8 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.[1] 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

[1] Jonathan Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (Washington, DC: n.p., 1836), II, p. 455.
[2] Ibid., p. 456. [3] Ibid. [4] ibid., pp. 478, 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 Wilson 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."[5] 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.[6]

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."[7] The young Alexander Hamilton went so far as to declare in 1775 that the king "is the only Sovereign of the empire," such that "the part which the people have in the legislature, may more justly be considered as a limitation of the Sovereign authority."[8] 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.

5 *The Records of the Federal Convention of 1787*, ed. M. Farrand, 3 vols. (New Haven: n.p., 1911), I, p. 65. An extended version of the argument that follows may be found in E. Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge, MA: Harvard University Press, 2014).

6 Thomas Hart Benton, *Thirty Years' View, Or A History of the Working of the American Government for Thirty Years, From 1820–1850*, 2 vols. (New York: n.p., 1858), I, p. 58.

7 Franklin to Samuel Cooper, June 8, 1770, in Benjamin Franklin, *The Papers of Benjamin Franklin*, ed. W. B. Willcox et al., 39 vols. (New Haven: Yale University Press, 1977–2008; henceforth *PBF*), XVII, p. 163.

8 [Alexander Hamilton], *The Farmer Refuted: or, A more impartial and comprehensive View of the Dispute between Great-Britain and the Colonies* (New York: n.p., 1775), p. 16. Cf. "Marginalia in *An Inquiry*, an Anonymous Pamphlet," in *PBF*, XVII, p. 345 ("the King . . . alone is the Sovereign").

Very different is the case with regard to the Parliament. The Lords and Commons have a separate interest to pursue."[9] John Adams similarly reflected that, if he had understood the Revolution to embody a campaign against monarchy, he "would never have drawn his sword."[10] 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 Parliaments. Pretty Burlesque!"[11]

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."[12] 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 parliamentary majority (and who themselves sat in one of the two Houses). Patriots of the late 1760s and 1770s were effectively proposing to turn back the clock on the English constitution by over a hundred years – to separate the king from his Parliament and his British ministers, and to restore ancient prerogatives of the Crown that had been extinguished by the Whig ascendancy. These theorists wanted more monarchy, not less.

Defenders of the British administration fully recognized the radicalism of the American position. Lord North observed in the House of Commons that the Patriot program could not be described as remotely "Whig": "If he understood the meaning of the words Whig and Tory . . . he conceived that it was characteristic of Whiggism to

9 Hamilton, *Farmer Refuted*, p. 18.

10 William Maclay, *Journal of William Maclay: United States Senator from Pennsylvania, 1789–1791*, ed. E. S. Maclay (New York: n.p., 1890), p. 10.

11 John Barker, *The British in Boston: Being the Diary of Lieutenant John Barker of the King's Own Regiment from November 15, 1774 to May 31, 1776*, ed. E. E. Dana (Cambridge, MA: Harvard University Press, 1920), p. 40. See also Lieutenant William Fielding to Major Generals William Howe, John Burgoyne, and Henry Clinton, June 1775, in M. Balderston and D. Syrett (eds.), *The Lost War: Letters from British Officers during the American Revolution* (New York: n.p., 1975), pp. 29–30; and the "Extract of a Letter from the Camp at Cambridge" published in the *New-York Gazette* on July 24, 1775. For a similar incident in New York see *Pennsylvania Evening Post* (March 11, 1775).

12 Hamilton, *Farmer Refuted*, 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

[13] *The Parliamentary History of England: From the Earliest Period to the Year 1803*, ed. T. C. Hansard, 36 vols. (London, 1806–1820), XVIII, p. 771. Cf. "A Revolution Whig," *Scots Magazine* 37 (1775), p. 646.

[14] Josiah Tucker, *A Letter from a Merchant in London to His Nephew in North America* (London: n.p., 1766), pp. 7–8.

[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 Marquess of Bute, who had made the same argument) see Willoughby Bertie, 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.

