Direct Legislation Before Supreme Court

George Fred Williams of Massachusetts has filed an interesting and instructive brief in the direct legislation case now before the United States supreme court.

The first installment of this brief was printed in The Commoner of November 10. The third installment appears in this issue. Other installments will follow. The third installment of Mr. Williams' brief follows:

III. The Basis of Construction and Interpretation

A. THE GENERAL RULES

It is submitted that in construing and interpreting Art. IV, Sec. 4 there must be a material departure from the rules ordinarily applied to the constitution of the United States.

National powers were acquired by delegation of sovereignty from the people of the states. When the limits of these powers are in question it is a proper and necessary inquiry what the people of the then existing states intended to delegate to the United States. The national powers can not be extended beyond what were then intended to be conveyed. Hence the minute inquiry into the interpretation then put upon the constitution. It would seem that even in this inquiry the opinions of those who comprised the convention which framed the constitution, are given too much weight, inasmuch as the meetings were secret and these opinions were not known to the people. The debates before the people and in the ratifying conventions would seem to be entitled to greater weight, as they may be taken to have fairly expressed the opinions of the people whose consent gave effect to the instrument.

But we deal now with a different case, viz., a provision of guaranty, which is for the benefit of the states and in which the states, not the United States, are the interested parties. The guaranty was not designed to deprive the states of any sovereign powers not expressly delegated in the national constitution, and the X. and XI. amendments emphasized this fact.

Hence, not only, as has been heretofore submitted, are the states alone entitled to call for the enforcement of the guaranty, but the prevailing opinions of the states become of dominating importance in determining what is a "republican form." If the states are content with the present forms of the state governments there can be no call for the guaranty.

Hence it is submitted that present public opinion is the foremost test in construing this guaranty.

Next in importance seem to be the precedents established by congress, which is invested with power to admit new states, and therefore from time to time establishes the forms, which, like those of the original states, can not be impeached.

Any opinions of the courts not in conflict with the above two standards should next be considered.

But there are also, it is submitted, certain irrevocable standards of the past, which even present opinion can not exclude.

First among these are the forms of free government which were known to the colonists, when they were permitted to exercise sovereignty. Any free forms practiced by the colonists can not be excluded from the category of "republican forms."

The second irrevocable standard must include any form, which was recognized as republican, when the constitution was framed. So far as there was agreement upon fundamental principles, we must accept any forms which, within the fundamental principles were comprehended in the extremes of opinion of that day. As Hamilton and Jefferson agreed that popular sovereignty must always be maintained, any "form" which was within the purview of the schools they represented must be accepted as "republican."

Next in importance would seem to be the popular judgment in 1887.

Finally would come the secret statements in the constitutional convention.

These then are the standards of construction, suggested, in the order of relative importance.

1st Present public opinion.
2d Congressional precedents.
3d Opinions of the courts.
4th Historic democratic forms.
5th Extremes in contemporaneous opinion.
6th Public opinion in 1887.
7th Statements in constitutional convention.

Hence consideration is asked to

B. THE STANDARDS BY WHICH THE GUARANTY IS TO BE CONSTRUED

1. Present Public Opinion

The views above expressed as to the primary importance of present public opinion are the justification for the full statement made above (under I, B and C) of the present status of the initiative and referendum in the various states. It may be assumed that "whatever is" is at least intended to be republican, as the standards of liberty have not been lowered in the last century. This basis of construction is suggested by the expressions of Mr. Justice Holmes in his dissenting opinion in

Opinions of the Justices, 160 Mass. 587.

"— in construing the constitution we should remember that it is a frame of government for men of opposite opinions and for the future, and therefore not hastily import into it our own views or unexpressed limitations derived merely from the practice of the past."

Thomas Jefferson said of constitutional changes (Works, Vol. VII, p. 14):

"Forty years of experience in government is worth a century of book reading—

"I know also that laws and institutions must go hand in hand with the progress of the human mind. As—manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

The sovereignty of the people found expression in Lincoln's first inaugural address:

"This country with its institutions belongs to the people who inhabit it."

In Martin v. Hunter's Lessee, 1 Wheat. 327, the court says:

"It could not be forseen that new changes and modifications of power might be indispensable to effectuate the general objects of the charter (U. S. constitution), and restrictions and specifications which at the present, might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms."

Of all the terms used in the constitution "republican form of government" is the most general.

It swept into meaning and significance all the free forms of the past, the then existing conceptions, and the possible developments in free government for generations, perhaps centuries, to come. The term has, and was intended to have, infinite elasticity.

