized federal prosecutors to pursue a civil penalty of up to \$10,000 from any county in which a lynching occurred.²³ In the words of James Weldon Johnson, the NAACP's executive secretary, this "vital section" turned lynching from "cheap fun" into an expensive habit: "When it begins to cost taxpayers money to lynch Negroes somebody is going to see that it is stopped."²⁴ Invoking what Professor Derrick Bell would later label the "interest-convergence dilemma,"²⁵ Johnson predicted that ending lynching would depend on white Americans' feeling its financial harm, since most refused to recognize its moral expense.

Both Congress and the public erupted in debate about Dyer's controversial proposal. A wide variety of Americans—Black and white, Northern and Southern, Democrat and Republican—had something to say about the Dyer Bill. Some opponents led with blatant bigotry, but most cited constitutional concerns. They argued that the authority that the Dyer Bill gave the federal government to prosecute individuals constituted an abuse of federalism and a violation of the state-action limitation on Congress's powers under the Fourteenth Amendment.²⁶ Although the Force Act of 1871,²⁷ a civil rights bill passed during the first Reconstruction, had provided for federal criminal prosecution of those who conspired to deny persons equal protection of the laws, it was significantly undercut by the Supreme Court in 1883.²⁸ In the eyes of the Dyer Bill's opponents, the proposed legislation attempted to revive a discredited form of federal intrusion into the prerogatives of the states. In rebuttal, supporters contended that the states' woeful failure to prevent lynching justified federal

22. H.R. 11279, 65th Cong. §§ 2, 4-5 (1918).

23. *Id.* § 3. The revenue from the fine was to compensate the victim's family. *Id.*; see also SULLIVAN, *supra* note 13, at 105. Adjusted for inflation, the \$10,000 in 1918 currency could equate to just over \$170,000 in 2020. See U.S. INFLATION CALCULATOR, <https://perma.cc/7NMY-PPJF> (archived Dec. 13, 2020) (to locate, click "View the live page"; enter "1918" in the first box, "10,000" in the second, and "2020" in the third; and click "CALCULATE").

24. James Weldon Johnson, Opinion, *Views and Reviews: Help Make the Dyer Anti-Lynching Bill A Law*, N.Y. AGE, Oct. 29, 1921, at 4.

25. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

26. See *infra* Part II.B.

27. Force Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986). The famous law is known by multiple names, including the Civil Rights Act of 1871, the Second Ku Klux Klan Act, and the Third Enforcement Act. *Civil Rights Act of 1871*, FED. JUD. CTR., <https://perma.cc/83JC-CTLU> (archived Dec. 14, 2020). Several of its provisions still exist in the United States Code, such as 42 U.S.C. § 1983. *Id.*

28. *United States v. Harris*, 106 U.S. 629, 643-44 (1883) (deeming the Force Act of 1871 unconstitutional and declaring the regulation of private action beyond Congress's Fourteenth Amendment enforcement powers).

intervention, and they argued that the Court's existing jurisprudence on the state-action doctrine misinterpreted the intent of the Fourteenth Amendment's Framers.²⁹ After more than three years of back-and-forth,³⁰ the House passed the Dyer Bill on January 26, 1922.³¹ The Senate Judiciary Committee, President Harding, and the Attorney General lent their support too, but the bill ultimately died in December 1922 when Republicans surrendered to the Southern Democrats' filibuster.³² Before 2020, no subsequent anti-lynching proposals had come closer to passage than the Dyer Bill.

This Note offers a novel reading of the Dyer Bill's development and demise, challenging standard assumptions about how members of Congress and their constituents regarded the Fourteenth Amendment in the Jim Crow era and about Black Americans' fidelity to the Republican Party. Long before the 1964 Civil Rights Act or even the New Deal, the Dyer Bill debates prompted Americans to confront Congress's unique prerogatives under the Enforcement Clause of the Fourteenth Amendment. To capture this broader context, this Note looks beyond the pages of the *Congressional Record* and incorporates various archival material, especially newspaper coverage of the wider public debate about the bill.³³ Upending assumptions that Americans in the first half of the twentieth century considered the Fourteenth Amendment a dead letter for achieving racial justice,³⁴ these sources reveal a country actively concerned with the Amendment's promise and possibilities. Proponents and opponents alike reevaluated Congress's authority to define the bounds of the

29. For discussion of opponents' and proponents' arguments, see generally CLAUDINE L. FERRELL, NIGHTMARE AND DREAM: ANTILYNCHING IN CONGRESS, 1917-1922, at 150-87 (1986); William B. Hixson, Jr., *Moorfield Storey and the Defense of the Dyer Anti-Lynching Bill*, 42 NEW ENG. Q. 65, 68-72 (1969); MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 74-90 (1947); L. C. Dyer & George C. Dyer, *The Constitutionality of a Federal Anti-Lynching Bill*, 13 ST. LOUIS L. REV. 186, 187-88 (1928); and William B. Harvey, Comment, 47 MICH. L. REV. 369, 374, 377 (1949).

30. *Harding Favors Dyer Bill: But He Makes No Comment on Senate Democrats' Filibuster*, N.Y. TIMES, Dec. 2, 1922, at 2 (describing President Harding's stance); *infra* notes 77-81 and accompanying text (discussing the Attorney General's position); *infra* notes 152-58 (discussing the Senate Judiciary Committee's position).

31. See 62 CONG. REC. 1,793-96 (1922).

32. *Filibuster Kills Anti-Lynching Bill: Republican Senators in Caucus Agree to Abandon the Dyer Measure*, N.Y. TIMES, Dec. 3, 1922, at 1.

33. Despite the growing popularity of the radio, newspapers still dominated in the 1920s. Even as the number of dailies and weeklies began to decline, circulation rates continued to rise, as newspapers appealed to readers with features like syndicated columnists, comic strips, and crossword puzzles. *Newspaper*, ENCYC. BRITANNICA, <https://perma.cc/R4PF-D3UU> (archived Dec. 14, 2020); see also Randall Patnode, *Friend, Foe, or Freeloader? Cooperation and Competition Between Newspapers and Radio in the Early 1920s*, 28 AM. JOURNALISM 75, 75 (2011).

34. See Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before Katzenbach v. Morgan*, 113 N.W. U. L. REV. 47, 51-52 (2018).

Fourteenth Amendment and questioned whether state omission could qualify as state action. This was not a period of consensus or contestation only at the margins or among the most dedicated activists; members of the public joined in discussing questions of constitutional meaning.

The anti-lynching crusade is scarcely a forgotten history, but traditional treatments fail to capture the legal and historical significance of the legislative campaign. On the one hand, many legal scholars have chosen to center the Supreme Court instead of legislative initiatives such as the Dyer Bill and what the debates surrounding them reveal about popular constitutional understandings and controversies.³⁵ So, too, legal commentary on the Fourteenth Amendment's Enforcement Clause omits this period, skipping between the first and second Reconstructions and assuming that hostility toward federal power saturated legal consciousness once Jim Crow segregation became settled law.³⁶ Meanwhile, many scholars of African American history have focused more on the social elements of this period, like religion, journalism, and the arts.³⁷ Finally, the handful of legal historians who have highlighted the Dyer Bill emphasize its broader significance in the organizational development of the NAACP rather than the nuances of the bill's constitutional meanings.³⁸ Like

35. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100-01 (2004) (surveying the Court's jurisprudence from *Plessy* to *Brown* but offering only a sentence on the Dyer Bill). See generally MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (centering civil rights leaders' litigation, not legislative, strategy); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689 (2005) (casting the Supreme Court Justices as the leading players in a civil rights epic).

36. See, e.g., Schmidt, *supra* note 34, at 58-60 (offering only a limited analysis of anti-lynching legislation and focusing predominantly on 1940s efforts).

37. While such studies center religion and culture, they hardly ignore legal and political consciousness. See generally EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920 (1993) (centering Black women's contributions to racial uplift through religious community and respectability); GEORGE HUTCHINSON, THE HARLEM RENAISSANCE IN BLACK AND WHITE (1995) (discussing the interracial exchanges of the Harlem Renaissance); WILLIAM G. JORDAN, BLACK NEWSPAPERS AND AMERICA'S WAR FOR DEMOCRACY, 1914-1920 (2001) (tracing the growing influence of the Black press around World War I); E. FRANKLIN FRAZIER/C. ERIC LINCOLN, THE NEGRO CHURCH IN AMERICA/THE BLACK CHURCH SINCE FRAZIER (1974) (studying the history of the Black church and its role in shaping and mobilizing the Black community); CHARLES A. SIMMONS, THE AFRICAN AMERICAN PRESS: A HISTORY OF NEWS COVERAGE DURING NATIONAL CRISES, WITH SPECIAL REFERENCE TO FOUR BLACK NEWSPAPERS, 1827-1965, at 51-61 (1998) (describing the Oklahoma City *Black Dispatch's* influence in publicizing racial violence in the late 1910s); STEVEN WATSON, THE HARLEM RENAISSANCE: HUB OF AFRICAN-AMERICAN CULTURE, 1920-1930 (1995) (synthesizing the literary, musical, and social impact of Harlem influencers like Langston Hughes, Zora Neale Hurston, and Duke Ellington).

38. See, e.g., MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 101-12 (2014); SULLIVAN, *supra* note 13, at 105-10; ZANGRANDO, *supra* footnote continued on next page

much revisionist work, which recovers grassroots activists' role in advancing justice at the highest levels, these histories can be overly attached to crafting a triumphant narrative out of largely tragic events. Consequently, they discount the value of studying why and how social movements can *fail* to achieve constitutional change.³⁹

The significance of the Dyer Bill drama does not hinge on whether it ended in triumph or tragedy. Periods scarred by failure have critically shaped which Americans fought for civil rights, the means they chose to do so, and the theories of structural constitutional law that informed their choices.⁴⁰ While the push for the Dyer Bill did offer the NAACP the opportunity to hone fundraising, media, and legislative skills that would prove critical come the 1950s and 1960s, it also allowed civil rights foes to rehearse oppositional arguments and tactics.⁴¹ The public's widespread engagement in the development of anti-lynching legislation challenges us to extend our understanding of the "long civil rights movement."⁴² Given the terms of the

note 13, at 51-71. Trained as a political scientist, Francis focuses especially on the NAACP's organizational development and casts the anti-lynching struggle as a buildup to *Brown v. Board of Education*, 347 U.S. 483 (1954). See FRANCIS, *supra*, at 11-21, 166-67. See generally FERRELL, *supra* note 29 (recounting the congressional debates on the Dyer Bill in meticulous detail but integrating little external evidence).

39. For an example of an article that does this very important work, see Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005). Balkin examines when and how social movements are able to achieve constitutional change either through Article V constitutional amendment or through the Article III judiciary. Believing in the value of studying failure, Balkin focuses his attention on a movement that was unable to achieve its goal: the New Departure push for women's suffrage from 1869 to 1875. *Id.* at 36-38. Like the anti-lynching activists, members of the New Departure advocated for a more expansive interpretation of the Fourteenth Amendment rather than seeking an entirely new constitutional lever. See *id.* at 37-38. Primarily composed of women who by definition could not vote, the New Departure ultimately failed at changing constitutional law because its proponents lacked political clout within the Republican Party. *Id.* at 60.
40. For an account of constitutional consciousness that finds "faith" in periods of formal exclusion and rights denial, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987).
41. See *infra* Part II.A.
42. See Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1233-35 (2005) (coining the phrase "long civil rights movement" and siting its origin in the 1930s). Dowd Hall's oeuvre, including *Revolt Against Chivalry: Jessie Daniel Ames and the Women's Campaign Against Lynching* (1979), demonstrates the importance of including the anti-lynching efforts in the long view of movement history. For works on early civil rights efforts, see, for example, RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007) (extending analysis of civil rights strategy back to the 1930s and 1940s); R. VOLNEY RISER, *DEFYING DISENFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890-1908* (2010) (documenting foundational, if futile, voting-rights efforts at the turn of the century); and Kenneth W. Mack, *footnote continued on next page*

retreat from Reconstruction—namely the federal government’s withdrawal from civil rights enforcement in the states—the debate pulled at the thread that many white Americans believed held together the seams of reunion.⁴³ In this sense the anti-lynching debate both repeated and reframed the failure of Reconstruction, and it posed new challenges to standard assumptions about federalism that rationalized Jim Crow segregation. This Note thus looks both forward and backward—forward to the predicates of the “Second Reconstruction” and backward to the unraveling of the first.⁴⁴

The Note proceeds in five parts. Part I examines arguments that Dyer Bill proponents offered in defense of its constitutionality. Challenging narrow interpretations of Congress’s Fourteenth Amendment enforcement powers, Dyer Bill proponents argued that Supreme Court precedent left open the possibility that state inaction, which they called “state negativity,” could itself represent a form of state action—that is, that the deliberate failure of states to extend equal protection of the laws to all residents violated the guarantees of the Fourteenth Amendment. Part II turns to opponents’ tactics, both procedural and doctrinal. It argues that the anti-Dyer Bill filibuster was the first of its kind and an essential rehearsal for Southern Democrats’ blockades against future civil rights legislation. As their senators stalled the Dyer Bill, the Southern public developed a states’ rights argument against it—an argument that in certain ways echoed proponents’ interpretation of the state-action doctrine by focusing on states’ affirmative responsibilities.

