

WMQ Forum, 2011

Whigs against Whigs against Whigs:

The Imperial Debates of 1765-1776, Reconsidered

By Pauline Maier

Eric Nelson's provocative essay reinterprets a transformation in the pre-revolutionary colonial argument that is not altogether unfamiliar. For decades now students in my course on the American Revolution, which is taught through documents, have traced the colonists' conception of the British Empire from what we call "Model A" to "Model B." In the first formulation, writers such as Stephen Hopkins and John Dickinson argued that the provincial legislatures had jurisdiction over their internal affairs and an exclusive right to levy taxes, but conceded to Parliament authority over issues that affected the various parts of the empire collectively such as the regulation of trade. By the late 1760s, however, William Hicks and James Wilson concluded that Parliament, in which only the people of Britain were represented, could pass no laws of any sort that bound the colonies. For Hicks and Wilson, as, by 1774, for Thomas Jefferson and the First Continental Congress, the king alone linked together the far-flung parts of the British world. "Model A" predicted the federal government of the United States, "Model B" the modern British Commonwealth.

For Nelson, however, "Model B"---or "dominion theory"--- looked not to the future but to the past. It affirmed a position asserted by Charles I and James I in the 1620s and recorded in portions of the journals of the House of Commons that were

first published in 1762. The Stuart kings' acrimonious conflict with Parliament turned, it seems, to a considerable extent on colonial affairs. In the course of those fights, James I's spokesman, Sir George Calvert, insisted that Virginia, and by implication the other colonies, was ruled by the King's prerogative powers and was not subject to the laws of Parliament since "Newe Conquests are to be ordered by the Will of the Conquerer." His opponents, like those of Charles I, said the colonies were part of the realm and therefore within Parliament's jurisdiction. The story of that altercation, Nelson shows, echoed through the pamphlet literature and other forms of political argument 150 years later.

There was one critical difference in the colonists' telling of the tale: as Nelson's references make abundantly clear, writers such as Edward Bancroft, James Iredell, and Alexander Hamilton attributed the King's exclusive power not, like Calvert, to the right of conquest, but to the charters and contracts negotiated with the Crown by companies and proprietors in the early seventeenth century. That implied that the relationship of the Crown with the colonists was contractual, with limits on both royal authority and the colonists' obligation of obedience.

The emergent colonial position did, however, demand that the King reclaim a right to veto acts of Parliament that he had not used since 1707 in order to prevent any part of the empire from violating the rights of another and, as James Wilson put it, to "prevent any repugnancy in their laws." A long footnote in Wilson's Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (Philadelphia, 1774) even suggested that the King might regulate trade as part of his prerogative powers.¹ To advocate so dramatic an extension of royal

power could easily seem like an effort to reverse the Glorious Revolution of 1689, which curtailed the Crown's power to act independent of Parliament. And if, as Lord North put it, Whigs had traditionally argued for the rights of Parliament while "the aim of Toryism was to increase the prerogative," the colonists had adopted the language of Toryism.

Nelson does not go so far as to call the American defenders of "Model B" Tories or Jacobites: no colonist defended the divine right of kings or the claims of the pretender to the British Crown. He does, however, say that in the early 1770s the colonists had become "zealous defenders of Stuart Royalism," and, consequently, that the "patriot argument was characterized by rupture rather than continuity." The colonists began in the 1760s "as fairly orthodox whigs," then "lurched... to the right by becoming zealous defenders of Stuart Royalism in the early 1770s," and finally in 1776 essentially jugged to the left by becoming radical republicans. And in the course of their supposed lurch to the right, he says, they "left the whig inheritance far behind them."

Nelson identified an interesting strain in the colonial argument that has generally gone unnoticed, but he takes his argument too far. Context is critical: to approve a Stuart argument against Parliament in the 1620s was altogether different from doing so 150 years later. In the 1770s, the primary threat to American rights seemed to lie less with the King than with a Parliament that claimed a right to bind the colonists "in all cases whatsoever," as the Declaratory Act of 1766 asserted. That claim of Parliamentary absolutism---not, as Nelson claims, a need to answer Loyalist arguments--- prompted William Hicks to undertake his 1768 inquiry into

the “nature and extent of Parliamentary Power.”² Similarly, Wilson began his landmark Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774, but written before 1770) by questioning Parliament’s “supreme, irresistible, absolute, uncontrolled authority.” He made his case against Parliament in terms that were quintessentially Whig--- and much like those Congress would adopt in 1776:

All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed....