James Wilson of Pennsylvania, was the greatest republican in the constitutional convention. As a justice of this court he gave a definition of republican government, which was good for that day and will remain good to the end of time:

"My short definition of such a government is one constructed on this principle, that the supreme power lies in the body of the people."

Chisholm v. Georgia, 2 Dall. 457.

Within this circle of popular sovereignty forms may revolve, cross, intertwine, shift, live and die. It excludes absolutely the idea that forms are confined to those which existed when the constitution was framed.

Little was then known of popular government save in the memory of early colonial days, in the revolutionary fabrics of the states and the tottering confederation.

The states had just formed their constitutions, and free governments had not existed in the colonies since the Stuarts had committed them to the control of the privy council near the end of the 17th century. The only original conception which the revolution created was that of the sovereignty of the people. The framers of constitutions had fluctuated between royalty and democracy: there were Hamiltons and Jeffersons. The republic was an experiment; doubts applied to every feature of the new forms. It was the uncertainty of infancy, which only age and experience could abate. To say that these experimenters with newly formed ideas were to determine for all time what constituted a republican form, would be to bind posterity to the crude notions of republican childhood.

When the secret ballot has been discovered as the true record of a nation's will must we be limited in its use to the notions of our ancestors to whom the ballot was an untried tool?

Are the experiences of a simple colonial yeomanry to guage our armament against giant monopolies and legislative corruption?

The railroad, telegraph and telephone have multiplied a hundred fold the possibilities of democratic co-operation.

The daily press and multitudinous magazines of today can not take the same place in our horizon with the scattered pamphlets of the revolutionary period.

It would be a block in the way of human progress if this court should plant itself upon the conditions and conceptions of our forefathers in the constitutional conventions, and say to each of 46 sovereign states "Thus far shalt thou go and no farther."

The constitution of Oregon embodies the progress and development of our institutions; it is the first working model of an ideal form in which "the supreme power lies in the body of the people."

2. Congressional Precedents

Should this court undertake to declare invalid the terms of the Oregon initiative amendment, there will be established two different standards of republican government: one will have the sanction of the congress and president, the other of this court. Under its recognized power congress has admitted Oklahoma to this union and given its consent to the admission of Arizona.

These two states have in their constitutions, almost in the same words, the initiative and referendum forms of Oregon. It is not a parallel, it is an essential identity. (See ex parte Wagner, 21 Ok. 35.) It is submitted that such action of the political power is determinative of this case.

a. ADMISSION OF OKLAHOMA

The enabling act of congress for the admission of Oklahoma (U. S. S. at Large, Ch. 3335; Act June 16th, 1906).

Sec. 34—Provides for submission of the constitution to the people. "And if the constitution and government of said proposed state are republican in form &c., it shall be the duty of the president of the United States"—to issue his proclamation announcing the result of said election and thereupon the proposed state of Oklahoma shall be deemed admitted by congress into the union, &c.

The Congressional Record teems with attacks and defences of these direct legislation provisions and the decision of congress was made deliberately in their favor. It is matter of notoriety that in the year following there was much doubt expressed as to the acceptance of the constitution by President Roosevelt. Mr. Taft, then secretary of war, was supposed to have been the representative of the president in addressing the people of Oklahoma and criticising the provisions for the initiative and referendum. That the people of Oklahoma had strong reasons to believe that their constitutional provisions would meet with executive opposition, appears in the opinion of C. J. Williams in ex parte Wagner, 21 Ok. 35.

The court thus explains the history of the omission of the self-executing clause of the direct-legislation provisions in the Oregon constitution.

"Such self-executing provisions were in the original form which was provided to be submitted to the people; but the convention reassembled "in order to obviate any possible objection that might be made by the president of the United States to the same, wherein it was required by Sec. 4, Art. IV, Constitution of the United States and the terms of the enabling act to be republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the legislature to carry same into effect. Until the legislature created measures carrying it into effect, the federal government had less right or reason to complain."

The decision was deliberately and finally made as follows:

By proclamation (U. S. St. at Large, Vol. 35, pt. 2, p. 2160), Nov. 16, 1907, President T. Roosevelt declared that the constitution adopted by the people had been certified to him "And whereas it appears that the said constitution and government of the proposed state of Oklahoma are republican in form, &c., and said constitution" is not repugnant to the constitution of the United States or to the principles of the Declaration of Independence, &c. "the state of Oklahoma is to be deemed admitted by congress into the union under and by virtue of the said act (June 16th, 1906) on an equal footing with the original states."

Signed "By the President, Elihu Root,
Secretary of State."

b. ADMISSION OF ARIZONA

The enabling act for the admission of Arizona