THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE THREAT THAT IT POSES TO OUR DEMOCRATIC GOVERNMENT

PINCKNEY G. MCELWER *

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The major part of this treatise is directed to the invalidity of the purported 14th Amendment to the Constitution of the United States and the circumstances which caused honorable men—U.S. Senators and Representatives—who doubtless did not consider their conduct to be unethical or dishonorable, to "take the law into their own hands" to accomplish what they considered to be in the best interests of the Nation. But, in my dissertation on the 14th Amendment and the circumstances of its purported adoption, I am using it as a vehicle to demonstrate that under the present law of the United States, as decided by the Supreme Court, our entire Democratic—Republican form of Government, our system of checks and balances, our way of life, is faced with a threat of utter destruction. I bring this danger to the attention of the citizens and the Congress of the United States while there is yet time to provide a remedy.

At the outset I wish to say that this article is not motivated by a dissatisfaction evidenced in some quarters with recent rulings of the Supreme Court of the United States; nor am I advocating any effort to have the 14th Amendment declared invalid, although I deplore the means that were employed to obtain the end. I have a sincere concern for the future of our form of government in times of great national economic stress, resulting from the legal precedents established by the irregular procedures attending the adoption of the 14th Amendment. Lenin, Hitler, Moussolini, and the others did not become dictators without widespread support of many short—sighted people.

The able and wise patriots who drafted our Constitution were careful to protect its provisions against actions of a temporary majority of the Congress by requiring for its amendment not only a 2/3 approval by both Houses of the Congress, but ratification by 3/4 of the States. A study of the history of the 14th Amendment reveals the irregular manner in which these requirement were overcome, and a consideration of the precedents established thereby reveals the danger to our form of government.

The Civil War was fought over the asserted right of the Southern States to secede from the Union. The Southern States claimed they had such a right. The President, the

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/*\ Member of the Houston, Texas; St. Louis, Missouri, and Washington, D.C. Bars.
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Congress, and the Northern States denied that the Southern States had any such right under the Constitution of the United States. As Mr. Lincoln said, the aim of the Federal Government was to preserve the Union first; to preserve the Union without slavery, to preserve the Union with slavery if it must be, but the "Union forever." This issue was decided on the battlefield and the Union Army upheld the position taken by all departments of the Federal Government, i.e., that the Southern States had no right to secede and had never been out of the Union. Incidentally, Mr. Lincoln recognized that his emancipation of the slaves was a war measure and that it would require a Constitutional amendment to abolish slavery after the end of the War. Mr. Lincoln was steadfast in his position that the Southern States had never left the Union, although individual officials and soldiers of the South may have forfeited some rights; but not the States whose rights were fixed by the Constitution and thus beyond the power of Congress to add or detract. As stated by George Tickner Curtis in Volume II, Page 342, of his famous History of the Constitution—

> After the Civil War was ended, the Constitution was left just as it was before the War began; the United States had just the same sovereign rights as before and no others.

The House on July 22, 1861 and the Senate on July 25, 1861, adopted resolutions both resolving to maintain the Constitution in the rebellious States and to maintain the Union and the rights of the States unimpaired.

In the Proclamation of President Lincoln[1] of December 8, 1865, General Robert E. Lee surrendered to General Grant at Appomattox Court House. General Johnston surrendered to General Sherman at Durham Station April 26, 1865. In 40 days after the surrender of General Johnston there was not a single Confederate soldier in arms. Submission to the authority of the United States was complete. Postal service and tax collections resumed.

On December 18, 1865,[2] General Grant reported to Congress that the South had accepted defeat and had accepted authority of the Federal Government.

President Lincoln prepared a proclamation to restore North Carolina to its proper position as a State but it was not yet issued before his death. At the first Meeting of the Cabinet after his death it was read and unanimously adopted as the policy of the Administration. Mr. Lincoln was assassinated on April 14, 1865, and died April 15, 1865. Andrew Johnson took the oath and succeeded Mr. Lincoln.

On May 29, 1865, President Johnson issued Mr. Lincoln's proclamation for North Carolina; and through June 30, 1865, similar proclamations were issued by President Johnson setting up the local State Government of all Southern States.[3]

The Southern States having been restored to a legal and operational basis by elections and the convening of State Legislatures, most of them proceeded to ratify the 13th Amendment which was then proclaimed to have been ratified on December 18, 1865. Included in the 27 States then needed for its adoption were Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, Georgia, Maryland, Mississippi, Florida, and Texas.

> On April 2, 1866, the President, by proclamation, declared: It is the manifest determination of the America People that no State, of its own will, has the right or

1 13 STAT. 737 (1863).

2 Congressional Glove, p. 78 (1865).

3 13 STAT. 760, 763, 764, 765, 767, 768, 769, 771 (1865).

> power to go out of, or separate itself from or be separated from the American Union, and that therefore each State ought to remain and constitute an integral part of the United States… And whereas the Constitution of the United States provides for constituted communities *only* as State, and not as Territories, dependencies, provinces or protectorates. And whereas such constituent States must necessarily be, and by the Constitution of the United States are made equals, and placed upon a like footing as to political rights, immunities, dignity, and power with the several States with which they are united. . .I. . .do hereby declare that the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi and Florida at an end, and is henceforth to be regarded.[4]

On August 20, 1866, a similar proclamation was issued by the President in respect to Texas.[5] Article V of the United States Constitution provides: "No State, without its consent, shall be deprived of its equal suffrage in the Senate." Nevertheless, peace having been restored, the United States Senate refused to seat the Senators from all of the Southern States. The House did likewise.

Article V of the Constitution provides the method and manner of amendment, as follows:

> The Congress, whenever *2/3 of both Houses* shall deem it necessary, shall propose Amendments to this Constitution, or on application of the Legislatures of *2/3 of the States,* shall call a convention for proposing amendments, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of *3/4 thereof,* as the one or the other Mode of Ratification may be proposed by the Congress. . . (Writer's emphasis)

The 39th Congress, which proposed the 14th Amendment, met on December 5, 1865. There were 72 seats in the Senate for 36 States; 22 seats for 11 Southern States were vacant because of a joint resolution of the House and the Senate which voted not to seat any Senator or Representative from any Southern States until the Congress decided that each of said States was entitled to such representation. In the House there were 240 seats, and 58 seats from the 11 Southern States were vacant. Nebraska was not admitted to the Union as the 37th State until March 1, 1867. One of the New Senators who recently had been elected by the Legislature of his State was Mr. John P. Stockton of New Jersey.[6] John P. Stockton was introduced by the Senior Senator of New Jersey on December 5, 1866, took the oath and was duly *seated.*

While H.J. 127 was still in Mr. Thaddeus Stevens' Committee on Reconstruction, there was a private polling of Senators and Representatives to see how they stood on the measure. Mr. Stockton was an outspoken opponent of the proposal. Furthermore, since there were 50 Senators seated, the Constitution would require a 33 1/3 vote, or 34, in order to propose it by a 2/3 vote, and a counting of prospective Senate votes showed that there were only 33 who would vote in favor of it. In a maneuver to reduce the Senate to 49 members in order that a vote of 33 yeas would meet the requirements of the Constitution, a motion was made *not to seat* Mr. John P. Stockton, in spite of the fact that he had already been seated, on the ground that his election was invalid because he had been elected by a mere plurality and not a majority. It was the law of New Jersey and most of the other States that a plurality determined the election.

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4 14 STAT. 811 (1866).

5 14 STAT. 814 (1866).

6 This was before the 17th Amendment, which required Senators to be elected by the people.

The motion *not to seat* was made because it was impossible to obtain the necessary vote required to expel Mr. Stockton, which was the only legal means available to prevent a member from voting once he has been seated. In order to expel a member of the Senate or House a 2/3 vote was required, and this vote of 2/3 simply could not be mustered. However, a refusal to seat is determined by a majority. When this motion was finally called to a vote, after much debate, it was *defeated* by a vote of 22 to 21. During the night the hard core of Reconstructionists persuaded one of the Senators to change his vote. The next day a motion to reconsider the motion *not to seat* Mr. Stockton was *sustained* by a vote of 22 to 21; thus he was removed form the Senate and the number reduced to 49.

