North THE OLD State.

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THE

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For the Watchman & Old North State.

Can the Present Government in North Carolina be Declared Void and Without Authority, by Judicial Decision?

Messrs. Editors:—In your issue of the 30th of June you take ground in the negative, but state that you would rejoice exceedingly to see the questions discussed answered in such a way as "to show that we have a constitutional mode of escape from our present condition, &c."

It is a momentous question indeed, and involving, as I conceive, not only the welfare of our Southern people, but the integrity of the Constitution itself. The doctrine you advance (and though advanced by a non-professional person, one who I conceive, to be one of the best constitutional lawyers in North Carolina,) is shocking to every idea of Constitutional government, violates every notion of ethics in government and is at war with the fundamental principles of justice.

Your proposition, as I understand it is, that upon the admission of our Senators and Representatives, the States become integral members of the Federal Union, or that it is tantamount to such a recognition of the *statal [bogus]* governments, by the political department of the Government, as to preclude the Judicial Department from deciding on their validity.

Congress, we may suppose, shall see fit to reconstruct New York—a reconstruction act is passed—the Federal army sent on—a military Governor arrests Governor Fenton—a convention is called—all the colored people allowed to vote, and all white Irish and Catholics prohibited—the convention assembles—establishes a constitution—enfranchising all the colored and disfranchising by means of test oaths or otherwise a large proportion of whites and a Legislature assembles in pursuance and by virtue of that Constitution—the Legislature elects two Senators, other than Messrs Morgan and Conkling—the new Senators present their credentials—can it be supposed for an instant that Congress, by recognizing the two Senators and new Representatives, and ejecting the old, could thereby preclude the question of the validity of such new government from being decided by the highest court?

Suppose the above stated can be changed by Senator Morgan's resignation and the Senate seats one of the two newly elected Senators; which government is is then recognized by the political department,—"old New York," in Senator Conkling, or "new New York" in the newly elected Senator? Or take another modification: Suppose that the seats of the Senators from New York become vacant—their successors are duly elected under the present government and they present their credentials which are laid upon the table—then New York is reconstructed as before stated and the newly elected Senators are admitted to seats. Has New palpable and gross violation of her constitutional rights? By this logic the more outrageous and flagrant the violation of the constitution, the more effectually is it screened from the judicial condemnation! That if Congress stops short of complete iniquity, their course may possibly be arrested by the judicial sentence; but if it proceeds to the exhaustion of every recourse of tyranny and usurpation, the more they tyranize—the more they usurp, the more certainly are their acts screened from judicial scrutiny! Such is the *reductio ad absurdum* from your argument.

You base your whole argument upon the authority of Luther *vs.* Borden, 7, How 1, and its application to the matter in hand. Its authority none can deny—its application, I do. Long before that case had been decided it had been repeatedly held by the Supreme Court, that the recognition of foreign States was a matter to be settled by the political departments of the Government. Gelston *vs.* Hoyt, 3, Wheat, 246. United States *vs.* Palmer, 3, Wheat, 610. The Santissima Trinidad and the St. Andres, 7, Wheat, 283.

The case of Luther *vs.* Borden arose out of the Rhode Island difficulties; those difficulties arose between different parties of the *people* of that State and the quarrel was purely domestic; no department of the general government had any interest in upholding one party to the quarrel, rather than the other, but stood neutral, and some of them was therefore a fit umpire to decide. Chief Justice Taney delivering the opinion puts the decision upon three grounds:

1. The general rule that the recognition of a government belongs to the political department.

2. That the Statal Courts of Rhode Island had determined the question involved and that decision was binding on the U. S. Courts.

3. That the question could not be the subject of judicial investigation, by reason of the difficulty of the proof

The reasons given for confining the question of recognition to the political department is based upon the constitutional guarantees, viz:

1. That of a republican form of government.

2. That of protection against invasion.

3. That of protection against domestic violence.

Now, I agree that, if the *people* could in legal intendment, here acted in forming the carpet-bag governments, that the decision in Luther *vs.* Borden applies—for then it is reduced to a quarrel between different factions of the *people* of the State—but it is equally unfair and un-lawyer-like to call out certain expressions dropped by the Court *arguendo* and apply them literally to the present situation. Unfair, for that case was decided at a time when it cannot be supposed that the court had in view a state of things, following an unsuccessful attempt to dissolve the Union, and therefore, we may infer used much more general expressions, than had such a situation been contemplated.

Un-lawyer-like—for "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the *very point* is presented for decision."—Cohens *vs.* Virginia, 6, Wheat, 399.

As then it cannot be successfully asserted but may be confidently denied, that the court in Luther *vs.* Borden could or would have possibly anticipated and directed their opinion, to a state of facts non-existent and non-contemplated, if indeed, not non-contemplatable, then it remains to consider, would a case involving the validity of the carpet-bag or bogus governments present the *very point* on which the case of Luther *vs.* Borden turned

I say, that it would not, nor could it by any possibility. Taney, C. J., thus states the point decision: "The existence and authority of the government under which the defendants acted, was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the PEOPLE of Rhode Island," &c., p. 35.