Although the Southern detractors ultimately prevailed in defeating the Dyer Bill, the legislative proposal had lasting implications. After examining the congressional and public debates surrounding the bill, this Note turns to the bill’s repercussions for partisan politics and Supreme Court jurisprudence. Part III questions whether the filibuster was the true culprit for the Dyer Bill’s death and explores how Republicans played and betrayed Black voters in the final push for the legislation. Subpart A argues that Black voters’ disappointment in the Republicans’ treatment of the Dyer Bill contributed to their fracturing from the GOP at least a decade earlier than when many historians contend. Subpart B further investigates the racial politics within the party and traces the controversy that two Black Republicans provoked by proposing constraints on the Dyer Bill. Part IV considers arguments that the Dyer Bill’s defeat yielded the

Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 YALE L.J. 256 (2005) (spotlighting the efforts of civil rights lawyers between the world wars).

43. See *infra* note 52 and accompanying text.

44. The first Reconstruction spanned from 1865 to 1877; the second began on the heels of World War II and continued into the 1960s. On the chronology and origins of the term “Second Reconstruction,” see WOODWARD, *supra* note 8, at 135, 209-10; and MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982, at 1-2 (1984).

landmark criminal-procedure decision *Moore v. Dempsey*⁴⁵ and instead locates the bill's main legacy in the Supreme Court's subsequent state-action decisions. This Part, like the Note as a whole, demonstrates how the fight for anti-lynching legislation influenced the evolution of state-action doctrine in the twentieth century, shaping public, political, and judicial opinion on the scope of the Fourteenth Amendment. In conclusion, Part V returns to contemporary debates on anti-lynching legislation.

I. The Case for Constitutionality: State Negativity as State Action

When Representative Dyer introduced his anti-lynching bill in the House on April 8, 1918,⁴⁶ both law and history appeared strongly in his opponents' favor. In the decades following the Fourteenth Amendment's adoption, the Waite Court (1874-1888) had issued a series of opinions eviscerating the amendment's protections for Black Americans and Congress's authority to enforce them.⁴⁷ In *United States v. Cruikshank* (1876), the Court overturned the conviction of several men indicted under the Force Act of 1870, reasoning that the Fourteenth Amendment did not empower the federal government to criminally prosecute private individuals for civil rights violations.⁴⁸ The decision's implications reverberated immediately: "[T]he Justice Department dropped 179 Enforcement Act prosecutions in Mississippi alone," and a spike in racial violence followed.⁴⁹ In *United States v. Harris* (1883), the Court nullified the Force Act of 1871 and held that the federal government could not prosecute a

45. 261 U.S. 86 (1923).

46. See 56 CONG. REC. 6,176-77 (1918) (statement of Sen. Leonidas Dyer).

47. See HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 473-515 (1982) (surveying the Court's constitutional decisions in the 1870s and 1880s). See generally PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888 (2010) (summarizing the legacy of the Waite Court). That said, the Court did not diminish the Fourteenth Amendment's potential protections across the board in this period. For example, it used the Due Process Clause to protect corporations. See generally ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESS WON THEIR CIVIL RIGHTS (2018) (tracing corporations' claims to constitutional rights and emphasizing the Fourteenth Amendment's adoption as a turning point).

48. 92 U.S. 542, 548, 553-57 (1876); see also Enforcement Act of 1870, ch. 114, 16 Stat. 140. Although federal crimes had existed since the 1790s, they were generally restricted to those areas associated with federal power, such as piracy, assault, and other crimes on the high seas. The 1870 legislation, in sharp contrast, attempted to forge a federal crime out of behavior that was already criminal under state law. See 16 Stat. 140 (extending federal criminal jurisdiction over anyone who attempted to disenfranchise Black Americans through violence or other threatening tactics). For a broad overview of early federal criminal law, see *Jurisdiction: Criminal*, FED. JUD. CTR., <https://perma.cc/Q4QK-VKMD> (archived Apr. 25, 2020).

49. See EQUAL JUST. INITIATIVE, *supra* note 3, at 19.

Tennessee sheriff who had failed to intervene when a lynch mob seized four Black men from his custody.⁵⁰ The *Civil Rights Cases* (1883) then dealt the final blow to Reconstruction legislation: The Court expanded the “state action” limitation on Congress’s enforcement powers, gutting the broad anti-discrimination provisions of the Civil Rights Act of 1875 by holding that Congress had no power under the Fourteenth Amendment to regulate private individuals.⁵¹ The judiciary was not the only branch to blame for the rise of Redemption: As part of the Hayes–Tilden compromise after the contested presidential election of 1876, Republican leaders had agreed to withdraw troops from the South in exchange for one of their own in the White House, and the party largely abandoned enforcement of Reconstruction-era legislation.⁵²

In the early decades of the twentieth century, as the federal government remained inhospitable to racial-justice issues, historians romanticized the fall of Reconstruction. In doing so, they helped demonize the fallen acts of the 1870s and eviscerate the viability of future civil rights legislation. The Dunning School dominated the historiography, caricaturing proponents of Reconstruction as “vindictive Radical Republicans[,]... unscrupulous carpetbaggers, traitorous scalawags, and ignorant freedmen.”⁵³ The nation’s leaders affirmed the narrative: After a screening at the White House, President Woodrow Wilson famously

50. See 106 U.S. 629, 629-32, 643-44 (1883); see also Force Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986). Pamela Brandwein argues that modern jurists and academics have anachronistically overemphasized the Waite Court’s “judicial abandonment” of Black people, when, in fact, those early cases left open a “state neglect” justification for federal intervention that late-nineteenth-century writers continued to explore. See Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the “State Action” Cases of the Waite Court*, 41 LAW & SOC’Y REV. 343, 344-46 (2007). The Dyer Bill record does not absolve the Waite Court, nor does it seamlessly extend Brandwein’s findings into the twentieth century, but it does at least reveal the existence of a theory of “state negativity” in the early 1920s, decades before the classical phase of the civil rights movement ushered in a new era of constitutional interpretation. For similar rebuttals to modern criticism of the Waite Court’s record on race, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2347-60 (2003); Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 39-41, 77-79; Kenneth W. Mack, *Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell’s Encounter with American Law*, 39 J. SUP. CT. HIST. 347, 351-62 (2014); and James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 390-93 (2014).

51. See 109 U.S. 3, 11-12, 25-26 (1883); see also Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336.

52. For a thorough overview of the “Corrupt Bargain,” see ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 575-87 (1988).

53. Eric Foner, *Reconstruction Revisited*, 10 REVS. AM. HIST. (PROMISE AM. HIST.) 82, 82 (1982); see also *id.* at 82-87 (surveying historians’ accounts of Reconstruction over the course of the twentieth century).

praised the overtly white-supremacist film *The Birth of a Nation* (1915) as “like writing history with lightning.”⁵⁴ As Claude Bowers’s best-selling 1929 book put it, Reconstruction—not Redemption—was the “Tragic Era.”⁵⁵

The Dyer Bill was a daring challenge to the precedent and historiography used to justify the Jim Crow order. The bill, opponents argued, offended the Waite Court’s defenses of federalism and the constraints of state action. The most controversial provisions were sections 2 and 4. Section 2 deemed “every person participating in such mob or riotous assemblage . . . guilty of murder and . . . liable to prosecution” in federal court.⁵⁶ Section 4 threatened federal liability and up to five years in prison for any state or municipal officer who “neglects or omits to make all reasonable efforts” to prevent a lynching or prosecute its culprits under state law.⁵⁷ These two sections, alongside sanctions for negligent counties, made the bill’s reach incredibly broad and, to many, intolerable.

Despite the Dyer Bill’s inhospitable backdrop, its proponents managed to garner significant support from the federal government and the public. NAACP leaders teamed up with prominent Yankee lawyers to develop briefs that justified sections 2 and 4 by reconceptualizing the Waite Court canon. Although these documents were never filed in court, the authors and their fellow activists regularly referred to them by the legal term “brief,” lending a sense of jurisprudential authority that other labels, like pamphlet, would have lacked.⁵⁸ The Department of Justice echoed the NAACP’s arguments to the House,⁵⁹ and the Senate Judiciary Committee’s favorable report on the Dyer Bill reprinted that same testimony in addition to briefs by NAACP leaders.⁶⁰ Through the forum of the Black press, the Black community also assessed and embraced the

54. See Mark E. Benbow, Essay, *Birth of a Quotation: Woodrow Wilson and “Like Writing History with Lightning,”* 9 J. GILDED AGE & PROGRESSIVE ERA 509, 509 (2010); see also Dave Kehr, *The Birth of a Nation (1915)*, in *THE A LIST: THE NATIONAL SOCIETY OF FILM CRITICS’ 100 ESSENTIAL FILMS* 30, 31 (Jay Carr ed., 2002).

55. CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN*, at v-vii (1929); see also NINA SILBER, *THE ROMANCE OF REUNION: NORTHERNERS AND THE SOUTH, 1865-1900*, at 124-58 (1993) (describing how Northerners embraced a sentimental rhetoric of reunion that romanticized the Old South and further enabled white supremacy to flourish).

56. H.R. 11279, 65th Cong. § 2 (1918).

57. *Id.* § 4; see also 56 CONG. REC. 6,176-77 (1918) (statement of Sen. Leonidas Dyer).

58. See, e.g., James Weldon Johnson, Opinion, *Views and Reviews: The Constitutionality of the Dyer Bill*, N.Y. AGE, July 15, 1922, at 4.

59. See H. REP. NO. 67-452, at 7-13, 16-17 (1921) (reproducing part of a statement by an assistant to the Attorney General as well as a letter from Attorney General H.M. Daugherty to the House Judiciary Committee).

60. See S. REP. NO. 67-837, at 7-13, 16-31 (1922) (reproducing parts of the House Report as well as briefs by Moorfield Storey and Herbert K. Stockton).

new constitutional interpretation. Newspapers declared that the Fourteenth Amendment had lain in “slumberous desuetude”⁶¹—or, more plainly, had been “deader than Caesar”⁶²—but the Dyer Bill debates promised to revive it.

The backing of several prominent, white constitutional law experts lent valuable credibility to the Dyer Bill cause.⁶³ New York attorney Herbert Stockton authored one influential brief in support of the Dyer Bill even though he did not yet have any formal association with the NAACP or other civil rights organizations.⁶⁴ The preeminent pro-Dyer Bill brief was the brainchild of Moorfield Storey. A Boston attorney who served as president of both the American Bar Association and the NAACP, Storey was a steadfast opponent of lynching but a belated believer in federal criminal penalties.⁶⁵ During previous efforts at anti-lynching laws, like the 1901 Moody–Hoar bill, Storey had been skeptical that the state-action precedents were surmountable.⁶⁶ Storey did not initially support the Dyer Bill at the time of its 1918 introduction, but, on the heels of the horrifically violent Red Summer of 1919,⁶⁷ his position began to shift. He did not immediately abandon his constitutional concerns, but he reasoned that even a failed bill would raise awareness, getting “the attention of the country arrested” and “public opinion aroused.”⁶⁸ By 1922, his position had changed entirely, and he issued his influential brief defending the constitutionality of the Dyer Bill.⁶⁹

Storey explored several possible legal justifications for federal jurisdiction—namely, the Guarantee Clause, the Fifteenth Amendment, and the need to

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61. *Johnson and Howard Argue over Dyer Bill Failure*, DALL. EXPRESS, Dec. 30, 1922, at 1.
62. Howard (Tad) Jordan, Letter to the Editor, *Lynching Problems*, BUFF. EXPRESS, Nov. 1, 1922, at 8.
63. These supporters were not the first of their kind: At the turn of the twentieth century, Albert Pillsbury, a prominent Boston lawyer, found an audience for his arguments on behalf of the Moody–Hoar anti-lynching bills in the *Harvard Law Review*. See *supra* notes 10–11 and accompanying text.
64. See S. REP. NO. 67-837, at 26–31 (reproducing Stockton’s brief). Evidently moved by the experience, Stockton subsequently joined the NAACP’s legal committee and testified before the Senate in 1934 regarding another anti-lynching proposal. See *Punishment for the Crime of Lynching: Hearings on S. 1978 Before a Subcomm. of the S. Committee on the Judiciary*, 73d Cong. 93–102 (1934) (statement of Herbert K. Stockton, NAACP).
65. For more on Storey’s biography, see generally WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION (1972) (surveying Storey’s long and fascinating career); and Jenny S. Martinez, Essay, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1400–03 (2014) (exploring Storey’s conflicting work as an anti-imperialist activist and corporate lawyer).
66. See Hixson, *supra* note 29, at 68–69.
67. See *supra* note 20 and accompanying text.
68. *Id.* at 69–70 (quoting a November 1919 letter from Moorfield Storey to William N. Rice).
69. *Id.* at 74–75; see also S. REP. NO. 67-837, at 18–26 (reproducing Storey’s brief).

maintain the “peace of the United States”—but he emphasized the Fourteenth Amendment.⁷⁰ Storey deemed the Waite Court cases ripe for reinterpretation, and he recognized the value of reviving the amendment for future civil rights battles. Reviewing *Cruikshank*,⁷¹ *Harris*,⁷² and the *Civil Rights Cases*,⁷³ Storey argued that the Court had preserved the federal government’s authority to legislate when a state, by its inaction, had denied persons within its jurisdiction equal protection.⁷⁴ “All these cases,” Storey summarized, “recognize that conditions may arise which will render action by Congress necessary to enforce the guaranty of the fourteenth amendment.”⁷⁵ Under such conditions, Congress had not just a right but an “obligation” to act.⁷⁶

Alongside Storey’s brief, the Senate Judiciary Committee printed statements from the Attorney General and other Department of Justice officials advancing a parallel theory of Congress’s enforcement powers in cases of state “negativity.”⁷⁷ The Department’s endorsement followed pressure from James Weldon Johnson and other NAACP leaders.⁷⁸ In voluminous correspondence, these activists emphasized the urgency of the legislation and offered the Department possible legal arguments for its validity. In a letter to the chairman of the House Judiciary Committee, Attorney General Harry M. Daugherty wrote:

70. Hixson, *supra* note 29, at 76 n.43; *see also* FERRELL, *supra* note 29, at 158.

71. *United States v. Cruikshank*, 92 U.S. 542 (1876).