The 14th Amendment originated in the House of Representatives by House Joint Resolution 127, introduced by Thaddeus Stevens of Pennsylvania, and was referred to the Committee on Reconstruction of which Mr. Stevens was Chairman. Two other bills were offered and referred to the Committee on Reconstruction and there consolidate with H.J. 127 and reported out of the House. It was passed by the House on May 10, 1866, and sent to the Senate. In the Senate Mr. Wade proposed an amendment by adding what is now paragraph 3. As thus amended, it was passed by the Senate on June 8, 1866, and returned to the House where it was passed on June 13, 1866. In the Senate, the vote was 33 yeas and 11 nays, with 5 not voting. In the House there were 182 Representatives seated and of those the vote was 120 yeas and 32 nays, with 32 not voting.

If the 22 Senators and 58 Representatives from the Southern States who had been arbitrarily and unlawfully refused seats by the Senate and House are counted, the number is 71 Senators and 240 Representatives. The vote in the Senate of 33 for and 11 against by the members present and voting was 2/3. Likewise, the vote of 120 for and 32 against in the House was 2/3 of those present and voting. But if the 58 Representatives who were arbitrarily and illegally excluded had been counted against, the vote would be 120 for and 90 against, and the vote would have failed to carry by 2/3.

In the foregoing state of the record, the proposed Amendment was certified to have been passed by a 2/3 vote of each House and transmitted to the Secretary of State for transmission to the 36 States then composing the United States. 28 were needed to ratify.[7] Ten States could prevent ratification. The process of ratification began. By February 1, 1867, 17 States had ratified and 11 rejected.

Ratified

Connecticut—June 30, 1866

New Hampshire—July 7, 1866

Tennessee—July 7, 1866

New Jersey—September 11, 1866

Oregon—September 19, 1866

Vermont—October 30, 1866

New York—January 10, 1867

Kansas—January 11, 1867

7 28 was the figure used by Secretary of state Seward. In the opinion of this writer, 27 was all that was required as Nebraska was admitted after the Amendment was proposed.

Ohio—January 11, 1867

Illinois—January 15, 1867

West Virginia—January 16, 1867

Michigan—January 16, 1867

Minnesota—January 17, 1867

Maine—January 19, 1867

Nevada—January 22, 1867

Indiana—January 23, 1867

Missouri—January 26, 1867

Rejected

Texas—October 27, 1866

Georgia — November 9, 1866

Florida—December 3, 1866

Alabama—December 7, 1866

North Carolina — December 13, 1866

Arkansas—December 17, 1866

Virginia—January 9, 1867

Kentucky—January 8, 1867

Mississippi—January 29, 1867

California—March 17, 1868[8]

The 14th Amendment was thus defeated.

An editorial in the Philadelphia Enquirer on Saturday, February 9, 1867, gave a clue to what was to come. It states:

> The Constitutional Amendments having passed both branches of the Legislature of Pennsylvania will be sent to Governor Geary, who will undoubtedly sign them next week. Thus another State will be added to the list of those who have ratified these amendments. As it is probable that nearly all of the States which sustained the Government during the Rebellion will ratify those amendments, and as all of the Southern States we believe have now rejected them, the question arises: What will be done? There is a growing disposition to regard the States which maintained their relation with the Union as the only ones which have a voice in this matter, that a resolution will be brought before the present Congress, or the next, declaring that the consent of 3/4 of those is all that is necessary to give force and validity to an amendment to the Constitution is extremely probable. In that case, we suppose the question will have to fought over again in some way, and it is probable that it will

8 The California Legislature, on March 4, 1866, decided to take no action. This was equivalent to rejection since it failed to ratify and there were therefore in reality 11 rejections. California formally rejected later on March 17, 1868.

> finally enter the Supreme Court, *where the decision,* according to present appearances, *will be against it.* (Writer's emphasis).

The Editor was not aware that, four days prior to his editorial, H.R. 1143 had been introduced using a different scheme to accomplish the desired result.

THE RECONSTRUCTION ACT

On February 5, 1867, H.R. 1143 was introduced in the House. This was a bill whose *stated* purpose was to provide for the more efficient Government of the Rebel States.[9] This is what historically was called the "Reconstruction Act". Although these so—called Rebel States had been functioning as loyal States of the Union in complete peace for nearly two years, during which time they had ratified the 13th Amendment abolish slavery, this Act began by declaring:

> Whereas no legal State Governments or adequate protection for life or property now exists in the Rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas;[10] and whereas it is necessary that peace and good order should be enforced in said States until loyal and Republican State Governments can be legally established;...

Of course, the State Governments were and had been functioning in peace at all times since the surrender of General Johnston.

The Bill provided for military occupation of the named Southern States to be conducted without interference from any State authorities. It further provided that the Governments of such States were only provisional and subject to the paramount authority of the United States as exercised by the Military Government, and gave authority to the Military Commanders to try and persons by Military Commission. In addition it provided for new rules of suffrage under which a new Constitution of each State was to be adopted and a new Legislature elected, and disfranchised any person who had engaged in Rebellion or given aid and comfort to the rebels (which effectually disfranchised all white residents of the States). Nor, under the Bill was any Senator or Representative to be permitted to take the oath of office and be admitted to Congress until the new Constitution had met with the approval of Congress, the newly qualified electorate of the State had elected a Legislature, *such Legislature* had adopted the proposed 14th Amendment and the Amendment had become a part of the Constitution.

It may be here noted that the United States Supreme Court has held that each of the States has the supreme and exclusive power to regulate the right to suffrage and to determine the class of inhabitants who may vote.[11]

Congress passed the Bill and President Johnson promptly exercised his veto power. Congress overrode the veto of the President making the "Reconstruction Act" the law of the land. By this time three more States, for a total of 20, had ratified; namely, Rhode Island—February 7, Pennsylvania—February 12, Wisconsin—February 13, and Louisiana—February 6, and Delaware—February 7, 1867, had rejected, bringing that total to 13. Thus a Northern State had now joined 12 Southern States in rejecting when it

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9 14 STAT. 428, 15 STAT. 12, 14, 29 and 30 (1867).

10 This does not include Tennessee despite the fact that she had been a member of the Confederacy as she had ratified the 14th Amendment in July 1866.

11 Breedlove v. Suttle, 302 U.S. 277 (1937)

was only necessary to obtain ten rejections in order to prevent adoption of the Amendment.[12]

President Johnson's veto message is enlightening and reads, in part, as follows:

> I have examined the bill 'to provide for the more efficient government of the Rebel States' with care and anxiety which its transcendent importance is calculated to awaken. I am unable to give it my assent for reasons so grave that I hope a statement of them may have some influence on the minds of the patriotic and enlightened men with whom the decision must ultimately rest.
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> The bill places all the people of the ten States therein named under the absolute domination of military rules; and the preamble undertakes to give the reason upon which the measure is based and the ground upon which it is justified. It declares that there exists in those States no legal governments and no adequate protection for life or property, and asserts the necessity of enforcing peace and good order within their limits. This is not true as a matter of fact.
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> It is not denied that the States in question have each of them an actual government, with all the powers—executive, judicial, and legislative—which properly belong to a free state. They are organized like the other States of the union, and, like them, they make, administer, and execute the laws which concern their domestic affairs. An existing de facto government, exercising such functions as these, is itself the law of the state upon all matters within its jurisdiction. To pronounce the supreme law making power of an established state illegal is to say that law itself is unlawful.
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> The provisions which these governments have made for the preservation of order, the suppression of crime, and the redress of private injuries are in substance and principle the same as those which prevail in the Northern States and in other civilized countries. They certainly have not succeeded in preventing the commission of all crime, nor has this been accomplished anywhere in the world...
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> But that these people are maintaining local governments for themselves which habitually defeat the object of all government and render their own lives and property insecure is in itself utterly improbable, and the averment of the bill to that effect is not supported by any evidence which has come to my knowledge...
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> The bill, however, would seem to show upon its face that the establishment of peace and good order is not its real object. The fifth section declares that the preceding sections shall cease to operate in any State where certain events shall have happened. These events are, first, the selection of delegates to a State convention by an election at which Negroes shall be allowed to vote; second, the formation of a State Constitution by the convention so chosen; third, the insertion into the State Constitution of a provision which will secure the right of voting at all elections to Negroes and to such white men as may not be disfranchised for rebellion or felony; fourth, the submission of the Constitution for ratification to Negroes and white men not disfranchised, and its actual ratification by their vote; fifth, the submission of the State Constitution to Congress for examination and approval, and the actual approval of it by that body; sixth, the adoption of a certain amendment to the Federal Constitution by a vote of the Legislature elected under the new Constitution; seventh,

