TULANE
LAW REVIEW

Volume XXVIII
1953-1954

Tulane Law Review Association
Tulane University
New Orleans 18, Louisiana
1954
THE DUBIOUS ORIGIN OF THE
FOURTEENTH AMENDMENT

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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 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 interassociation—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.

SCHOOL SEGREGATION CASES

There are now pending in the United States Supreme Court a

¢This article is a revision and amplification of the material contained in an address delivered by the author at a meeting of the New Orleans Bar Association on September 29, 1953, and published in Louisiana Bar Association Journal, vol. 1, no. 2. The author desires to express his appreciation of the substantial assistance of Mr. Walter J. Waddington III in the work of revising and amplifying the original material for this publication.

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(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).


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


5What 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?

6If 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 establishing such segregation of its own force?

345 U.S. 972 (1953).
AMENDMENT PROCEDURE ESTABLISHED BY ARTICLE V

Article V 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:

“The 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 or major and final function in the amending process, and the role of Congress therein, although substantial and important, is, in effect, 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 whether the States, in voting on ratification, shall act through their respective legislatures, or through Conventions.

FOURTEENTH AMENDMENT

Evolution 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 proposal, i.e., during consideration of ratification by the States, and action thereon by the States. It is significant that, in the Convention, a proposal 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, in support of excluding the “National Legislature” entirely from the amending process, that “they may abuse their power, and refuse their assent on that 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 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 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.

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

5 id. at 192.

6 id. at 381.
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."

How remote was this Hamiltonian concept 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. This was done 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 of the joint work of Madison and Hamilton. As already noted, this affords a possibility for completely by-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 the 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. 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 to a requirement that Congress should call a Convention for that purpose upon such an application from state legislatures. This proposal was made by Gouverneur 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.

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 motion of Gouverneur Morris, of the prohibition 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.

115 Id. at 531.

116 There is an impressive and significant ideological 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.

117 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.

118 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 his argument that "the people would finally decide in the case." 5 id. at 531.

119 Id. at 531, 532.

120 Id. at 551.

121 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.

122 Elliot's Debates 552.
PROPOSAL OF THE AMENDMENT

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

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 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, 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 the 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 this "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 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. It was also rejected, during the latter part of 1866 and the early part of 1867, by the legislatures of the ten Southern States, 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 reversed. With thirty-seven States in all, ten 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 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

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26Flack, The Adoption of the Fourteenth Amendment 204 (1908).
27These legislative rejections of this amendment proposal in these ten States were in some instances by a unanimous vote and in all other instances by a vote but little short of unanimity. See Flack, op. cit. supra note 26, at 191-204.
3014 Stat. 423 (1867).
31The Reconstruction Act, as supplemented by later legislation, see particularly Act of July 19, 1867, 15 Stat. 14, established a system of registration boards which set up under military auspices, as a predicate for qualifying as States. This legislation gave the Registrars powers at least as absolute and arbitrary as those conferred upon such officials by the Boswell Amendment.
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. 32

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." 33

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 34 to the duress of continued and compelling force.

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, 936 U.S. 923 (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 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.


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 un fettered right and power to refuse to ratify.

President Johnson vetoed the Reconstruction Act in an able message, 35 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. 36 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. 37

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 at-

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.


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 assume 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 Tractor Co. v. Houck, 271 U.S. 583, 583 (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 statute, would describe most aptly the predicament in which the Southern States were placed by the harsh and compulsive provisions of the unconstititutional 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.
tain against these individuals, 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.

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 the 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.

In Mississippi v. Johnson, the Court expressed definite apprehension that an injunction against the execution of the Reconstruction Act by the President, on grounds of unconstitutionality, might result in Congressional impeachment of the President for obeying the mandate of the Court.

