



THE DUBIOUS ORIGIN OF THE FOURTEENTH AMENDMENT *

Walter J. Suthon, Jr.[†]

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The Fourteenth Amendment to the Constitution of the United States has loomed large in recent years in litigation before the United States Supreme Court involving contentions for restriction of State regulatory power and enlargement of Federal regulatory power. Under this Amendment—and its companion, or satellite amendment, the Fifteenth—the United States Supreme Court, in the past approximately fifteen years, has repeatedly rendered decisions<sup>1</sup> aimed at coercing racial integration and breaking down established systems of racial segregation in political, educational, social, economic and other fields in the Southern States—and in some instances outside the South.

It is not the purpose of this article to discuss the merits of segregation—or of its antitype, racial integration. These are questions upon which each of us has his or her own individual view, belief, and conviction, based on what we think and how we think. What is to be discussed relates to the use of the Fourteenth Amendment by the United States Supreme Court as an implement for invading the areas formerly reserved to State regulation, or to individual or group action, and for breaking down established systems of racial segregation and setting up compulsive racial inter-association—in effect compulsive racial integration. In this field, the “equal protection of the laws” clause and the “privileges or immunities” clause of the Fourteenth Amendment are those most frequently invoked in support of those legal attacks upon our fundamental way of life.

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/† Member of the Louisiana Bar, New Orleans; President, Louisiana State Bar Association, 1951—1952; Professor of Civil Law, Tulane University; Member, Board of Advisory Editors, Tulane Law Review.

1 Barrows v. Jackson, 346 U.S. 249 (1953); McLaurin V. Oklahoma State Regents, 339 U.S. 1 (1950); Swentt v. Painter, 339 U.S. 629 (1950); Shelly v. kraemer, 334 U.S. 1 (1948); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Fisher v. Llurat, 333 U.S. 147 (1948); Missouri ex. Rel. Gnines v. Canada, 305 U.S. 337 (1938); see also cases of substantially similar import involving carriers in interstate commerce, Henderson v. United States, 339 U.S. 816 (1950); Morgan v. Virginia, 328 U.S. 373; Mitchell v. United States, 313 U.S. 80 (1941); see also cases predicated upon the Fifteenth Amendment, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

## SCHOOL SEGREGATION CASES

There are now pending in the United States Supreme Court a group of cases<sup>2</sup> involving attacks upon the constitutionality of our system of segregated public schools, and presenting demands that the segregation feature of this system shall be destroyed by judicial fiat. These cases seek the overruling of the established jurisprudence, predicated in a large measure upon a leading decision<sup>3</sup> of the Supreme Court of Massachusetts, that a segregated system of public schools is constitutional, provided the educational facilities for each race are substantially equal.

The United States Supreme Court, after hearing arguments in these school segregation cases, and after several months of study and consideration following these arguments, has entered orders<sup>4</sup> refixing these cases for further argument, now scheduled to take place in December. The orders for reargument specify certain issues on which the Court desires to hear discussion and to receive briefs. From this course of events, it appears quite possible that this Court is closely divided on these cases, and that the ultimate outcome may be determined by the presentation on reargument and in the additional briefs to be filed thereon.

The specification of issues, on which discussion is requested at the reargument, includes inquiries<sup>5</sup> as to events contemporaneous with the framing, submission and ratification of the Amendment. These specifications were probably prepared without any particular intent to invite exposure or discussion of the dubious origin of this Amendment. Be that as it may, they involve study, consideration and evaluation of the legislative history of the Amendment, and its dubious origin—one may justifiably say its worse than dubious origin—is an inseparable part of its malodorous legislative history.

## AMENDMENT PROCEDURE ESTABLISHED BY ARTICLE V

Article V<sup>6</sup> of the Constitution sets forth the procedure for amendment proposals and ratifications. The portion of Article V pertinent to the amendment machinery utilized in this instance reads as follows:

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2 *Brown v. Board of Education of Topeka, Briggs v. Elliot, Davis v. County School Board, Bolling v. Sharpe, Gebhart v. Belton*, 345 U.S. 972 (1953).

3 *Roberts v. City of Boston*, 5 Cush. (Mass.) 198 (1849).

4 345 U.S. 972 (1953).

5 “1. What evidence is there that the Congress which submitted and the State Legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?  
“2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment  
“(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or  
“(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?” 345 U.S. 972 (1953).

6 “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, or by Conventions of three fourths thereof, as the one of the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth

“Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution...which... shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States...”

As will be observed, this amending process is a two-step process. Congress takes the first step—submission. The next step—ratification—must be the act of the States—the act of at least three fourths of the States concurring in ratifications passed by their respective legislatures.

When the amendment procedure set forth in Article V of the Constitution is carefully analyzed, it will appear that the States have the primary of major and final function in the amending process, and the role of Congress therein, although substantial and important, is definitely of a secondary and preliminary nature. Indeed, an amendment proposal defeated in Congress may nevertheless be adopted exclusively by state action. This would occur upon the legislatures of two-thirds of the States applying for the calling of a Convention to propose such an amendment, and upon the ratification of that amendment proposal by three-fourths of the States.

Even when the amendment proposal is the product of a two thirds vote of Congress, the final say—so rests entirely with the States. After the initial step of voting the amendment proposal, the only remaining function in the ratification procedure allocated to Congress by the Constitution is a minor one—the function of determining<sup>7</sup> whether the States, in voting on ratification, shall act through their respective legislatures, or through Conventions.

## **EVOLVEMENT OF ARTICLE V IN FEDERAL CONVENTION**

The record of the evolution of Article V, in the proceedings of the Federal Convention of 1787, fully supports the view that Congress has no function at all to perform in that stage of the amending process which comes after submission of the proposed, i.e., during consideration of ratification by the States, and action thereon by the States. It is significant that, in the Convention, a proposal<sup>8</sup> for excluding the “National Legislature” entirely from the amending process, and leaving the whole of that process to the States, was seriously made and considered. There was never any corresponding proposal that the States be excluded entirely from the amending process or that this process should be entrusted entirely to Congress.

Mason argued,<sup>9</sup> in support of excluding the “National Legislature” entirely from the amending process, that “they may abuse their power, and refuse their assent on that

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Section of the first Article; and that no State without its Consent, shall be deprived of its equal Suffrage in the Senate.”