The learned Chief Justice, then assumes (and bases every position taken in the opposition over the other) that there existed a contest between different portions of the PEOPLE of Rhode Island for the government—no outside pressure—no dictation from abroad—no importation of carpet-baggers aided by the bristling bayonets of U. S. Ttroops, but a pure, *Kilkenny* fight.

The question then which was raised and declined to be decided by the Court was, which was the rightful government of the PEOPLE of Rhode Island. Here it is whether or no called could have had no voice in erecting, can be ratified into a legitimate government of such PEOPLE without their consent, by the recognition of its very creator!

Now the question which might be presented, is not whether or not the PEOPLE have formed a so-called government, for admitting the legal opportunity, that becomes a political question and the decision in Luther *vs.* Borden would apply—but the question really is, whether in LEGAL INTENDMENT the PEOPLE could by any possibility have formed such governments?

If under the reconstruction acts the court should hold, that in legal contemplation the PEOPLE could not have formed these governments—then as no governments could have been formed in law, none have been formed by the PEOPLE in fact; this is a presumption *juris et de jure*—if the PEOPLE could have formed no government in law, a minority cannot form one in fact—then as the court can see that no government could be formed in law, they cannot without independent proof, i. e., something more than the admission of Senators, etc., see that any have been formed in fact, and as what does not appear cannot exist, the court must say that in legal intendment there was no government which could form the subject matter of recognition. In order that the case of Luther *vs.* Borden may apply, there must co-exist these circumstances: 1. A government *de facto* of the PEOPLE. 2. That such government should have been, in law and fact, recognized by the political department of the government, if therefore there is no government, and in legal intendment could have been no government formed by the PEOPLE, then there can be no recognition—recognition implies ratification and it is well settled that a nullity cannot be ratified; a *voidable* act may be confirmed, &c., but not a *void* act.

Then could the PEOPLE of North Carolina have formed any government under the reconstruction acts? I say not. A very large portion of the PEOPLE were absolutely debarred from participating in the formation of such government to say nothing of the allowing all the colored people to participate. The exact proportion of those excluded is not, nor can be estimated, but was necessarily numerous from the character of the excluding test and for the same reason embraced much of the talent, learning, virtue and respectability of the people, the government proposed to be erected under the reconstruction acts, by reason then of this exclusion of so large a class, could never then, as seen and understood by the judicial mind, be regarded in legal contemplation as having been formed by the PEOPLE; in law, it is but a mob clothed in the habiliments of lawful power—clothed in them by force. And I ask you, sirs, to distinguish the case as it stands from a government with the same officers framed under a reconstruction act, prohibiting all whites and permitting all negroes to vote? The difference rests not on principle but exists merely in degree; not only was a very large class absolutely debarred by the terms of the act but the same act provides military force to carry it out, as written—then I say, that as in legal intendment, the PEOPLE of North Carolina could by no possibility have formed the so-called government and as according to the established theory (so often advanced by yourselves) there was no conquest but upon the surrender, we were *eo instanti* remitted to the *jus postliminii*, this so-called-bogus-carpet-bag-government, is not nor could not have been in law, the creation of our PEOPLE, but is nothing but the creation of Congress—anarchy legalized and styled government. It is law, and as must be seen by the Judges to have just as much and no other or higher effect than if Congress had instead passed a law as follows:

The Congress does enact, that W. W. Holden be Governor of North Carolina; T. R Caldwell; Lieut. Gov.; John Pool and Joseph C. Abbott Senators in Congress, and French, Deweese, etc., etc., be members of the House of Representatives, &c., and so on, enumerating all the other officers.

Now, I ask you, sirs, if you would contend by virtue of Pool and Abbott being allowed their seats under this act, and French, etc., of the other House, the Court would be precluded from deciding upon such a government by force of the decision in Luther *vs.* Borden? Will you, distinguish the reconstruction acts from the imagined one as applied to New York, under the established theory that the State has always been a member of the Federal Union? It seems to me, sirs, that the lawyer who contends that Luther vs Borden is in the way of a judicial inquiry into the most infamous conspiracy against the rights and liberties of a peoples, like the reconstruction acts, has either never learned or has forgotten the maxim *qui haeret in litera haeret in cartice.* Indeed he has stuck in the form books of the law.

In the foregoing observations I have omitted the discussion of two points which bear upon the whole question of reconstruction.

1. That as the bogus governments are wholly the creatures of Congress, it would violate the first principles of justice to permit a recognition by Congress—indeed that the idea of applying the term recognize, (conveying as it does through judicial interpretation, the idea of impartiality, neutrality and entire disinterestedness) to the action of Congress towards its own work, is an absurdity, an incognity, and a legal solicism.

2. That Luther vs. Borden does not decide that when Congress shall have recognised the question is at an end, but when the political department does, including the Executive. In our case you say one department has recognised, the other has not, but expressly avoided doing so. Then has there been no unequivocal recognition—does not the diverse action of the Executive and Legislative department like mutual estoppels, set the matter at large? I merely throw these points for consideration. I lay the stress of my view on the other point. I have merely skimmed the surface of the question.

As some parties have written over my old *nome de plume of* SIGMA, articles which I dont intend to father, I sign myself

TAU.

*I am indebted to James Fountleroy Taylor, Esq., for this excellent adjective.