[16] On this theme see G. H. Guttridge, *English Whiggism and the American Revolution* (Berkeley: University of California Press, 1966), esp. pp. 61–3; and P. Langford, "New Whigs, Old Tories, and the American Revolution," *Journal of Imperial and Commonwealth History* 2 (1980), pp. 106–130, esp. pp. 110–112.

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 Parliamentarian 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." But

[17] Thomas Hobbes, *On the Citizen*, ed. R. Tuck and M. Silverthorne (Cambridge: Cambridge University Press, 1998), p. 137.

[18] The best account of the broad contours of this "dominion theory" remains C. H. McIlwain, *The American Revolution: A Constitutional Interpretation* (New York: Macmillan, 1923), pp. 114–147. See also A. Lacroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), chaps. 2 and 3; B. McConville, *The King's Three Faces: The Rise and Fall of Royal America, 1688–1776* (Chapel Hill: University of North Carolina Press, 2006), pp. 250–261; M. S. Flaherty, "More Apparent than Real: The Revolutionary Commitment to Constitutional Federalism," *Kansas Law Review* 45 (1996–1997), pp. 993–1014; J. C. D. Clark, *The Language of Liberty, 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge: Cambridge University Press, 1994), pp. 93–110; J. P. Reid, *Constitutional History of the American Revolution: The Authority of Law* (Madison: University of Wisconsin Press, 1993); J. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Knopf, 1979), pp. 34–41; G. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), pp. 344–354; and B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967), pp. 216–229.

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 fittest 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 jarring movement in the administration. He has a negative in the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws. The connection and harmony between Great-Britain and us, 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.[19]

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."[20] 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,[21] 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."[22]

[19] James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (Philadelphia: n.p., 1774), p. 33. 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. Breen, "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.

[20] Wilson's language here echoes that of the New York pamphleteer William Hicks. See [William Hicks], *Considerations upon the Rights of the Colonists to the Privileges of British Subjects* (New York: n.p., 1766), p. 21. For the demonization of prerogative in pre-Revolutionary America see J. P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge: Cambridge University Press, 2010), pp. 32–3, 60–1.

[21] Anne vetoed the Scottish Militia Bill in 1707. The Hanoverian monarchs had of course used the veto to nullify acts of American colonial legislatures, a practice bitterly opposed 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 R. J. Spitzer, *The Presidential Veto: Touchstone of the American Presidency* (Albany: State University of New York Press, 1988), p. 8). For the centrality of prerogative in the dominion theory see the insightful, albeit brief, discussion in J. G. Marston, *King and Congress: The Transfer of Political Legitmacy, 1774–1776* (Princeton: Princeton University Press, 1987), pp. 36–9. See also J. P. Reid, *Constitutional History of the American Revolution: The Authority of Law* (Madison: University of Wisconsin Press, 1993), pp. 151–162 (whose discussion is indebted to Marston), as well as the suggestive remarks in E. S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988), p. 244.

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 superintending 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?"[23]

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 impeccably Whig upbringing, Patriots recognized that it was the early Stuarts 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."[24] 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 most dominion theorists 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 matter (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 (*Journals of the Continental Congress: 1774–1789*, ed. Worthington Chauncey Ford et al., 34 vols. (Washington, DC: n.p., 1904–1937), I, p. 119.

[24] "An Act declaring and constituting the people of England to be a Commonwealth" (1649), in *Acts and Ordinances of the Interregnum, 1642–1660*, 3 vols., ed. C. H. Firth and R. S. Rait (London: HMSO, 1911), II, p. 122. More technically, it was the "Rump" Parliament that passed this measure.

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."[25] This first act of legislative "usurpation" had been allowed to stand even after the Restoration of 1660, thus establishing 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 Majesties late Answers and Expresses* (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."[26] This formulation

25 "Edmund Burke" [pseud.], "To the Right Honourable Lord North" (1774), in *American Archives Fourth Series*, 6 vols., ed. Peter Force (Washington, DC: n.p., 1837), I, p. 339. This claim was endlessly repeated in the late 1760s and 1770s.

