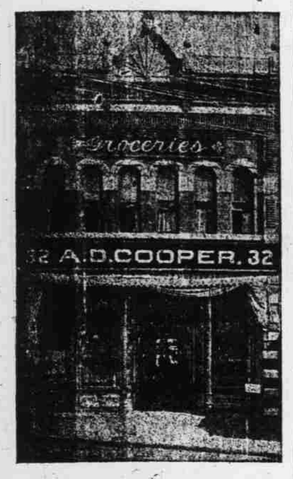

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SECTION 5 IN CONFLICT WITH THE FEDERAL CONSTITUTION

According to the Rules Governing Courts in Reaching Conclusions.

AND IN THE LIGHT OF PAST DECISIONS, THAT SECTION WILL BE HELD VOID.

The Arguments of the Advocates of Its Constitutionality Analyzed and Answered —The Proposed Amendment not Candid and Honest.

Editor of the Register:—

"Written constitutions are the product of deliberate thought and the words which express that thought are crystalized into strength. If ever there is power in words, it is in the words of a written constitution."—Judge Elliott, of Indiana.

All regulations of the elective franchise, however, must be reasonable, uniform and impartial. They must not have for their purpose, directly or indirectly, to deny or abridge the Constitutional right of citizens to vote or unnecessarily impede its exercise. If they do they must be declared void."—Cooley Constitutional Limitations, 602.

The proposition laid down in my first article (to the Post) was this: When a general law is enacted, which, in restricting the suffrage, acts equally upon all races and colors and regardless of their previous condition, that law is constitutional, though it disfranchises a greater number of blacks than whites, or whites than blacks. This principle, however, does not extend so far as to permit the State to establish a merely arbitrary qualification, though it does not in terms import a discrimination by reason of race etc., if in fact and in truth it is such discrimination. So much the more would this be true, if the proposed qualification was adopted with the intent to discriminate, by reason of race, etc.

I proceeded further and argued that the intent of Section 5, on its face perfectly harmless, is to be, and will be, discovered by the Supreme Court, in this way:

1st. By considering the political history of the country, which surrounds and so is mingled with the Fifteenth Amendment and Section 5.

2nd. By considering the effect of the adoption of said Section, upon that equality in the exercise of the suffrage which the Fifteenth Amendment secures.

Applying these rules of construction and interpretation, I concluded that Section 5 was plainly obnoxious to the Fifteenth Amendment, because its necessary effect was to establish an educational qualification for every former slave, or descendent of a former slave, while expressly removing it from all, or practically all, white men.

Since that article was published, the Editor of the Morning Post, Mr. Simmons and Mr. Aycock have discussed the constitutionality of Section 5 so ably and ingeniously that they have forced me to re-examine the authorities, with a view to any possible mistake that I may have made. After such re-examination I find myself confirmed in my original opinion. This opinion, however, was formed at the time that Louisiana was discussing a similar provision in its Constitution, and I have not seen nor read nor found anything to shake it, since.

It seems to be admitted on all hands that if the above canons of construction and interpretation are correct ones, then Section 5 necessarily must be unconstitutional, for they are the principal points of attack.

I purpose to show, first: That they are sustained by the very best of authority; and, second: To consider any new suggestions made by the gentlemen above mentioned, and show their utter fallacy.

Mr. Simmons says, anent the first canon above laid down: "Well, for the sake of the argument, let us admit it; although it must be confessed that this would be a novel method of interpreting a written constitution."

A novel method! Let us see.

Chief Justice Marshall, in Brown vs. Maryland, 12 Wheat, gives a succinct, yet full account of the difficulties that confronted the old Confederation. To illustrate the extent and force of the words in the Interstate and Foreign Commerce provision of the Federal Constitution, Chief Justice Taney, in the Dred Scott case, says, in discussing Art. 4 Sec. 3 and sub-sec. 2: (I quote his exact words) "A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, well shows the correctness of this proposition."

He then proceeds and gives this summary.

Daniel, J., in the same case, concurring, says: "In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. * * * It is what the world at large, and every individual, are presumed to know—nay, are bound to know and be governed by."

Campbell, J, concurring in the same case, said: "I pass now to the evidence afforded during the Revolution and Confederation"; and further, "An examination of this clause of the Constitution in the light of the circumstances in which the convention was placed, will aid us to determine its significance."