7 It is a far cry from the delegated power of determining whether ratification shall be considered by State Legislatures or by State Conventions, to the unmentioned and undelegated power, arrogated unto itself by Congress in 1867, *infra* p. 31 ff., of commanding sovereign states to ratify an amendment proposal hitherto rejected by them, under the penalty otherwise of continuing denial of all rights of self-government and continuing subjection to military rule. In thus attempting to coerce state action in favor of ratification after the proposal had been submitted by Congress to the state legislatures, Congress arrogated to itself a primary and paramount role in that part of the amending process wherein the Constitution has allocated to Congress no role at all.

8 See Thirteenth Resolution of the Virginia Plan, presented by Randolph. 5 Elliot’s Debates 128.

9 *Id.* at 182.

very account.” Of course, that view in precisely that form did not finally prevail. However, it is significant that Article V, as evolved and adopted, contains a safeguard against what Mason apprehended—a power in Congress to completely block an amendment proposal. This safeguard against possible Congressional obstruction appears in the provision that two-thirds of the States may by-pass a refusal of Congress to submit a particular amendment proposal, by voting through their legislatures for a Convention to propose such an amendment.

As the proposed language of the provision for amendments began to take form, the sole method at first for initiating amendments<sup>10</sup> was to be an application by the legislatures of two-thirds of the States for the calling of a Convention for that purpose, the “legislature of the United States” having merely the ministerial function of calling the Convention upon such an application by the required number of state legislatures.

Hamilton had a leading part in changing the language so as to permit Congress to have a power to propose a constitutional amendment. In arguing in favor of giving this power of initiating an amendment proposal to Congress, he said: “There could be no danger in giving this power, as the people would finally decide in the case.”<sup>11</sup>

How remote was this Hamiltonian concept<sup>12</sup> from the events of 1867 and 1868, when a “rump” Congress arrogated to itself the power to force ratification of a rejected amendment, through coercing ratifications by several of the rejecting States!

After Hamilton had made his point that Congress could be safely invested with a power of initiating amendment proposals, since that would not give it power of final decision on these proposals, the language of this provision was then and there worked out in substantially the final form of what later became Article V.<sup>13</sup> This was done<sup>14</sup> under the leadership of Madison and Hamilton, who thus collaborated on giving Congress a power (but not even an exclusive power) to initiate amendment proposals, with power of final decision as to ratification or rejection reserved to the States.

A power in the States to initiate amendment proposals, through action to that end by the legislatures of two-thirds of the States, was retained in this product<sup>15</sup> of the joint work of Madison and Hamilton. As already noted, this affords a possibility for completely by—

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10 5 *id.* at 381.

11 5 *id.* at 531.

12 There is an impressive and significant ideology consonance between the judicial recognition that ratification or rejection of an amendment proposal, by state legislatures or conventions, is “a decisive expression of the people’s will,” *Dillon v. Gloss*, 256 U.S. 368, 374 (1921), or a voicing of “the will of the people,” *Hawke v. Smith*, 253 U.S. 221, 226-227 (1920), and this concept of Hamilton that permitting Congress to initiate an amendment proposal would leave to the people the power of final decision on ratification or rejection.

13 It is interesting to note that Article V in its final form is quite similar to Article XVI in the Plan of a Federal Constitution submitted by Charles Pinckney early in the sessions of the Convention. 5 Elliot’s Debates 128, 132. However, Pinckney’s plan would have permitted the adoption of an amendment through ratification by the legislatures of two-thirds of the States, whereas the Convention ultimately fixed a more stringent ratification standard.

It is most significant that the Convention had before it Pinckney’s plan for amendment proposals by Congress, and action on ratification thereof by the state legislatures, when Hamilton persuaded the delegates to permit Congress to initiate amendment proposals on this argument that “the people would finally decide in the case.” 5*id.* At 531.

14 5 Elliot’s Debates 531, 532.

15 5 *id.* at 531.

passing Congress on a constitutional amendment proposal, and prevents a Congressional power to initiate amendment proposals from becoming a veto power.

It should also be noted that, on this same occasion, the rather general language, which would apparently have required unanimity of action by the States for ratification, was amended so as to fix proportion of the whole number of States required for ratification. Rejecting a motion to fix this proportion at two-thirds, the Convention voted to require ratification by three-fourths of the States in order to effectuate an amendment.<sup>16</sup> The significance of this choice of the larger of two proposed proportions as to the state action requisite for ratification is that the right to defeat an amendment proposal was thereby vested in a smaller proportion of rejecting States. It was this constitutional right of a group of rejecting States, sufficient in number to defeat ratification of the Fourteenth Amendment, which was infringed by the unconstitutional action of Congress in coercing ratification by several of the rejecting States through the compulsions of the Reconstruction Act.

Evidently to safeguard, as far as possible, against the risk of an obstructive attitude on the part of Congress, the provision for Congress submitting amendment proposals on the applications of the legislatures of two-thirds of the States was changed<sup>17</sup> to a requirement that Congress should call a Convention for that purpose upon such an application from state legislatures. This proposal was made by Governor Morris and Gerry, following a warning by Mason that Congress could be expected to use its power relating to the proposing of amendments to prevent the States from having an opportunity to ratify proper amendments.<sup>18</sup>

It is also interesting to note that the final change, in the provision which was about to become Article V of the Constitution, was the insertion, on the motion of Governor Morris, of the prohibition<sup>19</sup> against depriving any State of its equal suffrage in the Senate, without its consent. As pointed out elsewhere in this article, a gross and wholesale violation of this plain constitutional provision, through the exclusion from the Senate of all persons holding credentials as Senators from the ten Southern States, made it possible for the advocates of the amendment proposal to obtain in the “rump” Senate the two-thirds vote required to submit to the States the proposal for the Fourteenth Amendment.

The Fourteenth Amendment was proposed by Congress to the States for adoption, through the enactment by Congress of Public Resolution No. 48,<sup>20</sup> adopted by the Senate on June 8, 1866<sup>21</sup> and by the House of Representatives on June 13, 1866.<sup>22</sup>

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16 5 *id.* at 531, 532.

17 5 *id.* at 551.

18 The events of 1867 and 1868 confirmed the justification for Mason’s distrust of Congress respecting the amendment procedure. Indeed, those events went even further than Mason’s apprehensions. He was fearful that Congress, given a role in the amendment proposal process, would abuse that role by obstructive practices. In 1867 and 1868 Congress went entirely beyond its constitutional role as a proposer of amendments, and usurped the power to control the action of certain States in the ratification process—an area in which Congress has no constitutional function at all.