72. *United States v. Harris*, 106 U.S. 629 (1883).

73. *The Civil Rights Cases*, 109 U.S. 3 (1883).

74. *See* S. REP. NO. 67-837, at 25-26:

Ex parte Virginia recognizes the officers or agents by whom the powers of the State are exercised as the State, and provides that they shall not deny to any person within its jurisdiction the equal protection of the laws.

United States v. Cruikshank holds that the obligation which rests on the United States is to see that the States do not deny the right of the citizens to the enjoyment of fundamental rights, that the equality of the rights of citizens is a principle of republicanism, that every part of the Government is bound to protect its citizens in these rights, and that the power of the National Government extends to the enforcement of this guaranty.

In the *Civil Rights [C]ases* the court recognizes the fact that legislation may and should be provided in advance to meet the exigency when it arises, but it should be adapted to the mischief or wrong which it was intended to provide against, that is, State laws or State action of some kind adverse to the rights of the citizens secured by the amendment.

United States v. Harris holds that the Congress can not act when no one of the departments of the State has denied to any person with its jurisdiction the equal protection of the laws, but where such denial has taken place it can act.

75. *Id.* at 26.

76. *Id.* at 25.

77. *Id.* at 7-13, 16-17. For a history of the Department of Justice’s efforts to prosecute mob violence, *see generally* Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74 J.S. HIST. 589 (2008).

78. *See* FERRELL, *supra* note 29, at 185-87.

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.⁷⁹

Daugherty dealt swiftly with the Supreme Court precedent and reached what he deemed a commonsense conclusion. His theory of state negativity “must be so,” he wrote, or else the Fourteenth Amendment would have “no meaning.”⁸⁰ “Then the State has clothed one of its agents with power to annul or to evade it.”⁸¹ Daugherty did not personally attend the House Judiciary Committee deliberations, but he sent an assistant, Guy D. Goff, to testify. On July 20, 1921, Goff relayed Daugherty’s conclusion to the committee:

Must the Congress of this country sit supinely by when it knows that a State, either affirmatively or negatively, is denying that right? . . . *In a word, is the fourteenth amendment meaningless because of State negativity?* . . . [I]f 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?⁸²

In Daugherty’s estimation, states’ egregious failure to abide by the Fourteenth Amendment forfeited their autonomy and licensed federal intervention. Collectively, the arguments compiled in the House and Senate Judiciary Committee reports conveyed a growing consensus that the Waite Court cases could be read to authorize federal intervention in cases of state “negativity.”

The activists’ next step was securing public support. The NAACP convened public mass meetings in the spring and fall of 1922 to air arguments to rally political solidarity around the Dyer Bill.⁸³ Even after the Senate defeat, the NAACP organized an eighteen-city speaking tour for Representative Dyer to discuss arguments for and against the bill and hopes for future legislative

79. H. REP. NO. 67-452, at 16 (1921). While a valuable ally in the anti-lynching fight, Daugherty was not the most upstanding Attorney General. He was the subject of two federal corruption investigations, including the Teapot Dome scandal, and President Coolidge forced him to resign. See Michael Farquhar, *Tempest over a “Teapot,”* WASH. POST (June 16, 1992), <https://perma.cc/4HKW-HVKJ>; JAMES N. GIGLIO, H. M. DAUGHERTY AND THE POLITICS OF EXPEDIENCY 169-70 (1978).

80. H. REP. NO. 67-452, at 16.

81. *Id.*

82. *Id.* at 10 (emphasis added).

83. See, e.g., *Mass Meeting at Academy to Protest Lynching*, BROOK. DAILY EAGLE, Nov. 10, 1922, at 8A; Event Flyer, NAACP, Monster Mass Meeting at The Town Hall, N.Y.C., Mar. 1, 1922, at 8:00 PM. (n.d.), in National Association for the Advancement of Colored People Records, 1842-1999 (on file with the Library of Congress) [hereinafter NAACP Papers], reprinted in ProQuest History Vault, Folder 001529-028-0236, <https://perma.cc/ZE5L-9C94>.

efforts, reaching more than 25,000 people.⁸⁴ In November and December 1922, the NAACP took out full-page, eye-catching ads in mainstream newspapers across the country. These ads featured startling statistics on lynching and a broad summary of the Dyer Bill's interventions.⁸⁵ National news outlets like the *Washington Post* and the *New York Times* chronicled and commented on the congressional debates,⁸⁶ and even small-town western papers—like the *Beatrice Daily Express* in Nebraska and the *Great Falls Tribune* in Montana—chimed in.⁸⁷

THE NEW YORK TIMES, THURSDAY, NOVEMBER 23, 1922

THE SHAME OF AMERICA

Do you know that the United States is
the Only Land on Earth where human
beings are BURNED AT THE STAKE?

In Four Years, 1918-1921, Twenty-Eight People Were Publicly
BURNED BY AMERICAN MOBS

3436 People Lynched 1889 to 1922

For What Crimes Have Mobs Nullified Government and Inflicted the Death Penalty?

The Alleged Crimes	The Victims	Why Some Mob Victims Die!
Murder.....	1286	Not turning out of road for white boy in mob
Rape.....	271	Being a relative of a person who was lynched
Crimes against the Person.....	410	Jumping a labor contract
Crimes against Property.....	122	Being a member of the Non-Partisan League
Miscellaneous Crimes.....	75	"Taking hold" as a white man
Witness of Crime.....	170	"Insulting" white men.
	3436	

Is Rape the "Cause" of Lynching?
65,000 people murdered by mobs in our country, only 271, or less than 1% per cent., were even accused of the crime of rape.

83 WOMEN HAVE BEEN LYNCHED IN THE UNITED STATES
Do Southern mobsters think that they were lynched for "the usual crime"?

AND THE LYNCHERS GO UNPUNISHED

THE REMEDY

The Dyer Anti-Lynching Bill Is Now Before the United States Senate

<p><small>The Dyer Anti-Lynching Bill was passed on January 26, 1922, by a vote of 220 to 153 in the House of Representatives.</small></p> <p><small>The Dyer Anti-Lynching Bill Provides:</small> That public house officers and mobsters shall be fined in Federal courts on failure of their courts to act, and that a penalty to which a lynch mob shall be fined \$10,000, recoverable in a Federal Court.</p> <p><small>The Principal Objections Raised Against the Bill is upon the Ground of Constitutionality.</small></p> <p><small>The Constitutionality of the Dyer Bill Has Been Affirmed by—</small> The Judiciary Committee of the House of Representatives The Judiciary Committee of the Senate The United States Attorney General, legal adviser of Congress Judge Cuyler E. Coff, of the Department of Justice</p>	<p><small>The Senate has been petitioned to pass the Dyer Bill by—</small> 26 Lawyers and Jurists, including the former Attorneys General of the United States 15 State Supreme Court Justices 12 State Governors 2 Archbishops, 20 Bishops and prominent clergymen 20 Members of large cities, north and south.</p> <p><small>The American Bar Association at its meeting in San Francisco, August 6, 1922, adopted a resolution asking the Senate legislation by Congress to punish and prevent lynching and mob violence.</small></p> <p><small>Fifteen State Commissions of 1922 (5 of them Democratic) have inserted in their reports resolutions a demand for national action to stamp out lynchings.</small></p>
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The Dyer Anti-Lynching Bill is not intended to prevent the guilty, but to assure to every person accused of crime trial by the process of law.

THE DYER ANTI-LYNCHING BILL IS NOW BEFORE THE SENATE
TELEGRAPH YOUR SENATORS TODAY YOU WANT IT ENACTED

If you want to help the organization which has brought to light the facts about lynching, the organization which is fighting for 100 per cent. non-resistance, not for cases of the people some of the time, but for all of the people, white or black, all of the time

Send your check to J. E. SPENCER, Treasurer of the

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
 70 FIFTH AVENUE, NEW YORK CITY

THIS ADVERTISEMENT IS PAID FOR IN PART BY THE ANTI-LYNCHING CRUSADERS.

Anti-Lynching Crusaders, Advertisement, *The Shame of America*,
N.Y. TIMES, Nov. 23, 1922, at 19.

84. *Represen. Dyer Concludes Anti-Lynch Tour Arranged by Assn.*, BUFF. AM., June 14, 1923, 1; see also *Anti-Lynching Measure Debated in Open Forum*, BUFF. AM., Nov. 15, 1923, at 1.
85. See *Nation Roused to Lynching Danger*, N.Y. AMSTERDAM NEWS, Jan. 3, 1923, at 7 (itemizing newspapers in which the NAACP advertised and summing associated costs).
86. See, e.g., Ernest Harvier, *Political Effect of the Dyer Bill*, N.Y. TIMES, July 9, 1922, at 33; *Democrats to Oppose Dyer Antilynching Bill*, WASH. POST, Jan. 22, 1922, at 2.
87. See, e.g., Editorial, *A National Question*, BEATRICE DAILY EXPRESS (Neb.), Mar. 9, 1922, at 6; Editorial, *The Anti-Lynching Law*, GREAT FALLS TRIB. (Mont.), Jan. 3, 1922, at 4.

Black readers eagerly consumed and extended defenses of the Dyer Bill's constitutionality. Newspapers serving predominantly Black readerships diligently covered the bill's progress and dove into greater doctrinal detail. The *Richmond Planet* published Storey's brief in weekly installments.⁸⁸ James Weldon Johnson shared large excerpts from Stockton's brief in his regular *New York Age* column at the request of readers, who had "from time to time asked that some light and information" be given on the constitutional questions "for the purpose of having facts which would enable them to understand and meet arguments regarding the constitutionality of the Bill."⁸⁹ Johnson stressed that "[t]he brief is, of course, written for lawyers but we feel sure that if the laymen will not bother his head about the legal citations he will find sufficient in the body of the brief to interest and enlighten him."⁹⁰ Catering to laypersons, newspapers in Pittsburgh and Wichita translated the legal arguments into "everyday style" and criticized the senators who, though "learned in [c]onstitutional law," had not acted.⁹¹ The debates about the meaning of the Fourteenth Amendment grew so ubiquitous that *The Messenger* declared the Constitution "a fetish" among Americans.⁹²

In sum, activists, executive officials, legislators, and laypersons alike exchanged theories in support of the Dyer Bill's constitutionality. In his study of how social movements achieve constitutional change, Jack Balkin has posited that, given sufficient political clout, advocates can gradually transform

88. See *Hon. Moorfield Storey's Brief in Favor of the Dyer Bill*, RICH. PLANET (Va.), June 10, 1922, at 8; *Hon. Moorfield Storey's Great Brief in Support of the Dyer Bill*, RICH. PLANET (Va.), June 17, 1922, at 2; *Hon. Moorefield Storey's Great Brief in Support of Dyer Anti-Lynching Bill*, RICH. PLANET (Va.), June 24, 1922, at 2; *Hon. Moorefield Storey's Great Brief in Support of Dyer Anti-Lynching Bill*, RICH. PLANET (Va.), July 1, 1922, at 2.

89. Johnson, *supra* note 58; see also *Dyer Anti-Lynching Bill on List for Passage Before Adjournment*, BUFF. AM., Sept. 7, 1922, at 1 (outlining the arguments in favor of the bill's constitutionality); Editorial, *Federal Jurisdiction*, CHI. DEFENDER, Mar. 4, 1922, at 12 (outlining the areas of "consensus" and dispute among constitutional lawyers on the validity of the bill).

90. Johnson, *supra* note 58.

91. "Anti-Lynching Bill Unconstitutional"—*Borah*, NEGRO STAR (Wichita, Kan.), June 9, 1922, at 1 (quoting a piece in the *Pittsburgh Leader* by Alexander P. Moore). In order to compel the senators to action, many newspapers called on their readerships to contact their representatives and on organizations to send delegates to lobby in Washington, D.C. See, e.g., Editorial, *Constitutional Quibbling*, N.Y. AGE, June 3, 1922, at 4; Johnson, *supra* note 24.

92. Editorial, *The Dyer Anti-Lynching Bill*, 4 MESSENGER 327 (1922). This article is a rarity both because Chandler Owen and A. Philip Randolph's radical literary magazine, *The Messenger*, infrequently weighed in on the Dyer Bill debates and because it expresses immovable pessimism in the Constitution's capacity for realizing racial equality. See generally Sondra Kathryn Wilson, *Introduction* to *THE MESSENGER READER: STORIES, POETRY, AND ESSAYS FROM THE MESSENGER MAGAZINE*, at xix (Sondra Kathryn Wilson ed., 2000).

an argument from “off-the-wall” to “natural and completely obvious.”⁹³ The doctrine of “state negativity” did not follow this same linear path. The theory was relatively more “natural” and “obvious” to the Reconstruction Congress that targeted the Klan, but it had withered under the pressure of the Waite Court’s jurisprudence—not ludicrous, but not likely either. The debate over the Dyer Bill offered aspiring constitutional changemakers a new opportunity to revive the doctrine of “state negativity.”

