Deconstructing the First Reconstruction Act, or Why the Former-Confederate States Never Legally Ratified the Fourteenth Amendment

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DECONSTRUCTING THE FIRST RECONSTRUCTION ACT, OR WHY THE FORMER-CONFEDERATE STATES NEVER LEGALLY RATIFIED THE FOURTEENTH AMENDMENT

Abstract

The First Reconstruction Act (passed on March 2, 1867) was a crucial piece of legislation in our nation's history that effectively forced the legislatures of ten former-confederate states to ratify the Fourteenth Amendment. This paper begins by presenting and evaluating four principle arguments against the constitutionality of the First Reconstruction Act. Following this analysis of the Act’s constitutionality, this paper proceeds to argue that even if none of these constitutional objections is found persuasive, then precisely because of the terms of the First Reconstruction Act itself, the former-confederate states could not have ratified the Fourteenth Amendment in accordance with the requirements of Article V. This paper therefore illuminates a glaring problem in the history of the adoption of the Fourteenth Amendment. As this paper makes evident, approval of the amendment in the case of each former-confederate state (save that of Tennessee) was either a product of the requirements imposed upon these states pursuant to unconstitutional legislation, or was not the sort of approval that would qualify as “ratification” under Article V of the Constitution of the United States.

I. INTRODUCTION

Did the former-confederate states ratify the Fourteenth Amendment?

Conventional wisdom tells us that they did. Pick up any copy of the Constitution of the United States of America containing proposal and ratification comments and you will find that all eleven seceding states are documented as having ratified the amendment by
February 18, 1870.¹ Tennessee was in fact the third state to ratify the amendment, and did so as early as July 19, 1866.² The rest of the former-confederate states are recorded as having ratified the amendment anywhere between two and four years later: the legislatures of Arkansas, Florida, North Carolina, Louisiana, and South Carolina all approved the amendment before July 9, 1868, on which date ratification was officially complete;³ Alabama, Georgia, Virginia, Mississippi, and Texas, in turn, are documented as having subsequently approved the amendment by early 1870.⁴

Yet the true story behind the ratification of the Fourteenth Amendment is not nearly so straightforward as all this. With the exception of Tennessee, the legislatures of all the former-confederate states generally found themselves radically opposed to the new amendment.⁵ What the chronology above fails to mention is that Congress enacted legislation on March 2, 1867, the first of the so-called “Reconstruction Acts,” which required each of the remaining ten, former-confederate states to ratify the Fourteenth Amendment in order to regain its legal state authority.⁶ In simple terms, the First Reconstruction Act stipulated that Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia were no longer to be

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² Id.
³ Arkansas is documented as having ratified the amendment on April 6, 1868; Florida on June 9, 1868; North Carolina on July 4, 1868 (after rejecting it on December 14, 1866); Louisiana on July 9, 1868 (after rejecting it on February 6, 1867); and South Carolina on July 9, 1868 (after rejecting it on December 20, 1866). See id.
⁴ Alabama is recorded as having subsequently ratified the amendment on July 13, 1868; Georgia on July 21, 1868 (after rejecting it on November 9, 1866); Virginia on October 8, 1869 (after rejecting it on January 9, 1867); Mississippi on January 17, 1870; and Texas on February 18, 1870 (after rejecting it on October 27, 1866). See id.
⁵ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 269 (1988) (“Between October 1866 and the following January, all ten Southern legislatures that considered the Amendment repudiated it by overwhelming majorities.”).
regarded as legal state governments. The Act divided these states into military districts and imposed martial law in these areas. Lastly, the Act declared that these “rebel States” would have to comply with various conditions if they were to regain any legitimacy, the most important condition being that each legislature approve the new, Fourteenth Amendment.

Although the Supreme Court of the United States never directly addressed the constitutionality of the First Reconstruction Act, various politicians, including President Andrew Johnson most prominently, raised serious concerns as to the act’s legality. The concerns of President Johnson and others may be loosely arranged into the following four inquiries: First. Did Congress possess constitutional authority to declare that these ten “rebel” states were no longer legal State governments? Second. Was Congress permitted under the Constitution to impose martial law in these states? Third. Could Congress try civilians of these states in military tribunals consistently with the Supreme Court’s holding in *Ex parte Milligan*? Fourth. Did the terms of the First Reconstruction Act unlawfully coerce these ten former-confederate states into ratifying the Fourteenth Amendment?

This paper undertakes a thoughtful examination of these four inquiries (and related inquiries) with a careful eye toward the First Reconstruction Act’s content and structure. In the author’s opinion, careful analysis of the content of the First

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7 See id.
8 See id. §§ 1-3.
9 See id. § 5 (stating “that when . . . said State, by a vote of its legislature elected under said constitution, shall have adopted the [Fourteenth] amendment . . . then and thereafter the preceding sections of this act shall be inoperative in said State . . .”)
11 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
Reconstruction Act reveals many compelling objections to the act’s legality – objections which are moreover serious enough to taint the ten former-confederate states’ approval of the Fourteenth Amendment, and hence, to call into question the legitimacy of the Fourteenth Amendment’s integration into the Constitution of the United States of America. Yet this paper proposes an alternate conclusion of equal significance. Namely, it declares that even if one finds no constitutional difficulties inherent in the First Reconstruction Act (or the setting in which it was passed), then precisely in virtue of the Act’s putative constitutionality, these ten former-confederate states still could not have ratified the Fourteenth Amendment consistent with the requirements of Article V of the Constitution, because, by the terms of the First Reconstruction Act itself, these states were no longer legal state governments.

Stated somewhat more formally, this paper suggests that one of two alternate conclusions must be adopted: either the First Reconstruction Act is unconstitutional – in which case these ten, former-confederate states “ratified” the Fourteenth Amendment only pursuant to the demands of unconstitutional legislation; or the First Reconstruction Act is constitutional – in which case these ten, former-confederate states never actually ratified the Fourteenth Amendment in a way that satisfies Article V (because, ex hypothesi, the legislatures of these states no longer possessed any legal State authority).

The answer to the question “Did the former-confederate states ratify the Fourteenth Amendment?” cannot be a simple “Yes.” To be sure, the legislatures of each former-confederate state did eventually vote to approve the Fourteenth Amendment in the years between 1866 and 1870. But, as this paper makes evident, approval in every case (save that of Tennessee) was either a product of the requirements imposed upon these
states pursuant to unconstitutional legislation, or was not the sort of approval that would qualify as “ratification” under Article V of the Constitution of the United States.

