IMPORTANT CORRESPONDENCE.

Hon. John Brannon, General J. J. Jackson, Judge Thompson.

The Disfranchising Amendment, the Flick Amendment and the Registration Law.

THE DUTY OF THE DEMOCRACY.

GIVE US THE PEACE OF A REPUBLIC.

WESTON, WEST VIRGINIA,
December 1st, 1870.

Hon. George W. Thompson.

MY DEAR SIR:—I received yours containing the article to which you refer. I had previously read it.

The substance of the propositions as you make them is: First, that the so-called disfranchising amendment to the Constitution, purporting to have been adopted in 1866, is inoperative and void, because the Legislature, by an act which was unconstitutional, did undertake to deprive a large number of the qualified voters from voting on the question.

Secondly, That the amendment called the Flick Amendment, to undo this disfranchising amendment, is unnecessary, because it seeks only to undo that which is void and inoperative.

Thirdly, If the amendment claimed to be effective, is in force and effect, that the Flick Amendment cannot be adopted, because of the failure to published it fully as directed by the Constitution.

The difficulty I have, as to your *first*, is that although the Legislature, in palpable violation of the Constitution did declare that a certain class of persons, who were by the Constitution entitled to vote, should *not* vote, yet said amendment was submitted to the "qualified voters." When it was submitted it was the legal right of all Constitutional voters, to vote on the question, notwithstanding the unconstitutional enactment of the Legislature. It is true, we know, those who were intended by the act to be denied the right to vote, did not vote, yet they had the legal right to vote under the submission of said amendment to the qualified voters, and so the submission was legally made, and those who were deprived, did not save the question of their right to vote; or to have their votes counted, and the submission being lawful I do not see that the validity of the disfranchising amendment can now, for the reason assigned by you, be questioned. If the fact that force, void enactments, or other unlawful means were employed to prevent a full vote of the qualified voters upon this question, could without a legal saving of the question by the excluded voters, operate to render void the act of those voting, we may well conjecture the danger which would result from a precedent of a mere legislative declaration, that the act of those voting "shall be held void." If such rule is to prevail, a Constitution subjected to the caprice, incident to varying party success, would be a mere rope of sand.

It is a wide-spread opinion that our Constitution adopted in 1863 was not submitted, in fact, to the qualified voters, or rather that from menace and force only a portion of the qualified voters were allowed to vote on it, and if the

Legislature can nullify or invalidate for such cause, it may be said we have no Constitution. Apply the same reasoning, we would have no State and who of us would desire to go back, subjects of negro domination. I feel assured you would not. I should not. This disfranchising amendment was legally submitted and promulgated as part of the Constitution and will be presumed to have been regularly adopted until the contrary is proved. *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium.* What tribunal is there to hear the proof and determine whether it was open to the votes of only a part of the legal voters? The legislative department does not decide what the Constitution is. The courts are constituted for this purpose. What would judicial investigation disclose, if it could be had? Only that this amendment was submitted to the "qualified voters," and that the Legislature by a void enactment did attempt to prevent a portion of the "qualified voters" from voting. No adequate proof can now be produced that a sufficient uumber of those who were intended to be reached ever offered to vote. If in the power of the people or the Legislature to reach the question it would be left to the mere will of members to say, a number sufficient to have changed the result were excluded, when there might not have been enough.

If you are correct in your *first* proposition, then the Flick Amendment would be useless—if the amendment of 1866 is not a part of the Constitution, then it would seem to be a useless expenditure of time to undertake to undo a thing having no existence, and for a like reason a convention for the purpose *alone* of enfranchisement would seem to be unnecessary. If, however, you should be in error in this, and if the amendment of 1866 is a part of the Constitution, then your *third* suggestion is most worthy of investigation. This involves the inquiry whether exact conformity to the directions of the Constitution as to the time and manner of publication is an indispensable prerequisite, in order to validate the Flick Amendment if submitted to and ratified by the voters. You refer to some authorities on this subject, which, with your comments, would seem to sustain your conclusion. I wish I had your authorities and beg you to re-examine them. I should think it is necessary to conform to all requirements in amending a Constitution in all such requirements as would, in their nature, be inherent. This would be in harmony with well settled rules of law upon such subjects. All departures from directions not apparent would not be inquired into. Such requirements as are required to appear would have to be apparent. The Constitution requires such amendment to be agreed to by two succeeding Legislatures, and the same instrument requires a journal to be kept, and vote recorded, &c., &c. This requirement would not be complied with by a vote one session only, and such omission would be apparent.

I prefer, we should treat as valid, that that which has been done, saving that which is good, and undoing that which is vicious and bad. To do this we have a tedious task. I believe the Legislature will speedily adopt a tenable and rational line of action for the removal of all disfranchisements, and so believing I shall be satisfied. When they assemble I feel assured they will respect the public demand, so unequivocally expressed at the late election. Having confidence in my party I am entirely willing to leave the subject in the hands of its representatives. I am for no particular plan, to the exclusion of all others, and shall be satisfied when they have disposed of the subject.

Most truly, yours, &c.,
JOHN BRANNON.

WHEELING, WEST VA.,
December 13, 1870.

Hon. John Brannon:

DEAR SIR:—On my return home from a visit to my children, I found your letter awaiting me. I reply at my earliest leisure. The subject of your letter is of the gravest importance at this juncture of our affairs, as it invokes the consideration of constitutional law, the suggestion of a safe, just and proper policy to be pursued, and which involves the more delicate element of sentiment among a large portion of our own friends, as also of many who have heretofore opposed us, but who have aided us in the victory which has been vouchsafed to us in this State. At all times magnanimity in victory is the noblest policy, and the surest guarantee for the future. The want of it in our opponents, is, perhaps, the chief cause of our success at this time. The former questions we can examine in the dry light of legal reason, but the latter must be subjected to the peculiar

feeling of every man who considers his honor or his faith implicated in the course of action which may be adopted. I admit that my own devotion to constitutional principles is of such character that I am disposed only to ask, what does the Constitution say as plainly defined and fairly understood, and when I am sure what it says to inquire no further, but to stand by it, come weal or come woe

On the subject of your letter I feel no apprehension or room for doubt, as to the *status* of the constitutional question on the subject of disfranchisement, nor of the mode of treating it, and that there is a very direct and plain way, and but one way to pursue, and that this is consistent with the present sentiment of honor and secures the plighted faith of the so called disfranchised. It is consistent with the publicly avowed and generous wishes of liberal minded Republicans, and worthy of the spirit on both sides which is willing to let the past be forgotten, in order that the future may be solidly founded, and more happy, prosperous and successful; and it is in harmony with the Constitution of the general government as it now stands as a fact of history, although other and new questions may be expected to rise as to the extent and limitation of the newly granted powers. Our province and duty is to deal with the questions which surrounding circumstances present to us, and no farther than they are thus presented and call for attention.