12 It is interesting to note that the Louisiana Legislature, which rejected, was elected under a new Constitution of 1864, which was adopted by a convention held in New Orleans, under the auspices of Federal authorities under the direction of President Lincoln. The vote of the Louisiana House was a unanimous 100 to 0.

the adoption of said amendment by a sufficient number of other States to make it a part of the Constitution of the United States. All these conditions must be fulfilled before the people of any of these States can be relieved from the bondage of military domination; but when they are fulfilled, then immediately the pains and penalties of the bill are to cease, no matter whether there be peace and order or not, and without any reference to the security of life or property. The excuse given for the bill in the preamble is admitted by the bill itself not to be real. The military rule which it establishes is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment.

I submit to Congress whether this measure is not in its whole character, scope, and object without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive to those great principles of liberty and humanity for which our ancestors on both sides of the Atlantic have shed so much blood, and expended so much treasure.

The ten States named in the bill are divided into five districts. For each district an officer of the Army, not below the rank of a brigadier-general, is to be appointed to rule over the people; and he is to be supported with an efficient military force to enable him to perform his duties and enforce his authority. Those duties and that authority, as defined by the third section of the bill, are “to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish all disturbers of the public peace or criminals”. The power thus given to the commanding officer over all the people of each district is that of an absolute monarch. His mere will is to take the place of all law...

It is plain that the authority here given to the military officer amounts to absolute despotism. But to make it still more unendurable, the bill provides that it may be delegated to as many subordinates as he chooses to appoint, for it declares that he shall “punish or cause to be punished”.

Such a power has not been wielded by any Monarch in England for more than five hundred years. In all that time no people who speak the English language have borne such servitude. It reduces the whole population of the ten States—all persons, of every color, sex, and condition, and every stranger within their limits—to the most abject and degrading slavery. No master ever had a control so absolute over the slaves as this bill gives to the military officers over both white and colored persons...

I come now to a question which is, if possible, still more important. Have we the power to establish and carry into execution a measure like this? I answer, ‘Certainly not’, if we derive our authority from the Constitution and if we are bound by the limitations which it imposes.

This proposition is perfectly clear, that no branch of the Federal Government—executive, legislative, or judicial—can have any just powers except those which it derives through and exercises under the organic laws of the Union. Outside of the Constitution we have no legal authority more than private citizens, and within it we have only so much as that instrument gives us. This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all. If, therefore, the Southern States

were in truth out of the Union, we could not treat their people in a way which the fundamental law forbids. Some persons assume that the success of our arms in crushing the opposition which was made in some of the States to the execution of the Federal laws reduced those States and all their people—the innocent as well as the guilty—to the condition of vassalage and gave us a power over them which the Constitution does not bestow or define or limit. No fallacy can be more transparent than this. Our victories subjected the insurgents to legal obedience, no to the yoke of an arbitrary despotism. When an absolute sovereign reduces his rebellious subjects, he may deal with them according to his pleasure, because he had that power before. But when a limited monarch puts down an insurrection, he must still govern according to law...

This is a bill passed by Congress in time of peace. There is not in any one of the States brought under its operation either war or insurrection. The laws of the States and of the Federal Government are all in undisturbed and harmonious operation. The courts, State and Federal, are open and in full exercise of their proper authority. Over every State comprised in these five military districts, life, liberty, and property are secured by State laws and Federal laws, and the National Constitution is every where in force and every where obeyed. What, then, is the ground on which this bill proceeds? The title of the bill announces that it is intended ‘for the more efficient government’ of these ten States. It is recited by way of preamble that no legal State Governments ‘nor adequate protection for life or property’ exist in those States, and that peace and good order should be thus enforced. The first thing which arrests attention upon these recitals, which prepare the way for martial law can exist under our form of Government is not stated or so much as pretended. Actual war, foreign invasion, domestic insurrection—none of these appear; and none of these, in fact exist. It is not even recited that any sort of war or insurrection is threatened. Let us pause to consider, upon this question of constitutional law and the power of Congress, a recent decision of the Supreme Court of the United States in ex parte Milligan.

I will first quote from the opinion of the majority of the Court: ‘Martial law can not arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration.’

We see that martial law comes in only when actual war closes the courts and deposes the civil authority; but this bill, in time of peace, makes marital law operate as though we were in actual war, and becomes the cause instead of the consequence of the abrogation of civil authority. One more quotation: ‘It follows from what has been said on this subject that there are occasions when martial law can be properly applied. If in foreign invasion or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left by the military, it is allowed to govern by martial rule until the laws can have their free course.

I now quote from the opinion of the minority of the court, delivered by Chief Justice Chase: ‘We by no means assert that Congress can establish and apply the laws of war where no war exists, the laws of peace must prevail.’

This is sufficiently explicit. Peace exists in all the territory to which this bill applies. It asserts a power in Congress, in time of peace, to set aside the laws of peace and to substitute the laws of war. The minority, concurring with the majority, declares that Congress does not possess that power. . .I need not say to the representatives of the American people that their constitution forbids the exercise of judicial power in any way but one—that is, by the ordained and established courts. It is equally well known that in all criminal cases a trial by jury is made indispensable by the express words of that instrument… The Constitution also forbids the arrest of the citizen without judicial warrant, founded on probable cause. This bill authorizes an arrest without warrant, at the pleasure of a military commander. The Constitution declares that 'no person shall be held to answer for a capital or otherwise infamous crime unless on presentment of a grand jury'. This bill holds every person not a soldier answerable for all crimes and all charges without any presentment. The Constitution declares that 'no person shall be deprived of life, liberty, or property without due process of law'. This bill sets aside all process of law, and makes the citizen answerable in his person and property to the will of one man, and as to his life to the will of two. Finally, the Constitution declares that 'the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it'; whereas this bill declares martial law (which of itself suspends this great writ) in time of peace, and authorizes the military to make the arrest, and gives to the prisoner only one privilege, and that is a trial 'without unnecessary delay'. He has no hope of release from custody, except the hope, such as it is, of release by acquittal before a military commission.

The United States are bound to guarantee to each State a republican form of government. Can it be pretended that this obligation is not palpably broken if we carry out a measure like this, which wipes away every vestige of republican government in ten States and puts the life, property, liberty, and honor of all people in each of them under the domination of a single person clothed with unlimited authority?

...,here is a bill of attainder against 9,000,000 people at once. It is based upon an accusation so vague as to be scarcely intelligible and found to be true upon no credible evidence. Not one of the 9,000,000 was heard in his own defense. The representatives of the doomed parties were excluded from all participation in the trial. The conviction is to be followed by the most ignominious punishment ever inflicted on large masses of men. It disfranchises them by hundreds of thousands and degrades them all, even those who are admitted to be guiltless, from the rank of freemen to the condition of slaves.

The purpose and object of the bill—the general intent which pervades it from beginning to end—is to change the entire structure and character of the state Governments and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves. The Negroes have not asked for the privilege of voting; the vast majority of them have no idea what it means. This bill not only thrusts it into their hands, but compels them, as well as the whites, to use it in a particular way. If they do not form a Constitution with prescribed articles in it and afterwards elect a legislature which will act upon certain measures in a prescribed way, neither blacks nor whites can be relieved from the slavery which the bill imposes upon them. Without pausing here to consider the policy or impolicy of Africanizing the southern part of our territory, I would simply ask the attention of Congress to that manifest, well-known, and universally

acknowledged rule of Constitutional law which declares that the Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State. To force the right of suffrage out of the hands of the white people and into the hands of the Negroes is an arbitrary violation of this principle...

