Prerogative, popular sovereignty, and the American founding

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I

Historians have long recognized that the idea of "popular sovereignty" stood at the center of the ideological landscape that produced the American Revolution and, later, the constitution of the United States. As James Wilson of Pennsylvania put the point in a speech to his state's ratifying convention in 1787, since "it has not been, nor I presume, will be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority" in every state, which "may justly be termed the sovereign power," the only dispute concerns where this power properly resides. Some suppose that it resides in a supreme legislature, such as the British Parliament, while others come "nearer the truth" by insisting that the "constitution" itself should be regarded as the repository of this power. Yet both of these views are mistaken. "The truth," Wilson explains, "is, that the supreme, absolute, and uncontrollable authority remains with the people," and, while "the great and penetrating mind of Locke" had glimpsed this mighty principle, "the practical recognition of this truth was reserved for the honor of this country."2 The American Revolution, on this account, had been waged under the banner of popular sovereignty, and, with the drafting of the new constitution, the citizens of the United States could at last achieve "the happiness of seeing it carried into practice."3

There has been an understandable tendency to regard the principle of popular sovereignty, thus understood, as a democratic principle -- and, indeed, Wilson himself stressed that, in a sense, it was. If "democracy" means "rule by the people," then surely "when the body of the people is possessed of the supreme power" the resulting regime should be called a "democracy."4 On this conception, the American Revolution and the new constitution did indeed seek to advance "the democratic

2 Ibid., p. 456.
3 Ibid.
4 Ibid., pp. 476, 482.
principle." But what exactly does it mean to say that, under a proper constitution, the people will possess "supreme power?" Here matters become far more complicated. It was, after all, the very same James Wil- son who had declared barely six months earlier in the Constitutional Convention that, during the Revolution, "the people of America Did not oppose the British King but the parliament – the opposition was not against an Unity but a corrupt multitude." The Revolution, on Wilson's account, had been a rebellion against a tyrannical popular assembly, not against a monarch. Indeed, it had been an insurrection in favor of royal power. Wilson was not remotely alone in taking this view. Rufus King of Massachusetts, who had recorded Wilson's remarks in the Convention, cautioned a younger colleague years later that the Revolution had come to be badly misunderstood by posterity:

You young men who have been born since the Revolution, look with horror upon the name of a King, and upon all propositions for a strong government. It was not so with us. We were born the subjects of a King, and were accustomed to subscribe ourselves "His Majesty's most faithful subjects"; and we began the quarrel which ended in the Revolution, not against the King, but against his parliament.

Rufus King was not mistaken. Benjamin Franklin too had explained his opposition to Britain by observing that the Lords and Commons "seem to have been long encroaching on the Rights of their and our Sovereign, assuming too much of his Authority, and betraying his Interests." The young Alexander Hamilton went so far as to declare in 1775 that the king "is the only Sovereign of the empire," that "the part which the people have in the legislature, may more justly be considered as a limitation of the Sovereign authority." Such an arrangement, on his account, was uniquely favourable to liberty because a monarch "is under no temptation to purchase the favour of one part of his dominions, at the expense of another; but, it is his interest to treat them all, upon the same footing.


Very different is the case with regard to the Parliament. The Lords and Commons have a separate interest to pursue." John Adams similarly reflected that, if he had understood the Revolution to embody a campaign against monarchy, he "would never have drawn his sword." Nor was this understanding of the imperial crisis a matter of "high theory" alone. Describing Washington's fateful muster of the Continental Army on Cambridge Common in April 1775, a British officer stationed with General Thomas Gage recorded that "the Rebels have erected the Standard at Cambridge; they call themselves the King's Troops and us the Parliament. Pretty Burlesque!"

American "Patriots" of the late 1760s and 1770s developed the view that Parliament possessed no jurisdiction whatsoever over British North America; the colonies, they now claimed, were connected to Britain solely through "the person and prerogative of the king." But the late eighteenth-century British monarchy was in no position to function as the "pervading" and "superintending" power of the empire. The constitutional settlement that followed the Glorious Revolution had definitively subjected the king to Parliament, drastically curtailing his prerogatives and recasting him as a pure "executive." Those powers of state that legally remained with the Crown were no longer wielded by the person of the king, but rather by ministers who were required to command a parlia-


10 Hamilton, The Royalist Revolution, p. 16.
gain as much for the people as possible, while the aim of Toryism was to increase the prerogative. That in the present case, the administration contended for the right of parliament, while the Americans talked of their belonging to the crown. Their language therefore was that of Toryism.13 The Americans, Josiah Tucker likewise complained, were either, in effect, oddly "pleading for the Extension of the Prerogative of the Crown . . . beyond all the Bounds of Law, Reason, and of Common Sense!" in Britain itself, or else adopting the even more "absurd" view that "though the King cannot do these strange things in England, yet he can do them all in America; because his Royal Prerogative, like Wire coiled up in a Box, can be stretched and drawn out to almost any Length, according to the Distance and Extent of his Dominions."14 William Markham, Archbishop of York, was even more expansive. The Americans, he proclaimed, "have used their best endeavours, to throw the whole weight and power of the colonies into the scale of the crown," and have therefore plainly rejected the settlement of "the glorious revolution."15 It was simply through "God’s good providence, that we had a Prince upon the throne, whose magnanimity and justice were superior to such temptations."16