II. Fortifying the “Solid South”

On December 2, 1922, the Republicans surrendered to the Democratic filibuster in the Senate, and the Dyer Bill died a procedural death.⁹⁴ Despite the depth of debate on the Dyer Bill’s constitutionality, the Senate never actually voted on the bill’s merits. As a contributor to the NAACP’s magazine, *The Crisis*, lamented, the bill “was not killed by a majority vote but was lynched by a filibuster.”⁹⁵ Southern members of Congress certainly continued to invoke the rape-myth rationale for lynching—Mississippi Representative Thomas Sisson infamously declared on the House floor that mob violence would not stop until “black rascals keep their hands off the throats of white women”⁹⁶—but many saw the value in turning away from hyperbole and other inflammatory tactics. In the Senate, the Southern Democratic bloc honed its use of the filibuster, proving that the new 1917 cloture rule could do little to restore debate in the face of a determined minority.⁹⁷ In a manner reminiscent of Congress’s “gag rule” on slavery in the 1830s and 1840s, which precluded action on all petitions pertaining to slavery without hearing them,⁹⁸ the Senate refused to confront this reincarnation of racial oppression.

Subpart A takes up the revival of the filibuster in Congress, and Subpart B then turns to external responses to the Dyer Bill. Beyond Washington, in the pages of Southern newspapers that catered to white readerships, legislators and

93. See Balkin, *supra* note 39, at 52.

94. *Filibuster Kills Anti-Lynching Bill*, *supra* note 32.

95. C. H. Tobias, Letter to the Editor, 25 *CRISIS* 155, 155 (1923).

96. SULLIVAN, *supra* note 13, at 106; see also Editorial, *ABBEVILLE HERALD* (Ala.), Sept. 21, 1922, at 4 (quoting similarly inflammatory statements of Georgia Senator Tom Watson published in the *Columbia Sentinel*).

97. See *Filibuster and Cloture*, U.S. SENATE, <https://perma.cc/KHW9-JEC4> (archived Dec. 14, 2020); see also *Cloture Motions*, U.S. SENATE, <https://perma.cc/TU72-74JR> (archived Dec. 14, 2020).

98. On the history of the “gag rule,” see James M. McPherson, *The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839-1842*, 48 *J. NEGRO HIST.* 177, 177 (1963); and Scott R. Meinke, *Slavery, Partisanship, and Procedure in the U.S. House: The Gag Rule, 1836-1845*, 32 *LEGIS. STUD. Q.* 33, 35-38 (2007).

their constituents voiced constitutional objections to the Dyer Bill primarily sounding in states' rights. Notably, these discussions went beyond the predictable grumbles about Northern aggression and engaged with the question of "state negativity." To prevent federal intervention, Southerners argued that their states should take proactive measures to prevent lynching. The sincerity of these calls to action is questionable, but they indicate a shared belief that a state's woeful neglect could meet the standard for state action. In all, defeating the Dyer Bill proved a valuable rehearsal for civil rights opponents' strategy in the decades to come.

A. Honing the Filibuster

The stagnant 67th Congress (1921-1923) earned the epithet the "Do-Nothing Congress."⁹⁹ To accomplish so little, Senators exploited a previously underused tactic: the filibuster. According to Catherine Fisk and Erwin Chemerinsky, the tactic had been largely ineffective until 1880, when politicians from both sides of the aisle began to use filibusters successfully to delay or amend disfavored legislation.¹⁰⁰ After Progressives blocked a World War I measure through a filibuster, the Senate moved to adopt a new policy of "cloture" in 1917, which originally enabled a two-thirds vote to close debate and overcome the antics of a determined minority.¹⁰¹ Fisk and Chemerinsky argue that the filibuster later became a mainstay of civil rights battles between the late 1920s and late 1960s, but they do not identify a catalyst for that association or address the robust use of the filibuster in the early 1920s.¹⁰² This Subpart fills that gap. The Dyer Bill standoff became a proving ground for the filibuster's effectiveness in thwarting civil rights legislation and was an early indication that the new cloture policy would change little.¹⁰³

In defeating the Dyer Bill, Southern Democrats sharpened the filibuster as a weapon. For the first time, noted the *Washington Post*, "filibusterers frankly

99. William Starr Myers, *The "Do-Nothing" Congress*, 216 N. AM. REV. 445, 445 (1922).

100. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 195-96 (1997). See generally FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* (1940) (surveying the early history of the filibuster).

101. Fisk & Chemerinsky, *supra* note 100, at 196-98.

102. *Id.* at 199-209. The authors briefly referred to lynching among early civil rights issues, like the poll tax, that prompted a Senate filibuster, but they do not delve into the details. See *id.* at 199 & n.99.

103. Fisk and Chemerinsky find that the Senate did not vote cloture once in the period from the late 1920s to late 1960s that they study. "This was in part because Southern senators refused to vote cloture on any issue, in order to be able to take a 'principled' stand against cloture on civil rights issues, and in part because the conservative minority restrained its use of the filibuster for any issue except civil rights." *Id.* at 199.

avowed that they were filibustering.”¹⁰⁴ The *New York Times* explained the novelty of the Dyer Bill blockade: “Never before has the Senate so openly advertised the impotence to which it is reduced by its antiquated rules of procedure.”¹⁰⁵ Small-town newspapers shared the *Post’s* and *Times’s* surprise at the filibusterers’ method. A paper in Sumter, South Carolina, chronicled what Senate attachés had dubbed “the most scientifically conducted filibuster.”¹⁰⁶ The filibuster was both scientific and highly theatrical. Southern senators’ preferred tactic was to draw out the acceptance of the previous day’s journal, stretching a process that typically took “about 30 seconds” into a four-hour ordeal.¹⁰⁷ After the journal routine, senators turned to reading an “imposing array of books, pamphlets, literature and newspapers,” sometimes droning on for up to eight hours.¹⁰⁸ In papers both Northern and Southern, the public expressed a common shock that a single procedural rule could “prevent a legislative body from legislating.”¹⁰⁹

In the years to come, the filibuster would continue both to obstruct Congress from legislating and to captivate Americans’ attention. Southern Democrats filibustered again in the 1930s to block the Costigan–Wagner Anti-Lynching Bill¹¹⁰ even though its sponsors were members of the same party.¹¹¹ With Democrats dead set on passing New Deal programs, even Republicans’ mere mention of filibuster could kill an anti-lynching bill.¹¹² The drama of the filibuster climaxed in 1964, when Roger Mudd of CBS News broadcast the seventy-four-day blockade against the Civil Rights Act live from the steps of

104. SULLIVAN, *supra* note 13, at 108-09.

105. Editorial, *The Senate’s Surrender*, N.Y. TIMES, Dec. 4, 1922, at 16.

106. See *Determined Fight on Dyer Bill*, WATCHMAN & SOUTHRON (Sumter, S.C.), Dec. 2, 1922, at 4.

107. *Id.*

108. See *Blocked by Determined Democrat Filibuster Republicans Abandon Anti-Lynching Bill: Long Filibuster on Dyer Measure Achieves Object*, ATLANTA CONST., Dec. 3, 1922, at 1.

109. SULLIVAN, *supra* note 13, at 109 (quoting the *Indianapolis News* as reprinted in the *Washington Post*).

110. S. 1978, 73d Cong. (1934); see also *infra* note 227 and accompanying text.

111. See *Anti-Lynching Bill Engages Senate in Lengthy Filibuster*, VASSAR MISCELLANY NEWS, May 1, 1935, at 1; see also ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 155-56 (1990) (discussing the filibuster and Georgia Senator Richard Russell’s particularly obstinate tactics).

112. Determined to pass New Deal legislation, Democrats who might have been sympathetic to anti-lynching legislation sometimes opted to avoid any threat of filibuster. See Robert Siegel, *Anti-Lynching Law in U.S. History*, NPR: ALL THINGS CONSIDERED (June 13, 2005, 12:00 AM ET), <https://perma.cc/3SVU-7XW2> (interviewing Professor Harvard Sitkoff).

the Capitol.¹¹³ But the opening act was back in 1922 with the defeat of the Dyer Bill, seventeen years before “Mr. Smith” went to Washington.¹¹⁴

B. States’ Rights and Responsibilities

While Southern senators stalled in Washington, the public debated the proposal. Across the South and the Great Plains, newspapers viewed the Dyer Bill’s threat to states’ rights as a constitutional crisis.¹¹⁵ The *Galveston News* considered both the Dyer Bill and lynch mobs serious threats to the Constitution and advocated a state-level solution. A Topeka paper appraised the Galveston strategy as not about “local bias” and “local ‘patriotism’” but rather about “high minded” commitment to the foundational principle of federalism.¹¹⁶ The *Miami Herald* argued that the Dyer Bill would instigate a slippery slope toward a second Reconstruction, in which the federal government would completely usurp states’ police powers and intervene in everything from homicides to robberies and reckless driving.¹¹⁷ Those who painted the Dyer Bill as the latest example of swelling federal power had to confront the hypocrisy of Southern support for the Eighteenth Amendment, which many Southern states had enthusiastically supported.¹¹⁸ As the *Atlanta Constitution* reported, Georgia Democrat W. D. Upshaw drew a delicate distinction between Prohibition and the Dyer Bill:

Liquor is a commodity—a devilish sort of commodity—which, as an article of commerce, became a national evil. And that national evil required a national remedy.

But lynching is not a ‘commodity’—it is a local crime which can only be cured by a wholesome, individual conscience and a cumulative expression of that conscience.¹¹⁹

113. See Fisk & Chemerinsky, *supra* note 100, at 199-200.

114. See MR. SMITH GOES TO WASHINGTON (Frank Capra dir., 1939).

115. For examples of Missourians’ concern, see Editorial, *Congress Outside the Constitution*, DEXTER STATESMAN (Mo.), Jan. 6, 1922, at 2; and Editorial, *Dyer’s Anti-Lynching Bill*, ST. LOUIS POST-DISPATCH, Nov. 4, 1921, at 28.

116. See Editorial, *How to Avoid the Dyer Anti-Lynching Bill*, TOPEKA DAILY CAP. (Kan.), July 11, 1922, at 4 (citing the *Galveston News*).

117. See Editorial, *Where It All Leads*, MIA. HERALD, Dec. 31, 1921, at 4A.

118. See Editorial, *The Inconsistent South*, DALL. EXPRESS, Dec. 16, 1922, at 4 (pointing out the hypocrisy of supporting the Eighteenth Amendment but opposing anti-lynching legislation on states’ rights grounds); *The Dyer Anti-Lynching Bill*, *supra* note 92, at 327 (calling out the states’ rights argument, in light of recent suffrage and prohibition amendments, as “nothing but a fiction”).

119. See *Georgians Attack Anti-Lynch Bill in Ringing Terms*, ATLANTA CONST., Jan. 22, 1922, at 1. Upshaw’s invocation of “commodity” and “commerce” foreshadow the 1964 Civil Rights Acts’ grounding in the Commerce Clause. See *infra* note 236.

To Upshaw, lynching and liquor were both vices, but they merited two very different types of interventions. Commentary on the recently ratified Nineteenth Amendment, which had granted women suffrage, was absent from the newspaper discourse about the Dyer Bill, but the amendment must have lurked in the background of Southerners' general unease with steadily expanding federal power.

If Southerners were going to classify lynching as a "local crime," then they needed to at least gesture toward a local solution. The forward-thinking *Atlanta Constitution* led the way in urging Southern states to take action, both as a moral obligation and as a preemptive measure against "federal usurpation."¹²⁰ The paper warned that "the time is coming when the states and local communities themselves must put an end to the anarchistic and indefensible practice of lynching."¹²¹ If states and communities failed to take their own initiative, then federal intervention would be unavoidable and even deserved. The *Constitution* stressed that states had been "amply warned, time and time again," of what would result if they fell short of "their duty" and would "have no one to blame but themselves."¹²² The *Asheville Times* echoed the Atlantan arguments and gave readers a reminder: "We cannot hope that filibusters will always be effective in defeating the enactment of a federal anti-lynching law. There is only one safe way to forestall such action and that way is to be found in the stern handling of lynching parties by southern courts."¹²³ Members of the Mississippi State Bar Association similarly emphasized the need to preempt federal intervention. In his 1923 annual address, J. B. Holden, the president of the association and a justice of the state's supreme court, condemned both the practice of lynching and the "cause . . . of our Northern brethren for a Federal law to prevent lynching."¹²⁴ He asked: "[I]s it not time that the members of the legal profession, especially in the Southern States, make a radical effort toward

120. See Editorial, *Helping the Dyer Bill*, ATLANTA CONST., May 20, 1922, at 6.

121. *Id.*

122. Editorial, *The Whirlwind!*, ATLANTA CONST., Oct. 22, 1921, at 8; see also M. Ashby Jones, Opinion, *Text and Pretext: State Rights Plus State Responsibility*, ATLANTA CONST., Feb. 5, 1922, at 2F; M. Ashby Jones, Opinion, *Text and Pretext: Anglo-Saxon Supremacy*, ATLANTA CONST., June 4, 1922, at 2F; R. O. McCord, Letter to the Editor, *The Best Way Around Dangers of the Dyer Bill*, ATLANTA CONST., Dec. 28, 1921, at 6 ("The Dyer bill now before congress presents to the south two horns of a dilemma, one of which must be chosen quickly. We must submit to the yoke of federal interference in the administration of our laws as provided for in the Dyer bill, or we must bring about speedy corrective measures in our domestic policy so as to effect a regime of law and order.").

123. *States Must End Lynching*, J. & TRIB. (Knoxville, Tenn.), Jan. 6, 1923, at 6 (quoting the *Asheville Times*); see also *Press Comment on Dyer Bill*, OKLA. LEADER, Jan. 15, 1923, at 8 (quoting various state newspapers' statements to similar effect).