That the measure proposed by this bill does violate the Constitution in the particulars mentioned and in many other ways which I forbear to enumerate is too clear to admit the least doubt. It only remains to consider whether the injunctions of that instrument ought to be obeyed or not. I think they ought to be obeyed, for reasons which I will proceed to give as briefly as possible. In the first place, it is the only system of free Government which we can hope to have as a Nation. When it ceases to be the rule of our conduct, we may perhaps take our choice between complete anarchy, a consolidated despotism, and a total dissolution of the Union; but national liberty regulated by law will have passed beyond our reach...

It was to punish the gross crime of defying the Constitution and to vindicate its supreme authority that we carried on a bloody war of four years' duration. Shall we now acknowledge that we sacrificed a million of lives and expended billions of treasure to enforce a Constitution which is not worthy of respect and preservation?...

It is a part of our public history which can never be forgotten that both Houses of Congress, in July 1861, declared in the form of a solemn resolution that the war was and should be carried on for nor purpose of subjugation, but solely to enforce the Constitution and laws, and that when this was yielded by the parties in rebellion the contest should cease, with the Constitutional rights of the States and of individuals unimpaired. This resolution was adopted and sent forth to the world unanimously by the Senate and with only two dissenting voices in the House. It was accepted by the friends of the Union in the South as well as in the North as expressing honestly and truly the object of the War. On the faith of it many thousands of persons in both sections gave their lives and their fortunes to the cause. To repudiate it now by refusing to the States and to the individuals within them the 'rights' which the Constitution and laws of the Union would secure to them is a breach of our plighted honor for which I can imagine no excuse and to which I cannot voluntarily become a party...

...I am thoroughly convinced that any settlement or compromise or plan of action which is inconsistent with the principles of the Constitution will not only be unavailing, but mischievous; that it will but multiply the present evils, instead of removing them. The Constitution, in its whole integrity and vigor, throughout the length and breadth of the land, is the best of all compromises. Besides, our duty does not, in my judgement, leave us a choice between that and any other. I believe that it contains the remedy that is so much needed, and that if the coordinate branches of the Government would unite upon its provision they would be found broad enough and strong enough to sustain in time of peace the Nation which they bore safely through the ordeal of a protracted civil war. Among the most sacred guaranties of that instrument are those which declare that 'each State shall have at least one Representative', and that 'no State, without its consent, shall be deprived of its equal suffrage in the Senate'. Each House is made the 'judge of the elections, returns, and qualifications of its own members.' And may, 'with the concurrence of two—thirds, expel a member'. Thus, as heretofore urged, 'in the admission of Senators and Representatives from any and all of the States there can be no just ground of the powers of legislation, for this could not happen when the Constitution and the laws are enforced by a vigilant and faithful Congress'. When a Senator or Representative

> presents his certificate of election, he may at once be admitted or rejected; or, should there be any question as to his eligibility, his credentials may be referred for investigation to the appropriate committee. If admitted to a seat, it must be upon evidence satisfactory to the House of which he thus becomes a member that he possesses the requisite constitutional and legal qualifications. If refused admission as a member for want of due allegiance to the Government, and returned to his constituents, they are admonished that none but persons loyal to the United States will be allowed a voice in the legislative councils of the Nation, and the political power and moral influence of Congress are thus effectively exerted in the interests of loyal to the Government and fidelity to the Union...
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> While we are legislating upon subjects which are of great importance to the whole people, and which must affect all parts of the country, not only during the life of the present generation, but for ages to come, we should remember that all men are entitled at least to a hearing in the councils which decide upon the destiny of themselves and their children. At present ten States are denied representation, and when the Fortieth Congress assembles on the 4th day of the present month sixteen States will be without a voice in the House of Representatives. This grave fact, with important questions before us, looking solely to the attainment of political ends, fails to consider the rights it transgresses, the law which it violates, or the institutions which it imperils. *ANDREW JOHNSON*

In Volume II, p. 42 of the Growth of the American Republic, Samuel Eliot Morison, Professor of American History at Harvard University, and Henry Steel Commanger, Professor of History, Columbia University, speaking of the Reconstruction Act state:

> Johnson returned the bill with a scorching message arguing the unconstitutionality of the whole thing, and the most impartial students have agreed with his reasoning, Professor Burgess writing, indeed, that there was hardly a line in the entire bill which would stand the test of the Constitution.

On the same day of the veto, March 2, 1867, the House and the Senate overrode it by a 2/3 vote and the Bill became Public Law 68. Although considering the Act to be unconstitutional, as expressed in his veto message, President Johnson considered it his duty to enforce the law and proceeded to execute it. He thereupon sent the Army into the South; ousted all State Legislatures and Governments by military force; disfranchised all those who had participated in the Rebellion or who had aided or abetted them (contrary to the constitutional law announced by the U.S. Supreme Court); held elections in which all of the Negroes but practically no whites were eligible to vote. New constitutions were adopted and new legislatures were convened and the latter proceeded to ratify the 14th Amendment. The Army, all the while, was in control.

When the supplemental Reconstruction Act was passed in March of 1867, and then passed over the veto of the President on March 23, 1867, the Baltimore Sun carried the following Editorial on March 25, 1867:

> *The Last Veto*. The message of President Johnson, returning to Congress on Saturday last, the bill supplementary to the Act to provide for more efficient government of the Rebel State, assigning his reasons for non-approval, one of the most plain and convincing in argument among the several able State papers he has been called upon to incite in his endeavors to stay the Vandal hand of the Congressional majority, and conserve the great fundamental principles of the Constitution and Government.

While the military occupation of the South was in progress, Massachusetts and Nebraska ratified, on March 20, and in June 15, 1867, respectively. On March 23, by Joint Resolution, the State of Maryland rejected, becoming the 14th State to reject.

Observing how Congress had taken the Constitution into its own hands and was proceeding in willful disregard of the Constitution, on the 15th of January, 1868,— Ohio, and then on March 24, 1868—New Jersey,[13] voted to withdraw their prior ratifications

13 The following is an excerpt from Joint Resolution No. 1 of the State of New Jersey of March 24, 1868, when they rescinded their prior ratification and rejected:

> It being necessary, by the Constitution, that every amendment to the same should be proposed by two thirds of both Houses of Congress, the authors of said proposition, for the purpose of securing the assent of the requisite majority, determined to, and did, exclude from the said two Houses eight representatives from eleven States of the Union, upon the pretense that there were no such States in the Union; but, finding that two—thirds of the remainder of said Houses could not be brought to assent to the said proposition, they deliberately formed and carried out the design of mutilating the integrity of the United States Senate, and without any pretext or justification, other than the possession of the power, without the right, and in palpable violation of the Constitution, ejected a member of their own body representing this State, and thus practically denied to New Jersey its equal suffrage in the Senate and thereby nominally secured the vote of two—thirds of the said Houses.
>
> The object of dismembering the highest representative assembly in the Nation, and humiliating a State of the Union, faithful at all times to all of its obligations, and the object of said amendment were one ——to place new and unheard — of powers in the hands of a faction, that it might absorb to itself all executive, judicial and legislative power, necessary to secure to itself immunity for the unconstitutional acts it had already committed, and those it has since inflicted on a too patient people.
>
> The subsequent usurpation of these once national assemblies, in passing pretended laws for the establishment, in ten States, of martial law, which is nothing but the will of the military commander, and therefore, inconsistent with the very nature of all law, for the purpose of reducing to slavery men of their own race in those States , or compelling them, contrary to their own convictions, to exercise the elective franchise in obedience to the dictation of a faction in those assemblies; the attempt to commit to one man arbitrary and uncontrolled power which they have found necessary to exercise to force the people of those States into compliance with their will; the authority given to the Secretary of War to use the name of the President, to countermand its President's orders, and to certify military orders to be 'by the direction of the President' when they are notoriously known to be contrary to the President's direction, thus keeping up the forms of the constitution to which the people are accustomed, but practically deposing the President from his office of Commander—In—Chief, and suppressing one of the great departments of the Government, that of the executive; the attempt to withdraw from the supreme judicial tribunal of the Nation the jurisdiction to examine and decide upon the conformity of their pretended laws to the Constitution, which was the chief function of that august tribunal, as organized by the fathers of the republic; all are but amplified explanations of the power they hope to acquire by the adoption of the said amendment.
>
> To conceal from the people the immense alteration of the fundamental law they intended to accomplish by the said amendment, they gilded the same with propositions of justice. . .
>
> It imposes new prohibitions upon the power of the State to pass laws, and interdicts the execution of such part of the common law as the national judiciary may esteem inconsistent with the vague provisions of the said amendment; made vague for the purpose of facilitating encroachment upon the lives, liberties and property of the people.
>
> It enlarges the judicial power of the United States so as to bring every law passed by the State, and every principle of the common law relating to life, liberty, or property, within the jurisdiction of the Federal tribunals, and charges those tribunals with duties, to the due performance of which they, from their nature and organization, and their distance from the people, are unequal.
>
> It makes a new apportionment of representatives in the National courts, for no other reason than thereby to secure to a faction a sufficient number of votes of a servile and ignorant race to outweigh the intelligent voices of their own.