The puzzle, for our purposes, is therefore as follows: how can we reconcile the unprecedented American embrace of the royal prerogative with the undeniable fact that Patriots took themselves to be defending the principle of popular sovereignty? How, in other words, could American theorists have supposed that by empowering the monarch they were simultaneously empowering the people? The answer, I shall suggest, is that a great many Patriots quite self-consciously adopted the political and constitutional theory of those who had waged the last great campaign against the "usurpations" of Parliament: the reviled Stuart monarchs of the seventeenth century. English Royalists had grounded their strident defense of prerogative power in a particular theory of

15 William Markham, A sermon preached before the Incorporated Society for the Propagation of the gospel in Foreign Parts (London: n.p., 1777), pp. 22-3. For a pro-American response to Markham (and to John Stuart, First Marquis of Bute, who had made the same argument) see William Bathurst, Lord Abingdon, Thoughts on Mr. Burke’s Letter to the Sheriffs of Bristol on the Affairs of America (Dublin: n.p., 1777), pp. 46-7.

representation — one that explained how the king could be regarded as the authorized agent of the people as a whole. But if the monarch’s power is truly "representative" in this sense, then his subjects can be regarded as self-governing. If, as Thomas Hobbes famously put it, "the King is the people," then it seems to follow that the people are king — even in an absolute monarchy.17 Patriots, of course, were not defending absolute monarchy, but they were advocating a kind of prerogativist constitutionalism that had been unimaginable in Britain itself for generations. They therefore felt called upon to challenge and repudiate the rival conception of popular sovereignty that had stood at the center of the Parliamentary and Whig traditions since the 1640s (and that forms the subject of Lorenzo Sabbadini’s chapter in the present volume (Chapter 7)): the notion that the people may only be said to be self-governing if they are exclusively subject to laws made by a "representative" popular assembly. The clash between these rival conceptions during the imperial crisis would come to organize American understandings of popular sovereignty in the 1780s.

II

After a number of forensic false starts, Patriots of the late 1760s and early 1770s settled on the view that Parliament possessed no jurisdiction whatsoever over the colonies.18 North America was now understood to be "outside of the realm," a separate dominion within the British Empire. It did not follow that the colonies were to be regarded as "independent states"; rather, they were to be understood as "dependent" solely on the person of the king, and not upon the "Legislature of Great Britain.

If the king was to play the role of "harmonizing" and "superintending" power in the empire, he would have to be radically unlike any monarch who had reigned in Britain for more than a century. James Wilson offered a definitive early statement of the mature Patriot conception of monarchy.

To the King is entrusted the direction and management of the great machine of government. He therefore is fitter to adjust the different wheels, and to regulate their motions in such a manner as to co-operate in the same general designs. He makes war: He concludes peace: He forms alliances: He regulates domestic trade by his prerogative; and directs foreign commerce by his treaties, with those nations, with whom it is carried on. He names the officers of government; so that he can check every erring movement in the administration. He has a negative in the different legislatures throughout his dominions, so that he can prevent any regurgitation in their different laws. The connection and harmony between Great-Britain and in, which it is her interest and ours mutually to cultivate; and on which her prosperity, as well as ours, so materially depends; will be better preserved by the operation of the legal prerogatives of the Crown, than by the exertion of an unlimited authority by Parliament.20

It was not unusual for English or American Whigs to express devotion to the king, to look upon him as a defender of their liberties, or to assign him what formally remained the constitutional executive powers of the Crown (the right to make war, treaties, etc.), but it was wholly unprecedented in Whig discourse to flee from parliamentary authority and seek safety in the "prerogatives of the Crown." It was equally stunning to include among those prerogatives the dreaded "negative voice"—which had not been exercised by a British monarch over a parliamentary bill since the reign of Anne, and which the king did not even enjoy on paper in several of the American colonies—and the power to "regulate domestic trade" (that is, trade within the Empire) as well as "foreign commerce."21

19 James Wilson, Considerations on the Nature and Extent of the Legislative Authority of the Branch Parliaments, or, (Philadelphia, 1783). Wilson's Scottish background may well have predisposed him to think in these terms: between 1603 (the accession of James I and VI) and 1707 (the Act of Union), Scotland and England had been distinct states sharing a common monarch. On this see LaCroix, Ideological Origins, pp. 24-9, 86-87. See also T. H. Green, "Ideology and Nationalism on the Eve of the American Revolution: Revisions Once More in Need of Revising," Journal of American History 84 (1997), pp. 13-39, esp. pp. 23-8.


21 An act vetoed the Scottish Militia Bill in 1702. The Hanoverian monarchs had of course used the veto to nullify acts of American colonial legislatures, a practice briefly followed by colonists of the earlier period.

22 The Crown lacked a negative voice in Rhode Island and Connecticut, which were charter colonies, as well as in proprietary Maryland (see J. R. Sprague, The Provincial

Wilson was particularly conscious of the radicalism of this final claim, but he boldly defended it nonetheless: "If the Commerce of the British Empire must be regulated by a general supervening power, capable of exerting its influence over every part of it, why may not this power be entrusted to the King, as a part of the Royal prerogative?"22 This vision of an imperial monarch governing his various dominions by prerogative soon came to be grounded in a revisionist historical understanding of the English seventeenth century. For, despite their immensely Whig upbringing, Patriots recognized that it was the early Stuart who had defended the conception of empire to which they were now committed. James I and Charles I had never permitted their parliaments to meddle in colonial affairs. They had regarded the colonies as private dominions of the Crown, to be governed by the royal prerogative, and had emphatically denied that such an arrangement was incompatible with the liberty of their subjects. Patriots consequently traced the origins of the imperial crisis of the 1760s to the defeat of the seventeenth-century Royalist cause. The first parliamentary bill legislating for America, the Navigation Act of 1651, had been passed in the wake of the regicide by the Long Parliament—the very same body that had first declared "all of the Dominions and Territories" of the Crown to be under "the Supreme Authority of this Nation, The Representatives of the People in Parliament."23 In the words of one American pamphleteer, it was only "after the death of King Charles the First" that "the Commonwealth