124. J. B. Holden, President, Miss. State Bar Ass'n, Address at Biloxi, Mississippi (May 2, 1923), in MISSISSIPPI AND THE MOB 39, 40 (J. N. Flowers ed., rev. ed. 1926).

the end that all persons charged with crime be given a fair trial under due process of law, and thus, if successful, remove the cause?”¹²⁵ A few exceptional municipalities, including John Calhoun’s hometown of Abbeville, South Carolina, deemed themselves ill-equipped to make such a radical effort and considered calling in federal aid.¹²⁶

But most of these calls to action were empty rhetoric. Several states already had anti-lynching laws on the books but, well into the 1930s, continued to fail to enforce them.¹²⁷ What the discourse does show, though, is a commonplace belief that Congress’s enforcement powers could lawfully expand if states remained negligent. Thus, across the North and South, the Dyer Bill debates reveal a widespread recognition that the Waite Court’s state-action jurisprudence did not foreclose the constitutionality of expansive anti-lynching legislation.

III. Black Americans and the GOP in the 1920s

Congress did not rise to the occasion. On the evening of December 2, 1922, Massachusetts Senator Henry Cabot Lodge announced the Republican caucus’s concession. Rather than “giv[e] up the whole session to a protracted filibuster,” the Republicans chose to abandon the bill and return to “regular business.”¹²⁸ As *Atlanta Constitution* columnist M. Ashby Jones reported: “The lynching bill was lynched—the force bill was destroyed by force. The Dyer bill died a violent death, and there have been no mourners among either the democrats or the republicans.”¹²⁹ Why didn’t the Republicans grieve the bill that they had

125. *Id.* At the American Bar Association’s 1906 annual meeting, a prominent Louisiana lawyer delivered a provocative speech arguing that the best way for states to confront “unwritten’ and ‘lawless laws’ such as lynching and dueling” was “no[t] [an] expansion of due process but rather something approaching summary justice to rival the spectacle of spectacle lynchings.” Norman W. Spaulding, *The Impersonation of Justice: Lynching, Dueling, and Wildcat Strikes in Nineteenth-Century America*, in THE ROUTLEDGE RESEARCH COMPANION TO LAW AND HUMANITIES IN NINETEENTH-CENTURY AMERICA 163, 169 (Nan Goodman & Simon Stern eds., 2017) (quoting Thomas J. Kernan).

126. See Chadbourn, *supra* note 16, at 75 (describing Abbeville’s 1916 “mass meeting”).

127. In a 1937 pamphlet that asked “Can the states stop lynching?” the NAACP answered a resounding “no.” See NAACP, CAN THE STATES STOP LYNCHING? 5 (1937), in Department of Justice Classified Subject Files on Civil Rights, 1914-1949 (on file with the National Archives), reprinted in ProQuest History Vault, Folder 101767-010-0377, <https://perma.cc/7VNS-F5MN>; see also Chadbourn, *supra* note 16, at 72-75 (cataloging states’ failed statutory efforts); R. Grann Lloyd, *The States’ Rights Myth and Southern Opposition to Federal Anti-Lynching Legislation*, 1 NEGRO EDUC. REV. 78, 88 (1950) (“[T]he States’ rights myth . . . has long been used as a cloak for States’ Wrongs.”).

128. *Filibuster Kills Anti-Lynching Bill*, *supra* note 32.

129. M. Ashby Jones, Opinion, *Text and Pretext: The Lynching of the Dyer Bill*, ATLANTA CONST., Dec. 10, 1922, at 4F.

championed for years? Perhaps they were simply eager to address other pending matters and appease other constituencies. The more cynical interpretation, explored in Subpart A, is that Republicans had been preparing for the Dyer Bill's death from the beginning. They quietly held qualms about the bill's constitutionality but kept it on life support only to placate Black voters. Republicans' eventual abandonment of the bill contributed to Black voters' break from the GOP in the years to follow. Subpart B then turns to an intraracial controversy between civil rights leaders and two influential Black Republicans who professed party loyalty amid this moment of rupture.

A. Shipwreck

With racial violence spreading throughout the nation and lily-whitism within the party, Republicans had an increasingly fragile relationship with their Black constituents.¹³⁰ The traditional narrative locates Black voters' split from the GOP in the 1930s, but the Dyer Bill drama helps to reveal fractures developing at least a decade earlier.¹³¹ The story is not so simple as "Farewell, Lincoln. Hello, Roosevelt."¹³² Years before New Deal policies increasingly drew them toward the Democratic Party, Black voters were questioning the wisdom of their Republican loyalty and the merits of any partisan allegiance. The Dyer Bill history is an important chapter in the sustained debate on Black political allegiance preceding the 1930s' moment of widespread defection.

Republican representatives' commitment to Black voters ranged in its degree of authenticity. Black Americans still composed only a "tiny fraction" of the national electorate in the 1920s, as the majority remained in the former Confederacy, where literacy tests, poll taxes, and racial violence still reigned.¹³³ Yet millions were joining the Great Migration to Northern and Midwestern cities, where they could exercise the franchise and consolidate their political clout. In urban centers like New York, Chicago, and Leonidas

130. For a discussion of lily-whitism, see notes 136-51 and accompanying text below.

131. See NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* 9-12, 34-35 (1983) (acknowledging some early-twentieth-century conflict but focusing on the 1930s); see also JOSHUA D. FARRINGTON, *BLACK REPUBLICANS AND THE TRANSFORMATION OF THE GOP* 3-5 (2016) (discussing the 1930s through the 1970s). Black Americans' disillusionment with the Republican Party had been increasing steadily. Du Bois, for example, had endorsed Woodrow Wilson in 1912. W. E. B. Dubois, *I Won't Vote*, *NATION*, Oct. 20, 1956, at 324, 324. But the Dyer Bill marked a pivotal early fracture between race and party.

132. The phrase is my own but plays on the title of Weiss's *Farewell to the Party of Lincoln*, cited in note 131 above.

133. WEISS, *supra* note 131, at 21. Even by 1940, less than 5% of Black voters in the former Confederacy were even registered to vote. *Id.* The Supreme Court had only recently ruled grandfather clauses unconstitutional in *Guinn v. United States*, 238 U.S. 347 (1915).

Dyer's own St. Louis, support for anti-lynching legislation was an important means for politicians to cater to their new constituents.¹³⁴ Often, however, Republicans took Black voters' loyalty for granted, banking on historical allegiances to carry the day. By 1932, the Republican National Committee platform had replaced specific commitments to anti-lynching legislation with broad platitudes about the past, celebrating the seventy-year "tradition" of the GOP being "the friend of the American Negro."¹³⁵

Republicans have long relied on the attractive legacy of Lincoln, liberation, and Radical Reconstruction to mask a dark note in their party's history: the lily-white push to expel Black Americans from positions of influence. Despite the strong association between the Republican Party and abolitionism, its record on race was fraught from the beginning.¹³⁶ Texas Republican Norris Wright Cuney coined the term "lily whites" around 1888 to refer to the members of his party who were forming all-white clubs in order to control county conventions and thus send their own delegates to state and national conventions.¹³⁷ Lily-whitism continually plagued the party throughout the late nineteenth and early twentieth centuries,¹³⁸ but it flared up especially among Southern white Republicans during the 1920s. In the Dyer Bill's wake, historical tradition wore thin.

The ordeals of two Black Republican leaders, Perry Howard and Henry Lincoln Johnson, illuminate the particular strength of lily-whitism in the years

134. See, e.g., Editorial, *Dyer Anti-Lynching Bill Passes House*, 4 MESSENGER 347 (1922) (anticipating the influence of the Great Migration on midterm elections). See generally JAMES R. GROSSMAN, *LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION* (1989) (surveying the political and social impact of Black migrants on Chicago).

135. Compare, e.g., *Republican Party Platform of 1924*, AM. PRESIDENCY PROJECT (June 10, 1924), <https://perma.cc/L8PZ-42RK> ("We urge the congress to enact at the earliest possible date a federal anti-lynching law . . ."), with *Republican Party Platform of 1932*, AM. PRESIDENCY PROJECT (June 14, 1932), <https://perma.cc/GU92-MT4B> ("For seventy years the Republican Party has been the friend of the American Negro.").

136. For instance, historian James Oakes credits the Republican Party with leading a concerted military and legislative effort to undo slavery but also acknowledges that abolition and racial inclusion were not one and the same. Lincoln—neither a radical nor a reluctant emancipator—did not always treat Black abolitionists respectfully, and he seriously contemplated several proposals for the resettlement of freed people in Africa. See JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865*, at vx-xxii, 278-80 (2013).

137. Paul Douglas Casdorff, *Norris Wright Cuney and Texas Republican Politics, 1883-1896*, 68 SW. HIST. Q. 455, 457 (1965).

138. See RICHARD B. SHERMAN, *THE REPUBLICAN PARTY AND BLACK AMERICA FROM MCKINLEY TO HOOVER, 1896-1933*, at 152-53 (1973); WALTON ET AL., *supra* note 14, at 157-60. See generally LINDA GORDON, *THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION* (2017) (studying the Klan's resurgence and massive influence in the 1920s).

of the Dyer Bill. Howard, an attorney from Mississippi, was a former delegate to the Republican National Convention.¹³⁹ The Georgian Johnson, also an attorney and convention delegate, had served as President Taft's recorder of deeds—a patronage position often reserved for Black Americans since Frederick Douglass held it in the 1880s.¹⁴⁰ At the 1920 convention, Southern white Republicans complained about Johnson's presence and schemed to snatch his seat by 1922, but his remaining allies intervened in the nick of time.¹⁴¹ The following year, the effort to expel Black delegates grew even more explicit, and the white Republican leaders met to discuss a reorganization plan for the South that would minimize Black involvement.¹⁴² But Johnson would not go down without a fight. As the Committee's March meeting approached, he declared, "with my shield, buckler and sword I shall be there, ready for a battle royal and thrice armed because our cause is just."¹⁴³ Johnson's defense failed—the Committee adopted the reorganization plan in June 1921¹⁴⁴—but President Harding took note of his and Howard's vulnerability. Harding appointed Howard as special assistant to Attorney General Harry M. Daugherty, making him the highest paid Black federal employee.¹⁴⁵ Harding also nominated Johnson to serve again as recorder of deeds, but the Senate blocked his confirmation.¹⁴⁶ Wary of their precarious position within the party, Johnson and Howard offered only tepid support for anti-lynching legislation.¹⁴⁷ To capitalize on what remained of their clout, they officially joined forces and opened up their own general-practice law firm in the fall of 1922, just on the eve of the midterm elections and the Dyer Bill's defeat.¹⁴⁸

When it came to the Dyer Bill, Republicans in Congress expended little effort to conceal their political opportunism. The *New York Times* chastised: "It

139. HANES WALTON, JR., *BLACK REPUBLICANS: THE POLITICS OF BLACK AND TANS* 170 tbl.1 (1975) (listing Black delegates to the Republican National Conventions between 1868 and 1944). For Howard's biography, see generally Neil R. McMillen, *Perry W. Howard: Boss of Black-and-Tan Republicanism in Mississippi, 1924-1960*, 48 J.S. HIST. 205 (1982).

140. SHERMAN, *supra* note 138, at 93, 152-53. Frederick Douglas broke barriers and in 1881 became the first Black person to serve as the recorder of deeds. See DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 619 (2018); Recorder of Deeds Building (Exterior and Interior), Historic Landmark Case No. 11-19 (D.C. Hist. Preservation Rev. Bd. Dec. 19, 2019), <https://perma.cc/VFB8-ACNW>.

141. SHERMAN, *supra* note 138, at 152.

142. *See id.* at 152-53.

143. *H. L. Johnson to Make Bold Fight for Race*, NORFOLK J. & GUIDE (Va.), Mar. 5, 1921, at 1.

144. *See* SHERMAN, *supra* note 138, at 152-53.

145. FARRINGTON, *supra* note 131, at 14.

146. SHERMAN, *supra* note 138, at 153.

147. *See infra* Part III.B.

148. *See Lincoln Johnson and Perry Howard Combine*, CHI. DEFENDER, Oct. 14, 1922, at 1.

is doubtless true that the Republicans in the Senate were not sincerely and whole-heartedly in favor of the Anti-Lynching bill. . . . It was open to suspicion as a measure introduced mainly for partisan effect and election purposes.”¹⁴⁹ President Harding’s 1920 election had been a major victory for the GOP, and the party was eager to retain its upper hand in both houses of Congress come the 1922 midterms.¹⁵⁰ For committed reformers like Dyer, anti-lynching was a genuine policy priority, but many other Republicans regarded it as a means to an end. Some Republicans simply refused to play the game. Representative Ira Hersey of Maine declared: “We as a party owe the colored people nothing, and for one I refuse to be politically blackmailed.”¹⁵¹ Senator William Borah, an Idaho Republican who had chaired the Judiciary Committee that reported out the Dyer Bill,¹⁵² described the depth of the Republicans’ insincerity and half-heartedness in a private letter to W.E.B. Du Bois several years later.¹⁵³ He explained that all fourteen committeemen had believed the Dyer Bill to be unconstitutional but that most Republicans had decided to support it for political gain¹⁵⁴—whether that meant winning the support of Black voters, appealing to progressive white voters who considered Black civil rights as core to the party’s mission, or attracting more moderate white voters by exposing the Democratic Party’s moral bankruptcy. Despite the unanimity of opinion, the members nearly voted along party lines: eight in favor, six against.¹⁵⁵ Remarked Borah, “[i]t is one of the finest illustrations of how we played politics with the negro that I know of.”¹⁵⁶

149. Editorial, *The Senate’s Surrender*, *supra* note 105.

150. For a record of Republican gains and losses, including the transition from the 66th to 67th Congress, see *Party Division*, U.S. SENATE, <https://perma.cc/8BC6-P4D7> (archived Dec. 14, 2020); and *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES: HIST. ART & ARCHIVES, <https://perma.cc/VYR4-RF3L> (archived Dec. 14, 2020).

