

THE NON-RATIFICATION OF THE 14TH AMENDMENT
IN THE SUPREME COURT FOR THE STATE OF UTAH
(Dyett v. Turner, 439 P2d 266 @ 269, 20 U2d 403 [1968])

"In regard to the Fourteenth Amendment, which the present Supreme Court of the United States has by decision chosen as the basis for invading the rights and prerogatives of the sovereign States and its Citizens, it is appropriate to look at the means and methods by which that Amendment was foisted upon the Nation in times of emotional stress.

"It is common knowledge that any assumption of power will always attract a certain following, and if no resistance is offered to this show of strength, then the asserted powers are accepted without question. It is therefore my purpose to try to give a ray of hope to all those who believe that the States are capable of deciding for themselves whether prayer shall be permitted in schools, whether their bicameral legislatures may be composed of members elected pursuant to their own State constitutional standards.

"The method of amending the U.S. Constitution is provided for in Article V of the original document. No other method will accomplish this purpose. That article provides as follows:

"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, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;"

"The Civil war had to be fought to determine whether the Union indissoluble and whether any State could secede or withdraw there from. The issue was settled first on the field of battle by force of arms, and second by the pronouncement of the highest court of the land. In the case of State of Texas v. White, 7 Wall. 700, 19 L.Ed. 227, it was claimed that Texas having seceded from the Union and severed her relationship with a majority of the States of the Union, and having by her Ordinance of Secession attempted to throw off her allegiance to the Constitution of the United States, had thus disabled herself from prosecuting a suit in the Federal Courts. In speaking on this point the Court at page 726, 19 L.Ed. 227 held:

`When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final.

The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

`Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest of subjugation.

`Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first out break of the rebellion.'

"It is necessary to review the historical background to understand how the Fourteenth Amendment came to be a part of our U.S. Constitution.

"General Lee had surrendered his army on April 9, 1865, and General Johnston surrendered his 17 days later. Within a period of less than six weeks thereafter, not one Confederate soldier was bearing arms. By June 30, 1865, the Confederate States were all restored by Presidential Proclamation to their proper positions as States in an indissoluble Union, (13 Stat. 760, 763, 764, 765, 767, 768, 769, 771 [1865]) and practically all Citizens thereof. (13 Stat. 758 [1865])

"A few Citizens were excepted from the amnesty proclamation, such, for example, as Civil or Diplomatic Officers of the late Confederate government and all of the seceding States; United States Judges, members of Congress and commissioned Officers of the United States Army and Navy who left their posts to aid the rebellion: Officers in the Confederate military forces above the rank of Colonel in the Army and Lieutenant in the Navy; all who resigned commissions in the Army or Navy of the United States to assist the rebellion; and all Officers of the military forces of the Confederacy who had been educated at the military or naval academy of the United States, etc., etc., had been granted amnesty. Immediately thereafter each of the seceding States functioned as regular States in the Union with both State and Federal Courts in full operation.

"President Lincoln had declared the freedom of the slaves as a war measure, but when the war ended, the effect of the proclamation was ended, and so it was necessary to propose and to ratify the Thirteenth Amendment in order to insure the freedom of the slaves.

"The 11 southern States, having taken their rightful and necessary place in the indestructible Union, proceeded to determine whether to ratify or reject the proposed Thirteenth Amendment.

"In order for the Thirteenth Amendment to become a part of the Constitution, it was necessary that the proposed Amendment be ratified by 27 of the 36 States. Among those 27 States ratifying the Thirteenth Amendment were 10 from the South, to wit, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, Georgia, Mississippi, Florida, and Texas.

"When the 39th Congress assembled on December 5, 1865, the Senators and Representatives from the 25 northern States voted to deny seats in both Houses of Congress to anyone elected from the 11 southern States. The full complement of Senators from the 36 States of the Union was 72, and the full membership in the House was 240. Since it requires only a majority vote (see Article I, Section 5, Constitution of the United States) to refuse a seat in Congress, only the 50 Senators and 182 Congressmen from the North were seated. All of the 22 Senators and 58 Representatives from the southern States were denied seats.

"Joint Resolution No. 48, proposing the Fourteenth Amendment, was a matter of great concern to the Congress and to the people of the Nation. In order to have this proposed Amendment submitted to the 36 States for ratification, it was necessary that two thirds of each house concur. A count of noses showed that only 33 Senators were favorable to the measure, and 33 was a far cry from two thirds of 72 and lacked one of being two thirds of the 50 seated Senators.

"While it requires only a majority of votes to refuse a seat to a Senator, it requires a two thirds majority to unseat a member once he is seated. (see Article I, Section 5, Constitution of the United States)

"One John P. Stockton was seated on December 5, 1865, as one of the Senators from New Jersey. He was outspoken in his opposition to Joint Resolution No. 48 proposing the Fourteenth Amendment. The leadership in the Senate, not having control of two thirds of the seated Senators, voted to refuse to seat Mr. Stockton upon the ground that he had received only a plurality and not a majority of the votes of the New Jersey legislature. It was the law of New Jersey, and several other States, that a plurality vote was sufficient for election. Besides, the Senator had already been seated. Nevertheless, his seat was -refused- and the 33 favorable votes thus became the required two thirds of the 49 members of the Senate.

"In the House of Representatives it would require 122 votes to be two thirds of the 182 members seated. Only 120 voted for the proposed Amendment, but because there were 30 abstentions it was declared to have been passed by a two thirds vote of the House.

"Whether it requires two thirds of the full membership of both Houses to propose an Amendment to the Constitution or only two thirds of those seated or two thirds of those voting is a question which it would seem could only be determined by the United States Supreme Court. However, it is perhaps not so important for the reason that the amendment is only -proposed- by Congress. It must be -ratified- by three fourths of the States in the Union before it becomes a part of the Constitution. The method of

securing the passage through Congress is set out above, as it throws some light on the means used to obtain ratification by the States thereafter.

