**The People’s Two Bodies: The Forgotten Legacy of the Founding**

**Alin Fumurescu**

**afumurescu@uh.edu**

In their recent book, *Democracy for Realists*, Christopher Achen and Larry Bartels argue that the credibility of “folk theory” of democracy, according to which people rule either directly or indirectly, through their representatives, “has been severely undercut by a growing body of scientific evidence” (Achen & Bartels 2016, 11). Backed by a wealth of recent studies, the authors make a worrisome claim: None of the two main theories of democratic governance, namely the populist and the elitist, can sustain empirical inspection. Voters do not control public policy, neither directly, through referenda and popular consultations, nor indirectly, by prospectively choosing or retrospectively rewarding leaders that attend to their wishes. Bluntly put, “conventional thinking about democracy has collapsed in the face of *modern* social-scientific research,” yet “scholars … persist uneasily in their *schizophrenia*, recognizing the power of the critical arguments but hoping without hope that those arguments can somehow be discredited or evaded …” (Achen & Bartels 2016, 12 – emphases added).

 Even more recently, Daniel Caramani launched, from a different perspective, an equally concerning warning: The representation model of party democracy is under attack from two sides—the populist and the elitist/technocratic. Politicians are accused (by the populists) of being either too detached from the people or (by the technocrats) too willing to please them regardless of the consequences. According to Caramani, populism and technocracy share the “homogenous and organic vision of the people,” “a non-pluralistic view of society and politics.” As a result, “both forms believe in an ‘external’ interest [of the people], detached from the specific group interests and their aggregation. (…) For populism, the general interest can be identified through the *will* of the people. For technocracy, the general interest can be identified through *rational* speculation and scientific procedures” (Caramani 2017, 62 – emphases added).

 The undertones of Achen and Bartel’s book and Caramani’s article might be different, but both—and these are only two recent examples from a growing pool of scholarly literature concerned with this topic—point in the same direction: the crisis that democracies have to face is related to conflicting understandings of “the people.” (e.g., Bickerton & Accetti 2015, Pettit 2013, Urbinati 2014). Absent the clarification of what “people” are we talking about, the concept of popular sovereignty, central to any democratic system, remains an empty one, explaining everything and nothing. Not surprising, in Achen and Bartel’s view, “the ideal of popular sovereignty plays much the same role in contemporary democratic ideology that the divine right of kings played in the monarchical era.” “The doctrine of ‘The King’s Two Bodies’ (…) provided useful leeway for understanding and accommodating the fact that mortal rulers were often less than divine in bearing and behavior.” A similar rationale applies to the contemporary understanding of the people. “We … have our ‘two bodies’ doctrine: when majorities go seriously astray, it is not the people that ‘advised themselves,’ but rather the people misadvised by others and misled by misordered counsel (Achen & Bartel 2016, 19-20).

 The main aim of this essay is to show that there is more realism in the paradigm of the People’s Two Bodies than Achen and Bartel seem willing to grant. Far from being “modern” or from signaling some “schizoid” thinking, the idea of the people being apprehended *at once* as a multitude prone to errors *and* as a sovereign corporate entity that cannot err enjoys a long pedigree. Even if the label of the People’s Two Bodies is recent, the idea behind it is not.[[1]](#endnote-1) It predates the transfer of sovereignty from kings to people, and hence the transfer of the idea of the King’s Two Bodies to the People’s Two Bodies that came to characterize the revolutionary eighteenth century (Santner 2011, Wolin 1981).[[2]](#endnote-2) As I shall try to demonstrate in the following pages, what for us today may appear as “schizophrenia,” for a long period of time was, both theoretically and practically, a suitable way for dealing with a political reality that could not (and still cannot) be confined in the peculiarly modern “either-or” model of the people: either ruled by wills or by reason, either individualistic or corporatist, either artificial creation or organic whole. Thus, the populism vs. elitism question that dominates democratic theory becomes a moot one.