151. See 62 CONG. REC. 1,019 (1922).

152. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY 194-96* (2014) (discussing the Republican Party’s priorities in the mid-1920s).

153. Letter from William E. Borah, U.S. Sen., to W.E.B. Du Bois (July 17, 1926), <https://perma.cc/VSE4-PUPE>.

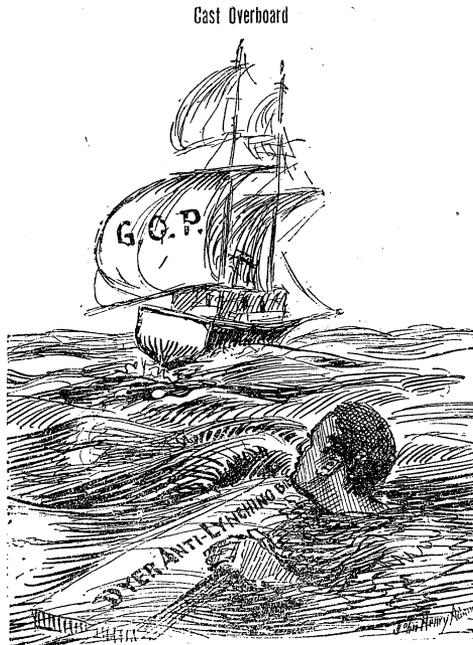
154. 62 CONG. REC. 1,019 (1922).

155. See ZANGRANDO, *supra* note 13, at 66. Borah, dissenting, was the only committee member who crossed party lines. *Id.*

156. Letter from William E. Borah, U.S. Sen., to W.E.B. Du Bois, *supra* note 153. Borah explained that one committee member believed the bill was probably unconstitutional but ought to go before the Supreme Court; the other thirteen believed it plainly unconstitutional. See *id.* Borah remained an antagonist to anti-lynching legislation. See, e.g., 83 CONG. REC. 812 (1938). When Borah made a bid for the Republican presidential nomination in 1936, the *New York Amsterdam News* had a scathing message for the senile senator:

footnote continued on next page

The timing was ideal: After some six months of letting the bill languish, the Committee passed it in the summer of 1922, just in time for the fall elections.¹⁵⁷ In November 1922, the Republicans lost a significant number of seats, but they retained majorities in both houses.¹⁵⁸ A Democratic wave was on the horizon, but the Republicans were able to keep it at bay, at least for the short term. Less than a month after the election, the Dyer Bill was “ignominiously withdrawn.”¹⁵⁹



John Henry Adams, Cartoon, *Cast Overboard*,
AFRO-AM. (Balt.), Dec. 15, 1922, at 9.

Walter White should have known it would be easy to bait Borah on lynching. Borah has spent years building up a reputation as an expert interpreter of the United States Constitution. He likes to feel that he is what they call the last word. What does he care about lynching if his position as an authority may be jeopardized? They may murder a thousand Negroes, but future generations must declaim: “Borah knew the Constitution.”

Editorial, *Senile Borah*, N.Y. AMSTERDAM NEWS, Dec. 7, 1935, at 8.

157. ZANGRANDO, *supra* note 13, at 66.

158. For more on how this loss in 1922 compared with that of other years, see Jonathan Hobratch, *10 Worst Senate/House Defeats of the Last 100 Years*, HUFFPOST (updated Jan. 5, 2015), <https://perma.cc/T3HW-5LDH>; and *Vital Statistics on Congress—Table 2-4: Losses by the President’s Party in Midterm Elections, 1862-2018*, BROOKINGS INST., <https://perma.cc/DH7M-V8EV> (archived Dec. 14, 2020).

159. NAACP, *The Looking Glass: The Shame of a Nation*, 25 CRISIS 132, 133 (1923).

In 1872, Frederick Douglass had famously declared that “[t]he Republican Party is the ship and all else is the sea.”¹⁶⁰ By December 1922, the Republican Party had cast Black voters overboard, leaving them and the defeated Dyer Bill to drown.¹⁶¹ In just the eight days following the Republicans’ surrender, another four Black Americans were lynched.¹⁶² James Weldon Johnson had warned that Black voters would consider the Dyer Bill’s defeat a “betrayal” by the Republicans¹⁶³ and any constitutional excuses “mere pretext.”¹⁶⁴ Some Black leaders advocated an immediate switch to the Democrats; most, wary of jumping from ship to ship, insisted on exploring political independence.¹⁶⁵ “For God’s sake,” exclaimed Du Bois, “give us the sea.”¹⁶⁶

Black leaders began calling upon their communities to break with the “Scared ‘Possums” of the Republican Party throughout the final stretch of the Dyer Bill debate and in the immediate aftermath of its defeat.¹⁶⁷ As the 1922 midterms neared, *The Crisis* urged readers to label each congressman who voted against the Dyer Bill as “your betrayer in the hour of trial and defeat him by every legitimate means when he asks your suffrage next fall.”¹⁶⁸ Any Black

160. RICHARDSON, *supra* note 152, at 105 (quoting Frederick Douglass); *see also* BOOKER T. WASHINGTON, FREDERICK DOUGLASS 286 (1907). The oft-repeated dictum oversimplifies Douglass’s complex views on the Republican Party. *See* Frederick Douglass, Oration Delivered at the Unveiling of the Freedmen’s Monument in Memory of Abraham Lincoln (Apr. 14, 1876) (reflecting on Douglass’s Republican forefather Lincoln’s complicated legacy as a reluctant, imperfect champion of Black freedom), *reprinted in* TEACHING AM. HIST., <https://perma.cc/WRA3-R92F> (archived Dec. 17, 2020); BLIGHT, *supra* note 140, at 274-76.

161. *The Crisis*’s March 1923 cover echoed the *Afro-American* cartoon in more abstract form, depicting what appears to be a murder of crows leading an unmanned sailboat toward an ominous horizon.

162. *Lays Four Lynchings to Senate*, N.Y. AMSTERDAM NEWS, Dec. 20, 1922, at 1.

163. Johnson, *supra* note 24.

164. NAACP, Special Report of the Secretary on Washington Trip 2 (Nov. 18, 1921) (quoting a November 1921 letter from James Weldon Johnson, NAACP Secretary, to members of the U.S. House of Representatives), *in* NAACP Papers, *supra* note 83, *reprinted in* ProQuest History Vault, Folder 001412-004-0126, <https://perma.cc/7NK8-GLH7>.

165. The defection to the Democrats varies by city. In Chicago, 11% of Black voters went Democrat in 1920, and only 10% did in 1924. By contrast, in New York’s Harlem, a mere 3% voted Democrat in 1920, and a whopping 28% did in 1924. This was due in large part to New York Democratic Governor Al Smith’s bid for president. *See* WEISS, *supra* note 131, at 10-11.

166. SULLIVAN, *supra* note 13, at 110.

167. *See No Need for Negroes to Vote Republican Ticket Any Longer Says N.A.A.C.P. Secretary*, AFRO-AM. (Balt.), Dec. 15, 1922, at 1 (quoting James Weldon Johnson).

168. NAACP, *Early Vote Expected on Dyer Bill*, 23 CRISIS 167, 167 (1922); *see also* Editorial, *Making a Mess of It*, AFRO-AM. (Balt.), July 14, 1922, at 7 (“So far as the *Afro-American* is concerned, no Republican candidate for national office need expect support until the party carries out its pledge to put anti-lynching legislation on the statute books.” (emphasis omitted)).

voter who remained loyal to the GOP was a “gullible fool.”¹⁶⁹ After the midterms, when Republicans lost several seats, civil rights organizations celebrated Black voters’ show of “political independence.”¹⁷⁰ At a November 10 mass meeting in Brooklyn, Alice Dunbar Nelson, a leader of the all-female Anti-Lynching Crusaders, declared that the elections had helped “to educate our people to political independence and stimulate their race pride.”¹⁷¹ James Weldon Johnson reiterated that point: “[E]ven if [the Dyer] bill should fail, our united fight has revealed to us the power we possess. The negro is finally awakened to his own strength.”¹⁷² Regardless of the ultimate outcome, the Dyer Bill battle had promoted voting by issue, not by party. In the wake of the fateful December defeat, Johnson made his declaration of independence even more explicit: “The fate of the Dyer bill, coming as a culmination of a series of disappointments under the present administration, completely rids the Negro of the old idea that he must now, henceforth and forevermore vote the Republican ticket merely for historic reasons.”¹⁷³ At its 1926 national convention, the NAACP resolved that “[o]ur political salvation and our social survival lie in our absolute independence of party allegiance in politics.”¹⁷⁴ By 1928, Neval Thomas, president of the NAACP’s D.C. chapter, had declared the “real Republican Party” officially “DEAD.”¹⁷⁵

The Dyer Bill’s defeat did not summarily kill Black Americans’ willingness to vote for the Republican Party, but the GOP has since made minimal effort or progress to regain the solid support of Black voters.¹⁷⁶ The Dyer Bill shipwreck serves as a cautionary tale for any political party that takes Black

169. See W.E.B. Du Bois, Opinion, *The Dyer Bill in the Senate*, 23 CRISIS 248, 248 (1922).

170. See, e.g., *Mass Meeting at Academy to Protest Lynching*, *supra* note 83.

171. *Id.*

172. *Id.*

173. James Weldon Johnson, *James Weldon Johnson Tells of Republican Abandonment of the Dyer Anti-Lynching Bill on Dec. 4*, BUFF. AM., Dec. 14, 1922, at 1.

174. COMM. ON HOUSE ADMIN., U.S. HOUSE OF REPRESENTATIVES, BLACK AMERICANS IN CONGRESS, 1870-2007, at 183 (2008), <https://perma.cc/N7YK-X6L2>.

175. Neval Thomas, *The Republican Party Is Dead*, AFRO-AM. (Balt.), Sept. 22, 1928, at 2. Nancy Joan Weiss’s study of Black voters’ break with the GOP begins with the 1928 election. See WEISS, *supra* note 131, at 10-12.

176. Instead, via the infamous “Southern Strategy,” the Republican Party has since the 1960s devoted significant energy and resources to courting white voters by capitalizing on their racial fears. For more on how the Southern Strategy pervaded electoral politics in the latter half of the twentieth century, see ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* (2019). One of the most notable counterexamples of Black Americans’ continued support for the GOP is Martin Luther King, Jr.’s fleeting but influential allegiance to then-Vice President Richard Nixon surrounding the Civil Rights Act of 1957. See DEAN J. KOTLOWSKI, *NIXON’S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY* 159-60 (2001).

loyalty for granted. As the 2020 South Carolina Democratic primary most recently demonstrated, Black voters are not a “monolith,” and even a relatively small regional stronghold can influence the national political landscape.¹⁷⁷ Relying on historical allegiance to sustain present fidelity is a hazardous strategy.

B. “The Treachery of Colored Men”

Black voters’ allegiance to the Republican Party faded alongside the Dyer Bill. Although lily-whitism played a significant role, there were Black Republicans high within the party ranks who faced some of the fiercest blame. In the words of Walter White, who replaced James Weldon Johnson as the organization’s executive secretary in 1929, the NAACP had met three enemies in the Dyer Bill battle: “the opposition of the Southerners, the apathy of Northern Senators, and the treachery of colored men.”¹⁷⁸ This Subpart offers the untold story of that treachery: the betrayals of Perry Howard and Henry Lincoln Johnson.¹⁷⁹ Johnson and Howard fashioned themselves as spokesmen for the Black community, but while Johnson may have held Frederick Douglass’s old job as recorder of deeds,¹⁸⁰ this was not the Republican Party of Douglass’s day.¹⁸¹ To retain what little remained of their clout, Johnson and Howard made a devilish deal that put party over race, proposing amendments to the Dyer Bill that would have significantly undercut its impact. They suffered a skewering from the NAACP and the Black press as a result. The two politicians’ battles with civil rights reformers and newspaper editorialists serve as a case study in the contested status of Black leadership in the period. With Douglass long dead and Booker T. Washington recently passed in 1915, men like Howard and Johnson vied with the likes of W.E.B. Du Bois and James Weldon Johnson to take the helm as representatives of their race.¹⁸²

177. See Kenya Evelyn, *What Super Tuesday Revealed About Black Voters: They’re Not a Monolith*, *GUARDIAN* (Mar. 5, 2020, 5:15 AM EST), <https://perma.cc/E2CW-UFG3>; see also *Black Voters in South Carolina Are Crucial for Democratic Candidates*, *CBS THIS MORNING* (Feb. 24, 2020, 7:57 AM), <https://perma.cc/H264-BL9K>.

178. FERRELL, *supra* note 29, at 280.

179. The only snapshot of this story appears in Robert Lewis Zangrando, *The Efforts of the National Association for the Advancement of Colored People to Secure Passage of a Federal Anti-Lynching Law, 1920-1940*, at 100-01, 139-42 (1963) (Ph.D. dissertation, University of Pennsylvania) (on file with the Stanford University Library).

180. See BLIGHT, *supra* note 140, at 619.

181. For a reflection on how the Republican Party has continued to change since Frederick Douglass’s era, see David W. Blight, *Opinion, Lincoln Would Not Recognize His Own Party*, *N.Y. TIMES* (July 23, 2019), <https://perma.cc/HK4M-VLQ3>.