When I wrote the article signed T intended to show that the Flick Amendment was unavailable at this time, because a prescribed requirement for constitutional amendment had not been complied with, and that there was no necessity for its further consideration or its adoption, because the disfranchising amendment was wholly void and inoperative, I simply gave it my initial, not seeking any publicity, yet not avoiding any responsibility which might arise from the announcement of its views. I was surprised at the editorial reference to it which made it quite the equivalent of my full signature. Then I became personally desirous, that those views which had been suggested for the reflection of others should receive their due consideration. The article was extremely short, and from its brevity could not be looked upon otherwise than as suggestive of the course which law and reason, and the kindly feelings of a considerable portion of the Republican party pointed out as practicable, wise and just. It was decisive in its tone as to the constitutional questions on both amendments, for on these questions I entertained no doubt then, and less, if possible, now. It was intended to be kind and conciliatory, for I felt that we did owe something to the fair-mindedness and liberality of feeling of a portion of our fellow-citizens who had been our opponents, and who were willing that the charities of life should prevail over the strife and selfishness of party and the malignities of personal feuds. While there were other elements in the contest which contributed to the success of the Democratic party in the late contest, these elements were surely, also, in it. I make these remarks here in justice to all such well disposed persons, and because the neccessity I am under to reply to your letter imposes on me the duty of a brief review of the past.

All candid and fair-minded men recognize the fact that in the late civil war of our country there was a great deal of devoted and self-sacrificing patriotism on both sides. It was mainly owing to this fact that the war closed suddenly and the return to peace and order on the part of the South was so prompt and universal on the surrender of Lee, and was not followed by those ill consequences which have characterized all other revolutions or civil wars where the insurgents were the vanquished. The country settled at once to peace; there were no flying detachments fighting in a hopeless cause and executing deeds of wantonness or vengeance; no marauding bands hiding in fastnesses and making life and property insecure; no blood shed by the Government for treason, for the nation, as a whole believed in the honesty and integrity of the Southern people in staking so much on the appeal to arms. The honorable opinion of the world concurs in the compliment which Mr. Long, of England, the translator of the "thoughts" of the great Antonine, in his preface to that work paid to Genèral Lee, "If I dedicated this little book to any man, I would dedicate it to him who led the Confederate armies against the powerful invader, and retired from an unequal contest defeated, but not dishonored; to the noble Virginian soldier, whose talents and virtues place him by the side of the best and wisest man who sat on the throne of the Imperial Cæsars.' And what the distinguished scholar said of

the leader, was mainly true of his followers, for they possessed the same qualities by their native characteristics and culture, and by the spirit of the leader transfused through the people.

And now, whether educated in the political-school of Washington and Jackson, or of Jefferson and Calhoun, the citizens of this country must accept the fact that its unity cannot be divided or disparted except by force of arms, and that hereafter the fate of the nation must depend upon the facts, whether it shall gradually consolidate into a central despotism, or by its intelligence and virtue maintain the just balance of powers divided between the three co-ordinate departments of the government in its executive, judicial and legislative branches, and between the general government with its centralizing tendencies and the States in their more immediate and direct sympathies with the wants, feelings and interests of the people. From these facts and in this view of our actual condition it must be seen that the resolutions of '98 and '99 are stripped of much of their equivocal character, and that if the *political* element in them which tended to promote the doctrine of State sovereignty to the extent that any one State was a final arbiter in her own case and had the absolute and complete right to withdraw from the Union, is gone forever, yet that, then, there is greater need for preserving the moral and judicial character of these resolutions. There is greater necessity for them as rules of construction, as guides for executive and legislative action and judicial determination, so as to prevent encroachment by one branch of the government on another, so as to prevent insidious violations of the Constitution, and so as to preserve the States from absorption or annihilation by the increasing tendencies to centralism in the General Government. Daily these considerations become more important and more stringent. Without some such rules of construction, without constant watchfulness to keep them alive and effective in the hearts of the people and the minds of their public functionaries, in all places and offices, the dangers of consolidation must increase from year to year, and the final centralization of the General Government must inevitably absorb the functions of the States, and measurably if not wholly destroy the liberties of the people. This is no longer a question of force, or a problem of States Rights as a question for independent action by any State; it is a question of encroachment by power and of sapping the foundations of liberty by undermining Constitutions by the finesse of construction on the one hand and to be corrected and held in check by the public intelligence and the private republican virtues of the people. Our only safety is in preserving a high regard for and cultivating a knowledge of constitutional powers, and the limitations on those powers. Constitutions are no more unlimited than any other grants of power. They are Constitutions *because they are limitations of powers.* Otherwise, why not have a central despotism at once; otherwise, why not make Congress supreme; otherwise, why not make the executive and judicial functionaries of the State subordinate to the legislative or to Congress, or to a President, by name, but a King, in fact. The Constitution is a limitation and an adjustment of the national powers, ordered by the people for the preservation and prosperity of the nation as such. The Constitution of the State is a limitation and adjustment of powers for the preservation of the State as such, and to secure the liberties and promote the welfare and happiness of the people of *that* State, as separate, so far, from other States, and as separate and distinct, in these rights, from the Central Government. A strict adherence to these limitations, at every point, in executive action, in judicial interpretation, and legislative enactment, insisting that the Constitutions shall be preserved inviolate and that their limitations upon all powers shall be held sacred, is the right of the people and the duty of every citizen. The duty of understanding their provisions; the duty of standing by them and enforcing them is equally incumbent on all the Departments. If there is any difference, practically it is most incumbent on the Legislative Department, for it is chiefly in the excesses of legislative enactments that the occasions for raising Constitutional questions originate. Those considerations are now more paramount than ever, when there is, acknowledgedly, no remedy against excesses and abuse of power, other than this intelligence and virtue of the people and of their respective agents in the administration of public affairs, both in the States and in the General Government. As States and nations become wealthier they become more corrupt. It is his-

tory. And there are corruptions of power, and of party, as well as of money, and the people can only by moral revolutions regain what they lose by violent or insidious encroachments.

Cases must and will arise when there will be differences of opinion between the respective branches, not only in the States but in the General Government, and between the powers of the States and those of the General Government. In the first class, where differences of opinion arise between the executive, legislative and judicial departments of the State, in most of such instances, not in al, the Supreme Court is only the final arbiter. But this does not take away the right of any individual member of the State, or any officer or department to pass upon the constitutionality of a law or any proposed measure. No constitutional question can arise until some individual or department has so passed in judgment or in action upon it. Whether he has done so wantonly or rightfully depends on his intelligence and virtue. But in the fact that the Supreme Court is the final arbiter, and that it has or ought to have the intelligence and moral firmness to vindicate the Constitution and preserve the limitations of powers and secure the rights and liberties of the people, it does not take away the right, but it is the right and the duty of an upright citizen, as I shall show, and of each public agent to determine and act upon his knowledge or honest conviction of what is his right or duty under the Constitution. This is eminently so in the discharge of legislative functions. That Constitutional questions do not arise more frequently in Legislatures, is because the matters of legislation are commonplace, and pretty uniformly within the limits of the powers granted. But when such question is raised, each member, at once, is his own judge and acts on his own conviction. The law is passed and it affects the individual, and his right to judge and to act is the direct consequence. That there is a final arbiter does not take away the right, *does not remit the duty to judge* in each or either case. The legal right and the moral duty is each there, and the question is, what does the Constitution say, and where and what is the Constitution.

