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CONSTITUTIONAL LAW--ANTI-LYNCHING LEGISLATION

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COMMENTS

CONSTITUTIONAL LAW—ANTI-LYNCHING LEGISLATION—Despite progress in recent years toward the elimination of lynching,¹ the demand for adequate federal legislation to cope with the problem is unabated. For almost three decades Congress has considered a succession of anti-lynching bills, most of which have been favorably reported

¹ The Report of the President's Committee on Civil Rights 17-20 (1947).

by committees.² None has become law. Legislators and others opposing the enactment of a federal anti-lynching act have placed primary reliance on an asserted lack of constitutionality. It is argued that lynching is merely local crime within the scope of the power and responsibility of the states to enforce their own criminal law.³ The purpose of this comment is to attempt to determine what constitutional bases may exist for such legislation.⁴ The political and sociological problems in this area are beyond the scope of this writing.⁵

A. *Statutory Materials*

While varying slightly in details, all the proposed anti-lynching bills have been substantially similar. The most comprehensive measure, incorporating provisions used before and some new ones, was introduced in the Eightieth Congress by Senators Wagner and Morse.⁶ This bill will be examined in detail and used as a basis for a consideration of the constitutional questions.

The first three sections of the bill set forth certain legislative findings designed to lay a constitutional foundation. These vital propositions are as follows: (1) the due process and equal protection clauses impose on the states a duty to act affirmatively to protect all persons without discrimination; consequently, state inaction may violate these clauses; (2) when persons are deprived by the state, or by private individuals without state condonation, of equal protection of the laws because of race, creed or color, their exercise of fundamental human rights and freedoms is circumscribed; (3) the law of nations requires that a person be secure in body and property from violence inflicted

² Among the active bills have been the following: H.R. 13, 67th Cong., 1st sess. (1921); H.R. 1, 68th Cong., 1st sess. (1924); S. 121, 69th Cong., 1st sess. (1927); S. 1978, 73d Cong., 2d sess. (1934); S. 24, 74th Cong., 1st sess. (1935); H.R. 1507, 75th Cong., 1st sess. (1937); H.R. 2251, 75th Cong., 1st sess. (1937); H.R. 801, 76th Cong., 3d sess. (1940); H.R. 5673, 80th Cong., 2d sess. (1948); S. 2860, 80th Cong., 2d sess. (1948).

³ See Minority Report on H.R. 5673, H. REP. 1597, 80th Cong., 2d sess. (1948).

⁴ For comprehensive discussion of present statutory materials not considered here, their limitations and suggested changes, see 57 YALE L.J. 855 (1948).

⁵ Several comprehensive studies of the problem of lynching have been made. Among these are CHADBOURN, *LYNCHING AND THE LAW* (1933); RAPER, *THE TRAGEDY OF LYNCHING* (1933); I MYRDAL, *AN AMERICAN DILEMMA* 560 (1944).

⁶ S. 1352, 80th Cong., 1st sess. (1947). Because of its breadth, this bill is chosen for primary consideration here rather than the active bills: H.R. 5673, 80th Cong., 2d sess. (1948) which does not set out the detailed legislative findings found in the Wagner-Morse bill; and S. 2860, 80th Cong., 2d sess. (1948) which does not contain the aforementioned findings, does not cover lynchings by private individuals and does not provide for a civil action against the political subdivision in which the lynching occurred.

because of his race, creed or color; (4) the proposed legislation is necessary to effectuate the due process and equal protection clauses, and the treaties of the United States and to define and punish offenses against the law of nations; (5) the right to be free from lynching accrues by virtue of national citizenship in addition to any similar right which may exist because of state citizenship or presence within a state.

Section 4 of the bill sets out comprehensive definitions of a lynch mob and lynching. It should be noted that an appreciable extension of the terms beyond the usual connotations has been authorized. Thus a lynching may consist of any violence or attempt to commit violence against any person or his property because of his race, creed, color, national origin, ancestry, language or religion, or the exercise by violence against person or property of any power of punishment over any citizen or other person because of his actual or suspected connection with a crime, for the purpose or with the result of preventing the legal arrest, trial or punishment of such person. For such acts to constitute a lynching, however, they must be committed by a lynch mob which must consist of two or more persons.