182. Scholars have written at length on the infamous ideological battle between Du Bois and Washington. See, e.g., JACQUELINE M. MOORE, *BOOKER T. WASHINGTON, W.E.B. DU BOIS, AND THE STRUGGLE FOR RACIAL UPLIFT* (2003); KEVERN VERNEY, *THE ART OF THE*
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In November 1921, Johnson and Howard recommended to members of the Senate Judiciary Committee that the Dyer Bill be amended to apply only to cases in which lynching victims were taken directly from police custody.¹⁸³ Their proposal's explicit state-action hook soothed many constitutional qualms with the bill but drastically restricted its impact. Curiously, Howard and Johnson seem to have made no attempts either to alert Black organizations and the press to their plans or to cast their intervention as an attempt to salvage at least a shred of the doomed bill. They did not succeed in getting Congress to adopt their amendments, if that was ever their true goal, but they did curry the favor of white Republicans and the fury of the NAACP. When Weldon Johnson learned of Howard and Johnson's betrayal, he immediately traveled from New York to D.C. to thwart the adoption of the "emasculat[ing]" amendments.¹⁸⁴ The NAACP scrambled to contain the issue, focusing on damage control.¹⁸⁵

The press did not unearth the story until Johnson and Howard struck out again in the fall of 1922. On November 23, Howard sent a letter disparaging the NAACP and its leaders to Senator du Pont, a Delaware Republican, with copies to four other senators, Daugherty, and the chair of the Republican National Committee.¹⁸⁶ "I have blood in my eyes for the National Association for the Advancement of Colored People," he wrote.¹⁸⁷ He accused the NAACP of "Democratic" and "bolshevist" loyalties and of representing the "basest of ingrates."¹⁸⁸ When the NAACP discovered his letter and leaked it to the press,

POSSIBLE: BOOKER T. WASHINGTON AND BLACK LEADERSHIP IN THE UNITED STATES, 1881-1925 (2001); Mark Bauerlein, *Booker T. Washington and W.E.B. Du Bois: The Origins of a Bitter Intellectual Battle*, J. BLACKS HIGHER EDUC., Winter 2004/2005, at 106. On the history of Black leadership more generally, see KEVIN K. GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY (1996); and MANNING MARABLE, BLACK LEADERSHIP (1998). For a Black feminist perspective on a debate that too often centers men, see PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984); JOY JAMES, TRANSCENDING THE TALENTED TENTH: BLACK LEADERS AND AMERICAN INTELLECTUALS (1997); and Beverly Guy-Sheftall, *Black Feminist Studies: The Case of Anna Julia Cooper*, 43 AFR. AM. REV. 11 (2009).

183. NAACP, *supra* note 164, at 1.

184. *Id.*

185. *See id.*

186. Press Release, NAACP, Perry Howard Does His Bit to Defeat Dyer Anti-Lynching Bill 1-2 (Dec. 8, 1922), in NAACP Papers, *supra* note 83, reprinted in ProQuest History Vault, Folder 001529-015-0199, <https://perma.cc/5S8D-3CST>; *see also* NAACP, Memorandum on Perry Howard Meeting (n.d.), in NAACP Papers, *supra* note 83, reprinted in ProQuest History Vault, Folder 001529-015-0909, <https://perma.cc/WA9R-R4B2>.

187. Press Release, NAACP, *supra* note 186, at 1.

188. *Id.* at 1-2.

Howard doubled down in his attack on its “luxuriously salaried” leaders.¹⁸⁹ While James Weldon Johnson indulged in “quail on toast” and W.E.B. Du Bois “stroke[d] his Chesterf[i]eldian beard,” wrote Howard, Republicans were sacrificing themselves in a futile fight for the Dyer Bill.¹⁹⁰ Personally offended, James Weldon Johnson spoke out most strongly against Howard’s “selfish, traitorous, and slavish action,”¹⁹¹ and others quickly joined the chorus. The *New York Age* deemed the letter an “abandonment of the race.”¹⁹² “Traitors,” proclaimed the *Philadelphia Tribune*.¹⁹³ “Too long have we suffered on account of some petty, quasi man willing to kill every and anything so long as he may satisfy his personal vanity for power at the sacrifice of the race... Foes without we should fight but traitors within we must defeat.”¹⁹⁴ Some pointed out that Howard’s origins in Mississippi—the state with the worst record on lynching, with Henry Lincoln Johnson’s Georgia close behind—made his treachery all the more malicious.¹⁹⁵

As 1922 came to a close, many had grown weary of the constant coverage of the spat: The controversy was “providing a vicious aftermath to the legislative farce recently acted in the upper house of Congress,” complained the *Dallas Express*. “Too much Johnson and too big a dose of Perry Howard is the result.”¹⁹⁶ Even if the controversy was fading from front pages, the allegiance that the Black press had shown to the NAACP was of lasting significance. Howard could not fathom how Black newspapers, many of whose employees were “crying for bread,” could forgive the NAACP for spending thousands of

189. See *Perry Howard Hits Back at N.A.A.C.P.*, AFRO-AM. (Balt.), Dec. 29, 1922, at 9 (quoting Perry Howard). Howard was particularly furious that the papers had only published a portion of his letter, arguing that his comments were taken out of context. See *Perry Howard Helped Defeat Dyer Bill: Letter to Senator Du Pont, Mississippian Flays N.A.A.C.P., Du Bois and Others*, N.Y. AMSTERDAM NEWS, Dec. 13, 1922, at 4 (initially printing letter only in part); *Perry Howard Makes Stinging Answer to James Weldon Johnson: Denied He Advocated Bill’s Defeat*, N.Y. AMSTERDAM NEWS, Dec. 27, 1922, at 1 (later printing omitted portions of letter at Howard’s request).

190. *Perry Howard Hits Back at N.A.A.C.P.*, *supra* note 189.

191. Memorandum from James Weldon Johnson to W.E.B. Du Bois 2 (Dec. 8, 1922), in NAACP Papers, *supra* note 83, reprinted in ProQuest History Vault, Folder 001529-015-0199, <https://perma.cc/B7MH-F4RE>.

192. *Abandonment of Race Charged Because of Howard’s Letter*, N.Y. AGE, Jan. 20, 1923, at 2.

193. See *Expressed by Our Contemporaries: “TRAITORS,”* N.Y. AMSTERDAM NEWS, Dec. 20, 1922, at 11 (quoting the *Philadelphia Tribune*).

194. *Id.* (quoting the *Philadelphia Tribune*); see also *Perry Howard’s Monkey Wrench*, NORFOLK J. & GUIDE (Va.), Dec. 23, 1922, at 3.

195. See Editorial, *Letter Writing Extraordinary*, N.Y. AGE, Dec. 16, 1922, at 4; Douglas O. Linder, *Lynchings: By State and Race, 1882-1968*, FAMOUS TRIALS, <https://perma.cc/AT35-8WLR> (archived Dec. 18, 2020).

196. *Johnson and Howard Argue over Dyer Bill Failure*, *supra* note 61.

dollars on full-page ads in affluent “white dailies.”¹⁹⁷ But the Black press ultimately put the cause ahead of any quarrel and slandered Howard and Johnson for bringing down the Dyer Bill.

Perry Howard and Henry Lincoln Johnson risked the support of the Black community in order to retain party power, and their gamble had marginal returns. Despite the mounting lily-white opposition, Howard and Johnson retained their delegate seats at the 1924 Republican National Convention in Cleveland, but their inclusion came at the cost of humiliating Jim Crow treatment. Howard and Johnson stayed and ate in Black establishments on the other side of town, “enjoying perfectly equal rights at a distance of three miles,” as the *Baltimore Sun* bitingly reported.¹⁹⁸ In the convention hall, they were seated behind a screen of chicken wire.¹⁹⁹ Johnson died the following year,²⁰⁰ but Howard carried on with his controversially conservative positions. When Howard, himself a former porter, represented the Pullman Company against the Brotherhood of Sleeping Car Porters, A. Philip Randolph dubbed him “persona non grata among negroes.”²⁰¹ In the late 1920s, Howard was repeatedly indicted for selling federal jobs, but the charges were all eventually dismissed—ironically thanks to the intervention of Democrats who had benefited from his corruption.²⁰² Somehow, Howard, the “elusively surviving Mississippian,”²⁰³ held on and attended every Republican National Convention through his death in 1961.²⁰⁴ It is telling that Howard, whose treachery the Black community never forgave, was able to maintain a foothold in the GOP as it grew almost exclusively white toward midcentury. Dyer Bill divides and backroom deals rippled through racial and party politics for decades.

197. *Perry Howard Replies to Charges Made by N.A.A.C.P.*, N.Y. AGE, Jan. 6, 1923, at 2.

198. Raymond S. Tompkins, *Negroes Contribute First Color Story in Convention City*, BALTIMORE SUN, June 10, 1924, at 1.

199. DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963, at 241 (2000).

200. *H. L. Johnson Dies; A Republican Leader*, N.Y. TIMES, Sept. 11, 1925, at 23.

201. See McMillen, *supra* note 139, at 214 (quoting A. Philip Randolph).

202. *Id.* at 210-219; FARRINGTON, *supra* note 131, at 14. Joshua Farrington explains that Howard often awarded Democrats with jobs because there were simply so few Republicans in the South at the time, and the potential for profit overpowered partisan loyalty. See FARRINGTON, *supra* note 131, at 14. Although Johnson did not face the same controversy as Howard, he did leave his wife in financial distress after he passed. See GLORIA T. HULL, COLOR, SEX, AND POETRY: THREE WOMEN WRITERS OF THE HARLEM RENAISSANCE 164 (1987).

203. Editorial, *The G.O.P. Speaks*, 43 CRISIS 209, 209 (1936).

204. FARRINGTON, *supra* note 131, at 14; McMillen, *supra* note 139, at 205-06.

IV. *Moore v. Dempsey*: A De Facto Dyer Bill?

After diagnosing the several causes of the Dyer Bill's defeat, the NAACP turned to another tactic for defending the victims of mob violence: litigation. While James Weldon Johnson had spent years lobbying Congress, Walter White had been building a case for the Court.²⁰⁵ In the fall of 1919, a bloody race riot exploded in Phillips County, Arkansas, after two white men (one a sheriff) opened fire on a union meeting of Black sharecroppers. One white man and nearly 250 Black residents lost their lives in the ensuing conflict.²⁰⁶ A lynch mob assembled to avenge the loss of that singular white life. In the hopes of placating the mob, which had also targeted Walter White, the state prosecuted seventy-nine Black residents.²⁰⁷ With the mob surrounding the courthouse, the defendants did not get the opportunity to consult counsel or take the stand, and the entire trial lasted three-quarters of an hour, with only five minutes of jury deliberation.²⁰⁸ The trial judge sentenced twelve of the defendants to death.²⁰⁹ The Supreme Court denied review on direct appeal from the Arkansas Supreme Court but eventually granted certiorari on a petition for a writ of habeas corpus to stay the executions.²¹⁰ An aging Moorfield Storey, leading advocate for the Dyer Bill's constitutionality, declined to write the brief but agreed to argue the case.²¹¹

In *Moore v. Dempsey* (1923), the Court held that criminal convictions obtained through mob-dominated trials violated the Due Process Clause of the Fourteenth Amendment.²¹² Writing for the majority, Justice Holmes stressed that the simple fact of providing a trial did not satisfy due process if "the whole proceeding is a mask." He explained that the decision preserved the general presumption against federal intervention in state criminal cases but that due process merited federal habeas review when "counsel, jury and judge [a]re swept to the fatal end by an irresistible wave of public passion."²¹³

205. See KENNETH ROBERT JANKEN, *WHITE: THE BIOGRAPHY OF WALTER WHITE, MR. NAACP* 49-54 (2003).

206. *Id.* at 50; Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50-51 (2000).

207. JANKEN, *supra* note 205, at 51-52; Klarman, *supra* note 206, at 51.

208. *See Moore v. Dempsey*, 261 U.S. 86, 89 (1923).

209. Klarman, *supra* note 206, at 51.

210. *See FRANCIS, supra* note 38, at 153-55.

211. *Id.* at 156.

212. *See* 261 U.S. at 90-92.

213. *Id.* at 91. Justice Holmes had dissented in *Moore's* key precedent, *Frank v. Mangum*, 237 U.S. 309 (1915). In that case, the Court had declined to intervene in corrupt state criminal proceedings that led to the lynching of Jewish factory superintendent Leo Frank. *Id.* at 344-45; Klarman, *supra* note 206, at 58. The *Moore* Court did not clarify
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Scholars consider *Moore v. Dempsey* a watershed moment in courts' acknowledgement of how extralegal violence corrupts criminal justice. Michael Klarman traces the origins of modern criminal procedure back to *Moore*.²¹⁴ He argues that the eight years between *Frank v. Mangum* (1915)²¹⁵ and *Moore* marked an "incipient transformation of the extralegal context which rendered the Justices more sensitive."²¹⁶ Even if *Moore* had limited impact, as most lower courts proceeded to interpret it narrowly, the Supreme Court victory added to a series of cases that "provided a slim ray of hope" and the possibility of greater federal oversight.²¹⁷ Political scientist Megan Ming Francis agrees about the significance that Klarman attributes to *Moore* but challenges his sweeping references to extralegal context.²¹⁸ In Francis's account, the Justices' growing sensitivity was not mere magic but rather the direct result of the NAACP's increasingly skillful and vocal advocacy.²¹⁹ *Moore* proved a turning point in the NAACP's size and strategy, fostering donations and support for continued focus on litigation.²²⁰ Although she does not invoke the "de facto" label that Reva Siegel has used to describe the revolution of gender discrimination law that followed the Equal Rights Amendment's failure,²²¹ Francis reads *Moore* positively, as a substitute—or at least a consolation prize—in the wake of the Dyer Bill defeat.²²²

Seeking a triumphant epilogue to legislative failure, scholars have turned to *Moore* and spotlighted its influence on criminal procedure and civil rights strategy. Neither claim is incorrect, but they miss some of what *Moore* meant for the interpretation of the Fourteenth Amendment. The lively constitutional debates on state action and states' rights did not suddenly die with the Dyer Bill—they remained open questions awaiting answers from the Supreme Court. *Moore* presented the Court with an opportunity to signal its stance. In the facts of *Moore*, the Court found a clear-cut case of state action: Even if the trial court's complicity did not quite amount to "judicial murder," as the NAACP's

whether its decision expressly overturned *Frank* or was distinguishable on the basis of uniquely egregious facts. *Moore*, 261 U.S. at 90-91.