A constitutional question is before the Supreme Court. How did it get there? It came by appeal, in most cases, from the Circuit Court. How did it get into that Court? Some individual or some officer had neglected or refused to do some act or to discharge some duty which was supposed to be required of him, and a suit or process of some kind was instituted to enforce such supposed duty. And the final question, as the first act in this drama is, did the first actor conform in his conduct to the provisions of the Constitution? If he did, he acted rightly, if he did not, the Constitution will be, at least in theory, vindicated. The first step of action, as the last act of judicial determination, is the rightfulness or wrongfulness of the originator of the suit or the process, and to whom, probably, was or may have been put the question, will you obey the Consitution or this unconstitutional law. Somebody must affirm a right, before there can be a case for the Court. If an unconstitutional law is passed and it affects fifteen thousand men who may bring fifteen thousand suits it is their right either to bring the suits or apply to a subsequent Legislature composed, as they may think, of wiser or more liberal men or both, and ask that the unjust, obnoxious and unconstitutional law shall be repealed' and avoid multiplicity of litigation, and the question still will be or may be What is the Constitution? And now under the new mode of amending constitutions by the joint action of the Legislature and a vote of her people, in a manner and mode pointed out and fixed by the Constitution for such amendments, the question will be and must be, in the greater necessity which now exists for preserving and enforcing Constitutional limitations, and securing a regard for these essential requirements, have the requirements for constitutional amendments been fairly and strictly complied with? And from first to last, and all the way through, the question is, the rightfulness or wrongfullness of the original actor in the matter under consideration. And pardon me, if I say that it strikes me almost as an absurdity to hold that a legislature whose duty it is at all times to pass upon the constitutionality of its own acts, cannot at any time repeal its own law expressly because it is unconstitutional, but must wait until some individual who is aggrieved shall go through all the tedious and expensive forms of litigation and bring to them the formal judgment of the final court, written on

a piece of paper. And, in all cases of legislative action, the laws are made without consulting the court as to their constitutionality.

Before I approach the special consideration of your letter in detail, I beg leave to remind you, that you admit, what every citizen of the State in the slightest degree conversant with the history of the disfranchising amendment knows full well, that it was passed after an unconstitutional act of the legislature depriving a large body of our citizens of the right of suffrage had been passed, and had been put into effective operation by the machinery of partizan agents, before this disfranchising amendment had been submitted, and that its submission was under such disfranchisement, and that you suppose the Supreme Court might, but I will not do you the injustice to think that you would say or hold, that they *ought* to resort to the subterfuge of a legal maxim to uphold the constitutionality of that measure, and which would require them to belie the well-known public history of the State.

You divide the subject of your letter into three propositions. I will not restate them. I accept them for the purposes of elucidation, but not as of the necessity of the case or of the argument, for if the Disfranchising Amendment is unconstitutional, which is the first and leading proposition, there is no necessity whatever for considering the two others so far as any action may be deemed necessary by the Legislature at its coming session, or as may be required or apprehended by the action of the Courts or of the Supreme Court. But it is due to you, and it is due to the subject to consider your views in the order in which you have placed them. To you, for I have confidence in your fairness and integrity and respect for your ability. I believe that you would only seek the right, that you would proceed with candour and caution, and that you would fairly redeem any pledge personally announced by you in language or justly inferrible from your conduct of your willingness to accept the situation, to obliterate as far as possible the acrimonies of the past and promote the welfare of the State, the solid perpetuity of the Union, and by a strict adherence to laws which are wise, just and constitutional, settle and secure more permanently than ever the prosperity of the people. It is due to the subject, for it is a grave question involving the moral and political vitality of the Democratic party of which we are both members and with which we have both acted through fairly long and not uneventful lives, in the belief that the Constitution was a sacred thing, that it, itself, was only a charter of limitations upon all the departments of the government both National and State, and as between the States and the National government, and that they were self-imposed limitations upon the powers of the people themselves, from whom they emanated, and only to be set aside or modified in regular and prescribed methods. Nay more, that from the complex form of our government, there were positive limits in many respects, and now more stringent than ever, on the power of the people in the States in regard to alterations of their own Constitutions,—they cannot invalidate contracts, they must give full faith and credit to the Public Acts, Records, and Judicial Proceedings of every other State, they must deliver up fugitives from justice, they are bound by treaties, they cannot make *ex post facto* laws, they cannot have any other than a republican form of government, &c., &c., and these as limited, enlarged or modified by the late amendments to the Constitution of the United States. Then, to preserve the rights of the States, for they are still sacred as rights and secure the liberties of the people under these guaranteed forms of *republican* government, which implies the perpetuation of a republican form of government in the nation itself, the only means left the States and the people is that strict construction of constitutional law which has been the fundamental principle of the Democratic party, and without which our institutions are built, only, on shifting sands to be swept away by any flood of violence which shall arouse popular passions and mislead or pervert the judgment or the sentiments of the populace. Whatever may have been any difference of opinion between the followers of General Jackson as the President of the United States and of Mr. Calhoun on the rights of the States and the method of enforcing them under this principle of strict construction, it is now clear that the remedy and the duty is to be found in this very principle of strict construction, based upon sound reasonings and moral suasions addressed to the intelligence and the integrity of the people. When these

fail, then Republican forms of government in the States and in the Nation shall have failed. These considerations require all good citizens to stand against any infractions of the Constitutions, State or National, and when violated to retrieve the wrong at once by their most direct action and prompt recovery of the true position, in order that the public judgment shall be the public vindication of Constitutional law.

I shall not repeat as far as I can avoid it, what was said in the articles over the signatures of T. and Z. As to your first proposition, involving the constitutionality of the Disfranchising Amendment, without restating it, the whole force of the argument depends on the just application of the Latin legal maxim which you quote, namely, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*, or, as translated, "All things are to be presumed to have been rightly and solemnly done, until the contrary is proved." The maxim is undoubtedly a correct one, but it is of limited application, and here, in my judgment, of no application whatever, because of the omission of the important facts which you have failed to bring into review, and which, when considered, make the very exception to the maxim adduced and which it distinctly announces, namely, that the contrary is proved. The maxim limits its own application, for there is no presumption that the act was rightly and solemnly done when the contrary appears. Does the contrary appear here in the public history and legislative and judicial proceedings of West Virginia? There is no lawyer in the State who knows better than yourself, that there are numerous classes of facts of which the Courts, all courts must take judicial notice, and that they form, without being proved, a part of every cause where they are pertinent, which comes before them for adjudication. Among them are the facts of the existence of civil war, and all governmental, State and public facts connected with that condition. There was a civil war; Virginia was a border State in that war; her people were greatly divided in that struggle as to the respective sides they espoused; so equal was this division that the legislative power of the State for a time was discharged by about only one-fourth of the constitutional members of the Senate and House of Representatives; the chief executive and judicial officers of the State, duly elected under the constitution were without the forms of the constitution and laws made in pursuance therof, replaced by others; the State of West Virginia by "*a coup d'etat*" was born in the throes of this revolution; citizens, in vast numbers were placed under arrest, or incarcerated in prisons or driven into exile; the State was a camp under the rule of martial law, and when more order was evolved from this civil chaos from first to last, and culminating in the test oath law of the 10th of February, 1865, and the Registration Act of the 26th of February, 1866, the statute books are filled with disqualifying and disabling laws, cutting off whole classes of the citizens of the State rom offices, professions, callings, and remedies for the recovery of legal rights and vindication for wrongs done to them. The courts of justice were closed against them, and all these things were done—though in violation of the Constitution, under the maxim that they were *rite et solemniter acta!* Then came the Registration law of the 26th of Feburary 1866; and the first passage of the disfranchishing amendment, showing the *animus* of the one and the other; and under it the election of the members of the Senate and House of Representatives for the succeeding Legislature, and for the submission of the disfranchising amendment, and under this submission and under this disfranchining act of the Legislature the disfranchising Amendment was submitted to the people, so decimated, so sifted and *qualified* by these winds of revolution and prepared for the adoption of this proposition.