Catron J. concurring, said: "Almost every provision in that instrument (i. e. the Federal Constitution) has a history that must be understood before the brief and sententious language employed can be comprehended in the relation its authors intended."

McLean, J., dissenting, said, "I will now consider the relation which the Federal Government bears to slavery in the States." He, then, enters into a long historical examination of slavery in the United States. He said further on: "It is refreshing to turn to the early incidents of our history and learn wisdom from the acts of the great men, who have gone to their account."

Curtis, J., dissenting, after a long dissertation, without any remarks prefacing it, said, in preface, to the further discussion: "To determine which of these is the correct view, it is needful to advert to some facts, respecting this subject, which existed when the Constitution was framed and adopted."

Chase, Chief Justice., in discussing the meaning of the term "direct tax" in the Federal Constitution, in Bank vs. Fenno, 8 Wallace, prefaced his remarks by these words: "We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relation to the government, and means of knowledge, warranted them in speaking with authority."

Fuller, Chief Justice, in delivering the prevailing opinion in the Income Tax Cases and White, J., who wrote the principal dissenting opinion, both, in discussing the meaning of the term "direct tax," enter into long historical dissertations.

Millen, J., who, as a constitutional lawyer, is considered by some as second only to Marshall, said in Ex Parte Bain of S. C., Rep., in discussing the functions of a grand jury: "It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."

Bradley, J., in Hans vs. Louisiana, decided in March 1890, reviews fully the history that surrounds the enactment of the Eleventh Amendment to the Federal Constitution.

Cooley, Chief Justice, (the author of Constitutional Limitations) in people vs. Harding, 53 Michigan, said: "In seeking for the real meaning of the Constiution, we must take into consideration the times and the circumstances under which it was framed, the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own, which is likely to be more or less peculiar, and unless interpreted in the light of this history, is liable to express purposes which were never in the mind when the people when agreeing to it. This the court must keep in mind when called upon to interpret it." etc. etc.

I call the roll of all these great names, Marshall, Taney, Daniel, Catron, McLean, Curtis, Chase, Fuller, Miller, Bradley, White and Cooley—is this a novel method of interpreting written constitutions, then?

2nd. The effect of Section 5 if adopted. The cases which illustrate this canon come thronging upon my memory as I write. There are bushels of them. I repeat what I wrote before: "There is not a case which defines the control of the State over private right, or limits the police power of the State by the Inserstate Commerce provision of the Federal Constitution, in the determination of which the courts have not gone back of the face of the act, to the results which may ensue from its practical operations." In defining the limit of the police power over private right, all the courts say that the act of the Legislature which destroys a private right, must, to be constitutional, be reasonably adapted to the end desired, i. e. the public health, the public morals or the public safety. How can they determine the act's reasonable adaptation without considering its effects? I cite, however, the following cases:

Judge Campbell, who was second, probably, only to Judge Cooley among Michigan judges, says, in Park vs. Press Co, November, 1888: "But we do not think the statue controls the action, or is within the power of constitutional legislation. This will in our judgment, appear from a statement of its effects, if carried out."

In Henderson vs. The Mayor, etc., 82 U. S., the United States Supreme Court says: "In whatever language a statute might be framed, its purpose must be determined by its natural and reasonable effect."

So it may be considered certain that the same Court will consider the effect of Section 5. Now considering the history that surrounds and so is mingled with the Fifteenth Amendment and Section 5, and the natural and reasonable effect of said Section, we find that there is not a single ex-slave or descendent of a slave or of an ex-slave, who has not the educational qualification imposed upon him, while no white man, practically, has it imposed upon him.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

There is not a word in this Fifteenth Amendment that has not been forged in the fire of public opinion, and by its authors welded into continuty and strength. No, no, Mr. Editor, there is no surplusage in it. Can there be any doubt about the unconstitutionality of Section 5?

But I promised, in the second place to examine more minutely the recent arguments for the constitutionality of said Section and show their fallacy in each instance. The Editor, of course, shall be first: "The amendment does not discriminate against the negro on account of his race, but because of his disqualifications," says he on May 14th. But, if those disqualifications are inherent in his race, the Fifteenth Amendment says that he cannot be disqualified on that account. If he could, why this trouble? Disfranchise the negro, not because he is a negro, but because he is not fit to vote. That is the logic of his editorial of May 14th. And the Fifteenth Amendment was incorporated in our "supreme law" just to meet such an argument as that.

