

Rhode Island, Vol 1, page 14) declared their obedience "to all such orders or agreements as shall be made for public good of the body in an orderly way by the major consent of the present inhabitants, masters of families incorporated together in a towne fellowship and others whom they shall admit unto them only in civil things."

The town of Portsmouth in 1638 by compact underwritten by the inhabitants (records of the Colony of Rhode Island, Vol. 1, page 52) submitted themselves "to the King of Kings and Lord of Lords and to all those perfect and most absolute lawes of his given us in his holy word of truth, to be guided and judged thereby."

Not only were the freemen of Portsmouth the makers of the laws but (Records of the Colony of Rhode Island, Vol. 1, 57) penalties were imposed upon those who "shall not repair to the publick meetings to treat upon the publick affairs of the Body upon publick warning (Whether by beate of the Drumm or otherwise) if they fayle one quarter of an hour after the second sound, they shall forfeit twelve pence; or if they depart without leave they are to forfeit the same summ of twelve pence."

Not only did the towns of Rhode Island thus independently practice a democratic system, but a general court, legislated for the united towns of Newport and Portsmouth and in 1641 (Records of the Colony of Rhode Island, Vol. 1, page 112) a democracy was declared in the following words:

"It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the jurisdiction thereof, in favor of our Prince, is a Democracie or Popular Government; that is to say, It is in the Powre of the Body of Freemen, orderly assembled or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."

Thus we have independent compact of the towns united in a purely democratic system recognizing only laws made by themselves based upon "the holy word of truth."

Not until 1643 (Records of the Colony of Rhode Island, Vol. 1, 143) was the charter of the Colony of Rhode Island granted bearing the name of "The Incorporation of Providence Plantations in the Narragansett Bay in New England."

This was a democratic charter giving to the inhabitants (Records of the Colony of Rhode Island, Vol. 1, p. 146) "full power and authority to rule themselves, and such others as shall hereafter inhabit within any part of the said tract of land by such a form of Civil Government as by voluntary consent of all, or the greater part of them, they shall find most suitable to their estate and condition."

Under the terms of this Instrument, the people of Providence, Newport, Warwick and Portsmouth met in "general court" in May 19th, 1647. They proceeded to enact a perfect form of the initiative and referendum in the following remarkable terms (Records of the Colony of Rhode Island, Vol. 1, 148, 149).

II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded. * * * The Towne where it is propounded shall agitate and fully discuss the matter in their Towne Meetings and conclude by Vote; and then shall the Recorder of the Towne, or Towne Clerke, send a copy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if unto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate, discuss and determine ye matter among themselves; and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and con-

cluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote: and if the major vote determine the case, it shall stand as a Law till the next Generall Assemblie then or there to be confirmed or nullified."

Historians (see remarks of Amasa M. Eaton, Harvard Law Review, XIII, 584, Arnold, History of Rhode Island, Vol. 1, pp. 203-204) regard this act as a genuine instance of the popular initiative and referendum.

In 1650 the general court gave its powers to a representative committee consisting of 6 from each town. (Records of the Colony of Rhode Island, Vol. 1, pp. 228, 229) and provided for the popular ratification of laws enacted by such committee by the sending of the same to the towns taking their vote thereon which, if unfavorable, should nullify such laws. This was the compulsory referendum in its purest form.

A similar referendum appears in (Records of the Colony of Rhode Island, Vol. 1, pp. 401, 402) and by later provision of the general court, (Records of the Colony of Rhode Island, Vol. 1, page 429,) the majority votes of the entire colony were required for the approval or disapproval of the law instead of the majority of those in each town.

In 1760, the Colony of Rhode Island was a pure democracy in the ancient form of a Folk-moot in which all the public freemen voted.

5. Connecticut

The settlement of Connecticut was occasioned by the dissatisfaction of certain colonists with their share in the government of the colony of Massachusetts Bay and in 1636 the inhabitants of three towns, (Johnson, History of Connecticut, pp. 24, 25) migrated in order that they might enjoy a larger liberty in civil affairs.

(See Lobingier, The People's Law, McMillan, 1909 which work contains a comprehensive and able analysis of the democratic institutions of the United States.)

It has been claimed by the historian, Alexander Johnston that "the birthplace of American Democracy is Hartford," (Johnston's Conn. preface p. VIII.)

Three years after their settlement, the inhabitants of Windsor, Wetherford and Hartford met in mass convention and formed "one Publike State or Commonwealth." (Colonial Records of Conn. Trumbull's Ed. p. 21.)

The agreement is known as the "Fundamental Orders" of 1639. It has been called and is perhaps entitled to be called the first written constitution known in history and is certainly the first which represents the idea of the sovereignty of the people.