In view of the legislation of 1866, there is no ground to doubt the purpose or the execution of the purpose to disfranchise a large body of the voters of the State. On the 17th of February they passed an act (see § 3, p. 25, acts) to compel all their officers, under pain of fine and imprisonment, "to execute or enforce any act of the Legislature, or any legal process or proceeding thereunder, or any *lawful!* order or proclamation of the Governor." By section second they had provided that, "No officer in the *lawful* exercise or discharge of his official duty under any act of the Legislature, or *any order* or proclamation of the Governor of this State shall be deemed personally responsible there-

for, either civilly or criminally, by reason of such act, order, or proclamation being afterwards adjudged by any court of this State, to be unconstitutional and void." Here they define what they mean by the term "lawful," and that it is obedience to their acts and the acts of their Governor. Here they avow the purpose to violate the Constitution by these acts, and provide for their enforcement and for the safety of the agents who are "to execute or enforce them." How could they secure the safety of these worthy officials, civilly and criminally? Only by wholly closing the courts of law against suitors, or to intimidate or corrupt and secure the concurrence of the judges. So the first section of this act, through which this *animus* is so apparent, affirms the doctrine on which gentlemen who oppose my views, now rely, viz: "The Circuit Courts and the Supreme Court of Appeals of West Virginia, are alone *authorized* to interpret and determine the constitutionality of any act of the Legislature of this State." Then follow the *lawful* provisions I have stated, with others, for the punishment of citizens who should oppose any portion of this legislation, with a provision securing the right of any person to test the constitutionality of these acts? Then nine days after the passage of this act they pass the famous Registration Act of February 26, 1866, and provide that this Governor "from among citizens most known for their loyalty," &c., shall appoint a county Board of Registration, who shall appoint "one loyal and upright person" in each ward, township, &c., and styled the Registrar, "who shall register the white male citizens in his ward, township or district entitled to vote therein, *according to the provisions of this act.*" The Constitution is directly ignored; these officers must act under penalties; all legal remedies, civil and criminal, are denied to injured citizens, and the doors of the courts of law are thrown open, but they cannot go in, for without remedies, suits are mere follies. Having cut off all remedies, *both civil and criminal*, having given this menace or peremptory instruction to the courts, they then let the injured parties go into these courts. Under this state of law and fact the case of Randolph *vs.* Goode *et al.* was tried, appealed, and held to be constitutional! Of this hereafter.

Think you that Governor Boreman, then holding the chief executive office, and having the appointing power for its enforcement, did not very *solemnly* execute that law and see that it was enforced to the letter,—and beyond the letter? Think you that these officers of Registration, these appointees of this Governor, disregarded the law and stood by the Constitution? All the world that took any cognizance of our affairs in these "times of trouble" know that they did not stand by the Constitution, and that they did stand by the Registration Law. They were not permitted by the passions and the interests of the times to do otherwise. Doubtlessly many of them acted from patriotic motives, but they did so act, and the legal effect is the same, be the motives whatever they were. That same purpose of exclusion of all these classes to which reference has been made and which marked the legislation of the State and the judicial action of the courts of that time prevailed in this instance. There is no test by which they can be separated or distinguished. They were for a purpose, so was this. They were unconstitutional, and so was this. They were enforced, so was this. The Supreme Court having affirmed this supremacy of the laws over the Constitution in more that one instance (*ex parte* Stratton, 1 W. Va. R. 305. Hunter's case, 2 id. 122. Randolph *vs.* Goode *et al.*, 3 W. Va. 551, id. 235,) would hardly hesitate to say that this law too was not actually and positively enforced. Now apply the maxim which is brought forward to ignore and disregard all these facts of history. Apply it in connection with the proposition that these Registering officers did or did not obey the law, and by affirming that they did you make the history of the times and the facts in this instance consistent; or otherwise, inconsistent and absurd, and, in this sense, unreasonable. The Legislature passed the law that it should be obeyed; they did not intend to do an idle and useless work; there is no provision for the postponement of its execution; every provision is made for its immediate and inexorable application, and the passions and interests of the times, as well as this very maxim of the law, as also, the whole argument that the citizen must assume the validity of the law until the Supreme Court, on the unwitting act or the intelligence and moral firmness of some man who will stand out from the crowd and deny its validity and incur responsibility, shall decide the question for him-

self—all these, maxims, provisions and principles, raise the actual and the legal presumptions that the law was executed, and that the registering officers "*rite et solemnitur*," excluded a large body of their qualified fellow citizens from the right of suffrage. I will not attribute to the Supreme Court, or to any two of its Judges, the absurdity to suppose that they would have held, or would now hold that these men, educated by their own judicial interpretations of these disabling laws, did not obey the law which gave them the explicit discretions to exclude these designated classes of citizens from the exercise of their elective franchise. And you will admit with me, that for that court, or any other, under the light of these public and historic facts, or without them, to presume that the body of these Registrars were upright and conscientious men, and that they all stood by the Constitution and disobeyed this law, would make a most violent presumption; and if made, would be indicative of a want of common sense and of common honesty, as understood by themselves. Nor is it possible for that Court to fix any point of time, or find any legal mixim or the presence of any moral elements of conduct from which to say, after what had been held in the cases decided by them, wherein they justified unconstitutional laws, that the time had come when these men had so far conformed to a better order of things that they had disregarded the statute and acted strictly under the Constitution. And without these facts appearing affirmatively, after such a history had been enacted, the submission of that Amendment was not in accordance with the Constitution. The Amendment being void, a registrar of to-day, or by appointment under the incoming Governor of the State, or under any new law of Registration enacted by the Legislature of this winter, cannot do otherwise than disregard it, or take upon himself the peril and the reponsibility of litigation in the court, and possibly under the penal statutes of the United States.

While these are my convictions, and while I can see no probability, scarcely any possibility that any such case, shall go to the Supreme Court for adjudication, I am free to say, that as a lawyer managing a case against the Amendment, I would, out of abundance of caution (*exabundantia cautelæ,*) if so compelled to fish in these turbid waters of the past, inquire what the Executive had done for the enforcement of this law and then, if need be, how various Boards of Registration in the State had responded to the policy and the law, to show that the Constitution had been violated in fact, as it was by the terms of the statute.