Sections 5 and 6 define the crimes punishable under the act. Section 5 makes it punishable for any person, official or private, to instigate, aid or commit a lynching. Section 6 makes it punishable for an officer of a state or subdivision, charged with a duty or possessing a power to act, to fail willfully or negligently to protect a lynch victim in his custody, prevent the lynching or apprehend and prosecute the lynchers.

Section 8 provides a civil remedy for the lynch victim or his next of kin against the governmental subdivision in which the lynching occurred or from which the victim was abducted prior to the lynching.

B. *Constitutional Bases*

The detailed findings in the act and the statement of purposes indicate clearly the concern of the drafters for the constitutional problem. With the Wagner-Morse bill as the basis of consideration some of the asserted bases of constitutionality will be examined.⁷

1. *Due Process and Equal Protection Clauses.* Since section 5 of the proposed act comprehends the acts of any person who commits, aids or instigates a lynching or participates in a lynch mob, grave doubt

⁷ Not all constitutional supports which have been suggested will be considered. Among those excluded are the following: (1) the commerce clause, see 6 *LAWYER'S GUILD REV.* 643 (1946); (2) the republican form of government provision, see Report of Senate Committee on Judiciary on Anti-Lynching Bill (S. 1978), *S. REP.* 710, 73d Cong., 2d sess. (1934); (3) the provision authorizing Congress to provide for organizing the militia and suppressing rebellion, see Report of House Committee on Judiciary on Anti-Lynching Bill (H.R. 13), *H. REP.* 452, 67th Cong., 1st sess. (1921).

exists regarding the support this provision can draw from the due process and equal protection clauses.⁸ It seems clear that the purposes of the Fourteenth Amendment, as indicated by the debates in Congress and the state legislatures, included that of granting to Congress the power to legislate directly to protect certain rights against infringement by either the states or private individuals.⁹ In an unbroken line of decisions the Supreme Court has held, however, that the prohibitions of the Amendment apply only to the actions of the states and add nothing to the rights of one individual against another.¹⁰ While this limitation on the scope of the Amendment may be attributable to the failure of the Court in its early decisions to ascertain or heed the intention of the framers,¹¹ it is now well established, and there is no reason to believe that it will be overruled.

It is possible that the due process and equal protection clauses may lend appreciable support to section 6 of the act, which declares punishable the negligent or willful failure of a state officer to prevent a lynching, protect the victim in his custody or apprehend and prosecute the lynchers. This support, it appears, will depend upon the acceptance by the Supreme Court of the proposition that mere state inaction may constitute a deprivation of due process or equal protection. There is no definite holding of the Court to that effect,¹² though again this seems to have been the intention of the framers.¹³

In *Strawder v. West Virginia*¹⁴ the Court held that while the words of these clauses were merely prohibitive, they carry by necessary implication a positive right to the equal protection of the laws and the protection inherent in the concept of due process. Correlative to this right must be the duty imposed on those wielding the police power of the state to exercise it diligently and without discrimination for the protection of all persons. While the local police power remains in the possession of the state, it is qualified by the constitutional mandate that it be so exercised that all persons, without regard to race, creed, or color, may equally enjoy its benefit. It would seem that this duty imposed

⁸ The Report of the Senate Committee on the Judiciary on S. 2860, S. REP. 1625, 80th Cong., 2d sess. (1948) accepts it as settled that any federal sanctions against individual lynchers are invalid.

⁹ FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 333 et seq. (1943).

¹⁰ United States v. Cruikshank, 2 Otto (92 U.S.) 542 (1875); Virginia v. Rives, 10 Otto (100 U.S.) 313 (1879); United States v. Harris, 106 U.S. 629, 1 S.Ct. 601 (1882); Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883).