23 Wilson, Considerations, p. 34. By 1774 more dominion theories were prepared to argue pragmatically that, although Parliament lacked the right to regulate American trade, such a power might be "conceded" to it by the colonies as a purely discretionary measure (although this power would not include a license to impose "external taxes" i.e. duties). This was, for example, the position taken by the First Continental Congress in article four of its Declaration of Rights—although even this concession disappeared in its petition to the king of October 1774. The latter document closed with the insistence that "we wish not a diminution of the prerogative," but rather only to be rescued from Parliamentarian tyranny (Speech of the Continental Congress: 1774-1779, ed. Washington Claflin Ford et al., 34 vols. (Washington, DC: n.p., 1904-1937), I, p. 119.

Parliament, which usurped the rights of the Crown, naturally concluded, that by those rights they had acquired some kind of supremacy over the Colonies of America. This first act of legislative usurpation had been allowed to stand even after the Restoration of 1660, thus establish- ing a nefarious precedent that had been used to justify increasingly brazen encroachments by Parliament on the king’s prerogative to govern his possessions in America. In the great constitutional crisis of the seventeenth century, so Patriots came to believe, the Royalists had got it right after all.

At this point, however, a serious problem presented itself. Whig political theory, which had its origins in the Parliamentarian ideology of the 1640s, straightforwardly denied that rule by prerogative was compatible with the liberty of subjects or the sovereignty of the people. A legitimate representative, on the Whig account, must be a good representation, or image, of those represented. Accordingly, this view insisted that only an assembly reflecting the complex composition of the “body of the people” could be said to represent them—and that such an assembly might represent the entire body of the people even if many citizens did not elect members to it. The theory thus conveniently established two vital propositions: that the king could not be the representative of the people; and that the House of Commons could be the representative of the whole people, despite the fact that nine-tenths of the English population did not elect members to Parliament. But if the king was not the representative of the people, it followed that the existence and exercise of his various prerogative powers (particularly the “negative voice”) would place Englishmen in a state of servile dependence upon an arbitrary and alien will—that is, in the condition of slavery.

The most sophisticated and elaborate defense of this position was provided by Henry Parker in a series of influential pamphlets from the early 1640s, most notably the Observations upon some of His Majesty’s late Answers and Expressions (1642). Parker begins the Observations by endorsing the contractarian piety that political power originates with the people themselves and is then conveyed by them to magistrates “by a special trust of safety and libertie expressly by the people limited.” This formulation


might be taken to imply that the people may entrust their “safety and libertie” to any constellation of magistrates that they desire, but Parker emphatically denies that this is the case. The people in such a situation must act in accordance with reason, and no rational people, he tells us, would entrust political power to any person or agency whose will was not identical to their own—for so to do would be to forfeit their status as free men. The only legitimate representative for the people is one who is representative of the people. A people must be represented by an “image” or “likeness” of themselves in miniature, one that reflects their unique composition with such exactitude that the interests (and therefore the will) of the “representative body of the people” will be identical to the interests and will of the “natural body of the people.” Parker thus straightforwardly imports into political theory the technical vocabulary of the visual arts: a well-paired assembly represents the people in precisely the same sense that a good piece of what we still call “representational” art re-presents its subject.

Having defended this set of propositions about the character of political representation, Parker is able to argue that Parliament has the exclusive right to represent the people—that it justly “claims the entire right of all the Gentry and Commonalty of England.” The king is one man and, as such, cannot be said to be a good “representation” of a large and manifold people. Parliament, in contrast, is to be regarded as “virtually the whole kingdom it selfe” (that is, possessing its full “virtue,” or power) and as the “quintessence” of the people. Indeed, Parker claims revealingly that “in truth the whole Kingdom is not so properly the Author as the essence itself of Parliament.” The key point, in other words, is not that Parliament has been “authorized” by the people (i.e., that the kingdom is its “Author”), but rather that Parliament offers such a “geometrically proportionable” image of the people that the “essence” of the kingdom may be said to reside there. Parliament is “nothing else, but the very people it self artificially congregated” in a “Representative Body”—one to which “all the States doe so orderly contribute their due parts therein, that no one can be of any extreme predominance.” The perfection of the resulting image produces a unique congruity of interests between the representative and those represented: “that which is the sense of the whole Parliament, is the judgement of the whole Kingdom; and
that which is the judgement of the whole Kingdom, is more vigorous, and sacred, and unquestionable, and further beyond all appeal, than that which is the judgement of the King alone, without Council, or of the King with any other inferior Clandestine Council: 53 Parliament, insofar as it simply is the people "by virtue of representation united in a more narrow room," 54 will never "counsel or consent to any thing, but what is publicly advantageous"; i. "is indeed the State it self." 55 The case is entirely different with Charles I: "the King does not represent the people, but only in such and such cases: viz. in pleas of common nature betwixt subject and subject. Wherein he can have no particular ends; and at such or such times, viz. when there is not a more full and near representation by the Parliament." 56 The king, unlike Parliament, does not represent the people. He has "particular ends" of his own in most cases, and, because his will is not identical to that of the people, government by his prerogative constitutes enslavement.
It was this Parliamentarian theory that defenders of the British administration in the 1760s and 1770s invoked, under the rubric of "virtual representation," to explain why the American colonists were in fact represented in Parliament. Contemporaries easily recognized the provenance of the British position. "I am well aware," wrote Soame Jenyns in 1765, "that I shall hear Locke, Sidney, Selden, and many other great Names quoted, to prove that every Englishman, whether he has a Right to vote for a Representative, or not, is still represented in the British Parliament; in which Opinion they all agree." 56 The Patriot James Ingersoll likewise explained that, on the British view, the House of Commons "is supposed to represent, or rather to stand in the place of, the Commons, that is, of the great body of the people... when it is said they represent the Commons of England, it cannot mean that they do so because those Commons choose them, for in fact by far the greatest part do not, but because by their Constitution they must themselves be Commons, and not Peers, and so the Equals, or of the same Class of Subjects, with the Commons of the Kingdom." 57 That is, the House of Commons represents all English commoners because its members resemble them; it constitutes a good representation of the body of the people.
The next step was simply to extend this argument to embrace all British commoners, whether residing in Great Britain itself or in British dominions overseas. 58 As the loyalist Martin Howard, Jr., explained in 1765, "it is the opinion of the house of commons, and may be considered as a law of parliament, that they are the representatives of every British subject, wheresoever he be." 59 "The freedom and happiness of every British subject depends," Howard insisted, "not upon his share in elections, but upon the sense and virtue of the British parliament, and these depend reciprocally upon the sense and virtue of the whole nation." 60 The Patriot complaint that Americans were not represented in Parliament, on this account, betrayed a straightforward conceptual confusion. Thomas Whately, the administration spokesman who authored the Stamp Act, put it like this:

