

UNORTHODOX AND PARADOX: REVISITING THE RATIFICATION OF THE FOURTEENTH AMENDMENT

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The War had ended. On April 9, 1865, General Robert E. Lee surrendered at Appomattox Court House;¹ General Johnston followed shortly thereafter.² Two months later, not a single Confederate soldier remained in arms.³ The South had tested its doctrine of secession on the battlefield, and lost a costly argument. The Southern states, it seemed, had never left the Union.⁴

Just as secession had tested the Constitution, a new threat to that grand document arose as Radical Republicans in Congress sought to “punish, plunder, and reconstruct the South.”⁵ This second constitu-

1. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 482 (2d ed. 1992).

2. *Id.* at 485.

3. *See id.*

4. *See Texas v. White*, 74 U.S. 700, 725-26 (1868).

5. Forrest McDonald, *Was the Fourteenth Amendment Constitutionally Adopted?* 1 GA. J.S. LEGAL HISTORY 1, 1 (1991).

tional challenge was Reconstruction and its offspring was the Fourteenth Amendment. Although most people likely believe the Fourteenth Amendment was adopted in a regular fashion, like most other amendments, this is not true. The Fourteenth Amendment was adopted during a time of great uncertainty, and with great irregularity. This Comment seeks to show that the Fourteenth Amendment was not constitutionally proposed or ratified in accordance with Article V of the United States Constitution.⁶ This Comment further raises the tough question, if the Fourteenth Amendment was not properly adopted, is it still a part of the Constitution?

I. WAS THE FOURTEENTH AMENDMENT CONSTITUTIONALLY PROPOSED AND RATIFIED?

Well before his assassination on April 14, 1865,⁷ President Lincoln had begun to reconstruct civil authority in four Southern states.⁸ Andrew Johnson adopted Lincoln's theory of indestructible states⁹ and continued Lincoln's Reconstruction policy. On May 29, 1865, Johnson issued two significant proclamations.¹⁰ The first afforded amnesty to all who took an oath of allegiance to the Union.¹¹ The second named a

6. Others have written articles on this subject, and most were directed against desegregation decisions by federal courts. See Joseph L. Call, *The Fourteenth Amendment and Its Skeptical Background*, 13 BAYLOR L. REV. 1 (1961), reprinted in 24 ALA. LAW. 82 (1963) (hereinafter cited to the *Alabama Lawyer*); Pinckney G. McElwee, *The 14th Amendment to the Constitution of the United States and the Threat that it Poses to Our Democratic Government*, 11 S.C. L.Q. 484 (1958); State Sovereignty Comm'n of La., *Unconstitutional Creation of the Fourteenth Amendment*, 23 GA. B.J. 228 (1960); Walter J. Suthon, Jr., *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953). A California lawyer authored a long and angry rebuttal to these articles. Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378 (1966). However, Forrest McDonald notes that Fernandez "misunderstood the main thrust of their arguments and ended up knocking over straw men." Forrest McDonald, *Was the Fourteenth Amendment Constitutionally Adopted?* 1 GA. J.S. LEGAL HISTORY 1, 5 (1991). The author of this Comment has no such motivation in writing on the topic. Rather, this note contends that the ratification of the Fourteenth Amendment is an interesting and overlooked question mark in constitutional law. See also, e.g., *Dyett v. Turner*, 439 P.2d 266 (Utah 1968); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984); McDonald, *supra* note 5.

7. MCPHERSON, *supra* note 1, at 482-83.

8. ERIC MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 122 (1960). These efforts were made in Louisiana, Arkansas, Tennessee, and Virginia under Lincoln's "Ten Per Cent Plan," where once ten percent of the qualified voters in 1860 had taken a loyalty oath and had taken steps to establish a government, such government would be recognized as the true government of the state. *Id.* at 122 n.2.

9. The rebellion was fought by individuals, not states. These individuals might be punished, but the states retained all their constitutional rights. MCPHERSON, *supra* note 1, at 496.

10. *Id.*; Proclamation No. 37, 13 Stat. 758 (May 29, 1865); Proclamation No. 38, 13 Stat. 760 (May 29, 1865).

11. 13 Stat. 758. There were exceptions to the amnesty. Amnesty was not offered to Confederate civil or diplomatic officers; Confederate officers above the rank of Army colonel and Navy lieutenant; all United States judges, congressmen, and military personnel who resigned their posts to aid the South, and others. *Id.*

provisional governor for North Carolina and directed him to call for a convention to frame a new constitution for that state.¹² In the next few weeks, Johnson issued similar proclamations for six other Southern states, and recognized Lincoln-sponsored governments in Louisiana, Arkansas, Tennessee, and Virginia.¹³ By the time Congress met in December, all the Southern states had formed constitutions and elected governments which were in full operation.¹⁴ After the ratification of the Thirteenth Amendment, Johnson issued a proclamation declaring the insurrection in the seceding states to be at an end.¹⁵ But the question of the status of the Southern states was hardly over.

A. *The Thirteenth Amendment*

Following Johnson's plan for reconstruction,¹⁶ the newly elected legislatures of the Southern states ratified the Thirteenth Amendment.¹⁷ They also elected congressmen. There was debate, however, about the status of these new state governments and of the states themselves. Some argued that ratification of the Thirteenth Amendment by the South was not required because the Southern states did not exist. Massachusetts Senator Charles Sumner, for example, proposed a "state suicide" theory, which held that the very act of seceding destroyed a state and dissolved its lawful government.¹⁸ Thaddeus Stevens, a Pennsylvania Congressman advocated that the Southern states were conquered provinces without any rights.¹⁹ Both of these theories would have allowed Congress to govern the states under its express power to govern territories.²⁰

The Republicans in Congress never endorsed these radical theories.²¹ After all, Congress had resolved to "maintain the Constitution in the rebellious States and to maintain the Union and the rights of the States unimpaired."²² Further, after thousands had died to preserve the

12. 13 Stat. 760.

13. MCPHERSON, *supra* note 1, at 497; Proclamation No. 39, 13 Stat. 761 (June 13, 1865); Proclamation No. 40, 13 Stat. 763 (June 13, 1865); Proclamation No. 41, 13 Stat. 764 (June 17, 1865); Proclamation No. 42, 13 Stat. 765 (June 17, 1865); Proclamation No. 43, 13 Stat. 767 (June 21, 1865); Proclamation No. 44, 13 Stat. 768 (June 23, 1865); Proclamation No. 45, 13 Stat. 769 (June 24, 1865); Proclamation No. 46, 13 Stat. 769 (June 24, 1865); Proclamation No. 47, 13 Stat. 771 (July 13, 1865).

14. Call, *supra* note 6, at 89. Texas was the only exception. *Id.*

15. Proclamation No. 1, 14 Stat. 811 (Apr. 2, 1866).

16. MCKITRICK, *supra* note 8, at 161.

17. Proclamation No. 52, 13 Stat. 774 (Dec. 18, 1865). Mississippi was the only former Confederate state not to ratify the Thirteenth Amendment. Call, *supra* note 14, at 89.

18. MCKITRICK, *supra* note 8, at 110; McDonald, *supra* note 5, at 7.

19. McDonald, *supra* note 5, at 7.

20. *Id.*; U.S. CONST. art. IV, § 3, cl. 2.

21. 2 ACKERMAN, *supra* note 6, at 114.

22. McElwee, *supra* note 6, at 484; 2 ACKERMAN, *supra* note 6, at 113-14.

Union, these doctrines appear to indicate that the Confederacy was right: the Constitution had not created an indissoluble Union.²³

At any rate, the South's votes for ratification of the Thirteenth Amendment were counted by Secretary of State William Seward,²⁴ and were, in fact, necessary for the Amendment's approval.²⁵ In order for the Thirteenth Amendment to become part of the Constitution, it had to be ratified by three-fourths of the states—twenty-seven of the thirty-six states.²⁶ Of the twenty-seven ratifying states, eight were from the old Confederacy.²⁷ Thus, had the Southern governments not been legitimate enough to ratify the Thirteenth Amendment, it could not have been adopted. Congress would also send these same governments the proposed Fourteenth Amendment in hopes of the South's approval.²⁸

B. Proposal of the Fourteenth Amendment

Article V states:

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, shall call a Convention for proposing Amendments, which, in either Case, 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 . . . and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.²⁹

When Southern senators and representatives began arriving in Washington to take their place in the Thirty-Ninth Congress, which convened on December 4, 1865, they were confronted with two oppos-

23. 2 ACKERMAN, *supra* note 6, at 114.