and to reject. Thus 16 States had now rejected prior to a full ratification by a ¾ vote having been reached. Iowa ratified on March 9, 1868. Prior to the Proclamation of the Secretary of State, Rhode Island, Pennsylvania, Wisconsin and Massachusetts, for a total of 23 States had ratified, but this number was reduced to 21 by the withdrawals of Ohio and New Jersey. The rejections, counting the withdrawals, numbered 16. On October 15, 1868, Oregon withdrew its ratification and became the 17th of 37 States to reject. The count stood: 20 ratifications and 17 rejections, (hardly near the ¾ majority required for adoption). Even without considering the rejection of Oregon, which came after the date of the Proclamation of the Secretary of State, (July 20, 1868), the 14th Amendment had by legal means been overwhelmingly rejected.[14]

After the U.S. Army had moved into the South and taken charge by force of arms and ousted the duly elected and qualified Legislatures of all of the Southern States (except Tennessee), disqualified practically all of the white voters (by Act of Congress and not by State law), enfranchised all of the Negroes, elected Negro Legislatures, and adopted new constitutions by these purported Legislatures, the matter of ratification of the 14th Amendment as a condition to permission by Congress for the exercise of suffrage of the Southern States (violating Article V of the U.S. Constitution) was presented to these newly constituted Negro Legislatures of such States. The rejections by the legally elected and constituted Legislatures of all of the Southern States were ignored and the newly constituted Legislatures of Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama and Georgia, ratified on April 16, June 9, July 2, July 9, July 16, 1868, and July 21, 1868, respectively.

At this point, by *counting* the ratifications of Ohio and New Jersey, who had in the meanwhile withdrawn their ratifications and had rejected, and by *not counting* the rejections of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama, who had later, by way of illegally established Legislatures, ratified under compulsion of the military force of the U.S. Army, the total of 28 States needed to ratify was achieved.

The Secretary of State then proceeded to publish an equivocal proclamation. Therein he stated that whereas under an Act of Congress it had been made the duty of the Secretary of State to cause any amendment to the Constitution *which had been adopted according to the provisions of said Constitution* to be published with his certificate

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. . . .

This Legislature, feeling conscious of the support of the largest majority of the people that has ever been given expression to the public will, declare that the said proposed amendment being designed to confer, or to compel the States to confer, the sovereign right of elective franchise upon a race which has never given the slightest evidence, at any time, or in any quarter of the globe, of its capacity for self—government, and erect an impracticable standard of suffrage, which will render the right valueless to any portion of the people, was intended to overthrow the system of self—government under which the people of the United States have for eighty years enjoyed their liberties, and is unfit, from its origin, its object and its matter, to be incorporated with the fundamental law of a free people:. . .

14 Oregon had ratified on September 19, 1866. The vote in the House was 25 yeas and 22 nays. Thomas H. Bentz and M.A. McKean of Grant County both voted yea. Their election had recently been certified by the County Clerk of Grant County and based thereon they had been seated. But, on a contest, it was found that they had in fact been defeated and that the certification by the County Clerk was false and fraudulent. They were unseated, and J.M. McCoy and G.W. Knisley, who had been duly elected, were seated. The latter immediately informed the House that if they had been seated and allowed to vote they would have voted nay. The vote would therefore have been 23 yeas and 24 nays. Consequently, the old ballot was declared invalid and on October 15, 1868, a new vote was taken, resulting in a vote for rejection. Nevertheless, Oregon is counted as one of the States which ratified.

specifying the States by which the same had been adopted, and that the same had become a part of the Constitution of the United States and, whereas neither the Act referred to, nor any other law authorized the Secretary of State to determine and decide questions as to the authenticity of the organization of State Legislatures, or as to the power of any State Legislature to recall a previous act or resolution or ratification, or rejections of any amendment, that *if* the ratifications of the "newly" constituted and newly established bodies *avowing themselves to be and acting as* the Legislatures, respectively, of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama, were counted, the 14th Amendment was ratified. This Proclamation was made on July 20.[15] Although the question as to whether an amendment of the U.S. Constitution has been properly submitted by Congress and properly ratified by the State in accord with the Federal Constitution, is properly a legal question to be determined by the U.S. Supreme Court[16] and Congress has no more right to decide this than the Secretary of State, the Senate and the House one day later, on July 21, 1868, *by majority voice vote*, proceeded by separate resolutions to "resolve" that the 14th Amendment had been adopted and was a part of the Constitution. Then, pursuant to this Resolution, the Secretary of State issued a new proclamation on July 27, 1868, reciting resolutions of the House and the Senate which declared the 14th Amendment adopted, and he thereby proclaimed it had been adopted.[17]

ATTEMPTS TO OBTAIN A DECISION OF THE SUPREME COURT

Although repeated efforts have been made to get the United States Supreme Court to directly pass on the question as to whether the 14th Amendment was adopted, the issue has invariably been dodged and no opinion has ever considered or discussed it. There have been several hundred cases in which the Supreme Court has based its holding on the 14th Amendment, but all of these have been based upon prima facie presumption of validity resulting from the Proclamation of the Secretary of State.

In *ex parte Milligan*,[18] decided by the Supreme Court on December 17, 1866, the Court held that the trial and conviction of a civilian by a military commission where peace exists and the civil courts were open was null and void as the commission had no jurisdiction, and further that Congress had no authority to apply the laws of War when no War existed. Despite this ruling, William McCardle was arrested and held for trial in Mississippi by a military commission when no War existed and the civil courts were open. This case clearly demonstrated that the Congress of the United States was aware of the unconstitutionality of the Reconstruction Act and was unwilling to permit a decision of the Supreme Court to prevent the carrying out of their known illegal plan. The Members of Congress had read the veto message of President Johnson and recognized its validity and were well aware of what the result would be if the Court was forced to pass on the question.

William McCardle was the Editor of the *Vicksburg Times.* He was arrested by the military authorities in Mississippi by a military for publishing an editorial regarding the validity of the Reconstruction Act, and they proposed to try him before the military commission for impeding reconstruction, inciting disorder and disturbance of the peace. On November 12, 1867, he applied to the United States Circuit Court for a writ of habeas corpus on the

15 15 STAT. 706 (1868).

16 Opinion of Justices, 204N.C. 806, 172 S.E. 474 (1933).

17 15 STAT. 708 (1868).

18 4 Wall. 2 (1866).

ground that the Reconstruction Act was unconstitutional and void and that the military commission was without legal authority to try him. The writ was issued directing the military commission to produce the body of McCardle and to present the cause of his imprisonment. The military authorities delivered McCardle into the custody of the U.S. Marshal showing they were holding him under authority of the Reconstruction Act.

Robert A. Hill of Jacinto, Mississippi, had been appointed Judge of said Court on May 1, 1866. He was a native of North Carolina, age 54, and an Old Line Whig. He had had experience as a State Court Judge in Tennessee and Northern Mississippi. Both the Judge and McCardle recognized that this case was a means of obtaining from the Supreme Court a ruling on the constitutionality of the Reconstruction Act on appeal. A hearing was held and on November 25, 1867, the Court adjudged that McCardle be remanded into the custody of the military authorities from which judgment McCardle appealed to the U.S. Supreme Court. The Supreme Court allowed his release on bond.