From the perspective proposed here, Caramani’s worries also appear misplaced. Historically speaking, populism, understood as direct or indirect rule *of* the people by a majority of votes, and technocracy, understood as rule *for* the people’s general interest, have been neither inherently incompatible, nor have they necessarily shared “a homogenous and organic vision of the people,” but rather the opposite. The general interest is not inherently incompatible with the aggregate interests of the groups composing it, as long as “the people” is apprehended—as it used to be—as a corporation of corporations (Fumurescu 2013, 140-41, Tierney 1983, 11, 20, 69). Hence, populism or elitism per se are less of a problem—all politicians are and will be, in various degrees, both populists and elitists, while popular leaders and technocrats are forced sooner or later to become politicians, as Caramani also agrees. The main problem, I suggest, might be a misapprehension of “the people” that creates unrealistic expectations both for the electorate and for the elites that are supposed to act on its behalf. Thus, far from being a mere linguistic artifice, the People’s Two Bodies proves a useful paradigm for dealing simultaneously with the pitfalls of elitism and populism while taking advantage of both.

 The essay begins by showing how the political thinking during medieval times was influenced not by the famous doctrine of the King’s Two Bodies (Kantorowicz 1957), but by a dual understanding of the people—as a corporation hierarchically ordered, on the one hand, and as an untrustworthy multitude, on the other one. In their former capacity, the people qua *persona universalis* enjoyed an equal or higher formal authority than the king. In the latter capacity, however, the people were nothing but mobs, a fickle thousand headed monster (Fumurescu 2013, Post 1964, Salmon 2007, Tierney 1983).

 Yet starting with early modernity, this second understanding of the people as a multitude of equal individuals enjoyed a drastic reconsideration, thanks primarily to the growing popularity of various versions of the social contract theory, initially in Great Britain, and eventually all across the Western World. This is not to say that the medieval political contract between the people as a whole and its representatives (primarily although not exclusively kings) vanished overnight. It was referred to not just in continental Europe but also in Great Britain, during the Civil War and the Glorious Revolution, when both Charles I and James II were accused of breaking the compact with the English people. And it was alluded to in the Declaration of Independence, despite many scholarly claims to the contrary (e.g., Henkin 1987, Pestritto & West 2003, Zuckert 1994).

As shown in the second part of the essay, partially responsible for this confusion between the two types of contract is the fact that in the New World the modern understanding of the people took a peculiar twist. Thanks to the Puritan bi-dimensional covenant, the idea of equal individuals consenting to form a new political body and to subject themselves to a new form of government was far from being a mere philosophical idea—it was a living reality, hence the later attractiveness of the social contract theory for the American political thinking. At the same time, once this body was formed, the details of setting up a specific form of government and its daily running was trusted in the hands of an elected aristocracy of merit (Foster 1971, Lutz 1998). In other words, it was generally assumed that people enjoyed equal constituent power, but different political skills (Ryerson 2016, 12).

 The following sections of the essay show how this legacy came to influence the entire American history. Stephen King’s observation about the “profound ambivalence concerning the people” of the delegates to the Constitutional Convention applies as well to the Americans of 1787 as it does to those of 1630, 1776, 1861 or 2018: “On the one hand, the people were definitely to ordain and establish the new constitution; on the other hand, those same people, *as individuals*, were by no means to be trusted.” (King 2012, 29 – emphasis added). Even by Achen and Bartels’s twenty-first century’s standards they would qualify as “realists,” as far as their faith in their ability of multitudes to choose wisely was concerned, yet they never lost faith neither in the people as corporation to make wise decisions under the guidance of enlightened elites, nor in the people as multitudes to be eventually able to stop potential abuses of these elites. In the concluding remarks I will discuss the implications of this forgotten understanding of the People’s Two Bodies for the challenges that democracies have to face when trying to navigate between the contemporary Scylla of populism and the Charybdis of elitism.