24. Seward's formal proclamation expressly rejected the view that ratification was an exclusively Northern affair. The proclamation attempts to render authoritative judgment on fundamental questions of higher law by the Secretary of State. Article V certainly does not grant this authority, and neither does the applicable federal statute, which states, "whenever official notice shall have been received, at the Department of State, that any amendment which heretofore has been . . . adopted . . . it shall be the duty of the said Secretary of State forthwith to cause the said amendment to be published." An Act to provide for the publication of the laws of the United States, and for other purposes, ch. 80, 3 Stat. 439 (Apr. 20, 1818). It is unclear where the "official notice" comes from, but it cannot be from the Secretary of State. After some griping by the Radicals, the Congress quickly acquiesced and did not challenge Seward's proclamation. *See* 2 ACKERMAN, *supra* note 6, at 153-57.

25. Proclamation No. 52, 13 Stat. 774 (Dec. 18, 1865).

26. *Id.*

27. *Id.* Of the former Confederate states, only Mississippi refused to ratify the Thirteenth Amendment. MCKITRICK, *supra* note 8, at 169.

28. *See infra* note 71 and accompanying text.

29. U.S. CONST. art. V.

ing legal signals.³⁰ The Secretary of State's proclamation that the Thirteenth Amendment had been ratified seemed to suggest the recognition of the validity of the Southern governments.³¹ Congress, however, had no intention of making such recognition. When the Thirty-Ninth Congress convened, Republicans refused to seat any Southern representatives,³² and would later declare, "no legal State governments . . . exist in the rebel States."³³ The Southern states were refused representation in Congress throughout the entire period in which the Fourteenth Amendment was proposed and ratified.³⁴

There can be little doubt that, were the Southern delegations admitted into the Congress, they would not have supported the Fourteenth Amendment.³⁵ Of course, this is the exact reason the Republicans excluded them. The Southern delegations, from the Republicans' viewpoint, seemed to be the same group of rebels who had started this crisis in the first place. Southern voters elected "no fewer than nine Confederate congressmen, seven Confederate state officials, four generals, four colonels, and Confederate Vice President Alexander Stephens."³⁶ Furthermore, the abolition of slavery would do away with the three-fifths method of determining population, which would actually give the South more power in Congress than it had before the Civil War.³⁷

Regardless of this, however, if the Southern states were still in the Union, and with legitimate governments, which the ratification of the Thirteenth Amendment suggests, then they were entitled to sixty-one representatives and twenty-two senators.³⁸ The final vote on the Fourteenth Amendment in the House was 120 to 32, with 32 abstentions.³⁹ The tally was far greater than the necessary two-thirds.⁴⁰ If the excluded Southern representatives' votes were added to the negative column, however, the two-thirds would not have been achieved. Similarly, if the twenty-two Southern senators' votes had been added negatively to the Senate tally of 33 to 11, with 5 abstentions,⁴¹ then the vote would have ended in a tie.⁴²

30. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 502 (1989).

31. Proclamation No. 52, 13 Stat. 774 (Dec. 18, 1865). *But see supra* note 24.

32. Ackerman, *supra* note 30, at 502-03.

33. An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2, 1867).

34. Ackerman, *supra* note 30, at 503.

35. McDonald, *supra* note 5, at 5.

36. MCPHERSON, *supra* note 1, at 500.

37. U.S. CONST. art. I, § 2, cl. 3.

38. McDonald, *supra* note 5, at 5-6.

39. *Id.* at 5; CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

40. U.S. CONST. art. V.

41. McDonald, *supra* note 5, at 6; CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

42. The majority in both Houses included delegates from West Virginia and Nevada, the

It is here, then, where the first problem with the proposal of the Fourteenth Amendment arises. If the Southern governments were legitimate enough to ratify the Thirteenth Amendment, how is it they could be denied representation in Congress? The Constitution seems to give the Republican Congress an out. It provides in Article I, Section 5 that, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business."⁴³ Thus the Constitution contemplates a legitimate congress that excludes some of its members, and allows such an exclusionary power on a majority vote.⁴⁴

But there is still a problem in respect to how Congress exercised this exclusionary power. The Qualification Clause gives Congress the power to serve as a "Judge" of its members' qualifications.⁴⁵ In this case, however, Congress made no inquiry into the qualifications of any particular Southern senators or representatives.⁴⁶ Instead of rejecting particular men, Congress excluded all the Southern delegates, regardless of their qualifications.⁴⁷

However, even a loose reading of the Qualification Clause is limited by other Constitutional provisions. Article I states that "each State shall have at Least one Representative"⁴⁸ and Article V asserts that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."⁴⁹ It appears, then, that the Constitution does not allow the Qualification Clause to serve as a textual warrant to defeat a state's claim of representation.⁵⁰ Congress would have to find some other way to deny Southern representation and still be a Constitutional "Congress" for the purpose of Article V.⁵¹

The Republicans did have another justification for excluding the South from Congress. Article IV, Section 4, states that "[t]he United

constitutionality of whose statehood was doubtful. McDonald, *supra* note 5, at 5.

43. U.S. CONST. art. I, § 5, cl. 1.

44. *See id.*

45. *Id.*

46. 2 ACKERMAN, *supra* note 6, at 104.

47. *Id.*

48. U.S. CONST. art. I, § 2, cl. 3.

49. U.S. CONST. art. V.

50. 2 ACKERMAN, *supra* note 6, at 104.

51. There is another Article V question. What does two-thirds of the "Houses" mean? Does it take two-thirds of the entire Congress or two-thirds of a quorum to approve an amendment? Article V does not say, but Article I defines a quorum as a simple majority and gives each house the power to make its own rules. U.S. CONST. art. I, § 5. It seems reasonable, then, that Article V only requires the approval of two-thirds of members present. This very question was raised during the proposal of the Twelfth Amendment, with some representatives arguing that two-thirds of the entire House and Senate was necessary, but the House overwhelmingly rejected this argument. McDonald, *supra* note 5, at 6. Also in other instances, the Constitution requires two-thirds majorities in impeachment trials and in ratifying treaties, two thirds of the members present. U.S. CONST. art. I, § 3, cl. 6; U.S. CONST. art II, § 2, cl. 2.

States shall guarantee to every State in this Union a Republican Form of Government."⁵² The Southern constitutions of 1865 looked very similar to their antebellum constitutions, with the exception that the 1865 documents had provisions outlawing slavery.⁵³ The South's antebellum constitutions, which protected slavery, had never been found to be un-republican and, in fact, Congress had on several occasions rejected abolitionist arguments that the Guarantee Clause barred the admission of new slave states.⁵⁴ It seems very odd, then, to promote the idea that the Southern governments had rendered themselves un-republican by freeing the slaves.

This argument supports Secretary of State Seward's proclamation that recognized the South as having legitimate state governments still in the Union with the ability to ratify or reject proposed amendments.⁵⁵ But, at the same time, there was nothing to keep the Republicans from advancing a new and revolutionary interpretation of the Guarantee Clause. There had never been a case of a state swapping a republican form of government for an un-republican version, and thus there had never been any prior reason for Congress to question the validity of a government under the Guarantee Clause.⁵⁶ From a modern point of view, at least, there seems to be quite a good argument for declaring Southern governments un-republican.⁵⁷

No Southern government had granted blacks the right to vote, and some radicals in Congress argued that "republican government required not merely that blacks be free but that they be enfranchised."⁵⁸ This argument was hard for many Republicans to accept.⁵⁹ For one reason, only six Northern states had granted blacks the right to vote by 1865, and during the period where Southern states were excluded, seven Northern states defeated proposals for black suffrage in popular referenda.⁶⁰ The best they could do was to point out that in the South one-half to one-third of the eligible male voters were disenfranchised, while in the North, only a minuscule portion of male voters were excluded.⁶¹

Further, if black suffrage was required, did a republican government also require women's suffrage? All this lead many Republicans to

52. U.S. CONST. art. IV, § 4.

53. 2 ACKERMAN, *supra* note 6, at 105.