II. BEFORE THE FIRST RECONSTRUCTION ACT: THE NEED FOR A FOURTEENTH AMENDMENT

In the wake of the Civil War, the Thirty-ninth Congress faced the difficult task of reconstructing the Union. William E. Nelson aptly described this task as having required “the restoration of self-government in the South under the direction of leaders willing to accept the results of the war . . . .” Although ratification of the Thirteenth Amendment was officially complete by December 6, 1865 (just two days after the Thirty-ninth Congress convened), state legislatures in the South had begun to enact “black codes,” which, although strictly imposing neither “slavery nor involuntary servitude” upon blacks (and therefore not violative of the Thirteenth Amendment), seriously restricted the rights of blacks in other ways. To many, the proliferation of black codes in the South underscored the pressing need for a solution that would “secure in a more permanent form the dear bought victories achieved in the mighty conflict.”

True security of the victories achieved in the Civil War could only come in the form of a Fourteenth Amendment to the Constitution of the United States. Federal legislation was only as permanent as the composition of Congress, and also ran the risk of exceeding the authority granted to Congress under the Constitution. The necessity of a

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13 See id.
14 See LAWS IN RELATION TO FREEDMEN, S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. (1867).
15 NELSON, supra note 12, at 44 (quoting “Governor’s Message,” Des Moines Iowa State Register, at 3 (Jan. 15, 1868)).
16 The Civil Rights Act of 1866, for instance, ran the risk of being revoked once a new Congress came along. Too, some of its provisions, e.g. its declaration that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States,” arguably exceeded Congressional authority. See An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27 (Apr. 9, 1866). It was not at
Fourteenth Amendment to the Constitution was therefore clear, although the precise path toward ratification was not.

III. A PRELIMINARY CONSTITUTIONAL QUERY: WERE THE FORMER-CONFEDERATE STATES NEEDED TO AMEND THE CONSTITUTION?

How was such an amendment to the Constitution to be achieved? The war was over, but the nation remained divided. To trust the former-confederate states to approve of the new amendment would have been foolhardy. Faced with the question of how to deal with these former-confederate states, many politicians turned a careful eye to the text of the Constitution itself, and asked specifically whether approval by the legislatures of the former-confederate states was strictly required in order to satisfy the “three fourths” clause of Article V. The debates surrounding the bill that would eventually become the First Reconstruction Act inevitably touched upon this preliminary question. Senator Charles Sumner, for one, believed that ratification by the former-confederate states was not required by the Constitution. Sumner thought that the governments in most of the former-confederate states were in truth “sham governments,” which must not “by some hocus-pocus or other, be enlisted in [this] number of States” counting towards the “three fourths” required by Article V. So firm was Sumner’s conviction in the bogusness of the southern legislatures that he even declared that any assent these legislatures might give to the proposed amendment would be entirely without value. “Suppose the present legislature, so called, of South Carolina gives its consent to the [Fourteenth] amendment,” Sumner proposed: “Would it be worth the paper on which it might be

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all clear that Congress (as opposed to the Courts) had the authority to define the meaning of the term “citizen” as used in the Constitution.

17 U.S. CONST. art V (“The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . . .”).


19 Id.
written?”20 The Senator from Massachusetts went on to frame this same inquiry with respect to Louisiana and Georgia, asking whether those respective legislative bodies were “invested with legislative authority capable of representing those States in the adoption of a constitutional amendment.”21 In Senator Sumner’s mind, they were most certainly not. “[A]ny adoption of the constitutional amendment,” he declared, “shall be by a valid Legislature, not by a humbug.”22

Under Sumner’s theory, Article V of the Constitution of the United States only required ratification by three fourths of the legislatures of the States currently represented in Congress.23 Representatives from the former-confederate states had been excluded from the Thirty-ninth Congress since the very first days it was in session.24 Hence, ratification by the legislatures of these states was unnecessary in Sumner’s mind. Still, other congressmen considered Sumner’s perception of the situation to be “wrong, radically wrong,” believing that approval by three fourths of the legislatures of all the extant states in the Union (not merely those currently represented in Congress) was necessary in order to amend the Constitution.25

The meaning of the “three fourths” requirement in Article V of the Constitution therefore remained slightly indeterminate at the edges, so that the question of whether ratification by the legislatures of the former-confederate states was required remained

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20 Id. at 1392 (statement of Sen. Sumner).
21 Id. (statement of Sen. Sumner).
22 Id. (statement of Sen. Sumner).
23 Id. at 1393 (statement of Sen. Sumner) (proposing an amendment to what would become the First Reconstruction Act that would require ratification by “three fourths of the Legislatures of the States now represented in Congress”).
24 See CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865) (House approval of joint resolution barring those representatives from Congress); id. at 30 (Senate approval of the same).
25 CONG. GLOBE, 39th Cong., 2d Sess. 1393-94 (1866) (statement of Sen. Doolittle) (“I understand that the amendment proposed by the Senator from Massachusetts [to what would become the First Reconstruction Act] to declare that only the vote of three fourths of the States now represented in Congress is necessary to the ratification of a constitutional amendment. As that recital in my opinion is wrong, radically wrong, I cannot give my assent to the main amendment itself if such a recital should be contained in it.”)
debatable. Yet, as Senator Reverdy Johnson of Maryland observed, further
Congressional debate on the issue was, in a very practical sense, meaningless:

It may go for what it is worth, that in the opinion of Congress (if that should be
the action of Congress) the Constitution may be amended by the ratification of
three fourths of the represented States; but whenever the question arises before the
judiciary it will be governed by other considerations. It must be governed by what
is the meaning of the Constitution in that particular . . . .

Senator Johnson rightly declared that Congress had no real authority when it came to
interpreting the meaning of Article V. The Supreme Court of the United States had, after
all, long ago staked out its role as the ultimate interpreter of the Constitution in Marbury
v. Madison, and was not likely to abandon this position any time soon. As Senator
Johnson suggested, if the Supreme Court were faced with the question of the meaning of
Article V, it could hold that Article V of the Constitution only required ratification by
three fourths of the legislatures of the represented States; but it could just as easily hold
instead that Article V required ratification by three fourths of the legislatures of all the
extant states. The meaning and application of the “three fourths” clause of Article V to
the instant case was quite simply not Congress’s to decide.