"Nebraska had been admitted to the Union and so the Secretary of State, in transmitting the proposed Amendment, announced that ratification by 28 States would be needed before the Amendment would become part of the Constitution since there were at the time 37 States in the Union. A rejection by 10 States would thus defeat the proposal.

"By March 17, 1867; the proposed Amendment had been ratified by 17 States and rejected by 10 with California voting to take no action thereon which was equivalent to rejection, thus the proposal was defeated.

"One of the ratifying States, Oregon; had ratified by a membership wherein two legislators were subsequently held not to be duly elected, and after the contest, the duly elected members of the legislature of Oregon rejected the proposed Amendment. However, this rejection came after the Amendment was declared passed.

"Despite the fact that the southern States had been functioning peacefully for two years and had been counted to secure ratification of the Thirteenth Amendment, Congress passed the Reconstruction Act, which provided for the military occupation of 10 of the 11 southern States. It excluded Tennessee from military occupation and one must suspect it was because Tennessee had ratified the Fourteenth Amendment on July 7, 1866.

"The `Act' further disfranchised practically all white voters and provided that no Senator or Congressman from the occupied States could be seated in Congress until a new Constitution was adopted by each State which would be approved by Congress. The `Act' further provided that each of the 10 States was required to ratify the proposed Fourteenth Amendment and the Fourteenth Amendment must become a part of the Constitution of the United States before the military occupancy would cease and the States be allowed to have seats in Congress.

"By the time the Reconstruction Act had been declared to be the law; three more States had ratified the proposed Fourteenth Amendment and two States, Louisiana and Delaware, had rejected it. Maryland then withdrew its prior ratification and rejected the proposed Fourteenth Amendment. Ohio followed suit and withdrew its prior ratification, as also did New Jersey and California, (which earlier had voted not to pass upon the proposal), now voted to reject the Amendment. Thus 16 of the 37 States had rejected the proposed Amendment.

"By spurious, non-representative governments; seven of the southern States, (which had theretofore rejected the proposed Amendment under the duress of military occupation and of being denied representation in Congress), did attempt to ratify the proposed Fourteenth Amendment. The Secretary of State, (of July 20, 1868), issued his proclamation wherein he stated that it was his duty under the law to cause Amendments to be published and certified as a part of the Constitution when he received official notice that they had been adopted pursuant to the Constitution. Thereafter his certificate contained the following language:

`And whereas neither the Act just quoted from, nor any other law, expressly or by conclusive implication., authorizes the 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 of any amendment proposed to the Constitution;

`And whereas it appears from official documents on file in this Department that the amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the States of [naming 23, including New Jersey, Ohio, and Oregon];

`And whereas it further appears from documents on file in this Department that the amendment to the Constitution of the United States, proposed as aforesaid, has 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;

`And whereas it further appears from official documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or of either of them, to the aforesaid amendment;

`And whereas the whole number of States in the United States is thirty-seven, to wit: [naming them];

`And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next there after named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three fourths of the whole number of States in the United States;

`Now, therefore, be it known that I, WILLIAM H. SEWARD, Secretary of State of the United States, by virtue and in pursuant of the second section of the act of Congress, approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that 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 those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment had been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States." *** (15 Stat. 707 (1868))'

"Congress was not satisfied with the proclamation as issued and on the next day passed a Concurrent Resolution wherein it was resolved:

`That said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.'

Resolution set forth in proclamation of Secretary of State, (15 Stat. 709 [1868]).

See also U.S.C.A., Amends. 1 to 5, Constitution, p. 11.

"Thereupon; William H. Seward, the Secretary of State (after setting forth the Concurrent Resolution of both Houses of Congress) then certified that the Amendment:

'Has become valid to all intents and purposes as a part of the Constitution of the United States. (15 Stat. 708 [1868])'

"The Constitution of the United States is silent as to who should decide whether a proposed Amendment has or has not been passed according to formal provisions of Article V of the Constitution. The Supreme Court of the United States is the ultimate authority on the meaning of the Constitution and has never hesitated in a proper case to declare an 'Act' of Congress "unconstitutional" - except when the 'Act' purported to amend the Constitution.

"In the case of *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505, the question was before the Supreme Court as to whether or not the Nineteenth Amendment had been ratified pursuant to the Constitution. In the last paragraph of the decision the Supreme Court said:

'As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.'

"The duty of the Secretary of State was ministerial, to wit, to count and determine when three fourths of the States had ratified the proposed Amendment. He could not determine that a State, once having rejected a proposed Amendment, could thereafter approve it; nor could he determine that a State, once having ratified that proposal, could thereafter reject it. The Supreme Court, and not Congress, should determine whether the Amendment process be final or would not be final, whether the first vote was for ratification or rejection.

"In order to have 27 States ratify the Fourteenth Amendment, it was necessary to count those States which had first rejected and then under the duress of military occupation had ratified, and then also to count those States which initially ratified but subsequently rejected the proposal.

"To leave such dishonest counting to a fractional part of Congress is dangerous in the extreme. What is to prevent any political party having control of both Houses of Congress from refusing to seat the opposition and then passing a Joint Resolution to the effect that the Constitution is amended and that it is the duty of the Administrator of the General Services Administration/7 to proclaim the adoption? Would the Supreme Court of the United States still say the problem was political and refuse to determine whether constitutional standards had been met?

"How can it be conceived in the minds of anyone that a combination of powerful States can by force of arms deny another State a right to have representation in Congress until it has ratified an Amendment which its people oppose? The Fourteenth Amendment was adopted by means almost as bad as that suggested above.