54. *Id.*; see also WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 140-65 (1972).

55. See sources cited *supra* note 24.

56. 2 ACKERMAN, *supra* note 6, at 108.

57. See generally GREEN B. RAUM, THE EXISTING CONFLICT BETWEEN REPUBLICAN GOVERNMENT AND SOUTHERN OLIGARCHY (Negro Universities Press 1969) (1884).

58. 2 ACKERMAN, *supra* note 6, at 106 (internal quotations omitted).

59. 2 ACKERMAN, *supra* note 6, 106.

60. *Id.*

61. *Id.* at 106-07.

become uneasy over the possibility that the federal government might soon have some permanent role in structuring state governments.⁶² Therefore, in preparing the document justifying Congress's power to exclude the Southern states and still propose the Fourteenth Amendment, the Congress, while still using the Guarantee Clause as its legal basis, looked not at the substance of the Southern constitutions, but on the presidential process of setting up the state governments.⁶³

In determining whether the Guarantee Clause may properly serve as a basis for constitutionally excluding Southern representation, it must be noted that, with two exceptions, everything in the Constitution, including the Guarantee Clause, may be changed or eliminated through amendment.⁶⁴ The first exception expired in 1808.⁶⁵ The clause in Article V, however, which states that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate," may not be altered and is forever a part of the Constitution.⁶⁶ If this clause was so important to the framers of the Constitution that they declared it unamendable, can it really be trumped by the Guarantee Clause?

Even if one agrees with the reasonable argument that the South's governments were so unrepresentative that the Guarantee Clause could allow Congress to exclude Southern representation and still propose the Fourteenth Amendment in accordance with Article V, there still remains one unavoidable problem. For while that argument potentially saves the proposition that the Fourteenth Amendment was constitutionally proposed, it necessarily admits that the Thirteenth Amendment was never ratified. How could an unrepresentative and thus unrecognized government's vote count towards the ratification of the Thirteenth Amendment?

One other matter clouds the proposal of the Fourteenth Amendment. Even with the Southern delegations excluded, an initial poll of support for the Amendment in the Senate showed that the Senate was still one vote shy of the required two-thirds.⁶⁷ One outspoken opponent of the Amendment was John P. Stockton of New Jersey.⁶⁸ Stockton had taken the oath of office and was formally seated on December 5, 1865, when the Thirty-Ninth Congress convened.⁶⁹ While it only takes a majority vote to refuse to seat a congressman, the Constitution requires a

62. *Id.* at 106.

63. *Id.* at 107-08.

64. 2 ACKERMAN, *supra* note 6, at 109.

65. Article V forbids the amendment of Article I, Section 9, clauses 1 and 4 of the Constitution. U.S. CONST. art. V. Importation of persons shall not be restricted by Congress. U.S. CONST. art. V.

66. *Id.*

67. McDonald, *supra* note 5, at 7.

68. *Id.*

69. *Id.*

two-thirds vote to expel a member who has already been seated.⁷⁰ A motion was passed by only a bare majority in the Senate to expel Stockton. Thus, Stockton was unconstitutionally expelled.⁷¹ Only through this bit of chicanery did the Fourteenth Amendment gain its requisite two-thirds majority in the Senate.⁷²

C. Ratification of the Fourteenth Amendment

1. Rejection by the States

While the proposal of the Fourteenth Amendment seems troublesome, the ratification process is even more perplexing and irregular. Once the Amendment had been "proposed" in Congress it was sent to all existing state governments, North and South.⁷³ Here lies an interesting inconsistency: If there were no legitimate republican governments in the South, why did Congress send these illegitimate governments the proposed Fourteenth Amendment? It seems the very fact that Congress sent the Fourteenth Amendment to the South for ratification serves as a tacit endorsement that the Southern states had legitimate governments, or at least that these states were "still full-fledged members of the Union."⁷⁴ Yet these very governments had been denied representation in Congress, and, as we shall see, would be abolished and the South divided into military districts after their refusal to ratify.

Against this dubious background, some states began to ratify the Amendment. Twenty-eight states were needed to ratify, and rejection by ten states would prevent ratification.⁷⁵ The first wave of states to ratify included Connecticut, New Hampshire, Tennessee, New Jersey,⁷⁶

70. U.S. CONST. art. I, § 5, cl. 1-2. "Each House may . . . with the Concurrence of two thirds, expel a Member." *Id.*

71. McDonald, *supra* note 5, at 7.

72. McDonald, *supra* note 5, at 7. New Jersey would eventually rescind its ratification of the Fourteenth Amendment, citing this incident. The resolution withdrawing the state's ratification stated:

[B]ut, finding that two-thirds of the remainder of said Houses could not be brought to assent to the said proposition, they deliberately formed and carried out the design of mutilating the integrity of the United States Senate, and without any pretext or justification, other than the possession of the power, without the right, and in palpable violation of the Constitution, ejected a member of their own body, representing this State, and thus practically denied to New Jersey its equal suffrage in the Senate and thereby nominally secured the vote of two-thirds of the said Houses.

Act of Mar. 24, 1868, 1868 N.J. Acts reprinted in McElwee, *supra* note 6, at 501 n.13.

73. McDonald, *supra* note 5, at 7-8.

74. *Id.* at 8.

75. McElwee, *supra* note 6, at 489.

76. New Jersey would later rescind this ratification. McDonald, *supra* note 5, at 8; see also *supra* note 72 and discussion contained therein.

and Oregon.⁷⁷ The ratifications of Tennessee and Oregon, however, are troublesome. In Tennessee, opponents of the Amendment absented themselves from the House in order to prevent a quorum.⁷⁸ This did not stop the supporters of the Amendment, who forcibly seized two absent members and held them in a committee room.⁷⁹ The House ignored a court order to release the two and overruled the Speaker, who ruled there was no quorum present.⁸⁰ Thus, the Tennessee House voted for ratification amid significant controversy.⁸¹

Ratification in Oregon was also irregular. The Amendment supporters had a three vote majority in the House, but two of their seats were disputed.⁸² The Amendment was quickly put to a vote and ratified by three votes.⁸³ The disputed seats were later awarded to Democrats on the grounds that the Republican supporters of the Amendment were illegally elected.⁸⁴ Therefore, Oregon would later rescind, by one vote, its ratification of the Fourteenth Amendment.⁸⁵

Regardless of these controversies, by February 1, 1867, only seventeen states had ratified the Fourteenth Amendment,⁸⁶ and eleven had rejected it,⁸⁷ one more than the ten required to prevent ratification. The Fourteenth Amendment appeared defeated.

Ironically, if Congress had followed the Radicals' views, such as Sumner's "state suicide" theory or Stevens's conquered provinces theory, the Fourteenth Amendment would have been ratified at least loosely within the bounds of the Constitution. Article I, Section 8 of the Constitution allows Congress to determine whether domestic insurrec-

77. McElwee, *supra* note 6, at 489.

78. JAMES, *supra* note 6, at 20-24; McDonald, *supra* note 5, at 8.

79. *Id.*

80. *Id.*

81. JAMES, *supra* note 6, at 23. One historian has noted that Tennessee ratified the Amendment "amid some of the most violent and irregular scenes in the history of parliamentary government in America." JAMES, *supra* note 6, at 23.