**The People as Corporation**

Despite the generally held opinion, the doctrine of the King’s Two Bodies was far from being widespread, and was equally far from characterizing the entire medieval period. Even if the doctrine was probably known all across Europe, “it was nevertheless in England alone that there had been developed a consistent political, or legal theory of the ‘King’s Two Bodies’.” The theory, “in all its complexity and sometimes scurrilous consistency, was practically absent from the Continent” (Kantorowicz 1957, 446, 441). According to Queen Elizabeth’s lawyers, “the King has in him two Bodies, viz., a Body natural and a Body politic. […] [H]is Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal, and this Body is utterly void of Infancy, and old Age” (quoted in Kantorowicz 1957, 7). Far from being typically medieval, this “notion had … its important heuristic function in the period of transition from mediaeval to modern political thought” (Kantorowicz 1957, 447).

 This is not to say that European medieval political thought was deprived of this dual way of thinking, quite the opposite. Thanks to the Christian Weltanschauung, the medieval mind was trained to simultaneously accept conflicting notions such as Christ was fully man and fully God. The same duality applied to the understanding of “the people.” Throughout the Middle Ages, at least starting with the Roman lawyer Azo onwards, the people were apprehended simultaneously as a whole and as a multitude, as One and as Many. The same rationale informed both the Church and the political bodies (Ciepley 2017, Tierney 1983). That the body politic was to be distinguished—as later on the political body of the King would be—from the physicality of its members, was a certitude for the famous Commentator Baldus de Ubaldis, who wrote in the fourteenth century: “Therefore separate individuals do not make up the people, and thus properly speaking the people is not men, but a collection of men into a body which is mystical and taken as abstract, and the significance of which has been discovered by the intellect” (quoted in Canning 1987, 187). Like later Rousseau’s General Will, this “mystical body of the commonwealth” (*corpus mysticum republicae*) could not err.

 As modern as it might seem today, the idea that governments are the creation of the corporate people and that rulers are responsible and subordinate to the people was a common trope throughout the entire medieval period. Jacques Almain and John Mair, for examples, two lecturers at the University of Paris “were … explicit … about the power of the secular community over the ruler. The community retained a constituent power. It could change both the ruler and the form of the constitution for reasonable cause” (Salmon 2007, 462). The first monarchomachian theories of justified resistance were based, not on some proto-social contractatrianism, but on the medieval political contract between the people and their rulers. Thus, in Beza’s words, “those have the power to depose a King who have the power to create him” (Beza 1970, 45).

 There is no doubt, however, that in the medieval and early modern understanding, the people entitled to remove an unworthy king were not the multitude but the *optimates*, i.e., the most reasonable part of it (*maior et sanior pars.*)[[3]](#endnote-3) However, who exactly could fulfill this role was opened to debate. For François Hotman they were the supreme magistrates in the Estates, while for Beza, in case of corruption of the Estates, the role could devolve to inferior magistrates. Yet despite these differences, all authors from the period, Protestants and Catholics alike, were carefully distinguishing between the people as a conceptual whole and the majorities, i.e., between the people as One, and the people as Many. They would have all agreed with Bodin who argued that “in popular assemblies votes are counted, not weighed, and the number of fools, sinners, and dolts is a thousand times that of honest men” (Bodin 1955, VI.4, 193).

**The People as One *and* Many**

The Puritans and Pilgrims who arrived on the shores of the New World beginning in the 1620s did not have to wait for Hobbes’s social contract theory, let alone for Locke’s, to *actually* create “peoples” through the express consent of individuals entering various compacts and covenants. “One could also speak of their creating a society, but this term is not quite strong enough” (Lutz 1998, xxiv). From the very beginning, most of the foundational documents celebrated today as political statements prove to be, for an attentive reader, less focused on designing a specific form of government, and more on founding distinctive peoples, culturally defined. By necessity then, in the colonial setting, the religious community had to become a political one as well, “for the worke wee haue in hand, it is by mutuall consent (…) vnder a due forme of Government both ciuill and ecclesiasticall” (Winthrop 1630 [Miller & Johnson 2001, 197]). Thus, the same rationale informed both the creation of a church and of a political body. Half century before Locke, it also provided for the replacement of unworthy officers and ministers in the church, or of the magistrates, assistants or deputies in the Bodie Politick by majority of votes: “[I]f the church have power to chuse their officers and ministers (…) then, in case of manifest unworthiness and delinquency, they have power also to depose them: for to open and shut, to chuse and refuse, to constitute in office, and to remove from office, are acts belonging to the same power” (Cotton et al. 1649, [Frohnen 2002, 53]).