Lobingier, p. 90,

Fiske, Civil Government, 192

Johnston, Conn. 63.

The instrument was adopted by the entire body of the freemen and no longer contained any appeal to the sovereign in its enacting clause, but was a direct announcement from the people, "It is ordered, sentenced and decreed."

This instrument had been previously prepared and was adopted as prepared and therefore contains the two essentials of modern constitution making, namely, the preparation of a draft and the popular ratification. Likewise when this instrument was amended, the ratification by the people was required. (Colonial Records of Conn., Vol. 1, p. 140 and 347.)

6 The Townships

From the landing of the Pilgrims to the time of the constitutional convention, the town meeting was the unit of popular action in New England. It was the purest form of democracy, and was never abandoned except when larger growth compelled a delegate form for cities. The colonies were obliged to yield to this necessity, but their constituent towns were enduring democracies. Plymouth town has not for a year yielded up this form and the same is true of all other towns to this day. When the constitution was framed the towns elected the delegates to the ratifying conventions and in numerous cases instructed them as to their action. Lobingier, Peoples Law, p. 188 and 189.

Many towns framed amendments upon which their delegates were to insist.

The towns of New England were as distinct entities within their colonies and states, as were the states under the confederation and constitution.

The Stuart ministries were able to impose their governors upon the colonies as federalized governments, but as has been well stated the latter "in respect to their municipal rights and

privileges were so strongly entrenched in the New England town system that they were practically impregnable." Batchellor, Government and Laws of New Hampshire, p. 36.

From the date of the new Charter (1671) to the Declaration of Independence the law-making power of the colonies was limited, and the only autonomy was in the towns. As revolutionary states the colonies of New England were aggregated towns, pure democracies, the real seat of government.

In Massachusetts the Township has always been a political unit, endowed with legislative powers.

By act of the general court of Massachusetts Bay, 1636, it was ordered that "the freemen of every town or a major portion of them * * * make such laws and constitutions as concern the welfare of their town * * * not of a criminal but of a prudential nature."

The call for the convention to frame the constitution of Massachusetts was issued upon returns from the towns demanding a convention; the towns were requested to send delegates and such constitution was not to be promulgated until the instrument was laid before the "respective towns and plantations" for approval or disapproval by two-thirds of the citizens. Journal of Convention, p. 5, 1779.

The democratic towns thus took the initiative in the framing of the constitution and held control through the right of ratification.

Such were the democratic institutions which were cherished in the memory of the colonists.

When they by violence shook off the sovereignty of the king these were the traditional forms. It is inconceivable that in forming their states and a national constitution these were not the most precious shapes of government, which they contemplated and which they wished to perpetuate in their exercise of sovereign power.

5. Extremes in Contemporaneous Opinion

The importance of public opinion in the construction of the national constitution is apparent when we consider that Alexander Hamilton took but small part in the constitutional convention, and Jefferson was not a member. Samuel Adams, John Adams, Patrick Henry and other great patriots were not in the convention.

It was indeed in the debates on ratification and in contemporaneous discussions that the real test of popular opinion is to be found. Jefferson and Adams objected that the rights of the people had not been sufficiently guarded, and the ten articles of amendment served as a rebuke to the indifference of the national convention as to fundamental popular rights.

The two great men, who were then and are now recognized as the leaders of the two extremes of political opinion, were Hamilton and Jefferson, federalist and republican.

They agreed as to one fundamental proposition, viz.: that popular sovereignty was the basis of free government. In sympathies Hamilton was a monarchist, but he acknowledged the principles of the Declaration of Independence.

As to the question of the republican form there was a wide divergence between Hamilton and Jefferson, but it is submitted that they fully represented the current extremes of opinion among the citizens who ratified the constitution.

Their extreme interpretations of "republican form" may be accepted as including the entire contemporaneous interpretation, and no form between these extremes should be excluded in the present construction of the "republican form" which was guaranteed to the states.

Hamilton declared that "as long as offices are open to all men and no constitutional rank is established, it is pure republicanism." (Works, Vol. 2, page 416).

Also, "after all we must submit to this idea, that the true principle of the republic is that the people should choose whom they please to govern them; representation is imperfect in proportion as the current of popular favor is checked." (Works, Vol. 2, page 44).

Hamilton went so far as to declare, "A reunion with Great Britain not impossible with the son of the present monarch in supreme government of this country." (Works, Vol. 2, page 421).

His conception of a republic was contained in the plan which he had prepared for the constitutional convention. Works, Vol. 2, page 407; Elliot's Debates, Vol. 5, page 584.

This plan provided that the governor of each state should be appointed under the authority of the United States, and that he should have the right to negative all laws about to be passed in the state. He proposed a senate selected by electors of the several states who must be free-

(Continued on Page 10.)