19 5 Elliot’s Debates 552.

20 14 Stat. 358 (1866).

21 Cong. Globe, 39th Cong., 1st Sess. 3042 (1866).

22 *Id.* at 3149.

That Congress deliberately submitted this amendment proposal to the then existing legislatures of the several States is shown by the initial paragraph of the resolution.<sup>23</sup>

This submission was by a two-thirds vote of the quorum present in each House of Congress, and in that sense it complied with Article V of the Constitution. However, the submission was by a “rump” Congress. Using the constitutional provision<sup>24</sup> that “Each House shall be the judge of the Elections, Returns and Qualifications of its own Members. . .” each House had excluded all persons appearing with credentials as Senators or Representatives from the ten Southern States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas. This exclusion, through the exercise of an unreviewable constitutional prerogative, constituted a gross violation of the essence of two other constitutional provisions,<sup>25</sup> both intended to protect the rights of the States to representation in Congress.

Had these ten Southern States not been summarily denied their constitutional rights of representation in Congress, through ruthless use of the power of each House to pass on the election and qualifications of its members, this amendment proposal would doubtless have died a-borning. It obviously would have been impossible to secure a two-thirds vote for the submission of the proposed Fourteenth Amendment, particularly in the Senate, if the excluded members had been permitted to enter and to vote. Of course, that was one of the motives and reasons for this policy of ruthless exclusion.

Assuming the validity of the submission of this amendment by a two-thirds vote of the “rump” Congress, there is no gainsaying the obvious proposition that whatever “contemplation” or “understanding” this “rump” Congress may have had, as to the intent, or the scope, or the effect, or the consequences of the amendment being submitted, was necessarily a “rump” contemplation or understanding. The ten Southern States, whose Senators and Representatives were all excluded from the deliberations of this “rump” Congress, could have had no possible part in the development or formation of any “contemplation” or “understanding” of what the consequences and effects of the proposed amendment were to be.

If the Supreme Court now finds that the Congress submitting the proposed Amendment understood and contemplated that it would abolish segregation in the public schools, either immediately or ultimately, one naturally wonders whether the Supreme Court will then enforce this necessarily “rump” contemplation or understanding against the ten Southern States who were deliberately and designedly excluded from any possible participation in these “rump” submission proceedings.

When the Fourteenth Amendment was submitted, these ten Southern States, which had been excluded from representation in Congress, had existing governments and legislatures. Congress had sought to avoid extending any recognition to these existing state governments, and the legality of these governments, in what the radical majority in Congress termed the “rebel States,” was disputed in some quarters. However, in practically all of these ten States, these governments were the only governments then in

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23 “Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring) that the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution.”

24 U.S. Const. Art.. I, § 5.

25 Article V states that “not State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

Article I, § 2 provides that “each State shall have at least one Representative...”

existence and these legislatures, being the only legislatures then existing in these States, were in June 1866, the only legislatures in these States to which the Fourteenth Amendment could be then submitted under the directive in the proposal resolution that the amendment be submitted “to the legislatures of the several states.”

These State governments had received Presidential recognition and, through their legislatures, they had participated actively in the then recent ratification and adoption of the Thirteenth Amendment abolishing slavery. Indeed, ratification of that amendment by these legislatures in these Southern States had aided in making up the ratification of that amendment, abolishing slavery, by the required three-fourths of the States.

## REJECTIONS OF THE AMENDMENT

When the proposed Fourteenth Amendment was submitted to the legislatures of the several States, it needed to have ratification by twenty-eight States, being three-fourths of the thirty-seven States. While it was ratified rather promptly by most of the States outside the South, it was never ratified by California and it was rejected by the three border states of Kentucky, Delaware and Maryland.<sup>26</sup> It was also rejected, during the latter part of 1866 and the early part of 1867, by the legislatures of the ten Southern States,<sup>27</sup> including Louisiana, whose Senators and Representatives had been excluded from seats in Congress.

This created a situation which made impossible the ratification of the Amendment unless some of these rejections were sufficient to prevent the adoption of the amendment proposal. The thirteen rejections, by the ten Southern States and three border States, were more than sufficient to block ratification even if all other States finally ratified.

The Louisiana legislature, which rejected the Fourteenth Amendment early in 1867, had been elected under the Louisiana Constitution of 1864, and functioned under this Constitution. It should be remembered that this Constitution was not a product of the Confederacy, or of a reorganization of the State government by former Confederates after cessation of hostilities. The Louisiana Constitution of 1864 was adopted<sup>28</sup> by a convention held in New Orleans under the auspices of the Federal authorities, acting largely on suggestions and directions from President Lincoln. It was clearly a re-establishment and continuation of the Louisiana state government as it had existed before secession.

The rejection of the Fourteenth Amendment by this Louisiana Legislature is embodied in Act 4 of 1867, a Joint Resolution adopted by both Houses declaring

“That the State of Louisiana refuses to accede to the amendment of the Constitution of the United States proposed as Article (XIV) Fourteen.”

This is the only action ever taken on the Fourteenth Amendment by a Louisiana Legislature exercising free and unfettered and uncoerced judgment and discretion as between ratification or rejection of the amendment proposal. The subsequent purported ratification of this Amendment in Louisiana was be a legislature of a puppet government,

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26 Flack, *The Adoption of the Fourteenth Amendment* 204 (1908).

27 These legislative rejections of this amendment proposal in these ten States were in some instances by a unanimous vote and all other instances by a vote by little short of unanimity. See Flack, *op. cit. supra* note 26, at 191-204.

28 William Kernan Dart, *The Louisiana Judicial System*, in 1 White and Dart, *La. Digest Ann.* 50-51 (1917).

created by the radical majority of Congress to do the bidding of its master, and compelled to ratify this Amendment by the Federal Statute which had brought this puppet government into existence for this specific purpose.

It is most interesting to read the proceedings of the Louisiana House of Representatives on February 6, 1867,<sup>29</sup> whereby that body adopted the Joint Resolution ordaining the refusal of Louisiana to ratify the proposed Fourteenth Amendment—the Joint Resolution which became Act 4 of 1867. This Journal shows, by the roll call, that one hundred members voted out of a total House membership of one hundred and ten—and that the unanimous vote was one hundred against ratification and none in favor of it. This was the last opportunity for a free and uncoerced expression of views on this amendment proposal by the duly elected representatives of the people of Louisiana.