The extent to which Locke, born and raised in a Puritan family, was influenced in his contract theory by this covenantal approach is debatable. What is undeniable, however, is that many features of the *Second Treatise* (ST) bear more than a family resemblance with the practice of the Puritan colonists, which would make it easy later on to overlap the two. Besides constituting a people as one political body through the unanimous consent of the individuals, the Puritans—like Locke after them—never questioned the principle of election by majority vote, “the mayor parte of such as shall be then present,” as specified in the Fundamental Orders of Connecticut (1638-39). As the locus of power moved upwards, at the provincial and colonial level, the decisions were made by the legislature, where, once again, the number of *ayes* and *noes* was the only thing that mattered. *“They don’t weigh the intellectual furniture, or other distinguished qualifications of the several voters* …; they only add up the ayes and the no’s, and so determine the suffrage of the house (Wise 1717, [Miller and Johnson 2001, 259-69]; emphasis added).

Important as they are, however, the parallels between Locke’s theory and the Puritans’ covenants should not obscure the equally important differences between the two, especially when it comes to combining the principle of equality with the aristocracy of merit in the understanding of the people, while distinguishing between creating a people and creating a government. From the Mayflower Compact to the Massachusetts Body of Liberties, “we have an outline of the major sociocultural norms, not a design for government” (Lutz 1980, 59).[[4]](#endnote-4)The observation reveals a clear distinction between the social and the political contract and, furthermore, a differentiation between the people qua individuals entering the first, horizontal covenant, and the people qua corporation entering the second, vertical covenant. As Winthrop put it:

The great questions that have troubled the country, are about the authority of the magistrates and the liberty of the people. It is yourselves who have called us to his office, and *being called by you, we have our authority from God …* *The covenant between you and us* is the oath you have taken of us, which is to this purpose, that we shall govern and judge your causes by the rules of God’s laws and our own, according to our best skill (Winthrop 1645, [Frohnen 2002, 34] – emphasis added.)

Whenever “Freemen Incorporated into one Bodie Politick,” as they did, for example, in the political covenant of Pocasset (1638), they accepted the full implications of a corporate people, including the acknowledgement of an aristocracy of merit. Not everyone was equally equipped to actively take care of the people. This “popular aristocracy” or this “elective dictatorship of the wise and virtuous” represented nothing less than the political backbone of Puritanism (Foster 1971, 75, 168).

It is easy to see why many scholars still consider the Puritans’ legacy a “medieval one.” Like their medieval predecessors, they too assumed (a) a corporatist vision of the people as *universitas*, and, as a result, (b) a belief in a natural inequality of merit among the members of the community. Both assumptions were well captured by John Winthrop. In a *Modell of Christian Charity,* he reminded his fellow Puritans (a) that they had been united into a single body long before they had come aboard the *Arabella*, for “wee ought to account our seules knit together by this bond of loue …” By the same token, he argued, in such a community, (b) inequalities among its members were not only unavoidable, but actually ordered by God “for the preservacion and good of the whole.” It is precisely this hierarchy that bonded people together, for “every man might haue need of other, and from hence they might be all knit together in the Bond of brotherly affeccion” (Winthrop 1630, [Miller & Johnson 2001, 195 – 197]). Furthermore, as their medieval predecessors, the Puritan understanding of “the people” implied an “unconscious federalism” operating at the intra-colonial level, since each colony was understood as a corporation of distinct corporations. In effect, the colonies were each a collection of towns or counties. “Still, since charters recognize only a single entity, a colony, these various parts had to coordinate policy and control.” As a result, “colonial governments functioned effectively as federal politics, having been built up from below” (Lutz 1990, 59).