¹¹ SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 333-345 (1943).

¹² 38 COL. L. REV. 199 (1938).

¹³ FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 235 (1908).

¹⁴ 10 Otto (100 U.S.) 303 (1879).

on the local officers may be as effectively breached when they do nothing as when they act affirmatively in derogation of duty. In two inferior federal courts the proposition that state inaction may come within the prohibitions of the due process and equal protection clauses has been clearly asserted;¹⁵ while the decisions of the Supreme Court contain no holding that state inaction is a deprivation of due process or equal protection, it is equally true that there is no holding to the contrary.¹⁶

The civil action against the governmental subdivision provided for in section 8 of the Wagner-Morse Act is dependent upon the same constitutional bases as those called to support the imposition of criminal liability upon the police officers of the subdivision. Such a device for stimulating efficient local law enforcement has a venerable history in England and the United States.¹⁷ If the primary search for an adequate constitutional basis for federal legislation in this field is successful, sustaining the particular provision would present no special difficulties.

2. *National Citizenship and Privileges and Immunities Clauses.* The unfortunate failure of the drafters of section 1 of the Fourteenth Amendment, after recognizing a primary citizenship in the United States and a secondary citizenship in the states, to define the rights, privileges and immunities of that citizenship has given it an embarrassingly equivocal status. From the decision of the Supreme Court in the *Slaughterhouse Cases*¹⁸ the prevailing opinion of the Court has favored so narrow an interpretation of federal rights that the citizenship clause and privileges and immunities clause have added nothing to the limited protections granted by other provisions of the Constitution.¹⁹

¹⁵ *United States v. Blackburn*, (D.C. Mo. 1874) 24 Fed. Cas. No. 14603 at p. 1159: "By the equal protection of the laws . . . is meant that the ordinary means and appliances which the law has provided shall be used and put in operation alike in all cases of violation of law. Hence, if the outrages and crimes shown to have been committed in the case before you were well known in the community at large, and that community and the officers of the law wilfully failed to employ the means provided by law to ferret out and bring to trial the offenders, because of the victims being colored, it is depriving them of equal protection of the law." *Louisville and N.R. Co. v. Bosworth*, (D.C. Ky. 1915) 230 F. 191 at 207: "And what is it, then, to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing."

¹⁶ For a comprehensive study of state inaction under the Fourteenth Amendment, see 38 *COL. L. REV.* 199 (1938); 57 *YALE L.J.* 855 at 871 et seq. (1948).

¹⁷ *Chicago v. Sturges*, 222 U.S. 313, 32 S.Ct. 92 (1911); *Gunter v. Dale County*, 44 Ala. 639 (1870).

¹⁸ 16 Wall. (83 U.S.) 36 (1872).

¹⁹ *United States v. Reese*, 2 Otto (92 U.S.) 214 (1875); *United States v. Cruikshank*, 2 Otto (92 U.S.) 542 (1875); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908).

The drafters of the Wagner-Morse bill have attempted in section 3 to circumvent this restrictive interpretation by declaring that the right to be free from lynching is an incident of national citizenship itself.

The efficacy of such a declaration may be open to doubt. Thus far, the Supreme Court has assumed the responsibility of determining the scope and content of the rights, privileges and immunities of national citizenship.²⁰ This determination is a proper judicial function when it is based on interpretation of the Constitution and laws. It is submitted, however, that this function of the judiciary is not inconsistent with and does not preclude a legislative power to define rights of national citizenship, beyond those which the Court has been able to find. Such authority should inhere in the power of Congress to enact appropriate legislation for the enforcement of the Fourteenth Amendment. Conceding, *arguendo*, that the right to be free from lynching is thus made a right of federal citizenship, the Court should have no difficulty in finding the power in Congress to protect it by primary legislation against the encroachment of either the state or private individuals. Such a power might be derived from section 5 of the Fourteenth Amendment or found to arise as a necessary incident of national sovereignty.²¹

Reliance on the citizenship clause of the Fourteenth Amendment to support civil rights legislation is not novel.²² If national citizenship is to be, in fact, primary and that in the states secondary, a broader concept of federal rights and legislation to protect those rights are vitally needed.