## THE RECONSTRUCTION ACT

The scene shifts back to Washington. The Radicals have a majority, by over a two-thirds vote, in the “rump” Congress from which all representation of the ten Southern States is excluded. They accomplish the passage of the Reconstruction Act of March 2, 1867.<sup>30</sup> This Act had, as one of its major objectives, the attainment of ultimate ratification of the Fourteenth Amendment through compelling and coercing ratification by the ten Southern States which had rejected it.

The Act dealt with these ten Southern States, referred to as “rebel States” in its various provisions. It opened with a recital that “no legal State government” existed in these States. It placed these States under military rule. Louisiana and Texas were grouped together as the Fifth Military District, and placed under the domination of an army officer appointed by the President. All civilian authorities were placed under the dominant authority of the military government.<sup>31</sup>

This Act, as supplemented by subsequent amendments, completely deprived these States of all their powers of government and autonomy, until such time as Congress should approve the form of a reorganized state government, conforming to rigid and extreme specifications set out in the Act, and should have recognized the States as again entitled to representation in Congress.

The most extreme and amazing feature of the Act was the requirement that each excluded State must ratify the Fourteenth Amendment, in order to again enjoy the status and rights of a State, including representation in Congress. Section 3 of the Act sets forth this compulsive coercion thus imposed upon the Southern States.<sup>32</sup>

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29 1867 Journal of the Louisiana House of Representatives, p. 24.

30 14 Stat. 428 (1867).

31 The Reconstruction Act, as supplemented by later legislation, a particularly Act of July 19, 1867, 15 Stat. 14, established a system of registration before Boards set up under military auspices, as a predicate for qualifying as voters under the proposed new governments being imposed upon the Southern States. This legislation gave the Registrars powers at least as absolute and arbitrary as those conferred upon such officials by the Boswell Amendment being Amendment NO. 55 to Section 181 of the Constitution of Alabama. In the recent judicial annulment of the Boswell Amendment, as violative of the Fourteenth and Fifteenth Amendments to the constitution of the United States, great stress was laid upon the arbitrary powers which it conferred upon Boards of Registrars in the registration of voters. See *Davis v. Schnell*, 81 F. Supp. (S.D. Ala.) 872, 877-878, *aff'd*, 336 U.S. 933 (1949).

32 “...and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and

The most apt characterization of this compulsive provision, placing these States under military authority, there to remain until they complied *inter alia* with this requirement of ratifying the rejected Fourteenth Amendment, is found in a speech by Senator Doolittle of Wisconsin, a Northerner and a Conservative Republican. During the floor debate on the bill, he said:

“My friend has said what has been said all around me, what is said every day: the people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it.”<sup>33</sup>

Surely, the authors of our Constitution never contemplated or understood that ratification of a constitutional amendment proposal by a State could lawfully be compelled “at the point of the bayonet,” and by subjecting all aspects of civil life in the recalcitrant State to continued military rule, until this State recanted its heresy in rejecting the proposed amendment, and yielded the desired ratification<sup>34</sup> to the duress of continued and compelling force.

President Johnson vetoed the Reconstruction Act in an able message,<sup>35</sup> stressing its harsh injustices and its many aspects of obvious unconstitutionality. He justifiably denounced it as “a bill of attainder against nine million people at once.”

Notwithstanding this able message, the Act was promptly passed over his veto by the required two-thirds majority in each House.<sup>36</sup> Military rule took over in the ten Southern States to initiate the process of conditioning a subjugated people to an ultimate acceptance of the Fourteenth Amendment.<sup>37</sup>

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known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress...”

33 Cong. Globe, 39th Cong., 2d Sess., Part 3, at 1644 (1867).

34 It is elementary that any consideration of an amendment proposal from Congress by a State legislature must involve equal freedom on the part of each State to ratify or reject, as its legislature in its deliberation and discretion may determine. The constitutional right and power of a State legislature to ratify carries with it, by necessary implication, an unquestioned and unfettered right and power to refuse to ratify.

In *Dillon v. Gloss*, 256 U.S. 368, 374 (1921), the view is expressed that, action by the States, on ratification of a proposed constitutional amendment, through State legislatures as “representative assemblies,” is an “expression of the people’s will.” Accordingly, any effort to coerce or manipulate action by a State legislature, on a constitutional amendment proposal, would be tantamount to tampering with the machinery by which the will of the people is expressed in a matter of grave importance. That is exactly what was done on a vast scale, by the dominant majority in Congress, in bringing about the ostensible ratification of the Fourteenth Amendment.

35 Cong. Globe, 39th Cong., 2d Sess., Part 3, at 1729-1732, 1969-1972 (1867).

36 *Id.* at 1733, 1976.

37 Some may pretend that the ratifications of the Fourteenth Amendment by the Southern States were not compelled or coerced, since the Reconstruction Act gave those States the option or election either to ratify the amendment and resume their former statehood status, with representation in Congress and power of self-government restored, or else to persist in their rejection of the amendment and to remain under military rule. Any such suggestion can be effectively answered by citing the holding in *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1929), that an exercise of one constitutional right may not lawfully be conditioned upon the surrender of another constitutional right. That opinion speaks of such an ostensible choice as being “no choice, except the choice between the rock and the whirlpool” and “requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion.” These quoted expressions, although from a late case relating to another

## JUDICIAL REVIEW UNSUCCESSFULLY SOUGHT

Relief from the oppressive and unconstitutional features of the Reconstruction Act was sought in vain in the Courts. Three times the Supreme Court found some reason for not deciding these constitutional issues. Unlike the present Court, which was alert to protect three minor government officials against salary-blocking legislation by Congress, interpreted as constituting a bill of attainder against these individuals,<sup>38</sup> the Court of 1867-1868 seemed to feel no urge to review the Constitutional merits of the solemn charge of President Johnson that the Reconstruction Act constituted a bill of attainder against nine million people. This is all the more amazing since the two leading precedents on the enforcement of the constitutional prohibition of bills of attainder, cited and followed in *United States v. Lovett*, were decisions of the Court of 1867-1868.<sup>39</sup>

The decisions wherein grounds were found for avoiding a ruling on the constitutionality of the Reconstruction Act leave the impression that our highest tribunal failed in these cases to measure up to standard of the judiciary in a constitutional democracy. If the Reconstruction Act was unconstitutional, the people oppressed by it were entitled to protection by the judiciary against such unconstitutional oppression.<sup>40</sup>

In *Mississippi v. Johnson*,<sup>41</sup> the Court expressed<sup>42</sup> definite apprehension that an injunction against the execution of the Reconstruction Act by the President, on the

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statute, would describe most aptly the predicament in which the Southern States were placed by the harsh and compulsive provisions of the unconstitutional Reconstruction Act.