From this perspective, there are no major differences between Winthrop and John Wise, writing almost a century later. In the *Vindication* mentioned above, Wise starts by agreeing with Aristotle that “nothing is more suitable to Nature, than that those who Excel in Understanding and Prudence, should Rule and Controul those who are less happy in those Advantages …” Yet, he continues, “there is room for an Answer. That it would be the greatest absurdity to believe, that Nature actually Invests the Wise with a Sovereignty over the weak … for that no Sovereignty can be Established, unless some Humane Deed, or Covenant Precede.” In short, Wise distinguishes between two covenants—the first among naturally equal individuals “to joyn in one lasting Society”, the second, “a New Covenant,” between “those on whom Sovereignty is conferred” and “the Subjects” (Wise 1717, [Miller and Johnson 2011, 263, 265]). The first covenant (of society) is horizontal (egalitarian), the second one (of government), vertical (the hierarchy of merit).

This ambivalent position of the Puritans can be summarized as follows: individuals (the “purified” ones at least) were equally equipped and entitled to give their individual consent to the formation of a church and of a political body. They were also equally equipped and entitled to select, by a majority of votes, the form of government “in only the most general terms” (Lutz 1998, xxiv). But after forming the corporate body and covenanting with their rulers, the details of setting and running the government were put into the hands of the selected few, endowed with the necessary prudence to work out these minutiae. In contrast, “[f]or Hobbes and Locke, prudence was conspicuously absent from founding, embarrassed by its inegalitarian premises” (Rosen 1999, 72).

**Independent Peoples**

The Great Awakening swept across religious, social, and geographical boundaries, challenging the authority of learned ministry and weakening church allegiances—a development considered by Michael Walzer a radical break with the hierarchical vision of society (Walzer 1965). Contemporary scholars agree. “The notion that God ‘awakens’ people directly and salvation was open for all … translated in the political realm into the consent of essentially equal people as the source of legitimate government” (Dreisbach & Hall 2014, 2). Although such observations are mostly accurate, they only tell half the story. If the hierarchical vision of the corporate people and the political contract associated with it witnessed a rather dramatic setback, they were not about to disappear.

No matter how right Locke was “*in theory*”—argued William Blackstone—when he asserted that “there remains … inherent in the people the supreme power to remove or alter the legislative” (ST XIX, 226), in *practice* “we cannot adopt [this claim], nor argue from it, under any dispensation or government at present actually existing.” Hence, “so long … as the English constitution lasts … *the power of the parliament is absolute and without control*” (quoted in Maier 1972, 46 – emphases added). As a matter of fact, even Locke argued that “it is in their legislature that the members of a commonwealth are united and combined together into one coherent living body. This is *the soul that gives form, life, and unity* (…) and therefore when the legislative is broken, or dissolved, dissolution and death follows” (ST XIX, 212 – emphasis added).

However, as the relationships between the colonies and Great Britain began to deteriorate, it became quite clear that the appeal to the Parliament was a self-defeating strategy: as long as the principle of the supremacy of the British legislature went unquestioned, any minority was doomed to remain subject to the will of the majority in the Parliament, regardless of how one understood representation—virtual (as the British Parliament did) or actual (as the colonists demanded). A different approach was needed, one that disconnected the colonists from the British legislature, while preserving the idea that legislative assemblies are entitled to speak in the name of the people. Soon, the Imperial Debate became “a war of Legislatures (…) between the British Parliament and the Colonial Assemblies” (Cassandra [James Cannon] 1776 [Nelson 2014, 5]). But if, according to the social contract theory, the legislature was “the soul” of any political body, holding the people together, it would have been but a small step from war between different legislatures to war between different peoples, a step postponed only by the appeal to the political contracts between each colony and the king.

In the eyes of many Whigs, the political contract presented a considerable advantage: it limited the power of the executive. Yet, as Marston observed, “many Whigs, however, believed that their notion of such a [political] contract had come from John Locke. This may very well not be true, for Locke’s ‘contract’ had been primarily concerned with an original agreement between all members of society to form a political entity” (Marston 1987, 17).[[5]](#endnote-5) By now, it should be easy to see where the confusion came from. Predating by ten years the Declaration of Independence, the anonymous *Britannus Americanus*, captures well the switch of the argument from the social to the political compact via chartering.