The Thirty-ninth Congress could not proceed on the theory that amending the
Constitution only required ratification by three fourths of the represented states without
incurring a great risk. Any attempt to amend the Constitution premised on this reading of
Article V would almost certainly be challenged in court; and to leave the new amendment
open to such a challenge would have been a real gamble, especially when one considers
that the plain language of Article V did not favor Sumner’s interpretation.

IV. INCENTIVIZING SOUTHERN RATIFICATION OF THE FOURTEENTH AMENDMENT

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26 Id. at 1393 (statement of Sen. Johnson).
27 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
To be clear, Congress could not safely assume that any legislative approval or disapproval of the Fourteenth Amendment by the former-confederate states was meaningless; yet neither could Congress trust these legislatures to ratify the Fourteenth Amendment on their own volition. The only remaining option was therefore to incentivize southern ratification of the Fourteenth Amendment – that is, to offer these legislatures something valuable in return for approving the new amendment.

On December 4, 1865, the House had passed a joint resolution declaring that “no member shall be received into either House from any of the said so-called confederate states” until a joint committee had inquired into and reported on whether they were entitled to representation in Congress.29 Pursuant to the terms of this resolution, representatives from the former-confederate states were to excluded from the Thirty-ninth Congress. Congress’s first attempt at incentivizing southern ratification of the Fourteenth Amendment therefore came on April 30, 1866, when Thaddeus Stevens, a Representative from Pennsylvania, read the text of a bill on behalf of the Joint Committee on Reconstruction, entitled “A bill to provide for restoring the States lately in insurrection to their full political rights.”30 The bill provided that:

whenever the [Fourteenth] amendment shall have become part of the Constitution of the United States, and any State lately in insurrection shall have ratified the same, and shall have modified its constitution and its laws in conformity therewith, the Senators and Representatives from such State . . . may . . . be admitted into Congress as such.31

In simple terms, the initial plan conceived by the Joint Committee on Reconstruction was to predicate readmission into Congress of Senators and

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29 CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865) (House approval of joint resolution); id. at 30 (Senate approval of the same).
30 See CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).
31 H.R. 543, 39th Cong. § 1 (1866); see id.
Representatives from the former-confederate states upon the condition that the legislatures of the aforementioned states ratify the Fourteenth Amendment. In other words, without ratifying the new amendment (and adopting various other important measures), these former-confederate states would remain without representation in Congress.

Although cognizant of this pending legislation, the state legislatures of almost all of the former confederate states quickly displayed their distaste for the new amendment.32 By February 6, 1867, Texas, Georgia, North Carolina, South Carolina, Virginia, and Louisiana had all officially rejected the Fourteenth Amendment.33 It soon became clear that Congress would have to conceive of a more powerful incentive if it was to secure ratification of the Fourteenth Amendment by the legislatures of the former-confederate states.

V. THE LEGISLATIVE HISTORY BEHIND THE FIRST RECONSTRUCTION ACT

The bill that eventually became the First Reconstruction Act held hostage something more dear to the former-confederate states than representation in Congress. Rather than simply declaring that Senators and Representatives from the former-confederate states would not be admitted until their respective states ratified the Fourteenth Amendment, this bill declared in addition that these states would no longer retain any legal state authority or sovereignty either – that is, until the conditions of the bill were met. If the threat of remaining unrepresented in Congress had not been strong enough...

32 See Foner, supra note 5, at 269.
33 Texas rejected the amendment on October 27, 1866; Georgia on November 9, 1866; North Carolina on December 14, 1866; South Carolina on December 20, 1866; Virginia on January 9, 1867; and Louisiana on February 6, 1867. See supra notes 3, 4.
enough to galvanize the legislatures of the former-confederate states into adopting the Fourteenth Amendment, the terms of this new bill would surely do the trick.

The bill that eventually became the First Reconstruction Act was initially conceived when Representatives James Ashley of Ohio and Thaddeus Stevens of Pennsylvania made proposals predicated upon the notion that the existing governments in the former-confederate states were illegitimate. The notion that these former-confederate states no longer possessed legal state authority formed the core of what would become the First Reconstruction Act. The Joint Committee on Reconstruction took into consideration Ashley’s and Steven’s proposals, and created a preliminary version of a bill that would divide the former-confederate states into districts, and that would place those districts under the military authority of the United States. Representatives Bingham and Blaine subsequently proposed amendments to the bill that would allow the former-confederate states to rid themselves of military control once they complied with certain conditions. Although the Bingham and Blaine amendments were initially rejected in the House, the Senate quickly accepted what was essentially a version of the Blaine amendment, and passed the amended bill in the early hours of February 17, 1867. The terms of the bill now held out the removal of martial law and the reestablishment of legitimate state authority as incentives for the former-confederate states to comply with the conditions proposed in the legislation. In other words, in exchange for complying with certain conditions – the most important of which was

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35 See CONG. GLOBE, 39th Cong., 2d Sess. 1037 (1867).
37 See CONG. GLOBE, 39th Cong., 2d Sess. 1467 (1867); see also Currie, supra note 34, at 410.
38 See CONG. GLOBE, 39th Cong., 2d Sess. 1469 (1867).
ratification of the Fourteenth Amendment – the former-confederate states would be able to earn back their legitimacy and authority; but until then, they would find themselves subject to martial law. The House adopted two more small amendments to the bill which the Senate accepted. Finally, over the veto of President Johnson, the House and Senate passed the First Reconstruction Act into law on March 2, 1867.

Congress’s refusal to readmit southern Senators and Representatives had proved ineffectual as means toward luring the ten former-confederate states in question into approving the Fourteenth Amendment. But Congress’s new plan, in the bill that would eventually become the First Reconstruction Act, contained a much stronger punishment in case the former-confederate states refused to comply. Ultimately, these incentives (or punishments) left the former-confederate states with little choice. In order to regain any legitimacy, authority, and recognition as legal states, and in order to rid themselves of military rule, the ten former-confederate states in question would have to meet all the conditions Congress proposed – which meant, inter alia, ratifying the Fourteenth Amendment.

VI. THE CONTENT AND STRUCTURE OF THE FIRST RECONSTRUCTION ACT

It is helpful to conceive of the First Reconstruction Act as bearing three principle parts: the preamble, sections 1-4, and section 5. The preamble is best conceived as stating the premises upon which sections 1-4 operate. Sections 1-4, in turn, are properly conceived as imposing punishments upon the former-confederate states. Section 5,

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39 See id. at 1399 (House amendments); id. at 1645 (Senate acceptance).
40 See An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2, 1867). A more detailed summary of this legislative history may be found in Currie, supra note 34, at 408-10.
41 Section 6 of the act may be disregarded for the present purposes, as it merely rehashes the fact that the civil governments in the former-confederate states were to be deemed provisional until the terms of § 5 were complied with. See An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 § 6 (Mar. 2, 1867).
should accordingly be conceived as outlining the conditions that the former-confederate
states must fulfill in order to negate the premises contained in the preamble, and hence, to
remove the punishments imposed by sections 1-4.