I omit here any discussion of the unconstitutionality of this amendment because it is *ex post facto*, and the serious objection which arises under the first section of the twefth clause of the Constitution of the State, even admitting that a convention could make an *ex post facto* provision. That section provides that "in no event shall they by any shift or device be made to have any retrospective operation or effect." This is very broad, and much broader than the term *ex post facto*, and includes it, but as it could not of itself, bind any future convention, and as conventions of States are no further bound than as they are limited by the Constitution of the United States, the language is useless and nugatory, unless it is applied to the amendments provided for in the second section of the same article, under which the disfranchising amendment was adopted. And as no important clause is rejected as idle, if it can, any where in the instrument, have a proper application, it does control the second section and makes the amendment void.

As to your argument or illustration drawn from the vote on and adoption of the present constitution and that its constitutionality might be in like or other manner questioned, that depends altogether on another principle. That principle is found in Luther *vs* Borden, 7th Howard. The general Government having formally acknowledged the division of Virginia and the erection of the State of West Virginia, under the constitutional power contained in the third section of the fourth article of the Constitution of the United States, is bound to maintain its existence and guarantee to it a republican form of government. Any other irregularity is cured in the same way and upon the same principle that all governments are established when they emerge from a revolution or begin their existence, as the English charter of Rhode Island is still, or was a few years since the Constitution of the State, as the first Constitution of the State of Virginia was a legislative enactment before the Constitution of the United State was adopted—neither of

which cases could take place now.

I have now said all I intended to say on the subject of the first proposition, from the stand-point of politics, law and morals. I have shown the political importance of maintaining Constitutions as limitations upon the action of all departments, and especially as limitations upon itself, and these as inviolable, and that all else is revolutionary, however consumated, whether by the decision of courts, the arbritrary decrees of Legislatures, or by their concurrent acts. I have shown the legal principles which should at all times rule in the minds of able, wise and self-sacrificing judges for the maintainance of Constitutional law and the independency and judicial integrity of judges. I have shown the moral bearings of these questions as they control or might control, or, at times, modify what is known as the scriptural "madness of the people." In most people there is, it is said, a great deal of human nature. Lawyers, preachers and judges partake of this human nature—some of them very largely, so that neither grace nor culture serves them in the hour of temptation. But there is this great advantage that grace and culture enables us all to return to the paths of rectitude in our several modes of life, when the pressure of temptation is removed. Judges, either from moral weakness, like the willow in the tempest, bend to the storm of revolutionary passions, or from a policy yield temporarily to its fury, to take their upright posture when the storm is past. We have both argued from the legal point of view, and have perssed what sound maxims of law presented themselves to our minds as available. So far, although cited, no direct criticism has been made of the case of Randolph *vs.* Goode *et al.*, 3 W. Va. R. 551. The whole argument, by both of us, has proceeded on sound legal propositions, as if it were impossible for the judicial mind to make so monstrous perversion of legal principles as in this case. There the point is fully decided, that legislative enactment overrules constitutional provisions, and as if the *coup d'etat* of a judicial tribunal could legalize the *coup d'etat* of a legislative usurpation. This would seem strange and unjustifiable language, if it were not warranted by the fact, and if it had not the highest authority for its use. Judge Brown, in delivering his opinion in Faulkner's case, 1 W. Va. R. 281, "as to the first objection against Mr. F.'s qualifying to practice law," "that a Virginia license cannot avail the applicant in the courts of this State"—that is, that license before the reorganization and before the formation of West Virginia was not available, says: "As to the first objection, the formation of the State of West Virginia within the territorial jurisdiction of the State of Virginia, was a *coup d'etat* accomplished in conformity to the laws of the mother State." That is, it was a revolutionary proceeding, yet preserving the rights of individuals, for the learned Judge there shows that what was "valid in Virginia would be equally so in West Virginia," and Mr. Faulkner, an active partisan in the South, was admitted to the bar without taking the test oath prescribed for the officers of the State by the Act of June 26, 1863. This was January term, 1866. At the same term of this court, W. A. Quarrier, Esq., presented his appeal from the Circuit Court of Kanawha county, which had refused to let him qualify without taking this same test oath. He had been an attorney previous to the war; had voted for the ordinance of secession; had voluntarily entered the service of the Confederacy; had borne arms and waged war against the United States, and had taken the amnesty oath; all which are the agreed facts in his case. The rulings in Mr. Faulkner's case were re-affirmed. He had lost none of his Old Virginia rights by the *coup d' etat* which made West Virginia a State; and the Court further held, that treason against the United States did not necessarily involve treason against the State, p. 570-1, and that he could not have committed treason against the State, unless the act of Feb. 3, 1863 was void, p. 572. This was in January 1866; it was after the present Constitution was formed. Both cases affirmed that the rights of persons under the Constitution and the laws of Virginia were recognized and secured under the Constitution of West Virginia. Now observe that the rights of lawyers are not express, but that the right of suffrage is an *expressed* constitutional right, and above all powers of legislation. Twice has this Court affirmed the citizenship of these men, and so of all others similarly situated. Twice have they affirmed that their rights and privileges have been preserved. We are now dealing with the rights of voters under express constitu-

tional provisions, not with those of lawyers as incidental rights which as "valid in Virginia would be equally so in West Virginia." The Constitution of West Virginia, Art. I, §. 6, provides that "The citizens of the State are the citizens of the United States, residing therein," and section seventh says, "Every citizen shall be entitled to equal representation, equality of numbers entitled thereto, shall, as far as practicable, be preserved." Here are the decisions of the final court as to the Virginia rights conserved in West Virginia. Their citizenship, and their equality of numbers, are recognized in the distribution of Senators and members of the House; in the allotments of equality of numbers for the Congressional Districts; and in the distribution of Judicial Circuits. Did these men by taking up arms against the United States forfeit their right of citizenship in the United States? This Court has expressly said they have not. This Court has repeatedly said they had not, in the cases decided by it, involving belligerent rights. If they were not citizens, they were entitled to these rights. Otherwise, they were not traitors, and the doctrine of secession is vindicated. Otherwise, the rights of persons and of parties engaged in the war are international rights; there is no foundation for the Alabama claims; otherwise all the judgments of this Court based on the assumption or the fact that these men were citizens engaged in a civil war, and that their contracts as between themselves were void, and that their acts as individuals under their superior officers were without justification, are erroneous in principle. The theory of *decitizenation*, as it is called, is at war with the doctrine of the Union—the Constitutional unity of the States in *one* National Unity. It has been ignored in all the facts and principles just stated. And these have been recognized in Hedges *vs.* Price, 2 W. Va. R. 192, Williams *vs.* Freeland, id., 306, Lively's ex. *vs.* Ballard, id. 496, Echols *vs.* Stantons, 3 id. 574, and Hedges *vs.* Michaels, and Price *vs.* Lutman. Shall we be legally consistent and affirm that Secessionism is the correct legal and Constitutional doctrine and that the civil war was a revolution which obliterated all the landmarks *of all the States*, and substituted a centralized power, supreme, absolute. and when it pleases, despotic? No sane man will, now, so affirm, and these men would cease to be citizens of the United States and by this sixth section, Art. I of the Constitution of West Virginia they were citizens of the State, and by the first section of Art. III. they were *voters*, as therein described. This is *the law* which no legislative enactment can set aside or make void.