Parliament’s attempt to exercise absolute authority over the colonists would not increase their happiness, nor was it “consistent with their liberty.” James Iredell’s argument was much the same.³

Wilson thought the harmony and interests of the British people would better preserved under “the *legal* prerogatives of the Crown“ (emphasis added) than “an unlimited authority in Parliament,” but neither he nor any other colonial writer thought of the prerogative as a means of subjecting the people, as Nelson assumes, to “the mere ‘grace’ and pleasure of a master.” Wilson insisted that the British constitution created a “limited monarchy” and that the King’s “legal prerogative” could be used only for the benefit of the people and, with regard to the Americans, in ways that were consonant with the agreements contracted previous to the colonies’ settlement. Parliament, he said, could check abusive exertions of royal power over the King’s subjects within Great Britain, but not those in America.⁴ Only the

popularly elected provincial legislatures could perform that function for their constituents. In effect, dominion theory--- “Model B”--- did not reject the British constitution of king, lords, and commons, which was supposedly rebalanced by the Revolution of 1689, but reconfigured its constituent parts. As Nelson put it, the dominion theory “sought to export the settlement of the Glorious Revolution to the colonies” by having each colony “ruled by the King *in its legislature*” just as Britain was governed by “the King-in-Parliament.” That was the way Bancroft and other defenders of “Model B” understood the imperial constitution.⁵ Their conception hardly “left the whig inheritance far behind.”

Dominion theory nonetheless seemed like an abandonment of the Whig tradition to Loyalists [such as Joseph Galloway,⁶ Samuel Seabury,--cut] and others who understood Parliamentary Supremacy as a product of the Glorious Revolution. In fact, the doctrine of Parliamentary Supremacy (or Sovereignty) was far younger: [recent scholars such as Jack P. Greene say that—cut] it won acceptance in Britain only in the mid-eighteenth century, and remained contested thereafter.⁷ By the mid-1770s, however, the indivisible and complete sovereignty of Parliament had become a nonnegotiable item of faith for those in power, including members of Parliament who had once justified colonial opposition to the Stamp Act.⁸

Against that ascendant orthodoxy, the colonists built a case for separate dominion status that had solid roots in English law and tradition. Most colonies had been founded on the basis of charters or other contractual arrangements with the king alone in the early or mid-seventeenth century, quickly established legislatures that assumed primary power over their affairs, and were in fact administered by the

Crown. The rights they claimed---“no taxation without representation,” above all--- were well established among the “Ancient Rights and Liberties” listed in the English Declaration of Rights. And “the foundation of English liberty, and of all free government,” the First Continental Congress said, “is a right of the people to participate in their legislative council.”⁹ Ireland had a separate Parliament, as had Scotland between 1603 and 1707, when it was, in effect, a kingdom separate from England but under the same king. Scottish writers had probed at length the advantages of a “confederal” or “federal” system over an “incorporating” union of states, and the colonist could cite Continental writers who envisioned an empire of states with substantial local autonomy.¹⁰ The colonists’ case for dominion status under the Crown was not therefore dependent on the arguments of James I and Charles I. It rested firmly on history, precedent, and the “ancient constitution” of England, which imposed limits on power inconsistent with the claims of Parliamentary Supremacy.

Some forty years ago, Mary Beth Norton demonstrated that the American Loyalists were ideological Whigs who framed even their criticisms of their “patriot” countrymen in Whig terms.¹¹ Clearly Lord North saw himself as a Whig since he supported the power of Parliament. So did the leading defenders of the American case against Parliament and, ultimately, the King. From their treatises against the Stamp Act through the Declaration of Independence they affirmed the existence of basic rights and the principles of contractualism and consent that were at the heart of seventeenth century Englishmen’s case against Stuart absolutism. That all

contenders in the imperial conflict could work within the same ideological tradition suggests at once the capaciousness of Whiggism and its utter triumph by the 1770s. Only when the principles of Stuart Royalism had been thoroughly defeated could colonial writers claim that, a century and a half earlier, and on a single, limited point, the first Stuart kings had been right.