The preamble of the First Reconstruction Act declares: “no legal State
governments or adequate protection for life or property now exists in the rebel States of
Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana,
Florida, Texas, and Arkansas . . . .”42 This preamble serves as the premise upon which
Congress may rightfully claim the authority to impose martial law in the ten former-
confederate states in sections 1-4 of the same act. That is, the declaration that these
former-confederate states are “no longer legal State governments” is the legal/factual
premise upon which the penalty of martial law adumbrated in sections 1 through 4 is
predicated.

With “peace and good order” in mind, Congress stipulated in § 1 of the act that
these former-confederate states would be divided into five military districts.43 Sections 2
and 3 of the act provided for the assignment by the President of an officer and a
“sufficient military force” in these districts.44 It would be the duty of this officer to
oversee the suppression of insurrection and disorder.45 The supervising military officer
would also have the authority to utilize civil tribunals, or to convene military tribunals at
his discretion.46 Section 4 of the act required trials without unnecessary delay, prohibited

\[42\text{An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (Mar. 2,}
\text{1867) (preamble).}
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\[43\text{Id. § 1.}
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\[44\text{Id. §§ 2, 3.}
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\[45\text{Id. § 3.}
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\[46\text{Id.}
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the infliction of cruel and unusual punishment, and required the approval of the President for death sentences imposed under such a scheme.\textsuperscript{47}

To be clear, the imposition of martial law in the former-confederate states was not the primary goal of the First Reconstruction Act. Imposing martial law in the South was not a long-term solution. Nor was it necessarily a just one. Representative John Bingham’s proposed amendment to the bill, which was initially rejected in the House, had been predicated upon the notion that “the people shall have an opportunity to rid themselves once and for all of military rule and martial law by complying with the just and equitable provisions of the proposed amendment.”\textsuperscript{48} Although Bingham’s amendment had failed, its core notion that these former-confederate states should eventually be able to rid themselves of military rule had survived. The final version of the First Reconstruction Act gave the former-confederate states just this opportunity, as long as they were willing to comply with the conditions laid out in § 5 of the act.

The conditions laid out in § 5 were as follows. The people of each of the ten former-confederate states in question had first to form a state constitution “in conformity with the Constitution of the United States in all respects,” where the delegates framing such a constitution were to be elected by all male citizens over twenty-one years of age irrespective of “race, color, or previous condition.”\textsuperscript{49} The state constitution itself had also to include a provision guaranteeing suffrage to negroes and others. Then, the state constitution had to be ratified and approved by Congress.\textsuperscript{50} Next, section 5 required that the legislature elected under the new state constitution adopt the fourteenth amendment to

\textsuperscript{47} Id. § 4.
\textsuperscript{49} An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 § 5 (Mar. 2, 1867).
\textsuperscript{50} See id.
the Constitution of the United States. Finally, section 5 stipulated that when the
Fourteenth amendment “shall have become a part of the Constitution of the United States,
said State shall be declared entitled to representation in Congress . . . and then and
thereafter the preceding sections of this act shall be inoperative.”

The real thrust of the First Reconstruction Act was therefore to pressure the
former-confederate states into complying with the terms of section 5. The idea was not
simply to stabilize temporarily the situation in the South (through the imposition of
martial law), but rather to create a long-term legal framework for the future (in the form
of new state constitutions, and a new, fourteenth amendment). If the former-confederate
states wanted a restitution of their authority – i.e. if they wanted to make their own laws,
to execute them, to adjudicate without martial oversight, and generally to be recognized
as legal sovereign entities – they needed to fulfill the conditions laid out in § 5. The
former-confederate states needed to create new constitutions, they needed to grant
suffrage to negroes, and most importantly, they needed to ratify the Fourteenth
Amendment. Only when the former-confederate states had complied with those
conditions, and when the Fourteenth Amendment had become part of the United States’
Constitution, would the “preceding sections of [the First Reconstruction Act] be
inoperative,” and would Congress return to recognizing those states as “legal State
governments.”

51 See id.
52 Id.
53 Id. It is important to note that one condition was clearly out of the former-confederate States’ control:
namely, a state could not control whether the Fourteenth Amendment actually became part of the
Constitution of the United States. Presumably, this clause gave Congress the ability to keep these states
hostage until they fourteenth amendment was ratified. It also clues us in to the fact that the real aim of the
First Reconstruction Act was not securing “peace and good order,” as the preamble of the act would imply,
but rather, making the Fourteenth Amendment part of the Constitution of the United States.
54 Id. (preamble).
To be clear, the First Reconstruction Act may, in the end, have been a superfluous measure, at least as concerns its objective of making the Fourteenth Amendment part of our national Constitution. As has already been observed, Congress could have proceeded under the theory that ratification by the former-confederate states was unnecessary, as these states remained unrepresented in Congress, and the Supreme Court of the United States in turn could have agreed with this as a matter of constitutional law, had the question ever come before the court. However, the First Reconstruction Act was clearly premised upon the notion that ratification by the former-confederate states was at least desirable, if not strictly required by the terms of Article V of the Constitution of the United States.

Although crafted to avoid this particular constitutional issue regarding the meaning of Article V, the First Reconstruction Act (somewhat ironically) raised many more constitutional issues in its stead. These objections included: (1) whether Congress possessed authority under the Constitution to declare these ten rebel states to be “legal State governments” no longer; (2) whether Congress had the power under the Constitution to impose martial law in these (now former) states; (3) whether Congress could, in accordance with the Supreme Court’s holding in Ex parte Milligan, try civilians from these rebel states in military tribunals; and (4) whether the terms of the First Reconstruction Act improperly coerced these ten former-confederate states into ratifying the Fourteenth Amendment.

These four constitutional objections to the First Reconstruction Act, along with many other analogous objections, are discussed in detail in the sections that follow.