We had come to the January term 1866, of this Court. The decisions in favor of Faulkner and Quarrier were sustained by Judges Brown and Berkshire of the Supreme Court, though opposed by that man of unenviable notoriety, Mr. Nat Harrison, of the Greenbrier Circuit, who sat with these judges. Throughout the legislation of the State, during these struggles there was a constant tendency to adopt stringent and extraordinary means beyond the measure of the Constitution. In the human nature of these judges, there was a constant tendency to sustain and enforce them But as might be expected from their knowledge of history, from their own culture as men of learning and fair humanities, and their trustfulness in the genial and generous character of the American people, and especially of West Virginians, they felt that the reaction of great interests and of purer sentiments had come, and that it was their duty to lead in that direction, conscious that magnanimity and the demands of American civilization would win at last, and require a return to constitutional limitations and a speedy obliteration of the past. This history and these reflections compel me to refer to a new feature in our later constitutions, greatly at war with the integrity and independency of the judiciary in in times of popular excitement, and when dominant parties demand sacrifices not warranted by the constitution. The judiciary is not wholly and constitutionally independent of the Legislature, as will be seen by the 13th section Article VI. of the Constitution, which enables a simple majority of the two houses, each, to remove a judge, and which power was exercised in the cases of Judges Kennedy and Hindman. While its exercise is always to be deplored, no higher justification can be found for it in a republican government than in the vindication of constitutional law, when a people is settling or has settled to peace and order. The partizan majority in the State of West Virginia, though warned by Mr. Greeley and by the liberal men of its own party,

and by the "coming events which cast their shadows before," within a month after the decisions in Faulkner's and Quarrier's cases passed the Lawyer's Test Oath of February 14th, 1866, and re-passed the Voter's Test Oath in the Registration Act of the 26th of February, 1866. Harrison, the Judge who held the law as disfranchising these attorneys, has become a moral suicide. Judge Berkshire was not removed from office by the Legislature which thus condemned these decisions but his term of office having expired, and his principles and feelings as exhibited in these cases not being in harmony with the purposes of the party, he was ostracised by a political convention which dropped him from the succeeding candidacy for the office. The cases of Hunter and others was decided at the January term, 1867, under the new test-oath law.* Mr. Hunter was excluded. Then came the case of Randolph *vs* Goode *et al.* The lawyers had been expelled from the profession by the act of February 14th, 1866. The voters had been disfranchised by the acts of February 25th, 1865, and of February 26th 1866, and there was a new election of Supreme Judge ahead. What had been done to the lawyers was to be consummated on the voters, though they occupy distinct grounds as to their rights—the former standing on their rights as incidentally, though implicitly protected by the Constitution, as recognized by the Supreme Court of the United States, but the latter standing on the clear letter of the Constitution itself. The argument of the Court in the voter's case, 3 W. Va., R. 553, is without warrant in constitutional reasoning. It says, "The Statute of Virginia, (passed at Wheeling, February 3d, 1863) before the organization of the State of West Virginia, declared that any citizen who should thereafter levy war against the United States, &c., should be considered as having expatiated himself as far as regards the State and shall be deemed no citizen thereof. * * *I take it then*, that the Legislature had the constitutional power to exclude the enemies from the polls, and to continue them so long as it might be necessary to the public security." There are several fallacies here, in addition to those enumerated, and in contradiction of the reasoning of the cases before cited. They are excluded by the Constitution, or they are not. If they are not exeluded by the Constitution, the Legislature cannot exclude them: If they are excluded, the Legislature cannot admit them. Before this act was passed, the Constitution had been passed by the Convention, and they were included in its very terms. Constitutions override all antecedent constitutions and all legislative enactments. It is not any previous qualification or disqualification which furnishes the test in such case, *but were they citizens of the United States*, and if so they were voters by the Constitution of West Virginia. Admit, if you please, so to strain all law, that they had been decitizenized by this law of Virginia of February 3d, 1863, they were still citizens of the United States, and as such by the provisions of the Constitution of West Virginia were made citizens of the State, and by the first section of Art. III they were and are voters. I give you the full benefit of the case of Randolph *vs.* Goode, in the light of these principles and these historic facts. Were, then, the acts of February 25th, 1865, and February 26th, 1866, constitutional? If so, they were only declaratory of what the constitution was, and the Disfranchising Amendment was simply an idle, but surely a wanton exercise of unnecessary power. It is more. It is an imputation upon the sense and intelligence of the Legislature who did not see that the Constitution did not exclude these men, but believed that the disfranchising amendment was necessary for that purpose; and that these disfranchising laws were necessary to secure its passage. Randolph *vs.* Goode concludes the Court from saying that these laws were not passed without intent to enforce them, and from saying that they were not enforced. In the light of all these facts the submission was unconstitutional. What then is the law? and what the duty of the Legislature under all these difficulties? Where is the Constitution? What are the interests and the moral sentiments of the people of West Virginia as expressed in the late election? What is the current of public sentiment among

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* There is some confusion in the reporter's history of this case. On p. iii, 2, W. Va., R, he says Judge Berkshire presided until December 31st, 1866, when his time of office expired. Judge Maxwell succeeded him. Attorney General Maxwell's office expired the 31st of December, 1866, yet Hunter's case is reported as of the January term of 1867, and Mr. Maxwell, as Attorney General, *resisting*.

the people of the whole country, more firmly and more determinedly expressed on all sides, since the election? Is it not competent for the Legislature, in the exercise of sound judgment and with the support of this public moral sentiment to vindicate and uphold the Constitution *as it really is*? Is it not the duty of the hour, in this way and under this guide of principle and influences of sentiments and public interest, to do *for* the Constitution and undo what a previous Legislature, in times of trouble and passion, had done *against* it. In the great improvement in the character of the judiciary, in the moral reaction of public sentiment, in the moral and political necessity imposed upon courts of final resort, now, when the dangers of war are passed and its calamities are to be retrieved, and the nation is to be set in a forward course to prosperity and honor, there will be found in such legislative action the concurrence and coordinate harmony of the three departments of the State Government.

This brings me to the Flick Amendment. I was in favor of this Amendment, but by this latter course the substance of the amendment is attained in a speedy and constitutional manner. When I discussed that question at an early day in the last political contest, then no question as to the notice had been started. I supported that measure both for moral and political reasons. First, it was the cultivation of kindlier and more christian feelings and sentiments than had, theretofore prevailed. I felt that this was the first and only true step to the conciliations which were necessary to the moral and christian life of the people; the appeals and the arguments which were required for its presentation were the most efficient to the restoration of social intercourse. It was, then, the only way in which the people could be remitted from the confusions of the past, and could be left free to act deliberately and wisely on those momentous questions, which are looming up all around us for the future, of capital, taxation and labour, reform in head and members of State and National governments, and of the proper and necessary powers and limitations of both these latter. In this freer scope given to the intelligence and virtue of the people, thus absolved from the errors and passions of the past, we might and may hope will be more surely attained the economical prosperity of the people, the moral grandeur of the nation, its self respect at home, and its dignity and influence abroad. I sought to be true to the genius of American Republicanism.

Again, I was for this Amendment because so long as the Republican party remained in power that was the only way left for accomplishing a desirable end, and that end involving all the considerations I have mentioned. I advocated that measure in an article (the same alluded to in late numbers of the Parkersburg *Gazette* and *Journal*,) but reserved therein all exception to the Constitutionality of the Disfranchising Amendment. No question was then raised as to the want of notice for the proper passage of the Flick Amendment, and which later investigation has satisfied me is a fatal objection to its legal passage.