In the Supreme Court a motion to dismiss was filed by the Government on the ground that the Court lacked jurisdiction to hear the case, based upon the Act of February 1867 relating to suits begun in State Courts involving habeas corpus.[19] On February 17, 1868 the Court decided that it had jurisdiction and denied the motion to dismiss.[20]

Word was passed to the leaders of Congress that the Court would be forced to declare the Reconstruction Act to be unconstitutional. While the case was thus pending Congress acted quickly. A bill was presented to the House to deprive the Supreme Court of jurisdiction to decide the case. Mr. Schenck, Chairman of the Ways and Means Committee, in reporting the bill to the House with recommendation that it be passed, stated that the bill was designed to prevent the Supreme Court from passing on the validity of reconstruction legislation.[21]

Congress quickly passed this bill, which was vetoed by the President, and on March 27, 1868,[22] it was enacted over his veto. This statute deprived the Supreme Court of any jurisdiction to decide that type of case. The case was not argued until March 19, 1869, and, on April 12, 1869, the Supreme Court dismissed the case for want of jurisdiction.[23] The Legislature of the United States had thus deliberately and intentionally prevented the Supreme Court of the United States from declaring the Reconstruction act unconstitutional. If it had done so, the whole military occupation of the Southern States would probably have forthwith terminated and the Legislature of the United States would have been thwarted in its effort to force the adoption of the 14th Amendment by such illegal and unconstitutional means.

In *Marbury v. Madison*, [24] decided February 24, 1803, the Supreme Court in an opinion by chief Justice Marshall had held that an Act of Congress which was repugnant to the Constitution was invalid and that it was within the judicial powers of the courts to so decide. The contention was made that the Act of Congress was a political Act and could not be inquired into by the courts. Chief Justice Marshall said: “This doctrine would subvert the very foundation of all written constitutions.” And: “It would be giving to the legislature a practical and real omnipotence with the same breath which professes to

19 14 STAT. 385 (1867).

20 Ex parte McCardle, 6 Wall. 318 (1868).

21 81 Congressional Glove 1881, 1883.

22 15 STAT. 44 (1868).

23 *Ex parte* Mc Cardle, 7 Wall. 506 (1869).

24 1 Cranch 137 (1803).

restrict its powers within narrow limits." Again, in *Luther v. Borden*, [25] in an opinion by Chief Justice Taney, the Court had said:

> The high power has been conferred on this court, of passing judgment upon the acts of the state sovereignties and the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States.

In March 1867, the State of Mississippi filed a motion for leave of court to file a bill in the name of the State to enjoin President Johnson from executing the Reconstruction Act on the ground it as unconstitutional. It was argued on April 12 and on April 15,[26] the Court held it had no jurisdiction to enjoin the President in the performance of his official duties, as the Legislative, Executive, and Judicial Departments of the Government were equal, the President being the Executive.

Later, in *Georgia v. Stanton*,[27] argued in April and May of 1867, decided May 13, 1867, but opinion withheld until February 10, 1868, the constitutionality of the Reconstruction Act was directly attacked and an injunction sought in the U.S. Supreme Court to enjoin Secretary of War Stanton and General Grant and others from carrying out the military occupation of Georgia, inasmuch as the execution of this law would totally abolish the existing government of the State of Georgia. The Supreme Court has held on many occasions that the acts of an individual officer of the Government, which are void because of unconstitutionality, even though acting under an Act of Congress, are merely acts as an individual and may be enjoined by the Courts. Despite these holdings and the holdings of *Marbury v. Madison* and *Luther v. Borden*, which held the Court had the power and duty to determine whether an Act of Congress violated the Constitution of the United States, the Supreme Court dismissed the complaint for alleged lack of jurisdiction on the ground that only a political question was presented. The case of *Mississippi v. Stanton* was decided at the same time with the identical opinion.

In Volume II of the GROWTH OF THE AMERICAN REPUBLIC, it was said, at page 51:

> Many of the Acts which Congress passed to carry into effect its reconstruction policy were palpably unconstitutional, but the attitude of the Radicals was well expressed by General Grant when he said of this legislation that 'much of it, no doubt, was unconstitutional; but it was hoped that the laws enacted would serve their purpose before the question of unconstitutionality could be submitted to the judiciary and a decision obtained.'

The 14th Amendment contains many desirable provisions as may be observed. It provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United State and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

25 7 How. 1 (1848).

26 Mississippi v. Johnson, 4 Wall. 475 (1867).

27 6 Wall. 50 (1867).

excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or is any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the Untied States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote or 2/3 or each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

There are also many excellent and highly desirable provision in the first Ten Amendments, commonly called the “Bill of Rights” and in the amendments adopted before and after the 14th. But, the desirability of an amendment to the Constitution cannot accomplish the adoption thereof, nor can the passage of time override the specific provisions of Article V which details the only method by which the Constitution can be changed. The Congress has expended its function in the amending process when it has proposed the amendment to the States. Any further action is completely outside the scope of the amending process.[28]

On July 12, 1909, when Senate Joint Resolution No. 40 proposing the 16th Amendment was under consideration, the Honorable Cordel Hull[29] in a speech in Congress, referred to the unconstitutionality of the purported adoption of the 14th Amendment.[30] He stated:

> While the sole function of Congress with respect to amendments is to propose to the States such amendments as 2/3 of both Houses see fit, to be ratified or rejected, either of the State Legislature or by conventions, yet Congress in this instance did not permit all of the State to act upon this proposed amendment. . .It must be conceded that the moment 3/4 of the States duly ratify an amendment it becomes a part of the Constitution, the proclamation of the Secretary of State being a mere ministerial act. Hence, it follows that Congress has not power in the premises after it

28 2 CURTIS’ HISTORY OF CONSTITUTIONAL AMENDMENTS 380; Chandler v. Wise, 270 Ky.1, 108 S. W. 2d (1937).

29 Later Secretary of State.

30 44 (4) Cong. Rec. 4404 (1909).

> has once proposed an amendment to the States as the Constitution provides, not even of recalling the amendment; therefore, the passage of any resolution by Congress declaring that a given amendment has or has not been duly ratified by the State, such as was done with respect to the 14th Amendment, is ultra vires and void.

Many legal questions arise in respect to the existence or not of the 14th Amendment. Some of these will be discussed hereafter.

1. Were the Southern States ever out of the Union?

This question is answered in the negative by the United States Supreme Court in *Texas v. White*,[31] which was an original case brought by Texas, filed on February 15, 1867, decided April 12, 1869. It was contended that the State by reason of its act of secession had so changed its status as not to be a State entitled to file suit against the United States in the Supreme Court. In holding that Texas was and always had been a State in the Union from the date of its admission, the Court, after discussing its acts of secession, etc., said:

> Did Texas in consequence of these acts cease to be a State? Or if not, did the State cease to be a member of the Union?
>
> . . . .
>
> The Union of the States never was a purely artificial and arbitrary relation. . . .It was confirmed and strengthened by the necessities of War and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual'. And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect union'. It is difficult to convey the idea of indissoluble unity more clearly than by these words...
>
> When therefore Texas became one of the United States she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the union, attached at once to the State. The Act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete land perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution or through consent of the State. Considered, therefore, as transactions under the Constitution, the Ordinance of Secession adopted by the convention and ratified by a majority of the citizens of Texas, and all of the Acts of her Legislature intended to give effect to that ordinance, were null and void. They were utterly without operation of law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union.[32]

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31 7 Wall. 700 (1869).

32 See also Hickman v. Jones, 9 Wall. 197 (1870); White v. Hart, 13 Wall. 646 (18…); and Horn v. Lockhart, 17 Wall 570 (1873), the latter holding that the Acts of the individual States of the South during the Civil War, so far as they did not impair or intend to impair the supremacy of the national authority are to be treated as valid and binding.

2. Were the duly elected and organized bodies, acting as the Legislatures in the eleven Southern States, prior to March 2, 1867, duly organized under the Constitution of the United States?