This forthright language just quoted contrasts sharply with the unrealistic refusal in *White v. Hart*, 13 Wall. 646, 649 (1872) to recognize the obvious fact that the new state constitution, adopted by Georgia under the compulsion of the Reconstruction Act, was a product of Congressional "dictation and coercion." In that opinion, the Court ignored actualities to such an extent as to characterize this new constitution, forced upon that State through reiterated compulsive enactments of Congress, as "a voluntary and valid offering" submitted by the State to Congress. *Id.* At 648, 649. This decision did not require a direct adjudication upon the constitutionality and validity of the Reconstruction Act, which came into the case only in a collateral manner.

38 *United States v. Lovett*, 328 U.S. 303 (1946).

39 *Cummings v. Missouri*, 4 Wall. 277 (1866); *Ex Parte Garland*, 4 Wall. 333 (1866).

40 This is emphasized by decisions recognizing that conflicts between Federal and State authority bring into operation one of the most important functions of the Supreme Court. This high function of the Court was adverted to in the opinion in *Luther v. Borden*: "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." 7 How. 1, 47 (1848).

Other utterances of the court most pertinent to the judicial duty to entertain and decide issues arising when action by a State or the United States is challenged by the other, as an invasion of the constitutional rights and prerogatives of the challenger, are found in *Harkrader v. Wadley*: "And while it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States, it is also its duty to guard the States from any encroachment upon their reserved rights by the General Government or the Courts thereof." 172 U.S. 148, 162 (1898); and in *Matter of Heff*: "In this Republic there is a dual system of government, National and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." 197 U.S. 488, 505 (1905).

41 4 Wall. 475 (1866).

42 *Id.* at 500, 501.

grounds of unconstitutionality, might result in Congressional impeachment of the President for obeying the mandate of the Court.<sup>43</sup>

In *Georgia v. Stanton*,<sup>44</sup> the Court declined to entertain a suit assailing the constitutionality of the Reconstruction Act, on the ground that the issues raised were political and not justiciable. The opinion frankly describes in the language below the issues as to which the Court held that a State is without any protection in a court of law.<sup>45</sup>

In *Ex Parte McCordle*,<sup>46</sup> the Court permitted Congress to evade a judicial determination of the constitutionality of the Reconstruction Act, by repealing a statutory provision as to appellate jurisdiction after the appeal had been lodged, and even after the case had

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43 This refusal of the Court to entertain an action, seeking to enjoin the President from carrying into execution a law alleged to be unconstitutional, clashes sharply in principle with the established doctrine, going back to an early precedent set by Chief Justice Marshall, *Osborn v. Bank of the United States*, 9 Wheat. 728, 838-850 (1824), that, even when a sovereign government is not itself for want of the consent to be used, a governmental official may be sued and enjoin upon averment and proper showing of the unconstitutionality of the law under which he purports to act. This is the principle upon which the courts entertain and determine cases involving important constitutional questions, such as the Steel Seizure Cases, *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, *aff'd*, 343 U.S. 579 (1952).

It should also be noted that, in *Mississippi v. Johnson*, 4 Wall. 475 (1866), the defendants against whom the plaintiff sought to proceed included not only the President, but also his subordinates in the prospective enforcement of the Reconstruction Act in the State of Mississippi, particularly General Ord, Military Commander of the district whereof Mississippi was a part. If the Court could have been justified in maintaining its view of the President as a sort of an unsuable "sacred cow," then General Ord, as the chief subordinate through whom the President would execute in Mississippi the Act of Congress assailed as unconstitutional, would still have been a proper and logical defendant for testing and determining this constitutional issue under the principle of *Osborn v. Bank of the United States*, *supra*. Having as the defendant the subordinate, through whom the chief Executive would perform acts assailed as unconstitutional, would present the identical situation under which the Court acted, by enjoining the steel seizure adjudged to be unconstitutional in *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*.

44 6 Wall. 50 (1867).

45 "...we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained." *Id.* at 76.

This denial by the Supreme Court of the right of a State to litigate the constitutionality of a Congressional assault upon the validity of its government, and the existence of its sovereignty, exhibits a painful contrast on comparison with later recognitions by the same Court of the right of the same State to sue and litigate, in behalf of its *quasi*-sovereign rights and interests. *Georgia v. Tennessee*, 206 U.S. 203, 237 (1907), and, as *parens patriae* in behalf of the economic and industrial interests of its people, *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 446-451 (1945). Pertinent here also are judicial recognitions of the right of the State to sue for protecting the health, comfort and welfare of its inhabitants against a threatened infraction. See *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-592 (1923).

46 6 Wall. 318 (1867) (motion to dismiss denied), 7 Wall. 506 (1868).

been argued and submitted for decision. Again the opinion leaves the impression that the Court preferred not to be obliged to pass on the merits of the constitutional issue.<sup>47</sup>

As a result of these decisions, enforcement of the Reconstruction Act against the Southern States, helpless to resist military rule without the aid of the judiciary,<sup>48</sup> went forward unhampered. Puppet governments were founded in these various States under military auspices. Through these means, the adoption of new state constitutions, conforming to the requirements of Congress, was accomplished. Likewise, one by one, these puppet state governments ratified the Fourteenth Amendment, which their more independent predecessors had rejected. Finally, in July 1868, the ratifications of this amendment by the puppet governments of seven of the ten Southern States, including Louisiana, gave more than the required ratification by three-fourths of the States, and resulted in a Joint Resolution<sup>49</sup> adopted by Congress and a Proclamation<sup>50</sup> by the Secretary of State, both declaring the Amendment ratified and in force.