82. McDonald, *supra* note 5, at 8.

83. McDonald, *supra* note 5, at 8; Pinckney G. McElwee, *supra* note 6, at 503 n.14.

84. McDonald, *supra* note 5, at 8.

85. *Id.*

86. The states that ratified the Amendment included: Connecticut: June 30, 1866; New Hampshire: July 7, 1866; Tennessee: July 7, 1866; New Jersey: Sept. 11, 1866; Oregon: Sept. 19, 1866; Vermont: Oct. 30, 1866; New York: Jan. 10, 1867; Kansas: Jan. 11, 1867; Ohio: Jan. 11, 1867; Illinois: Jan. 15, 1867; West Virginia: Jan. 16, 1867; Michigan: Jan. 16, 1867; Minnesota: Jan. 17, 1867; Maine: Jan. 19, 1867; Nevada: Jan. 22, 1867; Indiana: Jan. 23, 1867; and Missouri: Jan. 26, 1867. Proclamation No. 13, 15 Stat. 710 (1868); McElwee, *supra* note 83, at 489. Other states that ratified the Amendment at a later time included: Massachusetts: Mar. 20, 1867; Nebraska: Mar. 20, 1867; Iowa: Mar. 9, 1868; Rhode Island: Feb. 7, 1867; Pennsylvania: Feb. 12, 1867; and Wisconsin: Feb. 13, 1867. McElwee, *supra* note 83, at 501-502.

87. The eleven states that had rejected the Amendment included: Texas: Oct. 27, 1866; Georgia: Nov. 9, 1866; Florida: Dec. 3, 1866; Alabama: Dec. 7, 1866; North Carolina: Dec. 13, 1866; Arkansas: Dec. 17, 1866; South Carolina: Dec. 20, 1866; Virginia: Jan. 9, 1867; Kentucky: Jan. 8, 1867; Mississippi: Jan. 29, 1867; and Delaware: Feb. 7, 1867. Proclamation No. 13, 15 Stat. 710 (1868); McElwee, *supra* note 83, at 489.

tion is occurring.⁸⁸ Article IV, Section 4, guarantees each state a republican form of government and that the federal government will protect against invasion or domestic violence.⁸⁹ Further, in 1848, the Supreme Court had ruled that matters of the legitimacy of state regimes arising under the Guarantee Clause were “political questions” falling under the exclusive control of Congress, and not subject to adjudication by the courts.⁹⁰

Therefore, if Congress had used Sumner’s or Steven’s theory and found that the Southern states had been reduced to territories,⁹¹ coupled with the above constitutional powers, they could have held ratification of the Fourteenth Amendment to be an exclusively Northern affair. The Fourteenth Amendment would then have been officially ratified when twenty of the twenty-six loyal states had approved the Amendment.⁹² The Southern states would then have to approve the Constitution, including the new Fourteenth Amendment, as a condition of statehood, just as is done in admitting new states formed from territories.⁹³ Yet, this was not the path Congress had chosen to follow, subsequently leading to the initial defeat of the Fourteenth Amendment. Congress would have to formulate a new strategy to get the Fourteenth Amendment ratified. This new strategy would see Congress exercise power well beyond that contemplated by Article V, and the ratification of the Fourteenth Amendment began a course of action that cannot be squared with the text of the Constitution.

2. *The Reconstruction Acts*

Senator Doolittle of Wisconsin, in a statement before Congress, demonstrated quite clearly the new strategy Congress would pursue to ensure the ratification of the Fourteenth Amendment: “[T]he 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 bayonet, and establish military power over them until they do adopt it.”⁹⁴

This statement exemplified how many moderate Republicans were

88. U.S. CONST. art. I, § 8, cl. 15.

89. U.S. CONST. art. IV, § 4. The Supreme Court has subsequently held that these latter two guarantees are primarily legislative functions. McDonald, *supra* note 5, at 9.

90. *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849).

91. See McDonald, *supra* at 5, at 7.

92. McDonald, *supra* note 5, at 10. However, even this scenario is complicated by the fact that Ohio, New Jersey, and Oregon rescinded their ratifications. Kentucky, Delaware, Maryland, and California had rejected the Amendment outright. If rescissions were constitutionally allowed, then only nineteen states, and not the required twenty, would have ratified. Congress rejected these rescissions. *Id.* The Supreme Court, in later cases gave Congress the last word in what it considered a political question. See *Coleman v. Miller*, 307 U.S. 433 (1939).

93. McDonald, *supra* note 5, at 10.

94. CONG. GLOBE, 39th Cong., 2d Sess. 1644 (1867).

exasperated by the South's refusal to accept the Fourteenth Amendment.⁹⁵ This refusal, coupled with rising violence against blacks in the South⁹⁶ and President Johnson's botched "swing around the circle" to promote Southern readmission,⁹⁷ resulted in a resounding victory for Republicans in the 1866 Congressional elections.⁹⁸ The Republicans viewed this one-sided victory as a mandate in favor of the Fourteenth Amendment, and would not allow the initial rejection by the South to curb their efforts to seek its ratification.⁹⁹

Indeed, on March 2, 1867, Congress passed the first Reconstruction Act¹⁰⁰ over President Johnson's veto.¹⁰¹ The Act stated that "no legal State governments . . . exist in the rebel States," and divided the South, with the exception of Tennessee, into military districts.¹⁰² The Act served to enfranchise black males and to disenfranchise large numbers of white voters.¹⁰³ Moreover, the Act required these voters in each state to form new constitutions, to be approved by Congress, and to ratify the Fourteenth Amendment.¹⁰⁴ Even then, however, before the "State shall be declared entitled to representation in Congress,"¹⁰⁵ the Fourteenth Amendment must have "become a part of the Constitution of the United States."¹⁰⁶ The Act further proclaimed that "until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to

95. MCPHERSON, *supra* note 1, at 518.

96. The worst violence occurred in Memphis in May 1866, and in New Orleans in July 1866. *Id.* at 516. The Memphis incident started as a quarrel between demobilized black soldiers and local whites, and ended in mob violence that left forty-six people dead. *Id.* In New Orleans a mob attacked delegates to a black suffrage convention, killing thirty-seven blacks and three of their white allies. *Id.* Republicans would exploit this violence to their political advantage. *Id.*

97. Johnson campaigned through the Midwest to garner support for the National Union movement, which called for immediate readmission of Southern states. *Id.* at 515-17. This "swing around the circle" turned disastrous. Johnson got in shouting matches with hecklers, traded insults with hostile crowds, and claimed the Republicans were as great of traitors as Jefferson Davis. MCPHERSON, *supra* note 1, at 515-17. Johnson even went as far as to answer criticism of his pardoning policy by comparing himself to Jesus, stating, "He died and shed His own blood that the world might live . . . If more blood is needed, erect an alter, and upon it your humble speaker will pour out the last drop of his blood as a libation for his country's salvation." *Id.* at 515-17.

98. *Id.* at 517.

99. *See id.*

100. An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2, 1867).

101. *See* McDonald, *supra* note 5, at 11.

102. 14 Stat. 428.

103. *See id.* Voting rights were granted to "male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law." *Id.*

104. *Id.*

105. *Id.*

106. 14 Stat. 428.

the paramount authority of the United States at any time to abolish, modify, control, or supersede the same."¹⁰⁷

Yale University scholar, Bruce Ackerman, noted that, "[u]p to now, it was possible to drape a legal fig leaf over each Congressional action. But at this point, we are in the presence of naked violations of Article Five."¹⁰⁸ University of Alabama history professor, Forrest McDonald, has stated that, "[t]he act flew in the face of the Constitution in a large variety of ways."¹⁰⁹ Thus, as these commentators note, there is simply no way to fit the Reconstruction Acts within the bounds of the Constitution, yet the Fourteenth Amendment owes its existence in the Constitution to this troublesome legislation.

The Reconstruction Act seemed to run afoul of a recent decision of the Supreme Court. In *Ex parte Milligan*,¹¹⁰ the Court held that military trials of civilians in times of peace and outside of war zones were unconstitutional, and stated that "[m]artial rule can never exist where the courts are open."¹¹¹ Since the Civil War had been over for almost two years prior to the passage of the Reconstruction Acts and because Southern governments and courts had been operating for some time, the Reconstruction Act seemed to run counter to the Court's ruling in *Milligan*. Further, the Court spoke of martial law in strong terms:

If . . . the country is subdivided into military departments for mere convenience . . . republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'¹¹²

The Republicans in Congress denounced the decision as a "piece of judicial impertinence which we are not bound to respect."¹¹³ Others said that the War was not over until Congress said so, and in the meantime the South was a war zone in which martial law could be imposed.¹¹⁴ At any rate, Congress, as we shall further see, had no intention of letting the Supreme Court get in its way.