26 [Henry Parker], *Observations upon some of His Majesties late Answers and Expresses* (London: n.p., 1642), p. 5. My discussion of the 1640s debate over representation is deeply indebted to Q. Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13 (2005), pp. 155–184. For an astute early study of Parker's theory see M. A. Judson, "Henry Parker and the Theory of Parliamentary Sovereignty," in C. Wittke (ed.), *Essays in History and Political Theory: In Honor of Charles Howard McIlwain* (Cambridge, MA: Russell & Russell, 1936), pp. 138–167.

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 to do so 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-poised 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 ague that Parliament has the exclusive right to represent the people – that it justly "claimes the entire rite of all the Gentry and Commonalty of England."[27] 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 kingdome it selfe" (that is, possessing its full "virtue," or power) and as the "quintessence" of the people.[28] Indeed, Parker claims revealingly that "in truth the whole Kingdome is not so properly the Author as the essence itselfe of Parliaments."[29] 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"[30] – one to which "all the States doe so orderly contribute their due parts therein, that no one can be of any extreame predominance."[31] 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

27 Parker, *Observations upon Some of His Majesties Late Answers and Expresses*, p. 15.

28 Henry Parker, *Some Few Observations upon His Majesties Late Answer to the Declaration or Remonstrance of the Lords and Commons of the 19th of May, 1642* (London: n.p., 1642), p. 4; Parker, *Observations upon Some of His Majesties Late Answers and Expresses*, p. 28.

29 Parker, *Observations upon Some of His Majesties Late Answers and Expresses*, p. 5.

30 [Henry Parker], *Ius Populi* (London: n.p., 1644), p. 18.

31 Parker, *Observations upon Some of His Majesties Late Answers and Expresses*, p. 15.

that which is the judgement of the whole Kingdom, is more vigorous, and sacred, and unquestionable, and further beyond all appeal, then that which is the judgement of the King alone, without Councell, or of the King with any other inferiour Clandestine Councell."[32] Parliament, insofar as it simply is the people "by vertue of representation united in a more narrow room,"[33] will never "counsel or consent to any thing, but what is publickely advantageous"; it "is indeed the State it self."[34] The case is entirely different with Charles I: "the King does not represent the people, but onely 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 neer representation by the Parliament."[35] 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."[36] 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 Commoners, and not Peers, and so the Equals, or of the same Class of Subjects, with the Commons of the Kingdom."[37] That is, the House of Commons

[32] Parker, *Some Few Observations*, p. 9.
[33] [Henry Parker], *The Contra-Replicant, His Complaint to His Maiestie* (London: n.p., 1643), p. 16.
[34] Parker, *Observations upon Some of His Majesties Late Answers and Expresses*, pp. 9, 34.
[35] Parker, *Ius Populi*, p. 19.
[36] Soame Jenyns, *The Objections to the Taxation of Our American colonies . . . Examined* (London: n.p., 1765), p. 8.
[37] Letter to Governor Thomas Finch, February 11, 1765, Jared Ingersoll, "A Selection from the Correspondence and Miscellaneous Papers of Jared Ingersoll," in F. B. Dexter (ed.), *9 Papers of the New Haven Colony Historical Society* (New Haven: n.p., 1918), pp. 201–472, at p. 307.