[I]n the *supps’d* state of nature … [the colonists] had a right to erect a government upon what form they thought best. […] But *the people* of England could have no more political connection with them or power of jurisdiction over them, than they have now over the people of Hanover, who are also subject of the same King. […] *Their compact being with the King only, to him alone they submitted, to be govern’d by him, agreeable to the terms of the compact, contain’d in their charter* (*Britannus Americanus* 1766 [Hyneman & Lutz 1983, 88-90] – emphases added).

*Britannicus Americanus* was not an exception in espousing these beliefs, as shown in the polemic of *Novanglus* (John Adams) with *Massachusettensis* (Daniel Leonard). Although adversaries, both agreed “that all men by nature are equal; that kings are but the ministers of the people; that their authority is delegated to them by the people, for their good, and they have a right to resume it, and place it in other hands, or keep it themselves, whenever it is made use of to oppress them” (Novanglus, Essay I, 7).[[6]](#endnote-6) None of the two authors, however, considered these claims tenets of a *social* compact theory, but of the *political* one, and both of them thought about the people as a hierarchical corporation. What Adams and Leonard disagreed on was the applicability of these principles to the reality of the American colonies. Leonard claimed that such revolutionary principles, wrongly applied, could create havoc: “In the *political* compact, the smallest defect in the prince, a revolution.” “By no means,” replied Adams, confident that this political compact did nothing but clarify the relationships between the colonists and Great Britain (Novanglus, Essay I, 7 – emphasis added). “How then do we New Englandmen derive our laws? I say not from parliament, not from common law, but *from the law of nature, and the compact made with the King* *in our charters*” (Novanglus, Essay VIII, 81 - emphasis added).

Using this very quote—a rather clear exemplification of the political contract established via chartering—Michael Zuckert claims instead that “[t]he background theory to which Adams appeals here should be easy to identify: it is the Lockean natural rights/social contract theory” (Zuckert 2005, 41). If there is indeed an “easy to identify” Lockean social theory in *Novanglus*, it is to be found in Essay No.VII, in which Adams made clear, once again, that each colony was a distinct political body, created and maintained in existence by the colonial legislatures, regardless of any common ancestry: “There is no need of being startled at this consequence. It is very harmless. There is no absurdity at all in it. Distinct states may be united under one king” (Novanglus VII, 70, 75).

As such, “[t]he controversy was about the rights of competing legislatures and thus was difficult to resolve” (Shain 2014, 13). Yet these rights were primarily corporate, not individual rights, at least during the First Congress and the early years of the Second One (Shain 2014, 10-11). From 1774 to the beginning of 1776, the delegates placed their high hopes and affections on King George III. “He is the King of America,” wrote Hamilton, “by virtue of a compact between us and the King of Great-Britain” (quoted in Marston 1987, 38). The hope was that the kings will act as “a dernier Resort for settling all their disputes” (Benjamin Franklin), as “the Umpires of our Disputes, and the Center of our Union,” as “a Philadelphian” put it in 1774 (quoted in Marston 1987, 26-7). And indeed the king acted as an arbitrator—only not in the way the colonists were hoping for. George III sided with the Parliament, in accordance with the principles of the constitutional monarchy. In his understanding, doing anything else would have meant “acting truly tyrannically” (Shain 2014, 15).

When finally the patriots lost all hope in the king, they made him “the perfect scapegoat” (Stourzh 1970, 28) for what was perceived as the “ultimate paternal betrayal” (Marston 1987, 25). Almost ironically, the patriots found their legal and philosophical justification not in Locke, but in Blackstone, despite his well-known position against the American colonists.[[7]](#endnote-7) In the eye of the famous Tory jurist, the Glorious Revolution could be seen as a precedent: If a future prince should “endeavor to subvert the constitution by *breaking the original contract between king and people …* we are now authorized to declare this conjunction of circumstances would amount to an abdication” (quoted in Stourzh 2010 [1970], 63 - emphasis added).[[8]](#endnote-8) Although Blackstone agreed that “the supposition of *law* … is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong,” under extraordinary circumstances “the law feels itself incapable of furnishing any adequate remedy. (…) [T]he *prudence* of the times must provide new remedies upon new emergencies” (quoted in Stourzh 2010 [1970], 21 – emphases added). Needless to say, neither Blackstone, nor the colonists, thought that the people as numerical majorities are endowed with this necessary prudence.