Again, in his issue of May 20th, he says:

"All who possess certain qualifications, age, residence, educational, will be allowed to vote. This will unquestionably include a number of negroes, who, if they were not slaves themselves, are immediate descendents of slaves."

That is true, but thatis Section 4, which everybody admits is constitutional. When we come, however, to Section 5, we find the educational qualification removed from the white man while it remains in full force and effect upon the former slave and his descendent. Is there any thing impartial in that? Is there any thing uniform in that? Does it act equally upon both races? If we cannot answer, Yes, to all these questions, then Section 5 is unconstitutional.

Again, in his editorial of June 4th, he has something to say about the District of Columbia. But Congress there disfranchised every citizen, white and black alike, the law acting equally, impartially and uniformly upon both and all races, and that it had constitutional power to do so appears from Art. 1, Sec 8, sub-Sec. 17 of the Federal Constitution. So this comes within the principle enunciated in my first article and set forth in full above.

Now I come to the denial of citizenship to the Chinese. The editorial of June 9th, as does Mr. Simmon's article of May 21st, states the position of the Federal Government towards the Chinese incorrectly. There never was a time from 1802 to 1873 that a Chinaman could become naturalized. The words of the Naturalization Act being "The provisions of this Title shall apply to aliens, being free white persons." In 1870 Mr. Sumner, in his universal and indiscriminate love for all mankind, moved to strike out the word "white" in the Naturalization Act. His motion failed. In the 1873 Revision, however, these words were omitted. Gen. S. Boutwell of Mass., made this revision. But they were again restored to the Act by Congress, Feb. 18th, 1875. Mr. Sumner, however, in 1870, did succeed in incorporating the following clause in the law, "and to aliens of African nativity and to persons of African descent." In 1882 Congress prohibited absolutely the naturalization of Chinese. But before that time Judge Sawyer in the case In re Ah Yup, 5 Sawyer, decided that Chinese could not be naturalized. See 39 Cent. L. I. 235. Nobody but a free white person or an African can be naturalized. Section 8, sub-Sec. 4 of Art. 1 of the Federal Constitution gives Congress plenary power over naturalization, and it must not be forgotten that the "citizens of the United States" of the Fifteenth Amendment are those born or naturalized in the United States.

Now I come to the cases about which Mr. Simmons makes such an eloquent peroration. I wish I could copy it but it is too long. The cases are Foong Yue Ping vs. United States, 149 U. S. 698, and Lem Moon Sing vs. United States, 49 Cent. L. I. 467. See 23 Am. Law Rev. p. 289 et seq.

Congress holds the key that unlocks the door which prevents aliens from entering into citizenship in this country. When that door is unlocked then they may become citizens, protected in their civil rights by the Fourteenth Amendment and in their suffrage rights by the Fifteenth Amendment. No Chinaman born in this country has ever been deprived of his right to vote. If he was born elsewhere, the naturalization laws have no application to him, and he can never become a citizen. Nor can a Jap nor any of the yellow races. We are either white or black under our naturalization laws. There are no mixed colors among them. See Article by Mr. Sawyer, 40 Cent. L. I. p. 106.

I come now to examine one of Mr. Simmon's positions in which he seems to have great confidence. I quote him:

"If there is anything that is absolutely certain, it is that the Supreme Court of the United States cannot hold that a law, which would be constitutional in one State, would be unconstitutional in another. The Federal Constitution applies to every inch of territory in the Union, and if there be one State in which such constitutional provision would be constitutional, it would be constitutional in all.

If Mr. Simmons had not written this himself and published it over his own sign-manual, I should not have believed that he could have written it, so much respect have I for his ability. It is true that the Federal Constitution applies to every inch of the several United States. But how can it apply equally and impartially and uniformly, unless the courts take into consideration the different circumstances, the different necessities, different history and different population of the different States.

Let me illustrate. Mr. Simmons is going to make a topographical survey of the country—New Hampshire, Vermont, Maine, and North Dakota are on a dead level. When he reaches North Carolina he is confronted by by butting crags, and beyond, in South Carolina. Mississippi and Louisiana, towering mountains. Will he pay any attention to them? No, no, what is level in Vermont, New Hampshire, Maine, and North Dakota must be level in North Carolina, South Carolina, Mississippi and Louisiana. That is Mr. Simmons' idea of the general operation of the Federal Constitution. But that Constitution does not operate in that way. It would not be equal if it did. It sees the crags and towering mountain tops and runs its line across them, and not through them. And thus it secures equality of operation, and only thus could it secure it. The Thirteenth Amendment grants the negro immunity from slavery; the Fourteenth Amendment the equal enjoyment of civil rights; the Fifteenth Amendment exemption from discrimination in voting. Equality of right, equality of privilege is all that these Amendments secure. Section 5 creates an inequality in that it, in reality, disqualifies slaves or the descendents of slaves from voting, if they have not sufficient education; while every white man may vote, regardless of his education, and thus it runs through the crags and mountain tops.