The inhabitants of the colonies are represented in Parliament: they do not indeed choose members of that Assembly; neither are there none tenth of the people of Britain Electors; for the Right of Election is annexed to certain Species of Property, to particular Franchises, and to Inhabitation in some particular Places; but these Descriptions comprehend only a very small part of the Land, the Property, and the People of this Island... all landed Property that is not Freehold, and all movéd Property whatsoever are excluded... Women and Persons under Age, be their Property ever so large, and all in Freehold, have none... none of them chuse their Representatives; and yet are they not represented in Parliament... The Colonies are in exactly the same situation: All British Subjects are really in the same; none are actually, all are virtually represented in Parliament; for every Member of Parliament sits in the House, not as Representative of his own Constituents, but as of that august Assembly by which all the Commons of Great Britain are represented. 61

56 Contemporary understood that also was the novel move in the 1760s; the doctrine of virtual representation within Britain itself had been advanced for more than a century. See, for example, The Crisis, Or, a full defence of the colonies (London: n.p., 1766), pp. 4-5; Maurice Moore, The Ideas and policy of taxing the American Colonies, in Great Britain, Considered (Whitinsville, NC: n.p., 1765), p. 11.
60 Ibid., p. 13.
61 [Thomas Whately], The Regulations Lately Made Concerning the Colonies and the Taxes Imposed Upon Them, Considered (London: n.p., 1765), pp. 188-189. Whately was Grenville's secretary, so this pamphlet clearly embodied a statement of the latter's own view. Note that Whately's position differs from Grey's in one subtle, but important, respect: for Grey, Members of Parliament should be regarded as "direct representatives of their own constituents, and the virtual representatives of every British commoner wherever he inhabits," whereas, for Whately, "all British Subjects are really in the same situation; none are actually, all are virtually represented as Parliament." Whately, in other words, endorses the orthodox Parliamentarian theory, according to which we are
Here again we have an orthodox statement of Parliament's representative theory, namely defined to the imperial context. Parliament represents the Crown. An agent can be said to speak or act in the name of the people, then, only if he possesses for that purpose the authority of the superintending person. Authority can be conferred in two ways: (1) by granting a mandate or (2) by formal appointment. The latter method is more appropriate for the Crown in the imperial context, as it is the supreme authority and its representatives must be formally appointed. In the case of Parliament, the authority of the Crown is transferred to the representatives through the act of commission. The commission is a formal document that appoints the representatives and delegates to them the authority to act in the name of the Crown. This is the basis for the representative theory, as it is clear that the representatives act on behalf of the Crown and not on their own authority. This is further supported by the fact that the representatives are not elected by the people but appointed by the Crown. Therefore, the representing agents are not authorized to act beyond their mandate, and their actions are limited to the powers granted to them by the commission. This is consistent with the representative theory, as it implies that the representatives act in the name of the people, but only as directed by the Crown. The representative theory is a useful tool for understanding the relationship between the Crown and its representatives, as it provides a clear framework for understanding the limits of their authority.
Again, authorisation is both necessary and sufficient to create a legitimate representative. It follows that a representative can come in any number of shapes and sizes: it can be one man, a few, or many. Hobbes utterly rejects the thought that a representative must resemble, or constitute a good likeness of those represented — that the "representative body" must re-present the "body of the people." 60 Kings are no less capable of representing the people than parliaments; it is authorisation through political covenant that allows magistrates, of whatever number or character, to act and speak in the name of the nation as a whole. A king's actions can therefore count as our actions and the subjects of a monarch may be regarded as self-governing. 61

For Patriot writers who adopted this theory in the 1770s, Parliament did not represent the people of British America because it had not been authorized to speak and act in their name — not because it did not constitute a "good image" of the colonists, or because Americans did not elect members to the House of Commons. At no point had the colonists entrusted political authority to the "legislature of Great Britain," although, counterfactually, they could certainly have done so. Parliament would then have been their legitimate representative, whether or not Americans elected members to it. In contrast, the people of British America had authorized the king and his successors to govern them in conjunction with the various colonial legislatures. This authorization had taken the form of colonial charters, to which

60 Indeed, Hobbes takes considerable pains to insist that there is simply no such thing as the "body of the people" before the creation of the sovereign representative. In the state of nature there is merely a "multitude" of individuals, they become a "people" only in virtue of sharing a common representative.