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.[38] 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."[39] "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."[40] 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 chuse members of that Assembly; neither are nine tenths of the people of Britain Electors; for the Right of Election is annexed to certain Species of Property, to particular Franchises, and to Inhabitancy 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 monied 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 one of that august Assembly by which all the Commons of Great Britain are represented.[41]

[38] Contemporaries understood that *this* was the novel move in the 1760s; the doctrine of virtual representation within Britain itself had been attested for more than a century. See, for example, *The Crisis, Or, a full defence of the colonies* (London: n.p., 1766), pp. 4–6; Maurice Moore, *The Justice and policy of taxing the American Colonies, in Great Britain, Considered* (Wilmington, NC: n.p., 1765), p. 12.
[39] [Martin Howard, Jr.], *A Letter from a Gentleman At Halifax* (Newport, RI: n.p., 1765), p. 11.
[40] Ibid., p. 13.
[41] [Thomas Whately], *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed Upon Them, Considered* (London: n.p., 1765), pp. 108–109. 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 Gray's in one subtle, but important, respect: for Gray, 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 in Parliament." Whately, in other words, endorses the orthodox Parliamentarian theory, according to which we are

Here again we have an orthodox statement of Parker's Parliamentarian theory, suitably adapted to the imperial context. Parliament represents the inhabitants of the empire by virtue of its status as a good representation of the body of the people; because its interests are aligned with their interests, it can justly be regarded as "virtually" the whole people – that is, as possessing their "virtues," or powers.

A second administration pamphleteer, John Lind, was even more emphatic on this point: "It is not essential to the character of a freeman who is to contribute a tax, that he have a right of voting for his representative. The greater part of the subjects of England, though they contribute to taxes, have no right of voting for their representatives."[42] Yet it by no means followed, on his account, that most Englishmen were governed by an alien will and were therefore to be regarded as slaves. One should not suppose that representatives, rightly understood, are agents who act by "the authority of their constituents" – that is, by virtue of having been directly "authorised" in some fashion (e.g. through elections). Quite the contrary, to "represent" a people is simply to "display, set forth – 'the condition of their country,'" and a legitimate representative is "a body of men chosen by a part of the community; but so circumstanced and related to the rest, that they cannot have or think they have any separate interests of their own to pursue, to the prejudice of the rest."[43] Parliament is plainly such a body: "it is the circumstances, it is the particular relation, that body stands in, to the whole community" which ensures that "they cannot have, they cannot think they have, a separate and distinct interest from the rest of the community."[44] Parker's familiar argument that Parliament (and only Parliament) is the English people had become the administration argument that Parliament (and only Parliament) is the British people.

In order to undermine this Whig equation of popular sovereignty with rule by a popular assembly, a great many Patriots turned momentously to the rival theory of representation that had been formulated by English Royalists in the 1640s – one according to which it is authorization, not resemblance (or "representativeness"), that is both necessary and

represented ("virtually present") so long as we are adequately "displayed" in a popular assembly – there is, on his account, no other sense in which individuals can be represented (the idea of an "actual," or "non-virtual" kind of representation is incoherent). Gray, in contrast, endorses a distinction between "real" and "virtual" representation, according to which electors are both "actually" and "virtually" represented, whereas nonelectors are only "virtually" represented.

42 [John Lind], *Remarks on the principal acts of the thirteenth Parliament of Great Britain* (London: n.p., 1775), p. 66.

43 Ibid., pp. 71, 84. 44 Ibid., p. 73.

sufficient to establish the legitimacy of a representative. If any authorized agent can be said to speak or act in the name of the people, then plainly a king, no less than a popular assembly, is capable of "representing" his people, from which it follows that the people can be said to be "sovereign" under the rule of a monarch who wields prerogative powers. Sir John Spelman and Dudley Digges had both offered explicit defenses of this position as early as 1643, but the most systematic statement of the Royalist theory was offered by Thomas Hobbes in his *Leviathan* (1651).[45] Hobbes begins his celebrated discussion by offering a definition of the word "person":

> A PERSON, is he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether Truly or by Fiction. When they are considered as his owne, then is he called a Naturall Person: And when they are considered as representing the words and actions of another, then is he a Feigned or Artificiall person.[46]

Some of these "Persons Artificall" have "their words and actions Owned by those whom they represent"; in such cases,

> the Person is the Actor; and he that owneth his words and actions, is the AUTHOR: In which case the Actor acteth by Authority . . . So that by Authority, is always understood a Right of doing any act: and done by Authority, done by Commission, or Licence from him whose right it is. From hence it followeth, that when the Actor maketh a Covenant by Authority, he bindeth thereby the Author, no lesse than if he had made it himselfe; and no lesse subjecteth him to all the consequences of the same.[47]