The Reconstruction Act also deprived most white voters in the South of their political rights, without due process of law, on a whole-

107. 14 Stat. 428.

108. 2 ACKERMAN, *supra* note 6, at 111.

109. McDonald, *supra* note 5, at 11.

110. 71 U.S. 2 (1866).

111. *Milligan*, 71 U.S. at 127.

112. *Id.* at 124.

113. MCPHERSON, *supra* note 1, at 529.

114. *Id.* at 508 n.34. *But see supra* note 15.

sale basis.¹¹⁵ President Johnson noted this in his lengthy veto message:

[H]ere is a bill of attainder against 9,000,000 people at once. It is based upon an accusation so vague as to be scarcely intelligible and found to be true upon no credible evidence. Not one of the 9,000,000 was heard in his own defense. The representatives of the doomed parties were excluded from all participation in the trial. The conviction is to be followed by the most ignominious punishment ever inflicted on large masses of men. It disfranchises them by hundreds of thousands and degrades them all, even those who are admitted to be guiltless, from the rank of freemen to the condition of slaves.¹¹⁶

Congress quickly brushed aside President Johnson's stinging, yet racist, veto message.¹¹⁷

More importantly, in holding that no legitimate republican state governments existed in the South, with the exception of Tennessee, Congress had trapped itself in an interesting inconsistency. These same governments had been called upon to ratify the Thirteenth Amendment. Five Southern states had ratified the Thirteenth Amendment and their votes had been counted towards the required two-thirds majority.¹¹⁸ How could these governments have been legitimate enough to ratify the Thirteenth Amendment, but not legitimate when they rejected the Fourteenth?¹¹⁹ Once again, then, we are faced with the "Thirteenth-Fourteenth Amendment Paradox,"¹²⁰ which plagues the Fourteenth Amendment from proposal to ratification. For, if Congress was right, and no legitimate state governments actually existed in the South, then Secretary of State Seward's proclamation that the Thirteenth Amendment was ratified is also illegitimate. Therefore the "Thirteenth Amendment" has not really been ratified, and slavery has not constitutionally been abolished. But if Congress was wrong, and the Southern governments were legitimate, then the Fourteenth Amendment is dead at this point. Therefore the Reconstruction Act is unconstitutional because the South's legitimate governments had been denied representation in Congress during the Amendment's proposal and had rejected the "proposed" amendment once submitted to them.

Placing aside this "Thirteenth-Fourteenth Amendment Paradox" for the moment, if possible, there are further problems and inconsistencies

115. McDonald, *supra* note 5, at 12.

116. Johnson's Veto Message, *quoted in* McElwee, *supra* note 6, at 497.

117. Johnson's message criticized the idea of Negro suffrage as the "impolicy of Africanizing the [South]." *Id.* at 498.

118. MCKITRICK, *supra* note 8, at 169 and n.43.

119. Ackerman, *supra* note 30, at 502.

120. *Id.*

on the face of the Reconstruction Act. The coercive nature of the Act itself is well beyond anything contemplated by Article V. Article V gives Congress the power to propose amendments and allows them to determine whether ratification will be by state legislatures or state conventions.¹²¹ Through the Reconstruction Act, however, Congress is attempting to exert a power to override a veto by the states of a proposed amendment. The Southern governments must have been viewed as legitimate because they were allowed to ratify the Thirteenth Amendment and were initially sent the Fourteenth Amendment. But now, through the Reconstruction Act, Congress is saying that their refusal to accept the Amendment has deprived them of all political power in the councils of the nation. Further, Congress is also telling the South that if they ever want that power back, the Fourteenth Amendment must become part of the Constitution, and until it does, the South will be governed by the Union army.¹²² This is entirely inconsistent with the limited power granted to Congress in Article V. Surely, the founding fathers never contemplated that an amendment to the Constitution could be lawfully compelled "at the point of the bayonet,"¹²³ or that a state could be placed under the duress of continued and compelling military force to achieve the ratification of a desired amendment.

Even placing aside the coercive nature of the Reconstruction Act, there is a further unavoidable problem with the Act's inconsistent internal logic. The Act stated that no legal republican state governments existed in the South.¹²⁴ According to the Act, in order for Congress to legally recognize Southern governments, the Fourteenth Amendment must have been ratified by the Southern states, and must have become part of the Constitution.¹²⁵ The key inconsistency is that the Amendment must have been ratified by the provisional government of a Southern state before that government was legally recognized. Yet, what good is ratification by a government that is not legally recognized or entitled to representation in Congress? And if ratification by a congressionally unrecognized state government is allowed, why can't an unrecognized state government reject an amendment?

With this problem duly noted, we may now further question the ratification of the Fourteenth Amendment by Tennessee. Tennessee had initially ratified the Fourteenth Amendment when other Southern governments had rejected it.¹²⁶ Upon ratification of the Fourteenth Amend-

121. U.S. CONST. art. V.

122. See An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2, 1867); 2 ACKERMAN, *supra* note 6, at 111.

123. CONG. GLOBE, 39th Cong., 2d Sess. 1644 (1867).

124. 14 Stat. 428.

125. *Id.*

126. See *supra* text accompanying notes 73-77.

ment by Tennessee, Congress, on July 24, 1866, declared Tennessee restored to the Union.¹²⁷ But Tennessee's government had been set up under the direction of the Chief Executive, as had all the other Southern governments.¹²⁸ Tennessee's government was no different from the other Southern governments, with the exception that it had enough votes to ratify the Fourteenth Amendment. So, if Tennessee's government was legitimate enough to accept the Fourteenth Amendment, why were the other Southern governments illegitimate when they refused? But as Congress's proclamation points out, Tennessee was declared restored to the Union because it had ratified the Fourteenth Amendment.¹²⁹ Again, this raises the question, what good is a ratification from a state whose government is not legally recognized?

This, however, brings us back to a now familiar problem. If the Southern governments were legitimate enough to ratify the Thirteenth Amendment, and Tennessee's government was legitimate enough to ratify the Fourteenth, then the Reconstruction Acts¹³⁰ cannot be constitutional. For Congress had no more power in 1867 to abolish a valid state government, than it would today to put New England under military rule for refusing to ratify a proposed anti-abortion amendment.

3. *Judicial Review of the Reconstruction Acts*

Both North and South realized the Reconstruction Acts stood on unstable constitutional grounds, and that the Supreme Court would likely have the final say.¹³¹ In fact, after the *Milligan*¹³² decision, Congress had introduced a flurry of bills and constitutional amendments seeking to limit the power of the Supreme Court.¹³³ The House passed a bill which would have required a two-thirds Court majority to overturn legislation deemed unconstitutional, but the bill did not make it out of the Senate.¹³⁴ Some congressional Republicans even sought to have the Supreme Court abolished.¹³⁵ These Republican attacks on the Supreme Court may have convinced some justices "that discretion was the better part of valor,"¹³⁶ because the Court would dismiss two suits by state officials in the South to enjoin the enforcement of the Reconstruction

127. Cong.J. Res. 73, 39th Cong., 14 Stat. 364 (1866).

128. See *supra* note 8 and accompanying text.

129. Cong.J. Res. 73.

130. Several acts were passed to supplement the first Reconstruction Act. These acts are collectively known as the Reconstruction Acts. See MCKITRICK, *supra* note 8, at 484 n.86.

131. See MCPHERSON, *supra* note 1, at 533-34.

132. 71 U.S. (4 Wall.) 2 (1866).