55 Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
VIII. Congress’s Authority to Declare the Former-Confederate States No Longer “Legal State Governments”

The preamble to the First Reconstruction Act declared, *inter alia*, that “no legal State governments or adequate protection for life or property now exists in the rebel States. . . .” A preliminary objection to the First Reconstruction Act questions Congress’s authority to make such a pronouncement. Undermining Congress’s authority to make such a declaration in the preamble would have the practical effect of undermining the entirety of the First Reconstruction Act, insofar as the preamble defines the premises upon which the punishments of sections 1 through 4 are based, and the premises in relation to which the conditions outlined in section 5 operate.

President Andrew Johnson observed in his Veto Message to the House of Representatives:

The bill places all the people of the ten States therein named under the absolute domination of military rulers; and the preamble undertakes to give the reason upon which the measure is based and the ground upon which it is justified. It declares that there exists in those States no legal governments and no adequate protection for life or property, and asserts the necessity of enforcing peace and good order within their limits. Is this true as matter of fact?

President Johnson aimed to challenge the notion that, as a matter of fact, no “adequate protection for life or property” existed in the ten former-confederate states in question. If instead, as Johnson urged, adequate protections for life and property did exist in those states, then arguably there would be no factual basis for Congress’s (legal) declaration that no “legal State governments” existed any longer in the areas in question.

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To this end, Johnson adamantly declared that “the Southern people . . . are completely united in the effort to reorganize their society on the basis of peace . . . .”

However, it is likely that President Johnson either underestimated or misrepresented the lack of protections for life or liberty currently afforded to blacks in the former-confederate states, offering instead a naively optimistic, and somewhat distorted, vision of the reality of affairs in the South at that time. A much stronger argument against the language of the preamble, which Johnson formulated only in the broadest strokes, was legal in nature. Johnson had questioned “whether this measure [i.e. the First Reconstruction Act] is not in its whole character, scope, and object without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution . . . .”

But which constitutional provisions were these to which Johnson referred? Some of Johnson’s remarks suggest that he may have believed Congress’s declaration to be incongruous with the very notion of dual sovereignty explicit in the Constitution itself. “To pronounce the supreme law-making power of an established state illegal,” President Johnson wrote, “is to say that law itself is unlawful.” With these words, President Johnson highlighted the absurdity of a federal legislature declaring that its state counterpart possessed no legal authority. Such an action clearly undermined the federalist system that the Constitution had erected, in which the national and state governments both possessed sovereignty existing side by side.

Part and parcel with the notion that the framework of the Constitution embodied principles of dual sovereignty was the concept, reaffirmed so many times by President

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58 Id.
59 Id.
60 Id.
Lincoln, that the Union was indestructible. Although Johnson did not formulate the argument in his Veto Message, we might query why, if Congress possessed the power to declare certain states to be without any legal state authority, such states would not possess the reciprocal power to declare the authority of the federal government null and void. Congress had attempted in the preamble to the Act to declare that “no legal State governments” existed in the former-confederate states; yet it was well settled that no state had the power to make the reciprocal pronouncement that “no legal Federal government” existed any longer.

President Lincoln had always held that no state possessed the right to withdraw from the Union under the national Constitution. And in 1868, this principle was subsequently reaffirmed by the Supreme Court of the United States itself, in *Texas v. White*:

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*

The holdings of *Texas v. White*, though formulated subsequent to the passage of the First Reconstruction Act, nevertheless are pertinent to our assessment of the constitutionality of that Act. The Supreme Court in *Texas v. White* held first that states never possessed the right to secede. Applying this principle to Congress’s language in the First Reconstruction Act, Congress’s declaration that “no legal State governments”

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61 President Lincoln’s Message to Congress in Special Session (July 4, 1861) (“The sophism itself is, that any State of the Union may, consistently with the national Constitution, and therefore lawfully, and peacefully, withdraw from the Union, without the consent of the Union, or of any other State.”).
63 See id. at 726.
existed would not have been properly predicated upon the notion that these states had
willfully seceded from the Union, for the act of secession was (and had always been), in
the eyes of the Supreme Court, absolutely null.\textsuperscript{64} Second, the Court in \textit{Texas v. White}
declared that the Constitution “looks to an indestructible Union, composed of
indestructible States.” As one commentator has noted, “such bold and clear assertions by
the Supreme Court indicate that a state may not exit the Union, period.”\textsuperscript{65} Accordingly,
in the words of the same commentator, the stipulations in the preamble of the First
Reconstruction act “hardly comport with the claim that an ordinance of secession is a
nullity and that a state, though in rebellion, never ceased to be a state.”\textsuperscript{66} In this respect,
Congress’s language in the preamble to the Act appears flatly inconsistent with the
Supreme Court’s (subsequent) pronouncement in \textit{Texas v. White}.

Stronger than an objection based upon principles of dual sovereignty or the
indestructibility of the Union, though, was an objection based upon the lack of any
relevant enumerated power in Article I of the Constitution permitting Congress to declare
the former-confederate states to possess no “legal State authority.” Arguably, no clause
in Article I granted Congress this authority.

Whether Congress had the power under the Constitution to strip the former
confederate states of any “legal State authority” was a separate question from whether it
had the power to impose martial law in those areas. The latter action could \textit{potentially} be
justified on the basis of Article I, Section 8, clause 15, which allowed Congress “[t]o

\textsuperscript{64} See id. (“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.”).

\textsuperscript{65} Kowalski, \textit{supra} note 10, at 339.

\textsuperscript{66} Id. at 340.
provide for calling forth the Militia to execute the Laws of the Union, suppress

Insurrections and repel Invasions . . . .“67 But as President Johnson noted:

Invasion, insurrection, rebellion, and domestic violence were anticipated when the Government was framed, and the means of repelling and suppressing them were wisely provided for in the Constitution; but it was not thought necessary to declare that the States in which they might occur should be expelled from the Union.68

Hence, even if the temporary imposition of martial law in the former-confederate states could somehow be justified on Congress’ power under Article I, Section 8, clause 15, Congress’s power under that clause could not reasonably be read to allow for the declaration, potentially indefinite in duration, that the former confederate states were no longer legal states, and possessed no legal State authority.