It is interesting to speculate upon what might have been the course of events if our Supreme Court of 1867-1868 had met these charges of unconstitutional action in the enactment and enforcement of the Reconstruction Act in the direct manner which characterized the judicial performance of the Supreme Court of the Union of South Africa in the recent "Coloured Vote Case."<sup>51</sup> The Malan Government had enacted certain legislation restricting the rights of colored voters, which clashed with the assertedly "entrenched clauses" of the Constitution for South Africa, and twice that Court upheld the constitution on the merits of the issues and pronounced the unconstitutionality of the offending legislation. For this fine judicial work, it has been highly commended.<sup>52</sup>

When *Georgia v. Stanton*<sup>53</sup> is compared with the recent South African decisions, one cannot escape the impression that the difference between the cases is the difference

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47 This decision appears juridically sound. See *Brunner v. United States*, 343 U.S. 112 (1952). It illustrates, however, the infirmities in our judicial system whenever a dominant and determined majority in Congress chooses to embark upon a program for sabotaging the power and efficacy of the Federal Judiciary. Our Supreme Court has very little vested constitutional judicial power, and our inferior Federal Courts have none at all.

48 There can be no basis for any legitimate and dispassionate doubt as to the jurisdiction of the Supreme Court over *Mississippi v. Johnson*, 4 Wall. 475 (1866), and *Georgia v. Stanton*, 6 Wall. 50 (1867), as original cases, in view of the applicable provision of Article III of the Constitution of the United States. The judicial power of the United States extended to each of these cases, as a case "arising under this Constitution, the Laws of the United States..." Art. III, § 2.

Each of these cases came within the original jurisdiction of the Supreme Court as a case "in which a State shall be Party..." Art. III, § 2.

The litigious interest of each of these States, in instituting its suit in a proper tribunal, extended to defending and protecting the validity of its government, and the existence of its sovereignty, against an assertedly unconstitutional assault thereon by Congress. Beyond this, since the proposed Fourteenth Amendment unquestionably would greatly enlarge Federal power, with a corresponding diminution of State power, each of these States also had a direct right and interest in litigating the constitutionality of those provisions of the Reconstruction

Act which sought to coerce and compel ratification of this hitherto rejected amendment proposal.

49 15 Stat. 706, 707, 710, 711 (1868).

50 15 Stat. 708, 708-710 (1868).

51 *Harris v. Minister of the Interior*, [1952] 2 So. Afr. L. Rep. 428 also reported in [1952] I T.L.R. 1245.

52 See Griswold, *The "Coloured Vote Case" in South Africa*, 65 Harv. L. Rev. 1361 (1952); Griswold, *The Demise of the High Court of Parliament in South Africa*, 66 Harv. L. Rev. 864 (1953).

53 6 Wall. 50 (1867).

between meeting and evading (even though the evasion be perhaps unconscious) an issue which ought to be met and decided.

### ATTEMPTED JUSTIFICATIONS OF COERCION

The supposed constitutional justification of the Reconstruction Act, most frequently asserted by its supporters, was the view that such legislation would come within the power of Congress under the guarantee of “a republican form of government” to each State by the United States.<sup>54</sup>

Whatever justification for other portions of the Reconstruction Act may or may not be found in this constitutional provision, there could clearly be no sort of a relationship between a guarantee to a State of “a republican form of government” and an abrogation of the basic and constitutional right of a State, in its legislative discretion, to make its own choice between ratification or rejection of a constitutional amendment proposal submitted to the state legislatures by the Congress of the United States. To deny to a State the exercise of this free choice between ratification and rejection, and to put the harshest sort of coercive pressure upon a State to compel ratification, was clearly a gross infraction—not an effectuation—of the constitutional guarantee of “a republican form of government.”

Beyond this, the whole idea that Article IV, § 4, could confer upon Congress power to alter the governmental structure of a State—particularly a governmental structure of the general type relating in the thirteen original States at the time of the adoption of the Constitution—has been most effectively refuted by Madison. Writing in *The Federalist*, No. 43, Madison poses two questions respecting the provision for a guarantee to each State of “a republican form of government”:

“It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves.”

He then proceeds to give his answers to these questions, and he answers the second question:

“...the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed, will hardly be considered as a grievance.”<sup>55</sup>

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54 U.S. Const. Art. IV, § 4.

55 *The Federalist*, No. 43 (Madison) at 283 (Mod. Lib. Ed. 1941).

Notwithstanding this clear and sound demonstration by Madison that this constitutional guarantee should not and could not serve as a pretext for an alteration in the form of a State government of established and recognized republican character, against the protest and objection of the State, there persists in certain decisions of the Supreme Court the concept that this constitutional provision confers upon Congress, acting upon a “political” subject and hence not subject to judicial review, and undefined power of nebulous character to compel changes in an existing state governmental structure. See *Luther v. Borden* 7 How. 1, 42 (1848); *Pacific Telephone Co. v. Oregon*, 223 U.S. 118, 133, 147 (1912); *Mountain Lumber Co. v. Washington*, 243 U.S. 219, 234 (1917); *Ohio ex rel. Bryant v. Akron*

Elsewhere in the same number of *The Federalist*, Madison reiterates his basic concept<sup>56</sup> that Article IV, § 4, unquestionably recognizes the then existing state governments as republican in form, and protects them against innovations or changes of a non-republican character.

It is interesting to note that the Supreme Court, in *Minor v. Happersett*,<sup>57</sup> enunciated a doctrine<sup>58</sup> completely in accord with Madisonian ideology that the type of government,

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Metropolitan Park District, 281 U.S. 74, 79, 80 (1930); *Highlands Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

These observations as to the supposed existence of any such “political” power on the part of Congress are necessarily purely obiter, in the sense that none of these cases involved any effort on the part of Congress to exercise any such power upon and against an existing and objecting state governmental structure. Each of these cases involved an unsuccessful plea or contention for judicial action against some exercise of state authority or against some state law, on the argument that the relief sought was required or authorized by the constitutional guarantee of a republican form of government. In each case, the Court declined to so act against the existing state governmental structure or law.

Accordingly, in so far as what was actually at issue and decided is concerned, none of these cases produced a decision which would clash with the view of Madison that the constitutional guarantee of a republican form of government serves as a safeguard protecting, against enforced change by federal action, a state governmental structure established and recognized as republican in character. In so far as these opinions contain discursive observations on a possible unrestrained power in Congress, of a “political” character, to alter an established state governmental structure on the pretext of carrying out the constitutional guarantee of a republican form of government, it should be sufficient to point out that a spurious fallacy does not become sound law merely through being incorporated as *obiter* in a reported decision of even the highest Court in an important case.