133. MCPHERSON, *supra* note 1, at 529.

134. *Id.*

135. *Id.*

136. *Id.*

Acts.¹³⁷

In *Mississippi v. Johnson*¹³⁸ the Supreme Court refused to issue an injunction against enforcement of the Reconstruction Acts by the President.¹³⁹ The Court noted that if it did grant the injunction against the President on the grounds of unconstitutionality, the President might very well be impeached by the House for complying with the Court order and refusing to enforce the Act.¹⁴⁰ The Court cited this "collision . . . between the executive and legislative departments" in refusing to grant the injunction, and therefore dodged the question of the Reconstruction Acts' constitutionality.¹⁴¹

In *Georgia v. Stanton*,¹⁴² the Supreme Court dismissed an action by the State of Georgia to restrain the Secretary of War and other executive officials from enforcing the Reconstruction Acts.¹⁴³ The Court noted that the Acts' 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."¹⁴⁴ However, the Court held that this was a political question and was not justiciable.¹⁴⁵ Again the Supreme Court had dodged the issue of the constitutionality of the Reconstruction Acts. The Court did hint, however, that if an action was brought relating to the rights of "persons or property," it would hear the matter.¹⁴⁶

The Supreme Court's language in *Stanton* left the door open for one more challenge to the Constitutionality of the Reconstruction Acts in *Ex parte McCordle*.¹⁴⁷ McCordle, the editor of the Vicksburg Times, was arrested by military authorities in Mississippi for publishing an editorial denouncing the constitutionality of the Reconstruction Acts.¹⁴⁸ He was

137. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

138. *Johnson*, 71 U.S. (4 Wall.) at 475.

139. *Id.*

140. *Id.* at 501.

141. *Id.*

142. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

143. *Stanton*, 73 U.S. (6 Wall.) at 77.

144. *Id.* at 76.

145. *Id.* at 77.

146. *Id.* The Court stated:

That these matters . . . call for the judge of the court upon political questions, and, upon rights, not of persons or property, but of a political character No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

Id. at 77.

147. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1868); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

148. *McElwee*, *supra* note 6, at 505.

charged with impeding reconstruction; inciting insurrection, disorder, and violence; libel; and disturbance of the peace, and was to be tried before a military court.¹⁴⁹ *McCardle* filed for a writ of habeas corpus on the ground that the Reconstruction Act was unconstitutional.¹⁵⁰ The district court refused to grant this petition for a writ of habeas corpus and *McCardle* appealed to the Supreme Court.¹⁵¹ The Supreme Court agreed to hear the case and denied the government's motion to dismiss for lack of jurisdiction.¹⁵²

After the Court denied the government's motion to dismiss, word soon reached congressional leaders that the Supreme Court would be forced to declare the Reconstruction Acts unconstitutional.¹⁵³ The Congressional response was quick. Republicans passed a bill that repealed the Habeas Corpus Act of 1867, the act under which *McCardle* had appealed, thereby removing the Supreme Court's jurisdiction in the case.¹⁵⁴ Congress noted that the purpose of this bill was to prevent the Supreme Court from passing on the validity of the Reconstruction Acts.¹⁵⁵ The case had already been argued about two weeks before Congress passed its bill stripping the Supreme Court of its jurisdiction, giving the Court time to issue a decision.¹⁵⁶ The Court, however, backed down from congressional authority, fearing that if they ruled on the Reconstruction Acts, the Republicans in Congress might retaliate by inflicting even more damage upon the Court's institutional independence.¹⁵⁷

Despite a strong dissent by Justice Grier, the Court decided to wait for the bill stripping its jurisdiction to become law.¹⁵⁸ The Court dis-

149. *McCardle*, 73 U.S. at 320; *McElwee*, *supra* note 6, at 505.

150. *McCardle*, 73 U.S. at 320; *McElwee*, *supra* note 6, at 505.

151. *McCardle*, 73 U.S. at 318; *McElwee*, *supra* note 6, at 505.

152. *McCardle*, 73 U.S. at 327.

153. *McElwee*, *supra* note 6, at 506.

154. An Act to amend the Judiciary Act, ch. 34, 15 Stat. 44 (Mar. 27, 1868); MCPHERSON, *supra* note 1, at 530.

155. *McElwee*, *supra* note 6, at 506.

156. 2 ACKERMAN, *supra* note 6, at 224-25.

157. *Id.* at 225-26.

158. Justices Grier and Field's dissents, for some reason, were not published in the official reports. *Id.* The dissents read:

Protest of Mr. Justice Grier:

This case was fully argued in the beginning of this month. It is a case that involves the liberty and rights not only of the appellant, but of millions of our fellow-citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of this court. By the postponement of the case we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for legislation to interpose to supersede our action and relieve us from our responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow; and can only say:

Pudet haec opprobrium nobis

missed *McCardle's* case for want of jurisdiction and refused to find the jurisdiction stripping legislation unconstitutional.¹⁵⁹ The Court had again, though just barely and for the last time, dodged the question of the Reconstruction Act's constitutionality.

4. *Fourteenth Amendment Declared Ratified*

While the constitutionality of the Reconstruction Acts was being challenged in the Supreme Court, military officials, and twenty thousand federal troops, had begun registering voters in the South in order for new Southern governments to be organized.¹⁶⁰ After the registration of voters was completed in September 1867, black voters made up a majority of voters in five of the ten unreconstructed states.¹⁶¹ Thirty-five percent to forty-five percent of potential white voters were either excluded from voting because of the Reconstruction Acts, or failed to register.¹⁶² Southerners still made some attempts to resist the forced creation of new governments. In Alabama, for example, most voters stayed away from the polls to prevent the new constitution from being approved by the required majority of registered voters.¹⁶³ This tactic was tried in other Southern states as well, but Congress responded by repealing the majority-of-the-voters requirement, and allowed for a majority of the votes cast to enable the new constitutions.¹⁶⁴ Thus, all the unreconstructed states "approved" new constitutions, and the new governments began ratifying the Fourteenth Amendment.¹⁶⁵

Arkansas was the first of the unreconstructed Southern states to act.¹⁶⁶ For the state's new constitution to be legal, it required congressional approval, but it's new legislature informally convened and approved the Fourteenth Amendment on April 6, 1868.¹⁶⁷ The Congress

Et dici potuisse;
et non potuisse
repelli

[*Trans.*: I am ashamed that such opprobrium should be cast upon the court, and that it cannot be refuted. Ovid, *Metamorphosis*, Book I, lines 758-759]

R. C. Grier

I am of the same opinion with my brother Grier, and unite in his protest.

Field, J.

2 ACKERMAN, *supra* note 6, at 466.

159. *McCardle*, 74 U.S. at 514-15.

160. MCPHERSON, *supra* note 1, at 535.

161. *Id.*

162. *Id.*

163. McDonald, *supra* note 5, at 16. Of the 170,631 registered voters, only 71,000 turned out. The 69,807 that voted to ratify the new constitution was less than a majority. *Id.*

164. *Id.*

165. *Id.* at 15-16.

166. *Id.*

167. JAMES, *supra* note 6, at 238-39.

voted to admit Arkansas to representation in Congress on June 22, 1868.¹⁶⁸ It should be pointed out, then, that Arkansas ratified the Fourteenth Amendment, even though it still had "no legal [s]tate governments" until June.¹⁶⁹

Florida was the next of the unreconstructed states to act.¹⁷⁰ Florida, in May of 1868, had approved its new constitution that had been drafted by a convention presided over by United States Army Colonel John Sprague in full military uniform.¹⁷¹ Florida ratified the Fourteenth Amendment on June 9, 1868.¹⁷² While Congress debated the readmission of Florida, it was pointed out that the text of the Amendment ratified by the state contained numerous errors and variations.¹⁷³ Some senators, therefore, argued that Florida had not properly adopted the Amendment.¹⁷⁴ Yet, after the ratifications of New York, Pennsylvania, Wisconsin, and Michigan were examined and found to have similar errors, some of them substantive, Congress decided that ratification in any form would suffice.¹⁷⁵ Florida was therefore readmitted as a legal government.¹⁷⁶ However, like Arkansas, Florida had ratified the Fourteenth Amendment before Congress declared it a legal government.