IX. DOES THE PREAMBLE OF THE FIRST RECONSTRUCTION ACT UNDERMINE THE LEGITIMACY OF THE THIRTEENTH AMENDMENT?

In his Veto Message, President Johnson identified a strange inconsistency between Congress’s declaration in the preamble to the First Reconstruction Act that “no legal State governments” existed in the former-confederate States, and the fact that many of the former-confederate states themselves comprised part of the “three fourths” necessary to make the Thirteenth Amendment part of the Constitution of the United States. Johnson observed:

The bill also denies the legality of the governments of ten of the States which participated in the ratification of the [Thirteenth Amendment]. If this assumption of the bill be correct, their concurrence can not be considered as having been legally given, and the important fact is made to appear that the consent of three-fourths of the States – the requisite number – has not been constitutionally obtained to the ratification of that amendment, thus leaving the question of slavery where it stood before the amendment was officially declared to have become a part of the Constitution.69

67 U.S. CONST. art I, § 8, cl. 15.
68 Andrew Johnson, supra note 57.
69 Andrew Johnson, supra note 57.
Properly understood, President Johnson’s objection was *not* that the former-confederate states failed to ratify the Thirteenth Amendment in virtue of the fact that Congress had declared them to be no longer “legal State governments.” To the contrary, all the former-confederate states (except Texas) had ratified the Thirteenth Amendment prior to the creation of the bill in question, and well before the First Reconstruction Act became law.\(^{70}\) Rather, Johnson’s argument more subtly observed that if no legal State governments were *currently* deemed to exist in the former-confederate states, then, in all likelihood, the state governments existing in 1865 were not legal either.

More formally, Congress’s declaration that “no legal State governments” existed in the former-confederate states had to have been grounded upon some factual basis; and Congress seemed to have supplied that factual basis when it declared in the preamble to the First Reconstruction Act that no “adequate protection for life or property” existed in the former-confederate states. President Johnson of course still believed that “adequate protection for life or property” existed in the South. But even if Congress thought differently, then precisely because no “adequate protection for life or property” was deemed to currently exist in the former-confederate states, such “adequate protection[s]” could not reasonably be believed to have existed in 1865 either — the year that seven of the ten former-confederate states in question ratified the Thirteenth Amendment.

Importantly, Johnson’s argument implicitly contained as its premise the notion that only “legal State governments” could “ratify” an amendment under the terms of

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\(^{70}\) Virginia ratified the Thirteenth Amendment on Feb. 9, 1865; Louisiana ratified on Feb 17, 1865; Tennessee ratified on Apr. 7, 1865; Arkansas ratified on Apr. 14, 1865; South Carolina ratified on Nov. 13, 1865; Alabama ratified on Dec. 2, 1865; North Carolina ratified on Dec. 4, 1865; Georgia ratified on Dec. 6, 1865. Ratification was official complete on Dec. 6, 1865. These states comprised part of the “three fourths” required under Article V. Subsequently, Florida ratified the Thirteenth Amendment on Dec. 28, 1865, and Texas did the same on Feb. 18, 1870. *See, e.g.*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, H.R. DOC. NO. 108-95, at 16 (2003).
Article V. Was this true? Johnson thought that if the former-confederate states were not “legal State governments” now, neither were they “legal State governments” at the end of the Civil War; and because of this, they could not have “ratified” the Thirteenth Amendment (in a way we would recognize as constitutionally relevant). To refute Johnson’s argument, one would have to hold either that (1) the former-confederate states were no longer legal State governments in 1867, but were legal State governments in 1865, or (2) that the former-confederate states need not have been “legal state governments” to have ratified the Thirteenth Amendment. Holding the former position would be tantamount to declaring that more protections for life or property existed in 1865 than existed in 1867. Holding the latter proposition would be essentially to declare that even entities without legal state authority (indeed, entities with no legitimacy at all), can ratify an amendment, and so constitute part of the “three fourths” required under Article V. Both of these positions seem untenable.

President Johnson’s argument therefore seems to force us into accepting one of two equally disturbing conclusions: either (1) there existed a fatal deficiency in the ratification of the Thirteenth Amendment, or (2) Congress’s declaration in the preamble of the First Reconstruction Act, which stated that the ten former-confederate states in question possessed no legal State authority, was factually erroneous.

X. Congress’s Authority to Impose Martial Law Upon the Former-Confederate States

A separate objection to the constitutionality of the First Reconstruction Act challenges Congress’s legal authority to impose martial law in the former-confederate states. Section 1 of the First Reconstruction Act declared that the “rebel States shall be divided into military districts and made subject to the military authority of the United
States . . .”

But President Johnson had urged in his Veto Message: “This is a bill passed by Congress in time of peace. There is not in any one of the States brought under its operation either war or insurrection. The laws of the States and of the Federal Government are all in undisturbed and harmonious operation.”

Article I, Section 8, clause 15 of the Constitution of the United States gives Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . .” Some Congressmen therefore justified the bill that would become the First Reconstruction Act on the grounds that military government was necessary to quash insurrection. Samuel Shellabarger, a Representative from Ohio, reasoned that:

[i]f the United States has the right to overthrow a rebellion by war at all, its war powers cannot be arrested and at an end the moment that arms are wrested from the public enemy . . . but continues until all such hostility to the United States is annihilated as it is too strong to be controlled by courts and constables.

But President Johnson noted that the Act itself did not “recite[] that any sort of war or insurrection [was] threatened.” Johnson wrote: “Actual war, foreign invasion, domestic Insurrection – none of these appear; and none of these, in fact, exist.”

While the First Reconstruction Act may not have explicitly declared that insurrection existed in the so-called “rebel States,” the Act did declare a lack of “adequate protection for life or property” in those states. Whether this was enough to invoke Congress’s power under Article I, section 8, clause 15, remained debatable.
Johnson pointed to the recent Supreme Court case of *Ex Parte Milligan* in favor of an argument that it did not. In *Ex Parte Milligan*, a majority had held that “[m]artial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration.”

Even if calling forth the militia were warranted under Article I, § 8, cl. 15 of the Constitution, President Johnson further argued that “when a limited monarch puts down an insurrection, he must still govern according to law.” Johnson believed that the power conferred to the commanding military officer under the First Reconstruction Act was not limited enough. He compared the authority of a commanding military officer appointed under the First Reconstruction Act to that of an “absolute monarch.”

Johnson observed that the commanding military officer was, under the terms of the Act, permitted to determine “what are rights of person or property.” Furthermore, he was “bound by no State law,” could “make a criminal code of his own,” was “bound by no rules of evidence,” and was “not bound to keep any record or make any report of his proceedings.”

In short, Johnson argued that Congress’s calling forth the militia was an improper exercise of Congress’s power, and was despotic as applied in the instant case.