It is appropriate to also mention *White v. Texas*, 7 Wall. 700 (1869), as a decision which may be asserted to embody a holding that the enactment of the Reconstruction Act was authorized by the constitutional guarantee of a republican form of government. Such an assertion would seem to be very much of an overstatement, since the validity and effect of the Reconstruction Act were not directly at issue, but came into the case only in a collateral and indirect manner. Indeed, the opinion rests the right of Texas to prosecute the suit as much upon the authorization of the suit by the state government antedating the Reconstruction Act as upon such authorization by the state government provisionally set up by the military authorities under the Reconstruction Act. *Id.* at 731, 732. The opinion expressly disclaims “investigating the legal title of either to the executive office.”

Furthermore, the concept of “an indestructible union... of indestructible states” expressed in this opinion, *id.* at 725, would seem to be at variance with the devastating impact of the Reconstruction Act upon Texas as a State. Highly significant in this connection are the carefully precise statements by the Court that the case required no pronouncement of “judgment upon the constitutionality of any particular provision of these acts” and no inquiry “into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress.” *Id.* at 731.

It would seem appropriate to close this discussion of cases, which might be already made in the test that under no conceivable theory could the coerced and compelled ratification of the Fourteenth Amendment be defended as authorized by the constitutional guarantee of a republican form of government, even if some of the other provisions of the Reconstruction Act might derive some support from that constitutional provision.

56 “In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.” *Id.* at 282.

57 21 Wall. 162 (1874).

existing in the original States when the Constitution was adopted, established a standard for the meaning of the term “republican form of government” in this constitutional provision.

### **COERCED RATIFICATION IN LOUISIANA**

The enactment of the legislature of the puppet government of Louisiana which ratified the Fourteenth Amendment is embodied in Act 2 of 1868. The legislative journals of that session reflect the presence of the military, all as provided for and contemplated by the Reconstruction Act.

The House Journal<sup>59</sup> shows that on June 29, 1868, Colonel Batchelder opened the session by calling the roll and reading an extract from the order of General Grant. The Senate Journal<sup>60</sup> for the same date shows the reading of instructions from General Grant to the Commanding Officer of the Fifth Military District emphasizing the supremacy of the power of the military over the provisional civilian government. It was under these auspices that the coerced ratification of the Fourteenth Amendment in Louisiana was accomplished.

Even under the puppet government, created in Louisiana pursuant to the Reconstruction Act, the ratification of the Fourteenth Amendment in Louisiana was not unanimous. In the Senate<sup>61</sup> on July 9, 1868, the vote on ratification was twenty yeas and eleven nays. The record contains a protest by Senator Bacon against voting upon ratification “under duress” imposed by the Reconstruction Act, and an unavailing appeal by that legislator for an opportunity for a “free and unrestrained” vote.

### **FORCED RATIFICATION REQUIRES REEXAMINATION OF PURPORTED ADOPTION OF THE AMENDMENT**

The fact that ratification in the Southern States came finally, as a coerced result, through the legislatures of the puppet governments created by the Reconstruction Act, after rejection of the amendment by the prior State Legislatures, can pose a very serious question in relation to one of the issues upon which the Supreme Court invited discussion on the reargument. This of course refers to the request by the Court for discussion of what understanding or contemplation of the scope of the amendment was had by the state legislatures which ratified it.<sup>62</sup>

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58 “The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

“The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.” *Id.* at 175, 176.

59 H.J.R. 1 (June 29, 1868).

60 Sen. J. 1 (June 29, 1868).

61 Sen. J. 20, 21 (July 9, 1868).

62 See note 5 *supra*.

Such an inquiry may be proper as to a legislature which, free to ratify or reject, determined of its own volition to ratify. But to give effect, as against the Southern States now, to whatever extreme and sweeping notions of the broad scope of the Fourteenth Amendment may have been expressed by the puppet legislators, who used their power under the Reconstruction Act to vote in favor of ratification States really opposed to ratification, would be a perversion of history and a contradiction of plain fact.<sup>63</sup>

But the attack upon the legality of the coerced ratifications of the Fourteenth Amendment by the Southern States, under the compulsions of the Reconstruction Act, goes beyond the question of whether the puppet governments, which went through the form of voting these enforced ratifications, were authorized to authentically express the “contemplation” or “understanding” of the Southern States as to the scope and operative force of the amendment. The question arises—upon an analysis of the provisions of Article V and upon a study of the history of the evolution of this Article in the Federal Convention of 1787—whether these coerced ratifications should be decreed null and void, as the product of an usurpative incursion by Congress into an area—the ratification—or—rejection process—from which it is clearly excluded by Article V.

To permit Congress to have a decisive and controlling part in the final decision on ratification of a constitutional amendment proposal, after Hamilton had secured the reluctant assent of the Convention to letting Congress have merely a power to initiate amendment proposals, on his solemn representation that “the people would finally decide,”<sup>64</sup> would constitute a clear disregard of the plain intent of the Founding Fathers concerning the meaning and effect of Article V. Beyond this, Congressional coercion, intruding into and upon the ratification process, amounts to a gross breach of faith with the obvious understanding had between Madison and Hamilton when, following Hamilton’s frank avowal that the power of final decision in an amendment proposal should be vested in “the people,” these two great statesmen cooperated in setting up the amendment procedure whereby, on an amendment proposal submitted by Congress to the legislatures of the several states, the people of each state, speaking through its legislature, have the “final decision” on ratification or rejection.<sup>65</sup>

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63 In 1877 the people of Louisiana succeeded in reestablishing their own government, and thus rid themselves of the puppet government excrescence which the Reconstruction Act had for a time imposed upon them by coercion from without. The present state government of Louisiana is the direct lineal successor of the “Nicholls Government,” which the people of Louisiana elected, installed and maintained in office in 1877.

The “Nicholls Government” came into office in Louisiana over the bitter opposition of the predecessor puppet government. The latter sought to install the “Packard Government” in official power in Louisiana, and for several months Louisiana had two governments—the puppet “Packard Government” spawned by the Reconstruction Act, and the “Nicholls Government” elected by the people. Upon the withdrawal of military support from it, “the Packard Government disintegrated.” See Henry P. Dart. *The History of the Supreme Court of Louisiana*, 133 La. XXX, liv, lv (1913). The “Nicholls Government” thus came into power as in actuality a new government—not as a successor and continuation of the “disintegrated” puppet government.