The case in 24th Alabama, turns on the very and *extraneous* fact of want of notice. Your suggestion of the distinction between facts which are essential are to be made apparent in the journals of the Legislature, and those which are not so apparent are not essential, is ingenious, but untenable, as the decided law expressly announces. The journals themselves are facts extraneous to the adopted provision. So is the fact of notice, and the only difference is in the *mode of proof* of the facts whether the requirements for amendment have been complied with or not. Suppose that no notice whatever had been given, the Court might possibly, nay would *presume* that it had been given, *until the contrary was shown*, but it would be competent to show it, as also to show that it was for a less time than was required. So as to any of these apparent facts of which you speak. The one must be proved by the record, the other by competent and credible evidence.

I am aware that many liberal minded Republicans have aided in the counter-revolution, and because they, too, were in favor of this proposition. Their numbers are said to be considerable in the Third Congressional district and in the southern end of the Second, and there are some everywhere in the State. I do not propose to violate their principles or their sentiments: nor do I propose to place the Disfranchised in any position in which plighted faith or the most sensitive honor shall not have their justification and vindication, but in matters relating to the Constitution

I do *rite et solemnitur* prefer substance to shadow, and open action based on the consciousness of rectitude to any indirection, especiallyt o any admission that the Disfranchising Amendment is constitutional or in any way binding, and, then, bringing in these gentlemen by an evasive law which shall say that they shall not be punished for voting. This indeed is practicable. So can any offense be legalized. So far the substance of the Flick Amendment is what has been called the enfranchisement of the white citizen. This is what it is and all that it is in substance. I do not propose to enfranchise the white man. I simply propose to stand by the Constitution and say he never was disfranchised; to save his self-respect; not to bring him in, for he was never out; not to bring him in after the negro, but to remit him to his position on the law and under the constitutional rights of their honored forefathers, whose blood was the price of our liberties. They do not come in by the grace or favor of the Republicans, as a party of extremists, but by the vindication of law and principle and constitutional order. The intelligent public judgment of the country admits, that in their struggle they were upright and conscientious, that their convictions were the result of a long education founded on differences of opinion which existed in the convention which framed the Constitution of the United States, and which were warmly, and in instances bitterly, maintained in the legislatures of the States, discussing its adoption; and that they were battling for rights which the practice of ages and the religious opinions of mankind had sanctioned as valid, and consecrated as being in the historical order of faith and of Christianity. The trial by battle has been decided against them, but they were always free, conscientious men fighting for their most solemn convictions, and I prefer to stand by the Constitution in their behalf that thus we may renew the last bope of the country and justify the convictions of forty years of my own life in the doctrine of strict construction, and vindicate and preserve the motto on the seal of the State, *Montani Semper Liberi*—The people of our mountains are free and always will be free.

Therefore, in the knowledge that the Flick Amendment is legally, unavailable for the want of the publication of the notice required by the constitution, and that by simply falling back upon the Constitution *as it really is*, I do not propose to step in between any plighted faith of the so-called disfranchised and the fair purposes of the liberal men who acted with the Democratic party in the regeneration of the State. I could very readily get over the objection, that the proposed amendment was not published in one particular county in which a paper was printed, because of the refusal of the editor, if everything had been done by those charged with the duty of giving the notice. But they had not done what the Constitution required in giving timely notice. Much is said about what is *mandatory* and what is *directory* in a law or constitution directing what is to be done. If the distinction is not obsolete, yet it has been very much limited, and could only apply to ca es of the former kind and of a similar nature, and cannot apply to the latter, and so far as I know, never has been so applied. Where a statute requires ten days' notice or ninety days, the law is not satisfied with any less notice. So much more strongly where it is a condition precedent in constitutional action, where the evils which might result are more grave and permanent and the parties or classes injured are without remedies. That in this case it is intended to confer a benefit or bestow a favor, cannot alter the principle, but makes the precedent more dangerous, because insidious. If this requirement may be dispensed with, why not any other requirement, and a constitution can be overthrown in violation of its own distinct provisions. I read the Constitution as expressed by itself, and as it is made more sacred and inviolate by the interpretation of the Courts of final resort, in cases where there were no party purposes to subserve, nor passions to mislead. Let us stand by constitutions and *laws made in pursuance thereof*, for without these we are afloat on restless and drifting waves; and, God knows, we drift fast enough with the modern appliances which we have for making and mending constitutions. This is what the illegally excluded citizen has the right to ask; it is what the liberal men proposed to give, and so far right and justice, and, if you please, honorable charity of sentiment meet.

[As to the remarks of General J. J. Jackson, Parkersburg *Gazette*, December 22d ult., (received since this letter was

prepared and in the printer's hands) the conclusive reply is, will Governor Stevenson certify that the due legal notice of three months has been given; will he make the statement of an official untruth to supply the General with the *facts* necessary to his legal presumption, and does he ask a Democratic Legislature to affirm or endorse a public falsehood.

Does General Jackson ask a Democratic Legislature to take this course and thereby affirm that it is right or in the power of an accidental majority in a Legislature to pass a law letting only a portion of the people vote (bankers, freeholders, or those who will take some oath to some particular party purpose,) then submit an amendment fundamentally changing the Constitution to accomplish that purpose? Then any Legislature, with a Governor to appoint registrars can change the whole framework of the Constitution. The power to disfranchise thus, is a power to enfranchise, black, white, or female or non-descripts of any kind.

As to General Jackson's fears of anarchy if the disfranchising clause is treated as void, that, then, all the acts of the Legislatures and election of officers would be also void, are imaginary. If this were so, I do not know that it would be any very great or irretrievable calamity; certainly not more so than some of the other *incidentals* which have been endured, and which he himself so graphically describes, as when a Constitution was made "by men who were not elected by the people," several of whom were refugees, had no constituents, and were admitted to represeut counties who, at the time, wholly repudiated their action, and that "it is matter of history that all action or discussion of it was suppressed by military force." But this fear has no foundation. As stated before, the State has been acknowledged by the sovereign political power of the General Government, and, although, this was "a *coup d'etat*," it preserves it as a State. So, by Art. IV. § 26th of the Constitution, "each branch (of the Legislature) shall be judge of the elections, qualifications, and returns of its own members," and no court or any other tribunal can inquire into these facts. Their acts, as legislative acts, are valid so far, but are invalid in all other matters wherein they violate the Constitution. The Legislature being final judges of the elections, qualifications and returns of its own members, could make laws, but it could not make unconstitutional laws. There is a marked difference in the cases, as there is in other points of similarity made by him. So as to the validity of patents for land, election of officers when no contest, or when the final tribunal in special cases have acted in their prescribed jurisdiction. It is to be remarked that the Constitution prescribes a formal manner, by the proclamation of commissioners, for its adoption and putting it into execution, but no such provision is made for the amendments, and the question of their adoption is always an open question, there being no *formal mode* of declaring their adoption. In view of the legislative and judicial confusion which have prevailed in this State, in and since the formation of its Constitution, we are now at the point to begin in an order of principle and apply the proper remedies to correct the errors of the past and provide, as far as possible, against like errors for the future. Will these gentlemen practically test their own doctrines? The Legislature disfranchises 15,000 voters, of any kind, for any cause; some dozen of suits are brought; first in the Circuit Court, and here are delays; they are appealed, and here are further delays; but the axe of proscription has been at work all this time. Randolph *vs.* Goode shows it, and the Constitution has been violated by the passage of a surreptitious amendment, and the false amendment is now made the justification of the unconstitutional legislation. But suppose the Court of Appeals should say that the act was void! as to these men who had sued; but that is no evidence, on their theory, that any body else was excluded, whatever the public history of the country would show upon the subject, and the amendment is valid! It is the sheerest abandonment of *principle* to tolerate such a *fact*—to justify such a deed when done, and corrupt the public morals so that it may be again repeated by any party ascendency. For such a purpose the passage of the Flick Amendment is very proper, for it embodies all these evils and enormities.]