3. *Treaty Power.* The treaty power of the federal government²³ has been relied upon before as a basis for federal anti-lynching legislation applicable to the lynching of aliens.²⁴ With the ratification by the Senate of the Charter of the United Nations,²⁵ the importance of the treaty power as a basis for such legislation was greatly increased.²⁶ Section 2(b) of the Wagner-Morse bill declares one of the purposes thereof to be the fulfillment of treaty obligations assumed by the

²⁰ *Crandall v. Nevada*, 6 Wall. (73 U.S.) 35 (1867); *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1872).

²¹ The Report of the President's Committee on Civil Rights 109 (1947).

²² See Harlan, J., dissenting in *Civil Rights Cases*, 109 U.S. 3 at 26, 3 S.Ct. 18 (1883).

²³ U.S. Const., Art. II, § 2; Art. VI; Art. I, § 8.

²⁴ *Dyer and Dyer*, "The Constitutionality of a Federal Anti-Lynching Bill," 13 *ST. LOUIS L. REV.* 186 at 198 (1928); Report of House Committee on Judiciary on Anti-Lynching Bill (H.R. 1), H. REP. 71, 68th Cong., 1st sess. (1924).

²⁵ Ratified as a treaty on July 28, 1945. 91 *CONG. REC.* 8189-8190 (1945). Whether the Charter is self-executing, so as to create private rights, is not material here. Since Congress regards it as a treaty, the power to implement it seems clear.

²⁶ See Report of House Committee on Judiciary on Anti-Lynching Bill (H.R. 5673) H. REP. 1597, 80th Cong., 2d sess., p. 6 (1948).

United States under Article 55 and Article 56 of the Charter. These articles provide as follows:

Article 55:

“. . . the United Nations shall promote: . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56:

“All Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.”

That legislation designed to prevent lynching and to punish those guilty of the crime is a proper means of fulfilling the obligations thus assumed by the United States seems open to no doubt. The question remains whether such a treaty and its effectuation are precluded by the Constitution and the relation it establishes between the federal government and the states.

The precise limits of the treaty power are difficult if not impossible to determine. In *Geofroy v. Riggs*, the Supreme Court stated that “the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations. . . .”²⁷ It is of course limited by the express prohibitions of the Constitution and perhaps some indeterminate restraints arising from the nature of the federal government and its relation to the states.²⁸ These generalizations leave the treaty power of incalculable scope. It would certainly appear broad enough to comprehend a compact designed to preserve fundamental human rights.

If Articles 55 and 56 of the United Nations Charter relate to a proper subject of a treaty, the power of Congress to effectuate those articles by appropriate legislation is unquestionable. Absent a power to legislate against lynching derived from any other constitutional source, the power may yet arise to implement a treaty of the United States.²⁹ That the exercise of such power may constitute an invasion of provinces normally under the cognizance of the states does not appear to be material. As Justice Holmes declared in *Missouri v. Holland*, “No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”³⁰

²⁷ 133 U.S. 258 at 266, 10 S.Ct. 295 (1889).

²⁸ *Id.* at 267.

²⁹ *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382 (1919).

³⁰ *Id.* at 434.

The United Nations Charter does not contravene any express prohibition of the Constitution. Nor does there appear to be any reason for thinking "it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."³¹ It may be concluded that the power to implement such a treaty has provided an unprecedented basis for federal civil rights legislation.

4. *Power to Define and Punish Offenses Against the Law of Nations.* The draftsmen of the Wagner-Morse bill have declared one of its purposes to be "to define and punish offenses against the law of nations."³² If this stated purpose is founded on the power granted to Congress "to define and punish Piracies and Felonies committed on the high seas, and offenses against the Law of Nations,"³³ then such use marks an unprecedented extension of the scope of this power.