For nearly two years prior to March 2, 1867, the Civil War had ended and peace had been restored. By Proclamation of President Johnson of April 2, 1866, the War had been declared ended. Under the Constitution which required that all States be equal, the rebellious States were restored to an equal basis and placed on a like footing as to political rights, immunities, dignities and power as the remainder of the Union. During the year of 1865, following the surrender of General Lee at Appomattox on April 9, and General Johnston at Durham Station on April 26, Legislatures of the Southern States had organized pursuant to President Johnson's Proclamation. These Legislatures had ratified the 13th Amendment abolishing slavery, which was proclaimed adopted by the Secretary of State on December 18, 1865. This ratification was recognized by all Departments of the Government: Executive, Legislative, and Judicial. Of legal necessity they recognized the then existing legislative bodies of at least the Southern States who had ratified, namely: Tennessee, Arkansas, South Carolina, Alabama, North Carolina, and Georgia.[33] The Legislatures of the Southern States were duly organized and existing, and since Congress lacked authority to oust these Legislatures by military power or otherwise, they never legally ceased to exist. The new Legislatures installed by the Army were, therefore, null and void and all new State officers were likewise usurpers, totally lacking in State authority.

3. Were the two Houses of the 39th Congress organized according to the Constitution? If not, what effect did the failure to seat Senators from the Southern States have upon the proceeding?

Section 5 of Article I of the Constitution provides that: "Each House shall be the Judge of the Elections. Returns and Qualifications of its own members,…"

While each House is made the sole Judge of the Elections, Returns and Qualifications of its member, there is no authority granted by the Constitution to refuse to "Judge." The whole purpose of this constitutional provision relates to the judging of each individual member. It contemplates a hearing and the taking of evidence with a right to be heard before being judged. To arbitrarily decide not to seat any of the Senators or Representatives from any specified States without even a hearing was not a judging, but rather an arbitrary deprivation of the equal suffrage of these States in violation of Article v of the Constitution. Upon a hearing and judging the Houses might lawfully have refused to seat all or most of such duly elected person, or they might have decided to seat any portion of them. But an arbitrary refusal to judge as authorized by the Constitution was an arbitrary refusal to seat in violation of the Constitution, and was therefore unlawful.[34]

4. Is the election of the Members of a State Legislature, conducted under military force by the United States Army, in violation of the laws of suffrage of such State, a valid election?

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33 The case of Horn v. Lockhart, note 32 supra, is decisive of this question.

34 If the Southern representatives had been seated and, as is likely, had voted unanimously against the Amendment, the vote would have been 33 yeas and 29 nays in the Senate, and 128 yeas and 79 nays in the House and the Amendment would have failed in both Houses.

In the case of *Breedlove v. Suttle*,[35] the United States Supreme Court has held that each of the States has the supreme and exclusive power to regulate the right to suffrage and to determine the class of inhabitants who may vote. The use of the U.S. Army in 1867 to occupy several of the sovereign States, change the State rules of suffrage, and to purportedly elect new State officers and new State Legislatures was just patently illegal as it would be today. If the officers of the Federal Government could in 1867 send the Army into a State, oust its legislatures and officers, and elect new ones under their own rules of suffrage, then a political party today could, after coming to power, use the United States Army to seize and occupy all States having a predominantly different party, oust its officers and legislators and make its return to self-government conditional on its ratification of an amendment to the Constitution abolishing all other political parties.[36] In other words, if the action of the Congress in the Reconstruction Act and all done under it be valid, then the United States can at any time by a simple majority vote of the Congress establish an absolute dictatorship.

Mr. Thaddeus Stevens of Pennsylvania, on December 14, 1865, said:

> According to my judgment they (Southern States) ought never to be recognized as capable of being counted as valid States until the Constitution has been so amended as to secure ascendancy of the Party of the Union (Republic).

His plan was twofold: *first*, to reduce the representation to which the Southern States were entitled under the Constitution; *second*, to enfranchise the blacks and disenfranchise the whites. This was calculated to keep the Southern States out of the Union until the Constitution had been so amended as to accomplish his objects and after that have control of the Southern States in the hands of the Party of the Union (Republican).[37] If Mr. Thaddeus Stevens[38] could legally accomplish his objects in 1867, and 1868, some political leader fired with personal ambition could make himself dictator and override and destroy the Constitution in 1968 with the support of a majority in Congress and the Army to back him. The patter is already established and he need but follow precedent.

5. Is the ratification of a constitutional amendment by a Legislature elected, as in Question No. 4, valid and effective?

The votes of the Southern Legislatures which were counted as having ratified the 14th Amendment by the Secretary of State when he issued his proclamation were not the votes of the duly constituted and existing Legislatures of such States, and the

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35 302 U.S. 277 (1937).

36 The ratification procured by an unlawful refusal to seat the duly elected representatives of the State and of the people of the State is similar to duress. This was coercion. Coercion exists where one, by the unlawful conduct of another, is induced to do or perform some act under circumstances which deprive him of the exercise of his free will. Coercion exists when the person is thus constrained to do what his free will would refuse. 14 C. J. S. 1307. A ratification procured by coercion against the free will of the Legislature, and which if it were not for the coercion would be rejected, is obviously not a binding and valid ratification within the meaning of the 5th Amendment of the Constitution.

37 2 CURTIS CONSTITUTION HISTORY.

38 2 GROWTH OF THE AMERICAN REPUBLIC 38, is stated:

> Stevens is one of the most unpleasant characters in America History. A harsh, sombre, friendless old man of seventy—four, and with no redeeming spark of magnanimity, he was moved less by sympathy for the Negro than by cold hatred of the Southern gentry. The former he would exalt to a status of complete political and social equality; the latter he would humiliate, disenfranchise, and despoil of all landed property in favor of the freedman.

certification of ratification by a usurper claiming to be Governor of a State was no certification at all. The Acts of Congress asserting that it had been ratified did not add one inch to its size. The Proclamation of the Secretary of State added no more to the compliance with the requirements of Article V of the Constitution than if there had been not a single ratification. By these methods, the Speaker of the House, the President of the Senate, and the Secretary of State, without even a vote of the Senate or House, or a ratification by a single State, could amend the Constitution at will.

6. May a State change its position toward an amendment before there has been a ratification by 3/4 of the States?

Many experts on constitutional law have taken the position and expressed the view that such a change can be made. The Supreme Court of Kentucky, in the case of *Wise v. Chandler*,[39] has held that when a State has acted on a proposed amendment to the Federal Constitution, to either ratify or reject, its power further to consider the question has been exhausted without a resubmission by the Congress. Certiorari was granted in this case to the United States Supreme Court,[40] but the case was dismissed on the ground that there was not controversy susceptible of judicial determination. The United States Supreme Court in *Coleman v. Miller*,[41] held that the Supreme Court of Kansas had a right to consider the question as to whether the proposed Child Labor Amendment to the United States Constitution had been properly ratified under a claim of members of the State Senate that their votes had not been given effect. But the specific question here considered has never been passed upon directly by the United States Supreme Court.

7. Is the question of the validity of the 14th Amendment a legal or political one?

Applying the test as announced by the Supreme Court in *Marbury v. Madison*,[42] the question as to whether a constitutional amendment has been effectuated is properly a judicial rather than a political one. However, that the question is a political one seems to be so well established as not to afford a contrary view.

Early in April, 1867, Georgia and Mississippi filed bills for leave of the Court to enjoin the Secretary of War Stanton and General Grant from carrying out the Reconstruction Act.

In *Georgia v. Stanton*,[43] and *Mississippi v. Stanton*[44] the constitutionality of the Reconstruction Act was directly attacked and the Supreme Court dismissed the complaints for alleged lack of jurisdiction on the ground that only a political question was presented.

In *Coleman v. Miller*,[45] the Court discussed the questionable nature of the adoption of the 14th Amendment pointing out the incongruity of the failure to recognize the withdrawals of the ratifications by Ohio and New Jersey as compared to the subseq1uent ratifications of North Carolina, South Carolina, and Georgia, after such States had formally rejected. The Court referred to the dubious first Proclamation of the Secretary of State and the following Act of Congress which declared the 14th

39 270 Ky. 1, 108 S. W. 2d 1024 (1937).

