

supreme law of the land; it is paramount to the power of the legislature, etc.—The legislatures are creatures of the constitution: they owe their existence to the constitution, they derive their powers from the constitution. The constitution is the work or will of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit in which it must move.”

Calder v. Bull, 3 Dall. 386, states:

“It is a self-evident proposition that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions, etc.”

Fletcher v. Peck, 6 Cranch 87, says:

“One legislature is competent to repeal any general act, which a former legislature was competent to pass, and one legislature can not abridge the powers of a succeeding legislature.”

Hamilton (Works, Vol. 2, page 322) recognized the exact limits of legislative power.

“Happily for this country the position is not to be controverted that the constitution is the creature of the people; but it does not follow that they are not bound by it, while they suffer it to continue in force; nor does it follow that the legislature which is, on the other hand, a creature of the constitution, can depart from it on any presumption of the contrary sense of the people. All the authority of the legislature is delegated to them under the constitution; their rights and powers are there defined.”

James Wilson (Elliot's Debates, Vol II, p. 446) says:

“The supreme power resides in the people—They can delegate it in such proportions to such bodies, on such terms, and under such limitations as they think proper.”

Story, (Comm. 1, Section 628) commenting upon the fact that the new confederation which had been created by the legislatures of the states really had no constitutional authority, remarks: “If the state in its political capacity had it (the right) it would not follow that the legislature possessed it; that must depend upon the powers confided to the state legislature by its own constitution; a state and the legislature of a state are quite different political beings.”

#### b. LIMITED POWER; INSTRUCTION AND RECALL

These powers of sovereign control over legislators have been recognized since representative government began in this country.

The Body Liberties of Massachusetts Bay Colony, 1641, No. 67, declares:

“It is the constant liberte of the freemen of this plantation to choose yearly at the court of election out of the freemen all the general officers of this jurisdiction. If they please to discharge them at the day of election, by way of vote they may do it without showing cause, but if at any other general court, we hold it due justice that the reasons thereof be alleged and proved.” From laws of New Hampshire, Volume 1, page 759.

The Articles of Confederation (March, 1781) recited:

“For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct to meet in congress on the first Monday in November of every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.”

The original form of constitution introduced by Randolph in the constitutional convention provided for a house of representatives elected by the people “and to be subject to recall.”

Apparently this provision dropped out of the later forms without discussion.

The instances of instructions to delegates in the colonies are too numerous to recite.

The Boston town meetings had frequently instructed their representatives, though they were such men, for instance, in 1768, as James Otis, Samuel Adams, John Hancock, and Thomas Cushing, and did so in 1764, '65 '67, '68, '69, '70, '72 and '74.

The town meeting in Boston in May, 1764, after electing four representatives, proceeded to instruct them as follows: “By this choice, we, the free-holders of the town, have delegated you the power of acting in our public concerns, in general, as your prudence shall direct you; reserving to ourselves the constitutional right of expressing our minds and giving you such instructions upon important subjects, as

at any time we may judge proper,” and then proceeded, through John Adams, who acted as spokesman, to lay down the principles of self-government in opposition to the claims of the British parliament.

It has been well stated that

“This constitutional right of expressing their minds and giving instructions inevitably resulted from the fact that in both Boston and New Plymouth all freemen had originally a personal voice in the transaction of public business at the general courts.” (History of Elections in the American Colonies, by C. F. Bishop.)

#### D. “SOVEREIGNTY” THE ONLY TEST FORM

##### 1. What is Sovereignty?

“Sovereignty is the right to govern.”

“Our governors are the agents of the people and at most stand in the same relation to their sovereigns in which regents in Europe stand to their sovereigns.” Justice Wilson in Chisholm vs. Georgia, 2 Dall. 470.

Sovereignty necessarily implies supremacy; it is indivisible, indefeasible and inalienable, though it may be delegated. Jameson Constitutions, p. 20.

“There can be no subordinate sovereignty”—

“There can not be two sovereign powers on the same subject.”

James Wilson in Elliot's Debates, Vol. II. pp. 443, 456.

Hamilton has well said in the constitutional convention (Elliot's Debates, Vol. V, page 202) “two sovereigns can not co-exist within the same limits.”

This principle makes it impossible that the sovereignty of the people should co-exist with the sovereignty of the legislature.

If a legislature be sovereign it must have final power to make laws; possessed of such power the anomaly is presented of sovereign states which are compelled to create legislatures to be sovereign over the people who created them.

Sovereignty is not a matter of degree but of kind.

James Wilson (Journal of Massachusetts Convention, 1788, p. 364) says “In all governments \* \* \* there must be a power established from which there is no appeal and which is, therefore, called absolute, supreme and uncontrollable. The only question is where that power is lodged.”