I come now to what the Progressive Farmer and the Editor regard as the strongest point made in favor of the constitutionality of Section 5. They say—first, the Editor: "Under the Mississippi law the registrar is given absolute discretion to say whether a voter, though he can read the Constitution, understands its meaning or not. The possibilities of the abuse of this law were not taken into consideration by the Court, certainly, not unfavorably." See the Post of June 9th.

Now, are the recital of facts and the conclusions of law in this extract true? I think not.

The Constitution of Mississippi provides that "on and after January 1st, 1892, every elector shall in addition to the foregoing qualifications, be able to read any section of the Constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof,"

Is there anything arbitrary in that? Does it not apply equally, impartially and uniformly upon all the citizens of the State? If it does, then it is not obnoxious to the Fifteenth Amendment. Yet we find Mr. Simmons in his article, the Post of June 9th, and the "Progressive Farmer," following its lead, saying that "an absolute discretion was conferred upon the registrar" in Mississippi. It is not correct. There was no absolute discretion given him, on the face of the proposed suffrage provision. There was a discretion given the registrar or judges of election which they might abuse. But until it was actually abused to the detriment of the blacks, there was and could not be any unconstitutional exercise of authority by the State. See Williams vs. Mississippi, 170 U S. This is illustrated by the two cases, Stranded vs. West Virginia, 100 U. S., and Ex parte Virginia, 100 U. S. In the case first mentioned, it was held that a State law confining the selection of jurors to white persons was in contravention of the Fourteenth Amendment; and second, that the action of the State officer invested with the power to select jurors, excluding all colored persons from the lists, was also repugnant to its provisions.

Strong, J., in the first case, says: "The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored men—the right of exemption from unfriendly legislation against them distinctly as colored, exempting from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to a subject race."

Now, as a general rule, when a State statute or constitutional provision, construed in one way is obnoxious to the Federal Constitution, and in another is not, the Federal Courts await, if possible, the construction of the State Supreme Court, for if that Court so construes the statute or constitutional provision, that its opposition to the Federal Constitution is avoided, why, then, there is no Federal question. That is exactly what the Supreme Court of the United States did in Williams vs. Mississippi. Sup. There is nothing unconstitutional in the terms of the Mississippi suffrage provision; there is nothing unconstitutional in its legal effect. It may be construed so as to make it unconstitutional. It may be administered so as to make it unconstitutional. But the case itself, has not been presented in this aspect, consequently there is nothing before the Supreme Court impugning its constitutionality. But how different is Section 5! Its unconstitutionality is apparent from its terms, interpreted in the light of surrounding history and in the light of its immediate and necessary effect. In other words, it cannot be construed or interpreted so it could be constitutional. It cannot be administered so it could be constitutional. This being true, either the State or Federal court would take jurisdiction in a proper case with the final decision in the United States Supreme Court.

Now Mr. Aycock's remarks require notice only in two or three particulars: His general remarks are excellent—indeed, nearly everything that he says and writes is excellent. I regard him as one of the most eloquent, one of the ablest, the purest and honestest men in North Carolina. Yet his article shows even his incapacity to discuss Section 5 from the legal standpoint. He gives as his first reason, why Section 5 is constitutional, that all the lawyers in North Carolina, or nearly all, whose opinion is worth a continental, say that it is. Yet why is it, if this is true, that none of the opinions, heretofore elaborately expressed, will bear the test of analysis and comparison with decided cases? Does not this show that these able lawyers are influenced more by their desires and hopes than their judgment.

He says, secondly, that public opinion has changed in regard to the negro and negro vote and this opinion has effected the court.

Does not Mr. Aycock remember the remark that a friend made to Wm. Wirt, when he came out of the court house after making as brilliant and as eloquent prosecution of Aaron Burr as possible "Why did you not remind John Marshall that the public demanded the conviction of Aaron Burr"? and Mr. Wirt's answer?