61 Hobbes took the view that any action of the sovereign must count as the subject's action, such that it is impossible to say that a subject may be "insulared" by his sovereign (Ibid., p. 270). But it was entirely possible to accept Hobbes's theory of representation while still rejecting his view about the powers inherent in it. Manhattan, unilaterally and unconstitutionally the original grant of authority: that is, one could argue that a king should be authorized to act as any representative in some respects, but not in others, or that his authorization should be conditional on good behavior. This is an important point to bear in mind as we turn to the American material. Indeed, it is worth noting that Adams, when discussing the theory of representation in the Deity, referred to Hobbes as "a man, however unhappy in his temper, or deformed by his principles, equal in genius and learning to any of his contemporaries" (John Adams, A Defence of the Constitution of Government of the United States of America, 3 vols. (London: C. Dilly, 1787-1788), III, p. 213); he likewise quoted Hobbes along with Harrington, Sydney, Northam and Locke as the authors on politics whom he had chiefly consulted before 1776 (John Adams, Diary and Autobiography, ed. L. H. Butterfield, 3 vols. (Cambridge, MA: Belknap Press of Harvard University Press, 1961), III, p. 359). Hobbes had precluded the cause of "simple monarchy and absolute power," but Adams saw that his theory of representation could be detached from these commitments.

62 The theory thus delivered the desired result: the king, and not Parliament, acted in the name of British Americans, and his government over them did not constitute enslavement. 63 The Patriot pamphleteer Edward Bancroft offered a canonical statement of this position in his Remarks on the Review of the Controversy between Great Britain and her Colonies (1769). The original settlers of North America, on his account, could certainly have chosen to make Parliament their representative had they wished to do so — this despite the impossibility of electing their own members to the House of Commons. But, as it happens, they did not enter into any such agreement: "not the least Provision is made therein [in the charters] for their Dependence, either on the law or Legislature of England, which are not even named in the Patents." 64 Lacking any such authorization, Parliament now governs the colonists "without their Consent" and for this reason alone cannot be described as "their Constitutional Representative." 65 Allegiance to the Crown and its succession, in contrast, is "provided for by clauses for that Purpose in their Charters." 66 The king has therefore been authorized to govern the colonies in conjunction with their legislatures, and this original authorization is constantly renewed by tacit consent (a Lockeian argument that Bancroft endorses unreservedly). 67 Bancroft's various disciples in the 1770s repeated and refined this analysis. In 1773 the Massachusetts House of Representatives declared in its reply to Thomas Hutchinson that "our Charters reserve great Power to the Crown in its Representative, fully sufficient to balance, analogous to the English Constitution, all the liberties and Privileges granted to the succeeding generations of British Americans had tacitly consented. 68 The theory thus delivered the desired result: the king, and not Parliament, acted in the name of British Americans, and his government over them did not constitute enslavement. 69

63 One deep problem with this argument, frequently pointed out by opponents, was that most American colonies did not have charters.

64 It is important to distinguish this position from the far more orthodox view that the king could not be regarded as the representative of the "the collective executive power of the whole realm" (see, e.g., Thomas Pownall, The Administration of the Colonies, 4th edn. (London: n.p., 1766), p. 134), or that the king, in executive, might be thought of as the "representative" of the legislative power of Great Britain (see, e.g., Pennsylvania Gazette, March 8, 1775, in American Archives: Fourth Series, I, p. 89; and Joseph Galloway, A Candid Examination of the several Claims of Great-Britain, and the Colonies (New York: n.p., 1775), pp. 7-8).


66 Ibid., pp. 19, 42. 67 Ibid., p. 45.

67 See, for example, Ibid., pp. 46-7; C. Arthur Lee, Observations on the Review of the Controversy between Great-Britain and her Colonies (London: n.p., 1769), pp. 22-3. Lee writes that he requirest only an "implied consent by representatives unequally and partially chosen," not that "the people should give their actual consent by deputies equally elected" (as he thinks Locke proposes).
People.\(^{57}\) But "is any Reservation of Power and Authority to Parliament thus to bind us, expressed or implied in the Charter? It is evident, that king Charles the first, the very Prince who granted it, as well as his Predecessor, had no such idea.\(^{58}\) In fact, the House concludes, the charters themselves "are repugnant to the Idea of Parliamentary Authority," and, for this reason, "if the Colonies were not annexed to the Realm, at the Time when their Charters were granted, they never could be afterwards, without their own special Consent, which has never since been had, or even asked.\(^{59}\) Again, it is not the fact that Americans do not elect members to the House of Commons that disqualifies Parliament from governing them; it is rather that they have not, by means of their charters, assigned Parliament the "authority" to govern them (although they might have done so at any time by annexing themselves to the realm). The colonists had, however, authorized the king to govern them, and the "great power" exercised by the Crown in America is therefore not incompatible with their status as free men.\(^{60}\)