40 Chandler v. Wise, 307 U.S. 474 (1938).

41 307 U.S. 433 (1938).

42 1 Cranch 137 (1803).

43 6 Wall. 50 (1867).

44 6 Wall. 50 (1867).

45 307 U.S. 433 (1938).

Amendment to have been adopted and the second Proclamation of the Secretary of State proclaiming adoption. The Court then stated:

> This decision by the political departments of the Government as to the validity of the adoption of the 14th Amendment has been accepted. We think that in accordance with this historic precedent the question of the efficacy of ratifications of State Legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in congress in the exercise of its control over the promulgation of the adoption of the Amendment.

In *Leser v. Garnett*,[46] it was held that the certificate of the Secretary of State certifying to the ratification of the 19th Amendment was binding on the courts. The duty to act in regard to Constitutional Amendments has now been given to the Administrator, General Services Administration.[47]

That the rulings in *Leser v. Garnett*; *Coleman v. Miller*, and *Chandler v. Wise* are of doubtful wisdom is emphasized by the actions of the Legislatures of Oregon and New Jersey. At the time of the Proclamation of Secretary Seward, the Legislature of Oregon had ratified and such ratification had been duly attested to by the Governor. But, upon investigation it was found that such vote was based upon fraud and that two of the members of the Legislature, whose votes were essential to ratification, had not in fact been elected. Their seating had been procured by a fraudulent certification of election by a county clerk. After the facts were discovered, these two members were unseated and the duly elected ones were seated. Upon a demand by them a new vote was taken in which their legal votes were counted. The Amendment was rejected. Nevertheless, Oregon was counted as having ratified the 14th Amendment.

At the time of the Proclamation, New Jersey had withdrawn its ratification because of the unlawful action of Congress in purportedly unseating Senator John P. Stockton by a majority vote; whereas, having been duly seated, Section of Article I of the Constitution required a 2/3 vote to expel. Yet we are told that the same Congress by a majority vote in making a so—called "political" decision will be the sole judge of its own misconduct, in open and flagrant violation of the Constitution, when the rights of citizens and the rights of States reserved by the 10th Amendment are involved.

DANGER TO OUR FORM GOVERNMENT

Coleman v. Miller; *Chandler v. Wise;* and *Leser v. Garnett*, seem to be decisive of the question as to a lack of authority in the Supreme Court to decide whether an amendment has been legally adopted. If it be so, the whole constitutional structure of the United States is in serious danger and Congress should forthwith initiate the necessary action to give jurisdiction to the Courts to determine whether an amendment has been legally adopted. Under the authority of *Coleman v. Miller*; *Leser v. Garnett,* and *Chandler v. Wise,* any political party which came to power in sufficient strength to propose an

46 258 U.S. 130 (1921). In spite of the fact that the persons who made the certificates for the Southern States certifying to a ratification were not legally elected or qualified Stated officers authorized to make such certificates, but were usurpers professing to occupy such offices under the military power of the United States, under the holding of Leser v. Garnett, the courts are unable to question whether the officers of the State who sent certifications to the Secretary of State certifying the ratification were duly authorized to do so.

47 65 STAT. 710, U.S.C. § 106 (b)(1951).

amendment to the Constitution by a 2/3 vote could propose an amendment to abolish all other political parties for the style of Government we see in many foreign countries. A mere Proclamation of one man (Administrator of General Services Administration) that such amendment had been adopted by 3/4 of the States would make it an incontestable amendment despite the fact that not a single State actually ratified. In similar fashion, the provisions of Section 1, Article II, of the Constitution, which fixes the term of office of the President at four years, could quickly be amended to a term for life; thus a dictator could be born. In like manner, it would be a simple matter to withdraw from the Courts the power to declare an Act of the President or of Congress a violation of the Constitution. An amendment might abolish the sovereignty of the States and leave but one Federal Government. This sort of thing can be anticipated in time of great national stress as the panacea for the Nation's ills.

Perhaps such a bold attempt to change the Constitution by the mere false certification by the Administrator of General Services Administration would be too unpalatable to the public conscience, as would be the military invasion by Federal troops of States having recalcitrant Legislatures. But a recourse to a pretense of ratification could more readily be procured by the organization of "Rump" Legislatures composed of henchmen of the Federal Executive. Such "ratifications" would thereupon be accepted by the "political" decision of the Congress based on a *majority voice vote*. There is no *legal* difference in such action from what was done in respect to the 14th Amendment. And the Supreme Court has declined to afford to the citizens of the States protection from such usurpation of power under the pretext that these are "political" questions.

It may be said by short—sighted persons now that it is preposterous to suggest that some Congress in the future might pass Amendments to the Constitution to abolish all political parties other than the one in power and to change the tenure of office of the President to life instead of four years, by the simple expedient of Congress by Joint Resolution declaring the Amendments to be adopted followed by a certification to that effect by the Administrator of General Services Administration. However, such unforeseen things have happened before.[48] It would be much wiser to preclude such a possibility now than to regret its occurrence later.

REMEDIES

It would serve no useful purpose to discuss the correctness of the decisions of the Supreme Court in *Leser v. Garnett* and *Coleman v. Miller* other than to mention that in the latter case there was a dissent by Justices Butler and McReynolds. There is a long line of decisions of the Supreme Court on questions that it considered not to be justiciable because they were "political"; most of them relating to foreign affairs,[49] but

48 When the 16th Amendment to the Constitution, seeking to authorize the United States to levy and collect taxes on incomes of citizens, was being debated in Congress, one of the Senators warned the Senate that if they passed this proposed Amendment they might conceivably some day see income taxes levied for as high as 20%, which would be confiscatory. At that time, the argument was answered by the assertion that it was preposterous for anyone to suggest that income taxes might ever be levied as high as 20% and that no right—thinking person could ever believe this would ever happen as the voters would defeat any legislator who voted for such a high tax; yet today the average person pays that much and some pay as high as 91%.

49 Ware v. Hylton, 3 Dall. 199 (1796); U.S. v. Palmer, 3 Wheat 610 (1818); Foster v. Neilson, 2 Pet. 253 (1829); Luther v. Borden, 7 How. 1 (1849); Doe v. Braden, 16 How. 635 (1853); Terlinden v. Ames, 174 U.S. 270 (1902); Pacific States Telegraph v. Oregon, 223 U.S. 118 (1912). See also "The

unfortunately it has also construed this particular area as political and will consequently not entertain it as matters now stand.

In order to reestablish the traditional checks and balances in this area between the three Departments of the Government, as designed by our founding fathers and destroyed by the 39th and 40th Congresses, it is imperative that the legality of the adoptions of Constitutional Amendments be subjected to judicial scrutiny.

The Congress could, of course, by ordinary Act, by majority vote of both Houses, and signature of the President, confer jurisdiction on the Courts of the United States and the Supreme Court to make a determination whether an Amendment to the Constitution has been adopted.

Whether an Amendment to the Constitution has been adopted is actually al mixed question of law and fact, or at worst a mixed question of law, fact, and politics. That the Congress has the power to authorize the courts to determine such question was decided by the Supreme Court in *Luther v. Borden*,[50] which related to the provision of the Constitution in which the United States guarantees to each State a republican form government. In a unanimous opinion, written by Chief Justice Taney, it was said:

> Under this article it rests with Congress to decide what Government is the establish one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.
>
> . . . .
>
> So, too, as relates to the clause in the above—mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to fulfill this guaranty. *They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere.* (Writer's emphasis).

The relative ease by which a remedy is obtainable by Act of Congress loses its attractiveness, however, when it is realized that such Act could be repealed with equal ease by the same willful, short—sighted men against whom protection is sought. The only remedy which would reestablish the checks and balances contemplated by the framers of the Constitution with safety against a willful congressional majority would be an Amendment to Article V of the Constitution, conferring on the judiciary the authority to determine whether an Amendment has been adopted. In my opinion the heritage of our Constitutional form of Government will be in danger of destruction until such Amendment to the Constitution is adopted.

Doctrine of Political Questions", 8 Minn. L. Rev. 485 (1924); "Political Questions", 38 Harv. L. Rev 296 (1925).

50 7 How. 1 (1849).