Stourzh concludes that “… the kind of contract referred to most often, whose violation was charged most often, was the governmental contract between ruler and ruled. However, this contract is not part of Locke’s system” (Stourzh 2010 [1970], 74). Recent scholarship confirms his observations. Based upon a thorough survey of the documents of the era, Shain (2014) argues that the Declaration of Independence is an “outlier” of its time and that too much attention has been dedicated to the second paragraph in order to sustain a Lockean interpretation. After all, the culprit was King George, accused between the lines, as his predecessors, Charles I and James II had been, for breaking the governmental contracts with the peoples from each colony.

Throughout all these historical and theoretical vagaries, the conviction that, once formed by the consent of equal individuals, a corporate people presupposes a certain hierarchy of wisdom and virtue, survived unscathed. “Americans … recognized the necessity in any well-ordered state of a due subordination of ruled and rulers,” old or new (Marston 1987, 22). Once the king was no longer part of the governmental power, the Congress stepped in to fill his place. And when the delegates discussed the allocations of powers between the national government and the states, resulting in Articles of Confederation, they confided “the executive and administrative responsibilities that have been exercised by or under the aegis of the king’s authority … to the successor of this authority, the Congress. Those powers that were exercised or claimed primarily by the Parliament however (…) were just as firmly located to the states” (Marston 1987, 303).

**One Constitution, Two Peoples**

The revolutionary era had witnessed the parallel development of radical theories of popular sovereignty. Benjamin Hichborn, for example, claimed in a speech delivered in Boston in 1777, civil liberty was “not a government by laws,” “but a power existing in the people at large … to alter or annihilate both the mode and essence of any former government … f*or any cause or for no cause at all, but their own sovereign pleasure*” (quoted in Corwin 1925 [1973], 21 – emphasis added). Such ideas were worrisome to many, if not all, of the founders. By the time of the Constitutional Convention the level of distrust in the masses reached a new high. Although none of the delegates believed in a standing aristocracy, many if not all of them, including the Antifederalists, believed—as the Puritans had—in “a wholly natural aristocracy.” Melancton Smith’s observed in New York’s ratifying convention:

I am convinced that this Government is so constituted, that the representatives will generally be composed of the first class in the community, which I shall distinguish by the name of the natural aristocracy. I do not mean to give offence by using this term (…) Every society naturally divides itself into classes. The author of nature has bestowed on some greater capacities than on others … (Smith 1788 [Bailyn 1993], 760).

In King’s words, “they wanted the new America to be governed by an elite, not by a hereditary elite but by an elite of the virtuous and talented” (King 2012, 24, 37). Their distrust in human nature was repeatedly expressed throughout the convention and is well documented in Madison’s *Notes of Debates in the Federal Convention*. George Washington thought that events such as the Shay’s rebellion were “a melancholy proof … that mankind left to themselves are unfit for their own government” (Madison [1987], 459). Hamilton made a similar observation, during New York’s ratifying convention: “It is unquestionable that *the body of the people* in every country desires sincerely its prosperity: But it is equally unquestionable, that they do not possess the discernment and stability necessary for systematic government” (Hamilton 1788 [Bailyn 1993], 796 – emphasis added). Yet unlike their predecessors from both England and the colonies, the delegates took their lack of faith in the multitude a step further. By the time of the Convention in Philadelphia, many no longer believed that a legislature properly represented the people, nor that the elected representatives were any better equipped to lead than the people at large who elected them.

In his *Notes on the State of Virginia*, Thomas Jefferson famously observed:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. … And little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for (Jefferson 1905 [1782], 214).

Madison, among others, reminded his fellow delegates that “the Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures” (Madison [1987], 364). Hamilton could not but agree wholeheartedly. Pointing out that the state legislatures are “immediate agents of the people,” and “so constituted, as to feel all their prejudices and passions,” he asked rhetorically: “Is not the state of Rhode Island, at this moment, struggling under difficulties and distresses, for having been led blindly the spirit of the multitude? What is her legislature but the picture of a mob?” (Hamilton 1788 [Bailyn 1993], 810-11).