**XI. Congress’s Authority to Try Civilians in Military Tribunals**

Another related objection to the First Reconstruction Act focuses on the declaration in § 3 that gave power to the commanding military officer of a military

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78 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
79 *Id.* at 127; see also Andrew Johnson, *supra* note 57.
80 *Andrew Johnson*, *supra* note 57.
81 See *id*.
82 *Id*.
83 *Id*. 
district to “allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders . . . to organize military commissions or tribunals for that purpose.”

By the terms of the act, civilians could be tried in military tribunals at the commanding officer’s discretion. This provision seemed seriously to clash with the notion, formalized in *Ex parte Milligan*, that military tribunals could not try civilians where civil courts operated. Representative William Finck from Ohio concisely summarized the holding of *Milligan* as follows: “[T]he Supreme Court of the United State has solemnly declared in the Milligan case . . . that there was no authority in these military tribunals either to try, convict, or punish any citizen who was not in the military or naval service . . . .” *Ex parte Milligan* had involved the trial of a citizen unconnected with military service by a military commission in Indiana during the Civil War. There, the Supreme Court had declared that trying this citizen in a military tribunal was not justified on theory that martial law applied, because “actual war” did not exist there. Here too, “actual war” did not exist in the ten former-confederate states in question. Hence, some argued that the Act, insofar as it allowed civilians to be tried in military tribunals, was unlawful.

In support of this assertion, President Johnson further identified a plethora of other constitutional guarantees that he perceived would, inevitably, fall by the wayside in light of this section of the bill:

The Constitution . . . forbids the arrest of the citizen without judicial warrant, founded on probable cause. This bill authorizes an arrest without warrant, at the pleasure of a military commander. The Constitution declares that "no person

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84 An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 § 3 (Mar. 2, 1867).
87 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).
shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury." This bill holds every person not a soldier answerable for all crimes and all charges without any presentment. The Constitution declares that "no person shall be deprived of life, liberty, or property without due process of law." This bill sets aside all process of law, and makes the citizen answerable in his person and property to the will of one man, and as to his life to the will of two. Finally, the Constitution declares that "the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it;" whereas this bill declares martial law (which of itself suspends this great writ) in time of peace, and authorizes the military to make the arrest, and gives to the prisoner only one privilege, and that is a trial "without unnecessary delay." He has no hope of release from custody, except the hope, such as it is, of release by acquittal before a military commission.  

Just as importantly, President Johnson questioned what would happen to a civilian’s right to a trial by jury:

An act of Congress is proposed which, if carried out, would deny a trial by the lawful courts and juries to 9,000,000 American citizens and to their posterity for an indefinite period. It seems to be scarcely possible that anyone should seriously believe this consistent with a Constitution which declares in simple, plain, and unambiguous language that all persons shall have that right and that no person shall ever in any case be deprived of it.

In other words, President Johnson and others formulated a strong argument that the First Reconstruction Act violated many constitutional rights by permitting citizens of these ten former-confederate states to be tried in military tribunals.

XII. WERE THE FORMER-CONFEDERATE STATES COERCED INTO APPROVING THE FOURTEENTH AMENDMENT?

A final query as regards the constitutionality of the First Reconstruction Act questions whether the Act unlawfully coerced the former-confederate states into approving the Fourteenth Amendment to the Constitution of the United States. President Johnson saw through the diaphanous façade of the First Reconstruction Act when he wrote that "The bill would seem to show upon its face that the establishment of peace and

\[88\] Andrew Johnson, supra note 57.
\[89\] Id.
good order is not its real object.” President Johnson observed. Yet Johnson discerned the true objective of the bill through this diaphanous façade: “The purpose and object of the bill – the general intent which pervades it from beginning to end – is to change the entire structure and character of the State governments and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves.” Indeed, as the legislative history leading up to the First Reconstruction Act makes evident, the true purpose of the First Reconstruction Act was to secure a fourteenth amendment to the Constitution of the United States, which would secure in more permanent form the victories achieved in the Civil War. But in order to achieve this, the approval of at least some of the legislatures of the former-confederate states was presumably necessary; for to ignore these state legislatures entirely would mean risking reversal of the amendment in court.

Was the manner in which the First Reconstruction Act attempted to secure the approval of the legislatures of the former-confederate states unconstitutionally coercive? Johnson, unsurprisingly, believed so. “The military rule which [the bill] establishes,” he stated, “is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment.” In other words, Johnson viewed the people of the former-confederate states as hostages who remained unable to govern themselves, unable to form or execute their own laws, unless and until they complied with the conditions of the act – which, of course, included legislative approval of the Fourteenth Amendment.

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90 Id. (emphasis added)  
91 Id.  
92 Id.
One aspect of the First Reconstruction Act seemed clearly to be at odds with the text of Article V of the Constitution of the United States. The First Reconstruction Act declared that only when a state had complied with all of the conditions outlined in section 5 of the act would “said State . . . be declared entitled to representation in Congress . . . .”\footnote{An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 § 5 (Mar. 2, 1867).} Any state that did not approve the Fourteenth Amendment, therefore, would remain unrepresented. Yet the text of Article V itself allowed for amendments to the Constitution \textit{only on the condition that} “no State, without its consent, shall be deprived of its equal Suffrage in the Senate.”\footnote{U.S. CONST. art V.} The First Reconstruction Act seemed clearly to violate this provision of Article V of the Constitution of the United States insofar as it denied suffrage to Senators from the rebel states, and moreover provided for their readmission only when the respective legislatures of those states had approved the Fourteenth Amendment.

There is little doubt that the First Reconstruction Act plainly violated the terms of Article V, because readmission of Senators from the rebel States would not take place until the Fourteenth Amendment had “become a part of the Constitution.” Yet Article V clearly did not allow any amendment to become part of the Constitution so long as a state was deprived of its equal suffrage in the Senate.

Hence, even if revoking the authority of state executive, legislative, and judicial officials and imposing martial law were \textit{not} unconstitutionally coercive measures – or at least not so coercive as to color the former-confederate states’ approval of the Fourteenth Amendment – it seems clear, in any case, that the First Reconstruction Act violated the narrow provision in Article V that allowed for the Constitution to be amended \textit{only when}
the Senators from each state were represented in Congress. Because Senators from the former-confederate states were not, in fact, allowed to vote in Congress – a fact which the First Reconstruction Act reaffirmed – one must question not only whether the approval of the amendment from those states was lawfully secured, but moreover, whether the Fourteenth Amendment itself was constitutionally permissible under the terms of Article V.