For Hobbes, to be a representative is simply to have one's words and deeds "owned" by an "author," such that one's actions count as the actions of another. In the political context, a representative is created when a number of individuals

> conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie.[48]

45 See [Sir John Spelman], *A View of a printed book intituled observations upon his Majesties late answers and expresses* (London: n.p., 1643), pp. 7, 25; and Dudley Digges, *The unlawfulness of subjects taking up arms* (London: n.p., 1643), pp. 33, 67, 151–2.

46 Thomas Hobbes, *Leviathan*, ed. N. Malcolm, 3 vols. (Oxford: Clarendon Press, 2012), II, p. 244.

47 Ibid., I, pp. 244–6. 48 Ibid., p. 260.

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."[49] Kings are no less capable of representing the people than parliaments; it is authorization 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.[50]

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

[49] 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.

[50] Hobbes took the view that *any* action of the sovereign must count as the subject's action, such that it is incoherent to say that a subject may be "injured" 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 open-endedness and unconditionality of the original grant of authority: that is, one could argue that a king should be authorized to act as my 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 *Defence*, referred to Hobbes as "a man, however unhappy in his temper, or detestable for his principles, equal in genius and learning to any of his contemporaries" (John Adams, *A Defence of the Constitutions of Government of the United States of America*, 3 vols. (London: C. Dilly, 1787–1788), III, p. 211); he likewise listed "Hobbs" along with Harrington, Sydney, Nedham and Locke as the authors on politics whom he had chiefly consulted before 1776 (John Adams, *Diary and Autobiography of John Adams*, ed. L. H. Butterfield, 3 vols. (Cambridge, MA: Belknap Press of Harvard University Press, 1961), III, p. 359). Hobbes had preached the cause of "simple monarchy and absolute power," but Adams saw that his theory of representation could be detached from these commitments.

succeeding generations of British Americans had tacitly consented.[51] 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.[52]

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."[53] Lacking any such authorization, Parliament now governs the colonists "without their Consent" and for this reason alone cannot be described as "their Constitutional Representative."[54] Allegiance to the Crown and its succession, in contrast, is "provided for by clauses for that Purpose in their Charters."[55] 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 Lockean argument that Bancroft endorses unreservedly).[56]

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

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

[52] It is important to distinguish this position from the far more orthodox view that the king could 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., 1768), p. 134), or that the king, as 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 mutual Claims of Great-Britain, and the Colonies* (New York: n.p., 1775), pp. 7–8).

[53] [Edward Bancroft], *Remarks on the Review of the Controversy between Great Britain and her Colonies* (New London, CT: n.p., 1771), p. 21.

[54] Ibid., pp. 19, 42. [55] Ibid., p. 45.

[56] See, for example, ibid., pp. 46–7. Cf. 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 requires 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 fully 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 sacredly 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 pleasing consideration of which it was alone performed.[62]

[57] *The Briefs of the American Revolution: Constitutional Arguments Between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdoin for the Council and John Adams for the House of Representatives*, ed. J. P. Reid (New York and London: New York University Press, 1981), p. 73.
[58] Ibid., p. 60. [59] Ibid., pp. 58–9.
[60] Cf. "To the Inhabitants of New York" (October 6, 1774): "Let that august Assembly [Parliament] only relinquish all pretence 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).
[61] James Iredell, *The Life and Correspondence of James Iredell, One of the Associate Justices of the Supreme Court of the United States*, ed. G. J. McRee, 2 vols. (New York, 1857–1858), I, p. 213.
[62] Ibid, p. 214.