¹ In Bird Wilson, comp., The Works of the Honourable James Wilson. L.L.D. (Philadelphia, 1804), III: 244-46. By contrast, the First Continental Congress, which also said the provincial legislatures had “a free and exclusive power of legislation... subject only to the negative of their sovereign,” was willing to “cheerfully consent” to Parliament’s regulation of commerce for the good of the empire. Declaration and Resolves of the First Continental Congress, October 14, 1774, available in Samuel Eliot Morison, Sources and Documents Illustrating the American Revolution, 1764-1788 (2nd ed., Oxford and New York, 1965), 120

² Hicks, The Nature and Extent of Parliamentary Power Considered (New York, 1768).

³ In Works of James Wilson, III: 204-06.; Iredell, “To the Inhabitants of Great Britain” (1774), in Griffith J. McRee, Life and Correspondence of James Iredell (New York, 1857-1858), I: 205-220.

⁴ Works of James Wilson, III: 216, 219.

⁵ Nelson concedes the point for Bancroft. See also Jack P. Greene, The Constitutional Origins of the American Revolution (Cambridge, England, and New York, 2011), 126.

⁶ Galloway, A Candid Examination of the Mutual Claims of Great Britain and the Colonies (London, 1780).

⁷ Greene, Constitutional Origins of the American Revolution, 39, where Greene cites the work of several other scholars. See also Alison L. LaCroix, The Ideological Origins of American Federalism (Cambridge, Massachusetts, 2010), 19: “the nature of sovereignty was a contested, not a settled, issue in Anglo-American thought” of the late eighteenth century.

⁸ Greene, Constitutional Origins of the American Revolution, 105; Edwin G. Burrows and Michael Wallace, "The American Revolution: The Ideology and Psychology of National Liberation," Perspectives in American History, VI (1972), esp. 235-42.

⁹ Greene, Constitutional Origins of the American Revolution, *passim*. Declaration and Resolves of the First Continental Congress, October 14, 1774, in Morison, Sources and Documents Illustrating the American Revolution, 118-22. The Congress's statement that it was declaring their rights and liberties "as Englishmen their ancestors in like cases have usually done" echoed a very similar statement in the English Declaration of Rights, which declared the "Ancient Rights and Liberties" of Englishmen as "their Ancestors in like Case have usually done." The English text is available in Jack Rakove, Declaring Rights: A Brief History with Documents (Boston and New York, 1998), 43.

¹⁰ Note that James Wilson cited cases in English law that, he argued, exempted Ireland, Jamaica, and Virginia from Parliamentary legislation because they had their own elected legislatures. The claim of Parliamentary Supremacy, he concluded, was "repugnant to the essential maxims of jurisprudence" as well as "to the ultimate end of all governments, to the genius of the British constitution, and to the liberty and happiness of the colonies." Wilson, "Considerations...", in Works of Wilson, III: 226-32. Although in 1720 the British Parliament passed a Declaratory Act that asserting its power to over Ireland "in all cases whatsoever," Parliament never attempted to pass tax laws for Ireland and in general deferred to the Irish Parliament's authority. See Greene, Constitutional Origins, p. 45, which draws on the scholarship of J.C. Beckett. On Scotland, see La Croix, Ideological Origins of American Federalism, 24-29. She also notes there that colonial writers could and did draw upon Continental writers such as Hugo Grotius, Samuel von Pufendorf, Emerich de Vattel, and Montesquieu, who saw the possibility of dividing authority within a "system of states" in a way that was at odds with the vision of a single central "sovereign" Parliament.

¹¹ Norton, "The Loyalist Critique of the Revolution," in The Development of A Revolutionary Mentality: Papers Presented at the first [Library of Congress] Symposium [on the American Revolution], May 5 and 6, 1972 (Washington, D.C., 1972), 127-48.