This type of change was characteristic of what occurred in other Southern States, as the puppet governments which had gone through the form of ratifying the Fourteenth Amendment, under the compulsion and coercion of the Reconstruction Act, fell from power one by one and were succeeded by governments of the people.

64 5 Elliot’s Debates 531.

65 *Id.* at 531-533.

One who says that such questions are political and not justiciable, must necessarily mean that a political body, actuated by political motives and effectuating political objectives, should have and exercise a final power, not judicially reviewable, to change the plain meaning of a constitutional provision, and to disregard its obvious intent and purpose, as demonstrated by the history of its evolution.<sup>66</sup>

The adversary or the skeptic might assert that, after a lapse of more than eighty years, it is too late to question the constitutionality or validity of the coerced ratifications of the Fourteenth Amendment even on substantial and serious grounds. The ready answer is that there is no statute of limitations that will cure a gross violation of the amendment procedure laid down by Article V of the Constitution.

Precedents are not wanting for the successful assertion of constitutional rights which have been flouted or ignored over long periods of time. In *Erie Railroad Company v. Tompkins*,<sup>67</sup> the Court, on a constitutional point, reversed its jurisprudence of more than

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66 It may be argued, upon the predicate of language in such decisions as *Leser v. Garnett*, 258 U.S. 130, 137 (1922), and *Coleman v. Miller*, 307 U.S. 433, 446-450, 456-460 (1939), that certain questions or issues pertaining to ratification procedure are, by their nature, political and non—justiciable, and that determination thereof by Congress or by some official in the exercise of functions delegated to him by Congress, 1 U.S.C. § 1066, formerly 5 U.S.C. 160, 3 Stat. 439, is conclusive upon the judiciary. The arguments predicated upon this theory have lost some force by the divisions of opinion within the Court on various applications of this theory in *Coleman v. Miller*.

No such paramount power over any step or event in the ratification phase of a constitutional amendment proposal, after submission of the proposal by Congress to either state legislatures or state conventions has taken place, is conferred upon Congress by either the plain wording of Article V, or the spirit or intent of Article V as shown by the history of its evolution in the Federal Convention of 1787. There is nowhere in the pertinent sources of Congressional authority deriving from Article V any warrant for a determination by Congress, unreviewable by the judiciary, that Congress has any power at all to coerce and compel rejecting States to change their action to ratification. To set up such an reviewable power in Congress, as to the validity of its own coercive action directed against sovereign States, would be an attempt to create a “High Court of Congress” having judicial functions and powers superior to those of the Supreme Court of the United States itself.

It may be assumed that, when state legislatures are acting on ratification *vol non* of a submitted constitutional amendment proposal, it is appropriate for Congress or some federal functionary so doing under authority delegated by Congress, to act as “scorekeeper” and to tabulate and announce the result. However, to use an apt illustration borrowed from a favorite outdoor sport, a “scorekeeper” at a baseball game would clearly have no power (inherent or implied) to score a strike out as a base hit. Or to recall to the bat a player who has just struck out and to order the pitcher to continue to pitch to this batter until he does get a base hit.

These simple illustrations of the very limited functions and powers of a “scorekeeper” completely refute any idea that any function or power which Congress might have to statistically record and compile, and to declare the results of action by the States on ratification or rejection of an amendment proposal, could by any stretch of the imagination confer upon Congress any power to influence or compel state action one way or the other on ratification or rejection, or to legalize a coerced and compelled change by a State from rejection to ratification.

Finally, a reference to the several decisions treating as justiciable issues controversies pertaining to various questions arising in the course of the amendment procedure established by Article V, clearly negatives any idea that the question of the validity of the coerced ratifications of the Fourteenth Amendment, compelled by the Reconstruction Act, could be properly classified as a political and non-justiciable issue. See, *e.g.*, *Hollingsworth v. Virginia*, 3 Dall. 378 (1798); *Hawke v. Smith*, 253 U.S. 231 (1920); *Rhode Island v. Palmer*, 253 U.S. 350 (1920); *Hawke v. Smith*, 253 U.S. 221 (1920); *Dillon v. Gloss*, 256 U.S. 368 (1921); *United States v. Sprague*, 282 U.S. 716 (1931).

67 304 U.S. 64 (1938).

ninety years standing, dating back to *Swift v. Tyson*.<sup>68</sup> This was done on the expression of the view that a doctrine involving statutory construction would not be re-examined and upset after that lapse of time, but that the true doctrine on the constitutional point, once resolved, must be given effect regardless of lapse of time.<sup>69</sup>

This principle should apply here. If the coerced and enforced ratifications of the Fourteenth Amendment by the Southern States in 1868, compelled by Congressional duress offending against the Constitution itself, constitute an infraction of the amendment procedure ordained by Article V of the Constitution, these enforced ratifications are just as violative of the provisions of Article V in 1953 as they were in 1868.

Also worthy of note in this connection is the holding<sup>70</sup> in 1895 that the levying of an income tax by the Federal Government, without apportioning that tax among the States as a direct tax, violated the taxing-power provisions of the Constitution of the United States—although, thirty years prior to this judicial vindication of what the majority of the Court deemed to be fundamental and true Constitutional provisions, the Federal Government had levied and collected income taxes for several years on a large scale, and had financed a major and successful war of vital consequences to a very considerable extent out of revenues so obtained.

In recent case<sup>71</sup> terminating the exclusion of Negroes from restaurants in the District of Columbia, the Court found still operative, and ordered enforced, a statutory enactment dating back to the early 1870's, which had lain dormant during practically the whole period of time since its enactment, and which had been variously regarded by lower courts in the case as having been repealed by codification or implication in 1877 or in 1901.<sup>72</sup> Upon a demonstration now that Article V of the Constitution was violated and flouted by the 1868 coerced ratifications of the Fourteenth Amendment, the true rule for this amendment process, ordained by Article V, is entitled to receive from the judiciary the same respectful consideration and orderly enforcement as was recently accorded the revived 1873 enactment of the short-lived local legislature of the District of Columbia.

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68 16 Pet. 1 (1842).

69 “If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.” *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77, 78 (1938).

70 *Pollock v. Farmer’s Loan and Trust Co.*, 158 U.S. 601 (1895), *reversing* 157 U.S. 429 (1895).

71 *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

72 See *id.* at 103, 111, 112; *District of Columbia v. John R. Thompson Co.*, 203 F. 2d 579 (1953), *reversing in part* 81 A. 2d 249 (1951).