An anonymous pamphlet from Virginia, issued in the same year under the pseudonym "Edmund Burke," likewise argued that "from these charters it manifestly appears to have been the Royal intention, to form these Colonies into distinct States . . . dependant on the Crown, but not on the Parliament of England."[63] It followed that, since the charters had not authorized Parliament to govern the colonists, "nothing but an act of union, made with their own consent, can annex them to the Realm, or subject them to its Legislature."

The young Alexander Hamilton offered perhaps the most expansive version of this argument in his *The Farmer Refuted* (1775). George III, he declared, "is King of America, by virtue of a compact between us and the Kings of Great-Britain. These colonies were planted and settled by the Grants, and under the Protection of English Kings, who entered into covenants with us for themselves, their heirs and successors."[64] By means of these covenants, the king had been authorized to exercise his prerogative powers over British America, and these powers were therefore not incompatible with the liberty of American subjects. Parliamentary laws, in contrast, "are subversive of our natural liberty, because an authority is assumed over us, which we by no means assent to."[65] The fact that the king "is the only Sovereign of the empire" was thus fully compatible with the essential, underlying sovereignty of the people.

Yet, despite their insistence that the king had been authorized to govern British America (and that Parliament was not the "constitutional representative" of America, simply because it had not been authorized to act as such), these Patriots of the early 1770s quite noticeably declined to call the king their "representative."[66] The reason is clear enough. In the context of the imperial crisis, to designate the king as the representative of the colonies would have exposed Patriots to the argument that they had in fact never been taxed without their consent: since parliamentary bills could not become law without receiving the royal assent (recall that it was the Patriots themselves who were arguing that the defunct royal veto remained a viable prerogative of the Crown), if the king truly represented the colonists, his agreement to these bills could be construed

[63] "Edmund Burke", "To the Right Honourable Lord North," I, p. 338. Cf. [Thomson Mason], "The British American," Letter 6 (July 7, 1774) in *American Archives: Fourth Series*, I, p. 522.
[64] Hamilton, *Farmer Refuted*, p. 9.
[65] 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., 1774), p. 5.
[66] Hamilton, *Farmer Refuted*, p. 7. See, for example, Bancroft, *Remarks*, pp. 19, 90–1. See also the Connecticut Resolution of May 1774 (*American Archives: Fourth Series*, I, p. 356).

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."[67] The Patriots, of course, had an answer to this objection: on their account, the king had indeed been authorized to exercise a number prerogative powers over British Americans, but not to tax them without the consent of their colonial legislatures. His assent to a parliamentary tax bill therefore did not express the consent of the colonists to be taxed. But Patriot pamphleteers 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).[68]

Not all Patriots, however, adopted this straightforwardly Royalist position 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 entitled 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 Zubly's *Humble Enquiry* made the case that "the people have not representatives assigned, but chuse them, and being so chosen, the rights of the people reside now in them."[69] "Every representative in Parliament," Zubly insisted, "is not a representative for the whole nation,

[67] *American Resistance Indefensible* (London: n.p., 1776), p. 20.

[68] A number of theorists acknowledged this point after the imperial crisis had passed. See, for example, Zabdiel Adams, "An Election Sermon" (Boston, 1782) in C. S. Hyneman and D. S. Lutz (eds.), *American Political Writing during the Founding Era, 1760–1805*, 2 vols. (Indianapolis: Liberty Fund Inc., 1983), I, pp. 543–5. Adams agrees that "to be deprived of the power of chusing our rulers is to be deprived of self dominion," but he likewise insists that the people may choose a hereditary monarch as their "representative."