See also Charles Pinckney in South Carolina Debates (Elliot's Debates, Vol. IV, p. 327).

##### 2. Where is the Sovereignty?

###### a. IN THE PEOPLE

“The people are the only legitimate fountain of power.” James Madison, Federalist No. XLIX.

“Our political creed is, without a dissenting voice that can be heard, that the will of the people is the source, and the happiness of the people the end, of all legitimate government upon earth.” John Adams in his first message to congress.

In the United States the supreme power “remains and flourishes with the people, and under the influence of that truth we at this moment sit, deliberate and speak \* \* \* that the supreme power, therefore, should be vested in the people is, in my judgment, the great panacea of human politics. It is a power paramount to their constitution, inalienable in its nature and indefinite in its extent.”

James Wilson, Journal of Mass. Convention, 1788, p. 365.

“A share in the sovereignty of the state which is exercised by the citizens at large in voting at elections—in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist a free people.—That portion of the sovereignty to which each individual is entitled can never be too highly prized.”

Hamilton, in Works, Vol. VI, p. 271.

“The legislatures have no power to ratify it. They are the mere creatures of the state constitutions and can not be greater than their creators.—Whither then must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them.” It was of great moment, he observed, that this doctrine should be cherished, as the basis of free government.

Geo. Mason of Virginia (Elliot's Debates V, p. 352).

Abraham Lincoln said in a speech at Peoria in 1854: “According to our ancient faith the just powers of government are derived from the consent of the governed. \* \* \* Allow all the governed an equal voice in the government and that and that only, is self-government.”

Charles Pinckney, one of the delegates in the

Philadelphia convention, spoke in the ratifying convention of South Carolina (Elliot's Debates, Vol. IV, pp. 318, 326), as follows:

“We have been taught here to believe that all power of right belongs to the people; that it flows immediately from them, and is delegated to their officers for the public good; that our rulers are the servants of the people, amenable to their will and created for their use.”

Speaking of the United Netherlands, he says: “According to my idea of the word it is not a republic; for I conceive it as indispensable in a republic that all authority should flow from the people.”

##### b. PASSAGE FROM STATE TO PEOPLE

The idea of sovereignty in the people was not original with the makers of the constitution. Locke and Rousseau had long before expounded the principle.

It found its first great expression in the Declaration of Independence at the hands not of the people but of “the representatives of the United States of America in Congress assembled.”

There is no doubt that the original conception of sovereignty by the colonies was that of corporate sovereignty. The articles of confederation were made not by the people but “between the states of New Hampshire, Massachusetts Bay, etc.,” and each state asserted therein “its sovereignty, freedom and independence.”

The articles were prepared by a legislature which had no authority from the people, and they were referred for ratification not to the people but to the legislatures of the state. The submission by the people this legislative usurpation in the framing of their national government shows how imperfect was the existing conception of popular sovereignty. The people had just formed their constitutions and hugged them as a dear possession secured by their blood and sufferings. They were jealous of their state independence, and the weak alliance of the confederation proved pitifully ineffective because the states would not trust sufficient delegation of national power.

“Oliver Ellsworth of Connecticut, said in the federal convention:

“As to the first point he observed that a new set of ideas seemed to have crept in since the articles of confederation were established. Conventions of the people, or with power derived expressly from the people, were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint.”

On the first impact of independence and supreme authority, the state seemed to be the prize which revolution had secured. The confederation was a beginning not an end; constitutional confederation constituted progress in popular government. Yet it was but the opening of the expanding system of self-government which was to ripen into more perfect forms such as are represented in the full legislative sovereignty of the people of the state of Oregon under their amended constitution.

#### 3. Direct Exercise of Sovereignty by the People.

##### a. STATES ENTITLED TO CHOOSE THEIR FORMS

Webster described the unlimited power of sovereignty in his reply to Hayne:

“The people, sir, erected this government. \* \* \* Gentlemen do not seem to recollect that the people have the power to do any thing for themselves.”

George Washington said in his farewell address: “The basis of our political system is the right of the people to make and alter their constitutions of government.”

“For I insist if there are errors in government, the people have the right not only to correct and amend them, but likewise totally to change and reject its form; and under the operation of that right the citizens of the United States can never be wretched beyond retrieve unless they are wanting to themselves.”

James Wilson, Journal of Mass. Convention, 1788, p. 364.

The Declaration of Independence, to the principles of which all new states have been expressly required upon their admission to the union to conform, asserts the supreme right of the people “to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.”

The people of Buckingham county instructed their delegates to the Virginia convention, which first declared the independence of the colonies, in the words, “the Supreme Being