There seems to have been little if any opposition in the constitutional conventions to this grant of power to the federal government.³⁴ It was believed that one of the defects of the Articles of Confederation was the lack of such a grant.³⁵ The successive drafts of the Constitution provided for this power,³⁶ but debate as to the scope of the grant is lacking.

It is certainly conceivable that the "law of nations" referred to in the Constitution might be construed to comprehend statements of principles and policies such as those contained in the United Nations Charter. It may be asserted with considerable assurance, however, that no such construction has ever been given to it. Justice Story, in discussing this power, deals with piracies and other felonies committed on the high seas.³⁷ While recognizing that offenses against the law of nations are separate, he concludes that they "cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations."³⁸ It is clear, by implication at least, that Story regarded such offenses as being in the same general category as piracies and felonies on the high seas and not including such internal acts as the Wagner-Morse bill is designed to define and punish. Cooley similarly declares "the manifest purpose of this provision is to empower Congress to provide for the punishment as crimes of all such infamous acts [as piracy] committed on the high seas as

³¹ *Id.* at 434.

³² S. 1352, 80th Cong., 1st sess., § 2(c) (1947).

³³ U.S. Const., Art. I, § 8, Cl. 10.

³⁴ 3 STORY, CONSTITUTION 57 (1833).

³⁵ 5 ELLIOTT'S DEBATES 127 (1845).

³⁶ *Id.* 130, 378, 561.

³⁷ 3 STORY, CONSTITUTION 52-56 (1833).

³⁸ *Id.* 56.

constitute offenses against the United States or against all nations.”³⁹ All the cases in the Supreme Court concerned with this power have involved such crimes.⁴⁰

It may be that the United Nations Charter constitutes the “public code, recognized by the common consent of nations”⁴¹ to which Story looked for a definition of offenses against the law of nations.⁴² That the Supreme Court would at present extend this grant of power to form a constitutional basis for anti-lynching legislation is possible, but material reliance upon this provision does not appear to be warranted in view of the history of its interpretation and use.

C. *Conclusion*

Constitutional support for anti-lynching legislation may be drawn from several provisions. Should the Supreme Court accept the principle that state inaction may violate the due process and equal protection clauses, a clear constitutional basis would exist for federal sanctions, civil and criminal, against local officers and the subdivisions whose police power they exercise, when police protection is withheld because of a person's race or color or no diligent effort is made to apprehend and prosecute lynchers. The recognition of Congressional power to define the rights of federal citizenship and to define and punish deprivations of those rights would support federal sanctions against the affirmative acts not only of the state but of private individuals as well. New treaty obligations assumed by the United States by the ratification of the United Nations Charter coupled with the unquestioned power of Congress to legislate in fulfillment of those obligations has opened an unmeasured and little-used residuum of federal power which can be directed toward the eradication of lynching. It is believed that ample constitutional bases are available for this vital legislation.

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³⁹ COOLEY, CONSTITUTIONAL LAW, 3d ed., 97 (1898).

⁴⁰ *United States v. Smith*, 5 Wheat. (18 U.S.) 153 (1820); *United States v. Furlong*, 5 Wheat. (18 U.S.) 184 (1820); *United States v. Holmes*, 5 Wheat. (18 U.S.) 412 (1820); *United States v. Flores*, 289 U.S. 137, 53 S.Ct. 580 (1933).

⁴¹ 3 STORY, CONSTITUTION 56 (1833).

⁴² Report of House Committee on Judiciary on Anti-Lynching Bill (H.R. 5673), H. REP. 1597, 80th Cong., 2d sess., p. 7 (1948): “Moreover, Congress participated in incorporating into international law the obligation of a State to protect all persons within its borders, including that State's own nationals, from discrimination because of race or religion in the enjoyment of fundamental human rights, not only when it ratified the United Nations Charter, but also when it ratified the peace treaties with Italy, Rumania, Bulgaria, and Hungary containing guarantees that those countries would protect racial minorities in their midst from discrimination.”