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39Cummings v. Missouri, 4 Wall. 277 (1866); Ex Parte Garland, 4 Wall. 333 (1866).
40This 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 sovereigns, 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).
41Other 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 Jeff.: "In this Republic there is a dual system of government in its own person as the 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 the two, protecting each in the powers it possesses and preventing any trespass thereon by the other." 197 U.S. 548, 563 (1905).
424 Wall. 475 (1866).
43Id. at 500, 501.
44This refusal of the Court to entertain an action, seeking to enjoin the President from carrying into execution a law alleged to be unconstitutional, is not itself suable for want of the consent to be sued, a governmental offi-
Coerced Ratifications of the Amendment

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,48 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 Resolution49 adopted by Congress and a Proclamation50 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.”51 The Malan Government had enacted certain legislation restricting the rights of colored voters, which clashed with the assertedly “en-trenched clauses” of the Constitution of South Africa. Twice the case went to the Supreme Court of 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.52

When Georgia v. Stanton53 is compared with the recent South African decisions, one cannot escape the impression that the difference between the cases is the difference 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.54

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 existing 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. 48, 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

49Wall. 50 (1867).
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 pre-existing 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.”

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55The Federalist, No. 43 (Madison) at 233 (Mod. Lib. ed. 1941).

Notwithstanding this clear and sound demonstration by Madison that this constitutional guaranty 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 constitutional 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, an undefined power of nebulose character to compel changes in an existing state governmental structure. See Luther v. Borden, 7 Wall. 1 (1869); Panama Railroad Co. v. salsa, 145 F. 124 (1911); Pennsylvania Co. v. West, 249 F. 219, 234 (1917); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79, 80 (1930); Highlands Farms Dairy v. Aegnew, 300 U.S. 608, 612 (1937).

These observations 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 and of the constitutional guaranty of a republican form of government 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 Courts.

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 as the Reconstruction Act, as upon the authorization of the suit 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, or the existence of the executive office.”

Furthermore, the concept of “indestructible union . . . of indestructible states” expressed in this opinion, id. at 725, would seem to be in 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 cited and relied upon in an adversary argument, by repeating the assertion already made in the text that under no conceivable theory could the coerced and compulsory ratification of the Fourteenth Amendment be authorized by the constitutional guaranty 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.

55aIn a confederacy founded on republican principles, and composed of republics, 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 right to insist that the forms of government under which the compact was entered into should be substantially maintained.” Id. at 282.

571 Wall. 162 (1874).

58The guaranty is of a republican form of government. No particular government is designated as republican, nor is the exact form to be guaranteed, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States their-
presence and dominance of the military, all as provided for and contemplated by the Reconstruction Act.

The House Journal 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 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 on July 9, 1868, the vote on ratification was twenty yes 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.

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

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63In 1877 the people of Louisiana succeeded in reestablishing their own government, and thus rid themselves of the puppet government exeresence 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.
To permit Congress to have a decisive and controlling part in the final decision on ratification or rejection 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," 64 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. 65

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. 66

64Elliott's Debates 531.
65 Id. at 551-553.
66 It may be argued, upon the premise of language in such decisions as Leser v. Garnett, 255 U.S. 150, 157 (1929), and Coleman v. Miller, 307 U.S. 432, 440-450, 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. § 106, formerly 5 U.S.C. § 160, 3 Stat. 438, 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 to be found 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 unreviewable 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 of a constitutionally submitted 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.

FOURTEENTH AMENDMENT

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, 67 the Court, on a constitutional point, reversed its jurisprudence of more than ninety years standing, dating back to Swift v. Tyson. 68 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. 69

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

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 negates 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 (1799); Ex parte Smith, 253 U.S. 291 (1920); Rhode Island v. Palmer, 258 U.S. 350 (1921); Hawke v. Smith, 255 U.S. 221 (1921); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931).

67 16 U.S. 64 (1918).
68 16 U.S. 64 (1918).
69 16 U.S. 64 (1918).
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\textsuperscript{70} 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 a recent case\textsuperscript{71} 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.\textsuperscript{72} 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 revivified 1873 enactment of the short-lived local legislature of the District of Columbia.


\textsuperscript{72} See \textit{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).
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