214. See Klarman, *supra* note 206, at 50 (identifying *Moore* as the first of four landmark interwar procedure decisions with Black defendants).

215. 237 U.S. 309; see also *supra* note 213.

216. See Klarman, *supra* note 206, at 76-77.

217. See *id.* at 78, 95.

218. See FRANCIS, *supra* note 38, at 6-7; see, e.g., Klarman, *supra* note 206, at 60.

219. See FRANCIS, *supra* note 38, at 130.

220. *Id.* at 126, 161-63.

221. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006).

222. See FRANCIS, *supra* note 38, at 183 (celebrating *Moore* as a turning point for the NAACP that helped fashion its "bold utopian vision of a new society").

brief contended,²²³ “counsel, jury and judge” had all been “swept to the fatal end.”²²⁴ Holmes continued: “[Since] the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.”²²⁵ Holmes impugned the state courts for their passivity, casting them as puppets who capitulated to the mob’s demands.²²⁶ He had no occasion to rule expressly on the “state negativity” theory, but his opinion suggested its viability. Holmes extended the Fourteenth Amendment’s reach and opened the door to a slightly more flexible interpretation of the state-action doctrine while maintaining the core presumption that federal intervention was legitimate only when state actors were somehow involved. In this way, Howard and Johnson’s Dyer Bill amendments had anticipated the Court’s position in *Moore*. The next anti-lynching bill to pass the House, the 1934 Costigan–Wagner Act, applied only to law enforcement and exempted private individuals.²²⁷ Following *Moore*’s emphasis on judicial involvement, Congress hesitated to confront private acts of racial terror, even if committed literally “on the courthouse lawn.”²²⁸

Moore nevertheless served as an important stepping stone toward the Supreme Court’s interpretation of state action in the decades to come.²²⁹ In

223. Brief for the Appellants at 32-33, *Moore v. Dempsey*, 261 U.S. 86 (1923) (No. 199).

224. *Moore*, 261 U.S. at 91.

225. *Id.*

226. *See id.* at 87-91.

227. *See* S. 1978, 73d Cong. (1934); ZANGRANDO, *supra* note 13, at 114-15; *see also* *Filibuster Ended as Senate Shelves Anti-Lynch Bill*, N.Y. TIMES, Feb. 22, 1938, at 1 (describing the death of the Costigan–Wagner bill by Senate filibuster).

228. For a meditation on the phrase and on racial terror’s reverberations in modern America, *see* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (2007).

229. As a habeas case, *Moore* also represents an essential precursor to *Brown v. Allen*, 344 U.S. 443 (1953), in which the various opinions cited *Moore* seven times. *Id.* at 464, 478 (majority opinion); 503 (opinion of Frankfurter, J.); 533 n.4, 540 (Jackson, J., concurring in the result); 549, 553-54 (Black, J., dissenting). In *Brown*—decided a year before the seminal school-desegregation case *Brown v. Board of Education*—the Court reviewed three federal circuit court decisions affirming the dismissal of habeas petitions filed by state prisoners. *Id.* at 446-47 (majority opinion). The petitioners were Black men whom North Carolina courts had convicted of either the rape of white women or the murder of white men. *See id.* at 466, 477, 482; *id.* at 548-49 (Black, J., dissenting). As in *Moore*, the petitioners alleged that their trials had been supremely corrupt: One involved a disproportionately white jury, and, in another, the judge admitted coerced confessions. *Id.* at 453 (majority opinion). The men’s habeas petitions followed unsuccessful appeals through the state courts, which had culminated in the Supreme Court denying certiorari. *Id.* at 484. Among the mess of opinions that the fractured Court issued, Justice Frankfurter alone authored two. First, writing for the majority, Justice

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Shelley v. Kraemer (1948), the landmark decision striking down racially restrictive housing covenants under the Fourteenth Amendment, the Court cited *Moore* for the uncontroversial proposition that the actions of the judiciary constitute state action.²³⁰ The *Shelley* Court then explained that although the covenants were created by private citizens, their enforcement depended upon “judicial action” that bore “the clear and unmistakable imprimatur of the State.”²³¹ The Court thus incrementally enlarged the scope of state action to an antiracist end, but it retained *Moore’s* emphasis on affirmative judicial involvement.²³² Together, *Moore* and *Shelley* set the stage for the Court’s resuscitation of § 1983 in *Monroe v. Pape* (1961).²³³ In his majority opinion, Justice Douglas assessed the original purpose of the Force Act of 1871, which the Court had undercut in *United States v. Harris* (1883),²³⁴ and concluded that Congress had intended to create a right in federal courts when states failed to uphold the Fourteenth Amendment’s protections “by reason of prejudice, passion, neglect, intolerance or otherwise.”²³⁵ A state agent at any level of state government, whether “act[ing] in accordance with their authority or misus[ing] it,” could satisfy the state-action requirement.²³⁶ Thus,

Frankfurter outlined the parameters of federal habeas jurisdiction, emphasizing the “uniqueness of habeas corpus in the procedural armory of our law,” *id.* at 512, but sternly cautioning federal district court judges against “do[ing] as they please” without “rational formulation,” *id.* at 496-97. In his dissenting opinion, Justice Frankfurter was less restrained, condemning the Court’s decision to “clos[e] both the federal and State courts to the petitioners” as a “jejune abstraction that habeas corpus cannot be used for an appeal.” *Id.* at 558 (Frankfurter, J., dissenting).

In sum, *Brown v. Allen* reinforced *Moore’s* defense of the writ of habeas corpus as a lawful means for federal courts to correct state courts’ discriminatory missteps. Despite the discord among the justices, *Brown v. Allen* helped usher in a criminal-procedure revolution, which owed its origins in part to *Moore* and, by extension, to the Dyer Bill. Several scholars have discussed *Brown v. Allen’s* early impact but said surprisingly little about race. See, e.g., Maurice Kelman, *Federal Habeas Corpus as a Source of New Constitutional Requirements for State Criminal Procedure*, 28 OHIO ST. L.J. 46, 51-56 (1967); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 583-86 (1982).

230. See 334 U.S. 1, 15-16 (1948).

231. *Id.* at 20.

232. For a later case emphasizing judicial action, see *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924, 942 (1982) (finding state action where state officers collaborated with private creditors to execute a prejudgment writ of attachment).

233. 365 U.S. 167, 171-87 (1961).

234. 106 U.S. 629, 643-44 (1883).

235. *Monroe*, 365 U.S. at 180.

236. *Id.* at 171-72. The Court’s confrontation of state action in *Monroe* contrasts with its avoidance of the issue in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In that case, the Court upheld the 1964 Civil Rights Act’s public-accommodations provisions under Congress’s Commerce Clause powers, *id.* at 252-62, even though, as
footnote continued on next page

the Court never condoned the regulation of private citizens that the Dyer Bill proposed, but it did gradually incorporate state “neglect” into the state-action doctrine. *Moore* and the Dyer Bill debates provide a bridge between *Harris* and the Court’s dramatic shift in *Monroe*.²³⁷ Decades after anti-lynching activists had hoped, the government began to recognize remedies for threats to Black Americans’ lives and livelihoods.

Rather than serving as a triumphant epilogue to the Dyer Bill defeat, *Moore* represented the beginning of a new strategy for social change. As Senate filibusters continued to block future anti-lynching proposals, the courts offered a more hospitable forum for progress, even if it was a painfully incremental one. *Moore*’s immediate impact was modest: The Arkansas governor ended up commuting the defendants’ sentences, but mob-dominated trials continued elsewhere unchallenged.²³⁸ State appellate courts still rarely reversed guilty verdicts in such cases, and most unjustly accused defendants could not reasonably rely on the hope that their case would somehow make it to the Supreme Court.²³⁹ And even if their case did make it, *Moore* showed the limits of permissible forms of federal intervention: vacating the convictions of the victims rather than pursuing the prosecution of the perpetrators. Yet tracing the development of the state-action doctrine helps recover another lasting legacy of the Dyer Bill.

V. And Yet They Paused

In 1938, at the NAACP’s urging, poet Georgia Douglas Johnson penned two plays dramatizing the sluggish battle for anti-lynching legislation: *A Bill to Be Passed* and *And Yet They Paused*.²⁴⁰ Georgia’s husband—none other than

Justice Douglas contended in concurrence, a “decision based on the Fourteenth Amendment would have [had] a more settling effect,” *id.* at 280 (Douglas, J., concurring).

237. The bridge showed signs of deterioration in modern state-action cases like *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). There, the Court held that a state agency’s failure to intervene to prevent child abuse by a custodial parent did not violate the child’s Fourteenth Amendment rights. *Id.* at 191. The outcome might have been different if the child had been in state custody, the Court explained, but the link between the state agency and harmful conduct was too attenuated under the facts of the case. *See id.* at 197-201. State officers’ complicity in lynching, which interrupts and supersedes the state criminal process, is more obvious than their responsibility for conduct that occurs within the private home. However, *DeShaney* placed a limit on the possible bounds of state action that could constrain future attempts at anti-lynching legislation.

238. *See* Klarman, *supra* note 206, at 77-78, 78 n.143.

239. *Id.* at 78.

240. Judith Stephens, “*And Yet They Paused*” and “*A Bill to Be Passed*”: *Newly Recovered Lynching Dramas by Georgia Douglas Johnson*, 33 AFR. AM. REV. 519, 520 (1999). In its
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Henry Lincoln Johnson—had dismissed “his wife’s longing for a literary career” and directed her to “take care of her home and her children and be content with that.”²⁴¹ After Henry’s death in 1925, however, Georgia dove into writing and distanced herself from his controversial legacy, becoming a staunch anti-lynching advocate and NAACP ally.²⁴² Her 1938 dramas juxtaposed an apathetic Congress with a rural Mississippi congregation dealing with the imminent threat of lynching. Two scenes take place just outside Congress’s chambers, which her Black characters are prohibited from entering. With his ear pressed to the chamber door, a Black reporter is able to hear just enough of the debate inside to glean that Congress intends further delay. “They’re arguing about the Fourteenth Amendment,” relays the reporter. A young man replies: “You know they’re playing for time.” The reporter regretfully agrees: “Just the same handful of crackers holding out so’s the bill can’t be passed.”²⁴³ The lynch mob soon claims its victim in Mississippi, and yet Congress continues to pause.

Anti-lynching history, as the Dyer Bill drama shows, is rife with contradictions: legislative losses and judicial gains, partisan betrayal and newfound political independence. Delay may be the one constant characteristic. As French theorist Michel de Certeau has written, “delays discreetly perturb the pretty order of a line of ‘progress’ or a system of interpretation,” thus frustrating historiography’s inclination toward neat periodization.²⁴⁴ The Dyer Bill drama unfolded across a matter of months in 1922, but it contributes to a long and messy history of the nation’s struggle to fulfill the unfinished work of Reconstruction.

Now, after more than one hundred years of delay, Congress finally appears determined to pass a law criminalizing lynching. Ninety-nine senators support the anti-lynching bill, but, amid this “chorus of conviction,” there has been one dissenter: Kentucky Senator Rand Paul.²⁴⁵ Stunningly insensitive to current

commission request, the NAACP encouraged Johnson to draw inspiration from the *Congressional Record*. *Id.* Dispute over revisions kept her plays from ever being produced, but the manuscripts survive. *Id.* at 519-20. Johnson wrote at least four other plays on lynching over the course of her career. *Id.* at 519.

241. Floyd J. Calvin, *Georgia Douglas Johnson Fears She Won’t Have Time to Complete All of the Work She Has Planned*, PITT. COURIER, July 7, 1928, at A1.

242. For more on Johnson’s career and activism, see HULL, *supra* note 202, at 164-65; and PATRICIA A. YOUNG, *AFRICAN AMERICAN WOMEN PLAYWRIGHTS CONFRONT VIOLENCE: A CRITICAL STUDY OF NINE DRAMATISTS* 64 (2012).

243. GEORGIA DOUGLAS JOHNSON, *And Yet They Paused: A One-Act Play in Four Scenes (1938)*, in *THE PLAYS OF GEORGIA DOUGLAS JOHNSON: FROM THE NEW NEGRO RENAISSANCE TO THE CIVIL RIGHTS MOVEMENT* 168, 171-72 (Judith L. Stephens ed., 2006).

244. MICHEL DE CERTEAU, *THE WRITING OF HISTORY* 4 (Tom Conley trans., 1988).

245. Nicholas Fandos, *Frustration and Fury as Rand Paul Holds Up Anti-Lynching Bill in Senate*, N.Y. TIMES (June 5, 2020), <https://perma.cc/7C6Q-6NR9> (quoting New Jersey Senator Cory Booker).

events—mass mobilization against lethal police brutality and systemic anti-Blackness—Paul stalled the bill, citing semantic objections to its broad definition of lynching.²⁴⁶ Paul’s worries about the breadth of the bill’s application inadvertently underscore its relevance, a twenty-first-century anti-lynching act might be more than just a symbolic victory. Racial terror is hardly a problem of the past, and the law could help to hold its perpetrators accountable. If the majority prevails, Congress’s action would at last conclude a century of fatal incrementalism and start to signal intolerance for the racist violence that continues to claim Black lives.

246. *Id.*