The 14th Amendment Never Passed

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What we now call the 14th amendment to the U.S. Constitution is the most controversial amendment that has ever been proposed. We will see that it's proposal and ratification process was fraught with irregularities and unconstitutional actions.

In order to provide historical background for the period in question, let's review some events that occurred after the Civil War ended. In May, 1865, President Andrew Johnson issued a Proclamation of Amnesty for former southern rebels. This action was in keeping with President Lincoln's wishes to heal the nation. He established provisional governments in each of the southern states. The states were instructed to call constitutional conventions in order to form new governments. Each southern state formed new governments and elected new representatives and government officers. At that time, only white men had the right to vote since the 15th amendment which established equal voting rights had not yet been passed. Senators and Representatives for U.S. Congress were also chosen. These representatives were refused admission when they appear at the opening of Congress. The various southern state governments continued to function during 1866.

Before an amendment can be ratified, it must first be proposed. The Constitution provides two methods of proposing an amendment: by two thirds of the states or by two thirds of both houses of Congress[1]. The congressional method was used in the case of the 14th amendment. The section of the Constitution that discusses amendments states: "no state without its consent, shall be deprived of its equal suffrage in the Senate."[2] When Congress proposed the amendment, twenty-three Senators were unlawfully excluded

[1] U.S. Constitution, Article 5
[2] ibid.

from the U. S. Senate, in order to secure a two thirds vote for the adoption of proposed amendment. Those excluded included both senators from eleven southern states and one Senator from New Jersey. This alone is sufficient to invalidate the so-called fourteenth because it was never properly proposed.

When an amendment is proposed by the Congress, it must be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths …"[3] When the proposed amendment was sent to the states for ratification, there were thirty-seven states in the Union. This means that ratification required the approval of twenty-eight states. Said another way, it would only take ten states rejecting the amendment to defeat it.

The proposed 14th amendment was sent to the states for ratification in June of 1866. By March 1867, twenty states had ratified and thirteen had rejected the proposed amendment. This means that the amendment failed.

These totals do not include the actions of Tennessee, which is generally regarded as ratifying the proposed amendment. The Tennessee legislature was not in session when the proposed amendment was sent, so a special session of the legislature had to be called. The Tennessee Senate ratified the proposed amendment. However, the Tennessee House could not assemble a quorum as required in order to legally act. Finally, after several days and "considerable effort, two of the recalcitrant members were arrested and brought into a committee room opening into the Chamber of the House. They refused to vote when their names were called, whereupon the Speaker ruled that there was no quorum. His decision, however, was overruled, and the amendment was declared ratified on July 19, 1866, by a vote of 43 to 11, the two members under arrest in the adjoining committee room not voting."[4]

After learning that the proposed amendment's failure, the U.S. Congress passed the Reconstruction Act of March 2, 1867. This act overthrow and annul this existing state governments of the ten southern states that rejected the amendment. Recall that these governments had just been established in 1865. The act placed these states under military rule and required the ratification of the proposed amendment before they could be readmitted to representation in Congress.

President Andrew Johnson vetoed the Reconstruction Act because he believed it was unconstitutional. His veto message stated: "I submit to Congress whether this measure is not in its whole character, scope and object without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive of those great principles of liberty and humanity for which our ancestors on both sides of the Atlantic have shed so much blood and expended so much treasure." President Johnson went on to point out that each of the southern states had legitimate governments. "It is not denied that the States in question have each of them an actual government with all the powers, executive, judicial, and legislative, which properly belong to a free State.

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[3] ibid.

[4] Adoption of the Fourteenth Amendment, H.E. Flack, p. 165; Tenn. House Journal (Extra Session), 1866, p. 25

They are organized like the other States of the Union, and, like them, they make, administer, and execute the laws which concern their domestic affairs."

Congress was undaunted as it overrode the President's veto of the Reconstruction Act.

After the Reconstruction Act was passed, two states (Nebraska and Iowa) ratified the proposed amendment and three states (New Jersey, Ohio and Oregon[5]) reversed their ratifications. So, without considering the actions taken under reconstruction, the final tally was nineteen for, sixteen against, and two (California and Tennessee) not acting.

As a result of the Reconstruction Acts (3 were passed in total between the dates of March 2 and July 19, 1867) the ten southern states were organized into military districts. Their lawfully constituted legislature were illegally removed by "military force" and they were replaced by illegitimate legislatures. Seven of these legislatures eventually ratified the 14th amendment.