By 1774 this view had become dominant among Patriot pamphleteers. James Iredell of North Carolina cited various statements of James I and Charles I in order to establish that the charters had intentionally "prohibited Parliament from interfering in our concerns, upon the express principle that they had no business with them.\(^{61}\) In contrast, the charters had authorized the king to exercise his prerogative rights over British America. Iredell is thus able to conclude as follows:

We respect and reverence the rights of the king; we owe, and we pay him allegiance, and we will scrupulously abide by the terms of our charters. These were purchased by the hard and severe labor of our ancestors, which procured for our Sovereign this fine country. But we will not submit to any alteration of the original terms of the contract, because these were the price for which the service was engaged, and in plein consideration of which it was alone performed.\(^{62}\)

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58 Ibid., p. 60.
60 Ibid., p. 60.
61 Cf. "To the Inhabitants of New York" (October 6, 1774): "Let that augur Assembly [Parliament] only relinquish all presence of right to govern the British Colonies in America, and leave that to whom it solely and exclusively belongs, namely the King, our lawful Sovereign, with his Parliament in the respective Colonies, and the Americans have a Constitution without seeking further" (American Archives: Fourth Series, I, p. 826).
63 Ibid., p. 214.
66 Hamilton had made precisely the same argument in a pamphlet published the previous year. See [Alexander Hamilton], A Full Vindication of the Measures of the Congress (New York: n.p. 1778), p. 7.
as embodying their consent. As one anonymous English pamphlet put
it, "no Part of the Property of the People can be taken from them, but
by laws which receive the assent of the Sovereign, who has no Interest
distinct from the general Interest of all his Subjects."* The PATRONS,
of course, had an answer to this objection: on their account, the king had
indeed been authorized to exercise a number prerogative powers o
British Americans, but not to tax them without the consent of their colo-
nial legislatures. His assent to a parliamentary tax bill therefore did not
express the consent of the colonists to be taxed. But PATRONS, clearly preferred to avoid this discussion altogether by reserving the
term "representative" for the members of their colonial legislatures. This
rhetorical sleight of hand, however, amounted to very little in substantive
terms. If I can be said to have authorized the king to govern me, such
that his actions are to count as my actions, then his government over me
is fully compatible with my status as a free man. Once I have accepted
this conclusion, it matters not at all that I decline, for semantic or tactical
reasons, to call the king my "representative" — for, at this point, to say that
the king is not my representative has no normative bite (it is no longer
to say that his government over me constitutes rule by an alien will, and
thus amounts to slavery).* Not all PATRONS, however, adopted this straightforwardly Royalist posi-
tion on the question of representation. While they were willing to agree
that authorization was both necessary and sufficient for representation,
some gravitated instead toward the view that authorization could only
be conveyed through voting. Only a magistrate for whom I have voted is
titled to claim that he has been authorized to act in my name, and that he
is therefore my representative. This argument, periodically advanced
but underdeveloped in the first half of the 1760s, would be formulated
with increasing sophistication as the conflict progressed. In 1769, John
Joachim Zuby's *Humble Enquiry* made the case that "the people have
not representatives assigned, but chose them, and being so chosen, the
rights of the people reside now in them."* Every representative in Par-
lament," Zuby insisted, "is not a representative for the whole nation,
but only for the particular place for which he has been chosen ... The
electors of Middlesex cannot choose a representative but for Middlesex,
and as the right of sitting depends entirely upon the election, it seems
clear to demonstration, that no member can represent any but those by
whom he hath been elected; if not elected he cannot represent them, and
of course not consent to any thing in their behalf.** The implications of
this position were quite sweeping, as Zuby himself appreciated:
If representation arises entirely from the free election of the people, it is plain
that the elected are not representatives in their own right, but by virtue of their
election; and it is no less so, that the electors cannot confer any right on those
whom they elect but what is inherent in themselves; the electors of London
cannot confer or give any right to their members to lay a tax at Westminster,
but the election made of them doubtless empowers them to agree to or differ
from any measures they think agreeable or disagreeable to their constituents,
or the kingdom in general. If the representatives have no right but what they
derve from their electors and election, and if the electors have no right to elect
any representatives but for themselves, and if the right of sitting in the House
of Commons arises only from the election of those designed to be representatives,
it is undeniable, that the power of taxation in the House of Commons cannot
extend any further than to those who have delegated them for that purpose; and
if none of the electors in England could give a power to those whom they elected
represent or tax any other part of his Majesty's dominions except themselves,
it must follow, that when the Commons are met, they represent no other place or
part of his Majesty's dominions, and cannot give away the property but of those
who have given them a power to do so by choosing them their representatives.***
This passage embodies the most complete possible rejection of the Parlia-
mentarian theory of virtual representation, as well as perhaps the boldest
single pre-Revolutionary statement of the view that authorization requires
voting. On Zuby's account, only a magistrate for whom I have voted can
be said to represent me. Those elected by others do not represent me,
although they may certainly take it upon themselves to act in my interests
once in office.
The most influential elaboration of Zuby's view was offered by Wil-
son in his 1774 *Considerations* — a pamphlet that established the terms
in which Wilson and his acolytes would discuss the theory of represen-
tation for the next twenty years. Wilson begins by endorsing both the
authorization theory of representation and the election theory of autho-
rization: he insists that a free man must be governed by magistrates whom