We may not have John Marshall's equals in ability on the Supreme Bench now but we do have his equals in character and in conscientiousness.

Public opinion, that is what they put there as a break-water against!

If Mr. Aycock doubts this, let him get the Federalist and read it.

But he says the Louisana Constitution has been in operation since January 1st, 1897. Where is the Supreme Court there? Does not he know that there has been no general election in Louisiana since the adoption of that Constitution, except for Congressmen in 1898? Does not he know that the members so elected do not meet their fellow members to form the Congress of the United States until next December? Does not he know that a case was made up and submitted to one of the Superior Courts of said State which decided that said suffrage Amendment was unconstitutional, and that said case unless it has been bought off, is now pending in the Supreme Court of that State?

Good round, sounding words go a long way, but after all, they are nothing else. The great trouble with Section 5, is that it lacks candor, it lacks honesty, it lacks fair dealings. And yet these gentlemen, its authors, fondly hope that the Supreme Court of the United States will trample the Fifteenth Amendment and with it their oaths in the dust, because the people demand it. It is a fond hope, based on air, thin air, and so will never find fruition.

Now all these good, round, high sounding phrases in Col. Cowles' and Mr. Aycock's article would do very well if our suffrage amendment stopped at Section 4, though, I, myself should have insisted upon a property qualification in the alternative, $100, $200, or even $300.

As a matter of fact, as early as 1891, I became a follower of Mr. Tillman, of South Carolina, not because I agreed with him in his national politics, but because he said he would put suffrage in South Carolina, on a sound, rational, honest, constitutional basis, and I knew he had both the power and the inclination to do so. I voted for him in the August primary 1892. The result has justified me. The South Carolina suffrage provision has run the gauntlet of the United States Supreme Court, as I knew it would, but we are different in North Carolina.

We are not candid, we are not honest, we are not courageous. We must use paraphrases, we must use a great cloud of words, which fool nobody who has two grains of common sense, and then sit back and hope that we may fool the greatest and ablest court in the world by all this nonsense.

FRANK NASH.

Hilliboro, N. C. June 24th, 1899.

LETTER FROM ASST. ATTY-GEN. JAMES E. BOYD.

The following letter, which is self-explanatory, has been received by Senator Pritchard from Assistant Attorney General James E. Boyd:

Washington, D. C., June 24, 1899.

Hon. J. C. Pritchard, Marshall, N. C.:

My Dear Sir—I am in receipt of yours of the 22d instant, enclosing clipping from the Asheville Citizen to the effect that I am reported by the Washington correspondent of the Greensboro Telegram as saying that the constitutional amendment limiting the suffrage will be carried before the people and then the republicans will gain more white votes than they will lose colored ones by the amendment.

I wish to say that the statement accredited to me is a fabrication from beginning to end. I have never spoken to the Washington correspondent of the Greesboro Telegram, knowing him to be such, about this or any other matter. In truth I did not know the Greensboro Telegram had a Washington correspondent.

So far as my views about the amendment are concerned, they are well known to you and to every other person with whom I have spoken upon the subject. You will well remember that we frequently discussed this matter whilst you were in Washington, and we entirely concurred in our opinion that the second section of the amendment—that is, the portion of it which undertakes to establish hereditary suffrage, and thus confer the right upon persons who are excluded under the general qualification clause—is unconstitutional and inoperative, and that the most that could be expected from the courts (in case the amendment is adopted by popular vote), in passing upon its validity, would be the decision that the state had the right, under the constitution of the United States, to prescribe general qualifications for electors which did not discriminate against a person on account of his race, color or previous condition of servitude, but that any effort to so modify them as to make them apply to one class and inoperative as to another, would be a direct violation of the constitution of the United States.

I did not, however, set about to give an opinion upon the amendment, for I cannot very well see how there can be any disagreement among lawyers who have given the matter serious thought and are disposed to be frank in giving expression to conclusions. I do not believe that the courts will permit that to be done indirectly which the constitution of the United States forbids to be done directly, and if the amendment proposed in North Carolina is adopted and can be put into effect as it is written, the result will be simply that that part of the constitution of the United States which forbids discrimination in conferring or denying the right of suffrage will be absolutely worthless, and the end accomplished will be that which the language of the constitution, if it means anything at all, intended to prevent. Yours very truly, JAS. E. BOYD.