In proposing to retain a Registration Law for the present, it is chiefly as guiding and instructing those having charge of the elective franchise, so that right and justice shall not fail, that there shall be uniformity in the administration of the law in every part of the

State, that these officers, themselves, shall not be subjected to civil suits or criminal proceedings, and to correct the errors of the past in disregarding constitutional proceedings, and to provide against the repetition of like errors for the future, by thus correcting and directing public opinion. No law of Registration, no ordinance of Convention can over-ride the Constitution of the United States; and in thus inaugurating a new policy, which it is claimed shall be wise and law abiding, there would be manifest impropriety so to legislate on the subject of suffrage as to make registrars or inspectors obnoxious to any litigation. I place it, here, upon the broadest and most apparent ground of prudence so that no one can fail to see it as a matter of policy, while the lawyer and the statesman will see it from the standpoint of Luther *vs.* Borden, 7 Howard, and know that any other course will only subject registrars and inspectors to civil and criminal prosecutions. The views of all parties, at least of the very large majority of our people, can be harmonized in a Registration law which in its mandatory, directory, or explanatory provision for registering the votes shall simply require the registrars to enrol "All male citizens of the State," and follow with the residue of the words of the first clause of the third article of the Constitution of the State, as it really is. By so doing no wrong is done to any one; no duty is imposed which will subject the officers of election to suits and prosecutions, and all questions are reserved in some form for further consideration and legal adjustment, without a continuing wrong to a large class of citizens. It will place the burthen of trying constitutioual questions, not on a class or individuals, as such, but on those who are seeking benefits by seeking the offices. The decision of the registrar or the appeal to the Board should be so far final as to the right to vote as that the inspectors should not deny the voter registered. Somebody must finally decide, and the inspector in the hurry, the excitement and the pressure of election day is not the competent nor the fit person to decide. Nor is it the proper time and place. This course is proper and necessary to the vindication of the principles of the party and to promote the views of all those who truly desire to wipe away as far as can be done, the sad and bitter memories of the past. It is the installation of a better day. It will guide those who have the administration of the Constitution and the laws made in pursuance thereof on this subject, and it will compel those who have infracted them or who might wish, further, to perpetuate their violation to regard them *rite et solemniter*.

These views, I trust, dispose of the third proposition. They leave the way clear for legislative action on the Constitution as it is. There is, in fact, no legal necessity for legislation on the subject, except that laws which are impolitic, which the people do not wish enforced, and laws which are not constitutional and never should be enforced should not remain on the statute book. They educate the people in mistaken ideas, as to what the law is, or that laws are above constitutions. or for disregard of all laws when some are not enforced, or of hate and discord when such laws are made instruments of oppression. A registration law, simply affirming the Constitution as it is, the supreme law of the State, is not wholly nugatory at this time. It affirms the Constitution, it is declaratory, here, of a purpose to stand by it; in the exercise of its statutory directions, as the old law stood, the officers having charge of elections have been educated in wrong, and have, so far, been legalized in their violation of constitutional law, and schooled to the moral obliquity which justifies such acts as if "all was fair in politics." The continuance of a proper registration law is necessary to correct all this; and it is right, as it is the reinstatement of law and order, and directs the minds of men into clearer channels of thought and purer modes of conduct.

It is a great mistake to say, as some do, that there has been a public acquiescence in this disfranchising clause. It is strange to my ears as it must be to all reflective men, to hear men quote the extremacy of a party wrong, exercised for party ascendency for five years, to prove that it is right, or to justify it as constitutional. To speak of it in the softest terms, it was the exercise of an arbitrary power never acquiesced in by the Democratic party, and only defended as a temporary expedient by those who adopted it. I know that as early as March, 1865, the whole proceeding, the law and the proposed amendment, was denounced as unconstitutional, and that then a decisive method was proposed for preventing the success of the revolutionary scheme, and from that time to this it has been more or less the ground of earnest protest, as opposition to it

was a chief element in the late success. Why it was not tested in the manner that certain gentlemen now think proper, but who believe it to be unconstitutional, should be passed over in silence, unless they are prepared to show why it was not done then, and should be done now, when there is the moral, the legal and the political right and power to disregard it. Your argument admits, as no one denies, that it is unconstitutional in fact. You have fears, based on a maxim of law behind which the court of final resort might entrench itself, and say that a legislature passed an unconstitutional law, for the direct and immediate action of the very officers brought into existence by the law itself, to accomplish an immediate purpose, and, so specially charged for its execution by the spirit of the law expressed in no equivocal terms, and prompted by the temper of the times, and yet that this court must say this, as the *solemn* fact of history, and then, under the fallacy of a maxim, turn square around and say *omnia esse acta rite et solemnitur*. Surely it would be a solemn farce, were it not for the solemn mockery of Randolph *vs.* Goode.

If there is such a general, nay, universal conviction of the unconstitutionality of this clause why, now, await the slow process of the Flick Amendment, or the slower process of the judicial investigation; and what gentleman is to be selected as the victim of the priest of the sacrifice to go through the ordeal? What is to be the condition of these voters in the mean time? They must remain out, or be brought in by an indirection and subterfuge which tacitly admits that the disfranchisement is in force, but that it should be circumvented; or shall they be brought in openly, upon that intelligence and moral courage in the avowal of right, which shall declare that it is unconstitutional and invalid. If responsibilities are to be incurred let them come in the consciousness of right and in the open discharge of duty. It is fair and proper to hope that better times are upon us; that there has been a purification of the public mind to some considerable extent, and that the laws are being, and to be, more wisely, justly and fairly administered in every branch of the State government, and that the first purpose and the last act should be the vindication of constitutional law and the preservation of the liberties of the people.

I shall aid whenever I can in disseminating correct views on constitutional questions, in cultivating a deep and abiding sense of obligation to their requirements, and to promote the union of all well-disposed persons for the prosperity of the State and the perpetuity of the republic. I have no aspirations for any earthly office which can induce me to abandon a constitutional right or cast into the current of events a principle of moral wrong.

With assurances of my personal confidence in your integrity as a man, in your ability and learning as a lawyer, in your purpose as a citizen to stand by law and order, and in all these to secure harmony of action and to found safely the liberties of the people and promote the welfare of the State, and, however we may differ as to mode and means for accomplishing these, yet as having one common end.

I am your friend,

GEO. W. THOMPSON.