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68 A number of theorists acknowledged this point after the imperial crisis had passed. See, for example, R. Arthur Adams, *An Election Sermon* (Boston, 1782) in C. Hymann and D. S. Lunsford (eds.), *American Political Writing during the Founding Era, 1760-1805* , 2 vo. (Indianapolis: Liberty Fund, 1993), 5, pp. 543-5. Adams agrees that "the
be deprived of the power of choosing our rulers is to be deprived of self dominion," but he
lywise insists that the people may choose a hereditary monarch in their "representa-
9 [John Joachim Zuby], *An Humble Enquiry into the Nature of the Dependency of the Ameri-
can Colonies* (Charlestown: n.p., 1769), p. 21.
10 Ibid., pp. 17-18. Cf. William Drayton, who argued that the consent of "American
Fireholders . . . is not signified in Parliament, by a Representation of their own election" (emphasized in original): William Drayton, A Letter from a Freeman of South Carolina, to
the Deputies of North-America, Addressed to the High Court of Congress at Philadelphia
he himself has authorized, and that authorization must take the form of voting. It follows that the only citizens who may safely be deprived of the franchise are those who are not free men — i.e. those persons who are dependent on the will of others for their livelihoods. "All those are excluded from voting," Wilson explains, "whose poverty is such, that they cannot live independent, and must therefore be subject to the undue influence of their superiors. Such are supposed to have no will of their own; and it is judged improper that they should vote in the representation of a free state." But these are the only exceptions. All free men must be governed by laws to which their representatives have consented, and they may only be represented by agents for whom they have voted. Armed with these arguments, Wilson is prepared to offer a remarkable account of the English constitution and the character of the imperial crisis:

Though the concurrence of all the branches of the Legislature [Parliament] is necessary to every law; yet the same laws bind different persons for different reasons, and on different principles. The King is bound, because he assented to them. The Lords are bound, because they voted for them. The Representatives of the Commons, for the same reason, bind themselves, and those whom they represent. If the Americans are bound neither by the assent of the King, nor by the votes of the Lords to obey Acts of the British Parliament, the sole reason why they are bound, is, because the representatives of the Commons of Great-Britain have given their suffrages in favor of those Acts. But are the representatives of the Commons of Great Britain the representatives of the Americans? Are they elected by the Americans? Are they such as the Americans, if they had the power of election, would probably elect? Do they know the interest of the Americans? Does their own interest prompt them to pursue the interest of the Americans? If they do not pursue it, have the Americans power to punish them? Can the Americans remove unfaithful members at every new election? Can members, whom the Americans do not elect; with whom the Americans are not connected in interest; whom the Americans cannot remove; over whom the Americans have no influence — can such members be styled, with any propriety, the magistrates of the Americans? Wilson flirts with several different arguments in this passage (his statement that Members of Parliament and British Americans "are not connected in interest" amounts to an internal critique of the parliamentary theory), but its basic thrust is unmistakable. Wilson argues that the House of Commons is only the representative of the English people, not (as the Parliamentarians had insisted) because it alone constitutes a good likeness or representation of the people, but because only its members are elected and, therefore, authorized by the people. The king and Lords are unelected and, therefore, unauthorized to govern Englishmen without the consent of the House of Commons, and the House of Commons is unelected by Americans and therefore unauthorized to govern them. As Wilson explains, "allegiance to the King and obedience to the Parliament are founded on very different principles. The former is founded on protection: The latter, on representation. An inattention to this difference has produced, I apprehend, much uncertainty and confusion in our ideas concerning the connexion, which ought to subsist between Great-Britain and the American Colonies. Representation requires authorization, and authorization requires voting. Here we see the stark dividing line between Wilson's authorization theory and the Parliamentarian theory of virtual representation. For Wilson, a single first magistrate or a small deliberative body may be said to represent the people, so long as he or they have been elected by the entire population of free men. Wholly absent from this view is the thought that a representative must be a good "representation" of the "body of the people" — i.e. a large assembly. But the line of demarcation between Wilson's theory and the Royalist theory of representation is equally clear: if representation requires authorization, and if authorization requires voting, then a hereditary monarch cannot be said to represent the people (leaving Wilson's defense of the royal prerogative on very shaky ground indeed)."
Yet, as both loyalists and the more circumspect Patriots quickly realized, this election theory of authorization was a hopeless muddle. John Lind identified its great liability as follows: if it were true of free men

that their own personal consent, or the personal consent of their representative is necessary to render a tax legal...it would follow, that no representative could be chosen but by the unanimous consent of every constituent, that no law could pass without the unanimous consent of every representative...Yet this principle, pregnant with such fatal consequences, have many of the friends of America chosen as a shield to protect the colonies against the power of the British legislature. This principle has the same extravagance laid down as the corner stone of British freedom. 78

In other words, the Wilsonian view that representation requires authorization and that authorization requires voting is tantamount to a defense of anarchy. For in every election there are citizens who vote for the losing candidate, and in almost every legislative controversy there are representatives who vote against the exprezzus law. If it is really the case that one cannot be represented by a magistrate for whom one has not voted, and that one cannot be said to have authorized a law for which one's representative has not voted, then it would appear that there are only two choices: to grant every citizen a veto over the election of representatives, and every representative a veto over the enactment of laws, or to accept the enslavement of large numbers of citizens. 79

The alternative is to argue that our authorization is conveyed, not by voting per se, but rather by our continuing, tacit consent to be bound by whatever decisions emerge out of the institutional scheme under which we live (a scheme perhaps initially authorized by our forebears at a moment of original contract), whether we agree with these decisions or not -- and whether the particular magistrates for whom we ourselves voted happen to support them or not. But if this is the case, then the argument delivers a momentous result: namely, that an unelected monarch might be the representative of the people. For why, on this account, am I more thoroughly "represented" by a majority of legislators for whom I have not voted than I am by a king for whom I have not voted? The Royalist provenance of the authorization argument becomes obvious and inescapable.