[69] [John Joachim Zubly], *An Humble Enquiry into the Nature of the Dependency of the American Colonies* ([Charleston]: n.p., 1769), p. 21.

but only for the particular place for which he hath been chosen . . . The electors of Middlesex cannot chuse 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 Zubly 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 on 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 derive 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 to 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.[70]

This passage embodies the most complete possible rejection of the Parliamentarian theory of virtual representation, as well as perhaps the boldest single pre-Revolutionary statement of the view that authorization requires voting. On Zubly'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 Zubly's view was offered by Wilson in his 1774 *Considerations* – a pamphlet that established the terms in which Wilson and his acolytes would discuss the theory of representation for the next twenty years. Wilson begins by endorsing both the authorization theory of representation and the election theory of authorization: he insists that a free man must be governed by magistrates whom

[70] Ibid., pp. 17–18. Cf. William Drayton, who argued that the consent of "American Freeholders . . . is not signified in Parliament, by *a Representation of their own election*" (emphasis in original): William Drayton, *A Letter from a Freeman of South-Carolina, to the Deputies of North-America, Assembled in the High Court of Congress at Philadelphia* (Charleston: n.p., 1774), p. 12.

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."[71] 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?[72]

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 Parliamentarian theory[73]), but its basic thrust is unmistakable. Wilson argues that the House of Commons is the only 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

[71] Wilson, *Considerations*, p. 5. [72] Ibid., p. 15. [73] Cf. ibid., pp. 17–18.

elected and, therefore, authorized by the people.[74] 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."[75] Representation requires authorization, and authorization requires voting.[76]

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[77]).

[74] Several pages later Wilson states explicitly that the Irish, and by analogy the Americans, are not "represented" in Parliament because they do not "send Members to Parliament" (p. 21).

[75] Ibid., pp. 21–2.

[76] Cf. *Pennsylvania Gazette*, March 8, 1775. The anonymous author of this essay argues, in a Wilsonian vein, that "the whole body of the [English] people" is "represented by the House of Commons" because "there is scarce a free agent in *England* who has not a vote" (*American Archives: Fourth Series*, I, p. 89).

[77] Wilson, as we have seen, tried to make room for an energetic monarchy by arguing that we owe obedience to the king, not because he represents us (he does not, because we have not elected him), but rather because he protects us, and "protection and obedience are the reciprocal bonds, which connect the Prince and his Subjects" (*Considerations*, p. 31). Here Wilson offers a straightforwardly Hobbesian characterization of the nature of political obligation – Hobbes famously declared that he had written *Leviathan* "without other designe, than to set before mens eyes the mutuall Relation between Protection and Obedience" (Hobbes, *Leviathan*, III, p. 1141) – but he refuses to endorse Hobbes's conclusion, namely that by accepting the protection of a sovereign I *thereby make him my representative*. It is for this reason that Wilson gets into trouble: if the king is not my representative, then it follows that he does not have the right to speak and act in my name (recall that, on the authorization theory, a representative *just is* someone who has this right). If I am constrained to obey him notwithstanding this fact, then, by definition, I am dependent on an alien will and am therefore unfree.

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 eventual 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 Merchant*, pp. 66–7. Note that Franklin's response to Tucker on this point begs the question ("Marginalia in a Pamphlet by Josiah Tucker," in *PBF*, XVII, p. 363).

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 indisputably in the body of the people" simply because the people had authorized the institutions and magistracies 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 simple 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 senates, 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 Parliamentarian 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

[80] Adams, *Defence of the Constitutions*, I, p. 14. Adams offers an additional argument in favor of this claim that focuses instead on the "popular" balance of landed property. See ibid., p. 71.

[81] Ibid., III, pp. 366–7. [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).[84] 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."[85] 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."[86] 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.[87]

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

[84] James Wilson, *The Works of James Wilson*, 2 vols., ed. Robert McLoskey (Cambridge, MA: The Belknap Press of Harvard University Press, 1967), I, pp. 311–312.
[85] Ibid., p. 312. [86] Ibid., p. 364.
[87] *Records*, I, pp. 24, 68. See also Wilson, "Speech on Choosing the Members of the Senate by Electors; Delivered, on the 31st December, 1789, in the Convention of Pennsylvania," in Wilson, *Works*, II, pp. 781–793; "Lectures on Law," in ibid., I, p. 411.

the totality of it is derived from them in the United States.[88] 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 Parliamentarian 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.

[88] Wilson, *Works*, I, pp. 311, 317.

Popular Sovereignty in Historical Perspective

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