The "official" vote tally is another source of controversy. On July 20, 1868, William H. Seward, Secretary of State, issued a Proclamation [6] that listed the "official" results. His tally showed twenty-three states that voluntarily ratified, six states that ratified under martial rule and two states that voluntarily reversed their ratifications. Seward said in his official proclamation that he was not authorized as Secretary of State "to determine and decide doubtful questions as to the authenticity of the organization of State legislatures or as to the power of any State legislature to recall a previous act or resolution of ratification." He also said that the amendment was valid "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, notwithstanding the subsequent resolutions of the legislatures of these States." Seward's report also call into question the ratifications of states who were under martial rule.

I think you will agree that Seward's reservations were rather startling. It is patently obvious to any thinking person that if a state has the right to ratify an amendment that it equally has the right to withdraw the ratification. It is equally obvious that any action which is taken under compulsion (southern states vote to ratify) is an invalid action.

Congress was not satisfied with Seward's proclamation due to the reservations it contained. On July 21, 1868, Congress passed a Joint Resolution[7] that declaring that three fourths of the several States of the Union had ratified the 14th amendment. On July 28, 1868, Seward bowed to the action of Congress and issued his Proclamation declaring that three-fourths of the states had ratified the amendment.

In such an environment, one would hope that the highest court in our nation would bring some clarity. But alas, such is not the case. In one of the leading cases on the validity of the 14th amendment the court stated"

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[5] Oregon Senate Journal, 1868, pp. 66 and 131; Oregon House Journal, 1868, p. 273

[6] Statutes at Large, v 15, p. 706.

[7] House Journal, 40th Congress, 2nd Session, p. 1126.

> “The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866. New governments were erected in those States (and in others) under the direction of Congress. The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868.”[8]

In this case, the U.S. Supreme Court did not bother to rule on the constitutionality of Congress sweeping away valid state legislatures in the Reconstruction Acts. The U.S. Supreme Court overlooked that it previously had held that at no time were these southern states out of the Union[9].

In the Coleman case, the court did make a slip to reveal that they understood what had happened in the case of the 14th amendment:

> "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same <u>may have been adopted</u>, and that the same has become valid, <u>to all intents and purposes</u>, as a part of the Constitution of the United States." [emphasis added]

The Supreme Court, in the Coleman case, did lightly review questions pertaining to the ratification of the 14th amendment, and of attempts by two states to rescind their previous ratification of an amendment.

> “...the question of the efficacy of ratifications by State legislatures, in the light of previous rejection or attempted withdrawal, <u>should be regarded as a political question</u> 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.” [emphasis added]

One would hope that the highest court in the land would properly exercise their Constitutional responsibilities to provide “check and balances” to the other branches of the federal government. Their statement that is was an issue for the political arena was an act of cowardice and wholly inconsistent with the high court’s pattern of *judicial statutory annulment*.

The precedent for *judicial statutory annulment* was established in 1803 where the court said “"...it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as that of the legislature. Why otherwise does it direct the judges to take an oath to support it?”[10] The practice of judicial review [as it is

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[8] Coleman v. Miller, 307 U.S. 448, 59 S.Ct. 972 (1938).
[9] White v. Hart (1871), 13 Wall. 646, 654.
[10] Marbury vs. Madison, 5 U.S. 137 (1803).

also called] continues on to this day. It is often used as a legal tool to justify taking a position that differs from the legislature when the court wants to nullify a law. It appears that the court uses this technique only when it suites their motive and not necessarily when necessary to protect the rights of the citizens.

The legal validity of the ratification of the 14th Amendment has often been disputed. The Utah Supreme Court once ruled that the ratification of the 14th Amendment was invalid[11].

For more than a hundred years now, the courts have applied the 14th Amendment to pertinent cases that have come before them. And although questions have been raised about both its language meaning and the legal correctness of its adoption process, Federal challenges to the ratification of the 14th Amendment have always fallen on deaf ears. Its long time usage and the *lateness of the hour doctrines* have caused the Supreme Court to accept the 14th Amendment as law[12].

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[11] See Dyett vs. Turner, 439 Pacific 266 (1968), and the numerous other cites therein.
[12] See Coleman vs. Miller, 307 U.S. 433 (1939).