After Florida ratified the Amendment, Congress changed the rules slightly. It declared that all the Southern states had, by adopting new constitutions, formed republican governments, and would be entitled to representation once they ratified the Fourteenth Amendment.¹⁷⁷ Congress, then, would no longer have to consider representation of an unreconstructed state once it ratified the Amendment. A state would automatically have its representation restored once it ratified the Fourteenth Amendment.¹⁷⁸ On these terms, North Carolina ratified the Amendment on July 2, 1868, Louisiana and South Carolina on July 9, 1868, and Alabama on July 16, 1868.¹⁷⁹ But again, regardless of the coercive factor that ratification was still a condition precedent to admission in Congress, the governments that ratified the Amendment still can not be considered legal state governments if they were not entitled to

168. See An Act to admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (June 22, 1868).

169. An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2, 1867).

170. McDonald, *supra* note 5, at 17.

171. *Id.*; JAMES, *supra* note 6, at 241.

172. JAMES, *supra* note 6, at 241; McDonald, *supra* note 5, at 17.

173. JAMES, *supra* note 6, at 242-43; McDonald, *supra* note 5, at 17.

174. JAMES, *supra* note 6, at 242-43

175. McDonald, *supra* note 5, at 17

176. *Id.*; An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (June 25, 1868).

177. 15 Stat. 73.

178. *Id.*

179. McDonald, *supra* note 5, at 18.

representation in Congress until after they ratified it.

These Southern ratifications seemed to give Secretary of State Seward the required twenty-eight states necessary for the Fourteenth Amendment to become law. Secretary Seward had twenty-nine ratifications on file, but prior to receiving the twenty-eighth, New Jersey and Ohio had rescinded their ratifications.¹⁸⁰ Nevertheless, on July 20, 1868, Secretary Seward issued a proclamation declaring the Fourteenth Amendment ratified.¹⁸¹ However, as one commentator has pointed out, "it is hard to ignore the tell-tale signs of irregularity that peer out from the fifteenth volume of the *Statutes at Large*."¹⁸² Seward's proclamation shows he obviously had doubts as to the validity of all of the listed twenty-nine ratifications. Clearly, on Seward's mind was the constitutionality of using military force to set up new Southern governments as a means securing ratification. Seward's proclamation explained that the Amendment had "also been ratified by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama."¹⁸³ As to the rescissions by Ohio and New Jersey, Seward noted that it was "a matter of doubt and uncertainty whether such resolutions" were valid.¹⁸⁴ Seward further concluded his proclamation conditionally, stating, "if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect . . . then the aforesaid amendment has been ratified."¹⁸⁵

Congress reacted quickly to Seward's proclamation, and on July 21, 1868, declared all twenty-nine ratifications to be valid and that the Fourteenth Amendment was "part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."¹⁸⁶ On July 28, Seward, issued a second proclamation in conformance with the congressional resolution, and declared the Fourteenth Amendment had "become valid to all intents and purposes as a part of the Constitution of the United States."¹⁸⁷

The Fourteenth Amendment has been considered a part of the Constitution ever since. Yet, 130 years after Secretary of State Seward's proclamation, no one has answered the question of how the original

180. See Proclamation No. 11, 15 Stat. 706, 707 (July 20, 1868); *supra* notes 70, 73, 90 and accompanying text.

181. 15 Stat. 706.

182. 2 ACKERMAN, *supra* note 6, at 112.

183. 15 Stat. 706, 707.

184. *Id.*

185. *Id.* The Ohio and New Jersey problem was solved when Georgia ratified the Amendment, giving it enough ratifications without Ohio or New Jersey. *Id.* at 710-11.

186. Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868).

187. *Id.* at 711.

reconstruction Southern governments were to be counted when they said "yes" to the Thirteenth Amendment, but when they said "no" to the Fourteenth Amendment, Congress had a right to destroy these governments, and then keep the new governments in the cold until they said "yes"?

II. ASSUMING THE VALIDITY OF THE FOURTEENTH AMENDMENT

It is possible that a person, after reading the story of the ratification of the Fourteenth Amendment, might say something like: "[T]his is very interesting, but the Fourteenth Amendment has been accepted as a part of the Constitution for over 130 years and we must assume its validity." While this seems like a reasonable enough statement, there are certain unfavorable consequences forced upon one who assumes the validity of the Fourteenth Amendment. These consequences are set out in the following scenarios from which one is required to choose from if he assumes the constitutionality of the Fourteenth Amendment.

A. *Thirteenth-Fourteenth Amendment Paradox*

One possibility may be to assume that the Southern governments were so "unrepublican" that they could constitutionally be excluded from Congress and deprived of their right to participate in the proposal of the Amendment. It must further be assumed that the Reconstruction Acts were constitutional and that Congress had the power to set up, through military occupation, republican governments in the South and compel ratification by these new governments and that these ratifications were valid even before Congress had declared these new governments "legal." These assumptions save the Fourteenth Amendment, but in a way that necessarily invalidates the Thirteenth Amendment. For if the Southern governments were unconstitutionally unrepublican, there is no way to justify counting their ratifications towards the Thirteenth Amendment. One is thereby left with the unfortunate choice between the validity of the Fourteenth Amendment or the abolition of slavery.

B. *Constitutional Secession*

Another possibility would be to assume that a state may somehow constitutionally leave, or be removed from, the Union through some method such as an ordinance of secession or by state suicide.¹⁸⁸ With this assumption, one could conclude that the Southern states were not entitled to representation in Congress and were not to be counted in

188. See McDonald, *supra* note 5, at 7.

determining whether three-fourths of the states had ratified an amendment. Therefore, if one also assumes that the resolutions by New Jersey, Ohio, and Oregon rescinding their ratifications were invalid,¹⁸⁹ then the Fourteenth Amendment can be saved. One who chooses to follow this scenario must not only repudiate the principle of an indissoluble Union, but also several Supreme Court decisions holding that the South had never left the Union¹⁹⁰ as well as actions by the legislative¹⁹¹ and executive¹⁹² branches that asserted the South had never left the Union. Even if one decides that recognizing some form of secession or method for dissolution of the Union is not so bad when compared to invalidation of the Fourteenth Amendment, this scenario is still problematic simply because it was not the method followed by Congress.

C. *Ratification Outside Article Five*

A final method which might potentially save the Fourteenth Amendment would be to assume that the Constitution can legally be ratified outside of the method set out in Article V. For example, one might argue that the North had a right to force the Southern governments to accept the Fourteenth Amendment because it had the South within "the grasp of war."¹⁹³ This "grasp of war" theory would save both the Thirteenth and Fourteenth Amendments without recognizing any form of secession by assuming that these amendments were not made part of our Constitution through Article V ratification, but by Gettysburg and Appomattox. While this would save the Fourteenth Amendment, "grasp of war" is an extremely undesirable justification for the Amendment, because while all amendments other than the Reconstruction amendments were products of the constitutional will of the American people, the Fourteenth Amendment would then find its justification solely by the guns of the Union Army.¹⁹⁴ Equally troubling is that, if the "grasp of war" theory is assumed to be a constitutional method for ratification, what other extra-Article V amendment methods

189. See *supra* note 90 and accompanying text.

190. *White v. Hart*, 80 U.S. (13 Wall.) 646, 651 (1871) The Court recognized that "[a]t no time were the rebellious States out of the pale of the Union." *Id.* *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1868) In *White*, the Court noted that "[t]he union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States . . . Texas continued to be a State, and a State of the Union." *Id.*

191. Congress had stated that the Civil War's object was "to preserve the Union with all the dignity, equality, and rights of the several states unimpaired." 2 ACKERMAN, *supra* note 6, at 113-14. Congress also sent the Southern states the proposed Fourteenth Amendment. McDonald, *supra* note 5, at 7-8.

192. Seward counted the Southern states as states ratifying the Thirteenth Amendment. See *supra* note 22.

193. See 2 ACKERMAN, *supra* note 6, at 115.

194. See *id.*

might be found to exist?

The most disturbing problem arising out of the Fourteenth Amendment ratification story is the precedent for constitutional amendment it may have set. For one to assume the constitutionality of the Amendment, they must accept its method of proposal and ratification as constitutional. Therefore, one who accepts the constitutionality of the Fourteenth Amendment must also accept the premise that, at least in certain circumstances, Congress may deny states their representation in Congress in order to compel ratification of a desired amendment. This cannot be right, but the dilemma is heightened by the recognition that the Fourteenth Amendment is a cornerstone of federal jurisprudence. There is simply no acceptable outcome if we are forced to choose between accepting a doctrine of congressional coercion or the Fourteenth Amendment. The only answer, besides ignoring the question, is to repropose the Fourteenth Amendment.