XIII. **DID THE FORMER CONFEDERATE STATES RATIFY THE FOURTEENTH AMENDMENT?**

The constitutional objections to the First Reconstruction Act discussed above should give readers certain pause. Some objections, if accepted, would serve to undermine the legality of the Act in its entirety. For instance, if Congress’s declaration in the preamble to the Act (which states that “no legal State governments or adequate protection for life or property now exists in the rebel States. . . .”) is to be regarded as unconstitutional, then this undermines the Act as a whole, insofar as this declaration in the preamble operates as the central premise upon which the rest of the Act is based. Other constitutional objections at least appear to affect only certain portions of the First Reconstruction Act. The Act’s apparent incompatibility with *Ex Parte Milligan* is of this sort. However, even in these cases, the reader must question whether such (unlawful, unconstitutional) clauses may have operated to improperly coerce the legislatures of the former-confederate states into approving the Fourteenth Amendment.

Although many strong arguments have been presented in favor of the proposition that the First Reconstruction Act (or parts of the Act) were unconstitutional, this is not the

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95 See id.
principal aim of this paper. Instead, the crucial point is to observe the problems that arise even if one assumes that the act is entirely constitutional (i.e., that none of its many terms is objectionable, and that all carry their intended legal force.)

Suppose, then, that all of the provisions of the First Reconstruction Act are constitutional; that is, that none of the constitutional objections to the Act above are ultimately persuasive. In that case, taking the provisions of the Act at face value, I propose that a new, serious problem emerges: namely, the ten former-confederate states in question could not have ratified the Fourteenth Amendment, under the meaning of Article V of the Constitution, according the terms of the First Reconstruction Act itself.

The text of Article V of the Constitution of the United States is clear: it provides that “Congress . . . shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .” 98 Yet by the very terms of the First Reconstruction Act itself, no legal State governments existed in the ten former-confederate states. 99 How then could the legislatures of those states “ratify” the Fourteenth Amendment? The legislatures of those states could approve of the new amendment, to be sure; but to parrot the words of Senator Charles Sumner, “Would it be worth the paper on which it might be written?” 100 Surely, if Congress’s declaration were valid, none of the former-confederate States would be in any position to ratify the Fourteenth Amendment because, by the terms of the act itself, they were no longer states.

98 U.S. CONST. art V.
100 CONG. GLOBE, 39th Cong., 2d Sess. 1392 (1866) (statement of Sen. Sumner).
The structure of the First Reconstruction Act creates a beautifully problematic ‘catch-22’. The former-confederate states could not actually ratify the Fourteenth Amendment because they were not states (in virtue of the declaration in the preamble of the act); but the former-confederate states could not properly regain their positions as “legal State governments” unless and until the Fourteenth Amendment “[became] part of the Constitution” (as declared in section 5 of the act), which required *ratification* under Article V by the former-confederate states.

There is no escape from this delightful paradox. Any attempt to interpret Congress’s declaration in the preamble (which declared that “no legal State governments” existed) in such a way so as not preclude the former-confederate states from still being recognized as “States” under the meaning of Article V, is entirely ineffectual, because it simply exposes the act to the objection discussed in previous section of this paper. ¹⁰¹ That is, by *conceding* that the former-confederate states are, in fact, to be treated as States under Article V, one would stand defenseless to the objection that Senators from the former-confederate states remained unrepresented in Congress, so that amending the Constitution (under the terms of Article V) was, in this instance, quite impossible.

**XIV. CONCLUSION**

This paper has presented a variety of serious challenges to the legality of the First Reconstruction Act, many of which apparently undermine the setting in which the Fourteenth Amendment became part of our Constitution. First, it can be argued that Congress possessed no constitutional authority to declare that the ten rebel states were no

¹⁰¹ *See* Part XIII.
longer “legal State governments.” Second, Congress had dubious authority to impose martial law in these regions. Third, Congress was clearly violating the holding in *Ex parte Milligan* by allowing civilians to be tried in military tribunals, and arguably violated a number of other individual constitutional rights. Finally, the First Reconstruction Act appears to have unlawfully coerced these legislatures into approving the Fourteenth Amendment, especially insofar as it denied suffrage to Senators from the former-confederate states (in clear contradiction to the terms of Article V). This last consideration seems not simply to have rendered the Act unconstitutional in a way that indirectly tainted the ten former-confederate states’ ratification of the Fourteenth Amendment: more than this, the denial of suffrage to Senators from these states was a condition under which the Constitution could not lawfully be amended at all, according to the terms of Article V.\(^{102}\)

This paper argues, alternatively, that even if one considers all of these objections to the First Reconstruction Act to be meritless, still, by the terms of the act itself, the ten former-confederate states in question could never actually have *ratified* the Fourteenth Amendment in a way that satisfies the requirements of Article V because, *ex hypothesi*, these former-confederate states were not legal state governments (and hence, were incapable of ratifying an amendment to the Constitution under Article V).

What can be said with certainty is this: that the former-confederate states’ approval of the Fourteenth Amendment in every case was either due to the requirements imposed upon these states by unconstitutional legislation, or was not the sort of approval that should qualify as ratification under Article V of the Constitution.

\(^{102}\) See U.S. CONST. art V.
This conclusion is startling insofar as it radically conflicts with conventional wisdom. But upon reflection, it is not so surprising. As the legislative history to the First Reconstruction Act makes clear, there always existed questions and concerns in Congress about the constitutionality of the Act. Even more fundamentally, there were questions as to the true requirements of Article V, specifically as regards whether ratification by the former-confederate states was required at all in order to alter the text of the Constitution. The First Reconstruction Act operated on the premise that ratification by the former-confederate states was desirable, if not strictly required; yet the states in question were completely unwilling on their own to approve the new amendment. Therefore, readers should not be surprised to learn that Congress ultimately failed to secure ratification by the legislatures of the former-confederate states in a constitutionally permissible way. After all, Congress was pushing an amendment that would profoundly reshape the nature of our Constitution and of our country, while attempting to work within the boundaries of our original Constitution, confining as they were.

The Fourteenth Amendment may be counted as one of our nation’s greatest achievements. But we should not delude ourselves with rosy pictures of the past. The integration of the Fourteenth Amendment into the Constitution of the United States was premised upon a falsehood, insofar as it was predicated upon the notion that the legislatures of Arkansas, Florida, North Carolina, Louisiana, and South Carolina (all of whom officially comprised part of the “three fourths” required under Article V) ratified the Fourteenth Amendment.