III

All of those who supported ratification of the new federal constitution in 1787 -- which notably featured a prerogative-wielding chief magistrate

78 Lind, Remarks, p. 66.
79 For precisely the same argument see Tucker, A Letter from a Man-church, pp. 66-7. Note that Franklin's response to Tucker on this point begs the question ("Marginalia in a Pamphlet by Josiah Tucker," in FBF, XVII, p. 563).

Prerogative, popular sovereignty, and the American founding

at its center -- believed that the new frame of government instantiated the sovereignty of the people. But they believed this for very different reasons. The most emphatic defender of the Royalist conception of the federal and state constitutions was undoubtedly John Adams. For Adams, "in America, the right of sovereignty resides indubitably in the body of the people" simply because the people had authorized the institutions and magistrates of the state to act on their behalf. 80 The people of the United States would have been no less sovereign had they chosen instead to be governed by a hereditary monarch. "If the original and fountain of all power and government is in the people, as undoubtedly it is," Adams argued, then "the people have as clear a right to erect a single monarchy, aristocracy, or democracy, or an equal mixture, or any other mixture of all three, if they judge it for their liberty, happiness, and prosperity, as they have to erect a democracy...and the wisest nations that ever lived, have preferred such mixtures, and even with such standing powers as ingredients in their compositions." 81 Moreover, "even those nations who choose to reserve in their own hands the periodical choice of the first magistrate, senate, and assembly, at certain stated periods, have as clear a right to appoint a first magistrate for life as for years, and for perpetuity in his descendants as for life." 82

Adams amplified his argument in a striking passage:

An hereditary limited monarch is the representative of the whole nation, for the management of the executive power, as much as a house of representatives is, as one branch of the legislature, and as guardian of the public purse; and a house of lords, too, or a standing senate, represents the nation for other purposes, namely, as a watch set upon both the representative and the executive power. The people are the fountain and original of the power of kings and lords, governors and senators, as well as the house of commons, or assembly of representatives. And if the people are sufficiently enlightened to see all the dangers that surround them, they will always be represented by a distinct personage to manage the whole executive power. 83

Rejecting both the Parliamentary view that only an assembly could represent the people (which he associated above all with Marchamont Nedham) and the election theory of authorization, Adams insists that any agency authorized by the people to act on their behalf is properly called a "representative" -- whether elected or not, whether unitary or composite. A single hereditary monarch might be the representative of the people, and, a fortiori, if the people are wise enough to parcel out political authority among several "standing powers as ingredients" in

82 Ibid., p. 367.
83 Ibid., pp. 367-8.
an overarching scheme, a single first magistrate, whether elected for life or "for years," is likewise to be considered as the representative of the people. And if a people is governed exclusively by "representative" power, that people may be said to be self-governing and, hence, sovereign.

James Wilson agreed with Adams that the new constitution was consistent with the requirements of popular sovereignty, but, unsurprisingly, he defended this claim on very different grounds. In his "Lectures on Law," delivered in 1790 at the College of Philadelphia, he offered a comparison between the English constitution and the new constitution of the United States. In England, he explained, the principle of representation extends only to the House of Commons, because only the Commons are elected (and only imperfectly at that, given the restrictions on the franchise that Wilson continued to bemoan). But in the new United States the case was entirely different: "the American States enjoy the glory and the happiness of diffusing this vital principle throughout all the different divisions and departments of the government." In America, all "departments" of government (executive, legislative, and judicial) in all "divisions" (state and federal) may be said to represent the people because all magistrates are elected by the entire population of free men (or are chosen by those who have been so elected) — and have therefore been authorized by the people. "The right of representing," Wilson explained, "is conferred by the act of electing." It was for this reason that Wilson zealously (and unsuccessfully) advocated the direct election of both senators and the president, whereas Adams and so many others were completely untroubled by the indirect election of these office-holders.

Wilson's distinctive position on the theory of representation, in turn, explains his celebrated claim (with which I began) that "the practical recognition of the principle of popular sovereignty "was reserved for the honor of this country" (i.e. the United States). The people of Great Britain, on his account, cannot be regarded as sovereign because only one-third of their supreme legislature can claim to represent them. Because a hereditary monarch cannot represent the people, any "original contract" between king and nation must be taken to "exclude, rather than to imply delegated power." In other words, some share of political authority is transferred from the people to the king in Britain, whereas

the totality of it is derived from them in the United States. Only when all of those entrusted with the making of law are elected by the people, on Wilson's account, can the people be said to be sovereign.

Few Federalists troubled to make clear exactly which theory of authorization undergirded their claim that the new constitution secured the sovereignty of the people — that is, whether, on their account, the president and senate would represent the people in virtue of being elected by them in some attenuated sense (Wilson's theory), or in virtue of the fact that Americans would authorize all magistrates, however chosen, to act on their behalf by submitting to the constitution (Adams's theory).

In the context of the ratification debates there was no need to address this question, since both theories of authorization delivered the desired result: each established that, pace the Parliamentary theory of the anti-Federalists, a single man, or a small group of men, could be said to represent the body of the people. But this strategic ambiguity on the part of the framers would have serious consequences for the future of American political thought. It would efface the crucial fact recognized by Adams and the other veterans of the pamphlet wars of the 1770s: that if popular sovereignty in America does not rest on the Royalist theory of representation, it rests on nothing.

87 Ibid., p. 312.
88 Ibid., p. 364.
Popular Sovereignty in Historical Perspective

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