III. CONCLUSION

It seems quite clear that the Fourteenth Amendment was not ratified, if proposed, even loosely within the text of Article V of the Constitution.¹⁹⁵ Article V does not give Congress the power to deny a state representation in Congress without its consent. In fact, it prohibits such conduct. Nor does Article V give Congress the power to abolish a state government when it refuses to ratify a proposed amendment. And certainly, Article V does not allow Congress to deny a state its representation until it ratifies a desired amendment.

Furthermore, Article V is the only way the Constitution can be amended. The Supreme Court in *Hawke v. Smith*¹⁹⁶ has stated:

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to

195. But what about states admitted since Reconstruction? By voting to accept the Constitution, didn't those states also ratify the Fourteenth Amendment? The answer to this question is no, not if the Fourteenth Amendment was not a part of the Constitution. Territories are not required to ratify proposed amendments as a condition of statehood, and their territorial status would not allow them to ratify a proposed amendment if they wanted to. But, for the sake of argument, even if you counted all the states admitted since 1868 as votes for the ratification of the Fourteenth Amendment and subtracted all the Southern votes (except Tennessee), there would still not be enough votes to equal three-fourths of the fifty states. Texas, Georgia, North Carolina, South Carolina, Virginia, Mississippi, Kentucky, Delaware, Maryland, Arkansas, Florida, Louisiana, and Alabama all rejected the Amendment, which is equal to the thirteen rejections needed to prevent a three-fourths majority. 15 Stat. 710 (1868). California also rejected the Amendment. McElwee, *supra* note 6, at 490 n.8.

196. 253 U.S. 221 (1920).

two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.¹⁹⁷

So, if the Constitution can only be amended through Article V, and the Fourteenth Amendment was not ratified properly under that article, what is its status? It seems as though this question can only be answered in one way. However, having the Fourteenth Amendment suddenly declared invalid would be disastrous.¹⁹⁸ The question is one for the Supreme Court. Yet, in *Coleman v. Miller*,¹⁹⁹ the Court discussed the rati-

197. *Hawke*, 253 U.S. at 227 (internal citations omitted).

198. The list of landmark decisions that would be overturned include the following: *Brown v. Bd. of Educ.*, 374 U.S. 483 (1954) (holding that state-imposed segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding a state antimiscegenation law violated the Equal Protection Clause of the Fourteenth Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (applying heightened scrutiny to gender discrimination); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a law prohibiting instruction on contraception violated the Fourteenth Amendment); *Roe v. Wade*, 410 U.S. 113, (1973) (finding that abortion was a fundamental right protected by the Fourteenth Amendment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (stating that state laws regulating abortions may not create an "undue burden" on a woman's ability to choose to have an abortion). All Bill of Rights cases as applied to the states would also be overturned. *Brandenburg v. Ohio*, 397 U.S. 444 (1969) (holding that government may not punish the advocacy of illegal action without a finding of imminent harm); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a state could not punish a person for wearing a jacket bearing the words "Fuck the Draft"); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that a state may not engage in content-based—including viewpoint—discrimination even where the subject matter of the speech falls within an area unprotected by the First Amendment); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment prohibits libel actions brought by public officials against critics of their official conduct, unless the official could show "actual malice"); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that freedom of association was protected by the First Amendment); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (stating that state laws must avoid "excessive entanglement" with religion); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding that the First Amendment forbade public schools from sponsoring religious practices akin to prayer); *Lee v. Weisman*, 505 U.S. 577 (1992) (finding that prayer at a public school graduation violated the Establishment Clause of the First Amendment); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a state's compulsory high school attendance law as applied to Amish Mennonites violated the Free Exercise Clause of the First Amendment). Further, all federal legislation enacted under the Fourteenth Amendment would be invalidated, along with all cases dealing with state action. See *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that a company town could not prohibit the distribution of religious leaflets within the town); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state judicial enforcement of agreements barring persons from ownership or occupancy of real property on racial grounds is forbidden by the Equal Protection Clause of the Fourteenth Amendment). The above cases are only several of the thousands that would be overturned or limited by the invalidation of the Fourteenth Amendment.

199. 307 U.S. 433 (1939).

fication of the Fourteenth Amendment for the first, and likely the last time. The Court did not discuss whether the ratification had conformed to Article V. It said only that:

While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.²⁰⁰

So, while the Court seemed to recognize that there were problems with the Fourteenth Amendment's ratification, it decided that Article V questions are non-justiciable political questions. It seems that whenever the Congress and the Secretary of State proclaim an amendment to be ratified, that proclamation is binding on the Court and "would not be subject to review by the courts."²⁰¹ While the wisdom of applying this political question doctrine to declared amendments is questionable,²⁰² the Court has been true to its word in *Coleman*, as it has not decided a single Article V case since.²⁰³

Still, the ratification process of the Fourteenth Amendment has never been reviewed by the Supreme Court²⁰⁴ and, in light of *Bush v. Gore*,²⁰⁵ the political question doctrine may have lost favor with the

200. *Coleman*, 307 U.S. at 449-50.

201. *Id.* at 454.

202. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 706-21 (1993).

203. See 2 ACKERMAN, *supra* note 6, at 117.

204. *Coleman v. Miller* only cited Secretary of State Seward's proclamation of the Fourteenth Amendment's ratification as a "historic precedent." 307 U.S. at 450.

205. 121 S. Ct. 525 (2000). The Supreme Court in *Bush v. Gore* found equal protection violations in Florida's scheme for determining presidential electors. Justice Breyer, in his dissent, pointed out the political question problem in the Court's ruling: "Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court." *Bush*, 121 S. Ct. at 556.

Another interesting observation may be made of *Bush v. Gore* in relation to the Fourteenth Amendment in that it suggests a willingness of the Court to scrutinize the way votes are counted on issues of national importance. But, while the case may appear to breath some life into a chal-

Court. So, while a federal court would likely be unreceptive to an argument claiming the Fourteenth Amendment invalid, it would make for an interesting affirmative defense.²⁰⁶ The Fourteenth Amendment will, undoubtedly, remain a part of the Constitution, but as one commentator has stated, "no one ever became rich by predicting what the Supreme Court would do from one generation to another."²⁰⁷ We should at least be aware of its irregular adoption and guard against such constitutional disrespect in the future. Congress should also seriously consider re-proposing the Amendment if it is concerned with preserving equal protection and due process for future generations.

The ratification story of the Fourteenth Amendment, which shows the irregular and likely unconstitutional process by which it has been declared part of our Constitution, demonstrates that a major cornerstone of constitutional law is placed on a shaky and uneasy foundation. Unfortunately, although one may wish to remedy the constitutional wrongs committed during its ratification, it is apparent that this cornerstone amendment should be left in place, lest the entire house of higher law as we know it should come toppling down. It is not too late, however, to shore up the foundation of constitutional jurisprudence. Congress and the states should repropose and ratify the Fourteenth Amendment, and thereby ensure the principles of equal protection and due process which the Amendment guarantees.

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lenge to the Fourteenth Amendment's validity, *Bush v. Gore* is itself a Fourteenth Amendment Equal Protection case and it seems terribly inconsistent to rely on a Fourteenth Amendment case in an argument challenging the Amendment's validity.

206. See *United States v. Ass'n of Citizens Councils of La.*, 187 F. Supp. 846 (W.D. La. 1969). "Finally, the Citizens Councils contend that the Fourteenth and Fifteenth Amendments were adopted unconstitutionally. With all deference to able counsel, we find ourselves unable to agree with this contention in the light of the hundreds of cases in which the United States Supreme Court has applied these Amendments." *Citizens*, 187 F. Supp. at 848.

207. McDonald, *supra* note 5, at 18; see also *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (overturning *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and with it almost 100 years of federal common law in diversity cases).