This is not to say that the Antifederalists, despite their arguably greater trust in the people, rejected, as we have seen, the idea of a natural aristocracy. Nor did they differ from their adversaries when it comes to distrusting human nature. Both Federalists and Antifederalists fit Cecilia’s Kenyon famous label, *Men of Little Faith*, as she was the first to acknowledge, after providing plenty of examples from their speeches and writings:

It is a curious and remarkable fact that during the course of this great debate in which the most popular national constitution ever framed was submitted to the public for the most popular mode of ratification yet attempted, there was very little tendency on either side to enthrone “the people” or to defer automatically to their judgment. (…) Rather was the contrary true, and some of the Anti-Federalists expressions of this attitude could easily have fitted into the dark picture of human nature presented in The Federalist (Kenyon 1955, 33).

 “The important point to note” about the rhetorical battles between the Federalists and the Antifederalists, observes King in a similar vein, “is that to a remarkable degree they were fought on the same philosophical ground.” “There is scarcely any mention in any of the anti-federalists papers of the desirability of empowering the people *beyond according them the right to elect,*” very much in line with their Puritan predecessors (King 2012, 80, 72 – emphasis added). Even more, in many instances famous Antifederalists, such as Patrick Henry, Richard Henry Lee, George Mason, or Melancton Smith expressed their serious doubts about the wisdom of the electors. According to Achen and Bartels’s standards of realism about democracy, they were undoubtedly as realists as one can get.

But if the Federalists and the Antifederalists “fought on the same philosophical ground,” sharing the same distrust in both “multitudes” *and* in their representatives, what was the main source of disagreement between the two camps, at least from a theoretical perspective? The answer is to be found, apparently paradoxical, in the sovereignty of the people. It is a sovereignty implied in the opening of the Constitution—“We the People—” yet conspicuously absent from this foundational text. The paradox, however, is only apparent, for “the people” the delegates were referring to there were not the same people as the “changeable multitudes” they were worried so much about. The fact that this phrase was left undefined created a space for maneuver between different understandings of the people during the ensuing debates. The difference between the two camps can be summarized as follows: While the Antifederalists were first and foremost concerned with the *concentration of power*, the Federalists’ main concern was, in Hamilton’s blunt words, the *concentration of democracy*. Differently put, while the former camp was concerned with the dangers of elitism, the latter was worried about the excesses pf populism.

The Antifederalists were rather satisfied with the basic principles of representation as embodied in the Articles of the Confederation, for it assumed the representation of people not qua individuals, but collectively, as corporations, much as the Congregationalists understood them a century before. From here the famous rhetorical question raised by Patrick Henry: “Who authorized them to speak the language of, *We, the People*, instead of *We, the States*?” (Henry 1788 [Bailyn 1993, 596]). From here, also, the Antifederalists’ belief that a republican government can operate only on small areas, for according to them, that was the only way of ensuring a descriptive representation of various corporate interests—those of farmers, merchants, artisans, and the like. As Melancton Smith repeatedly argued throughout the New Yok Convention, under the newly proposed Constitution, “a proper representation [of these various groups] in a federal legislative is impracticable” (Melancton 1788 [Bailyn 1993]). “To make representation real and actual,” argued George Mason as well in the Virginia Convention, echoing many of the arguments of the Patriots (of whom he was one,) “the number of Representatives ought to be adequate; they ought to mix with the people, think as they think, feel as they feel, ought to be perfectly amenable to them” (Mason 1788 [Bailyn 1993, 607]; see also Kenyon 1955, Wood 2011, etc). From here the Antifederalists distrust—also of Congregationalist pedigree—in any concentration of power removed from the people, the demands for short periods in office, and the repeated appeals to a Bill of Rights. The political contract that they embraced with the same enthusiasm as during the Revolutionary era, came with a built-in suspicion of any men in power.

The Federalists begged to differ with all of the above. In the Federalist No. 15, Hamilton harshly attacked his opponents on the “the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist,” defining it as “the great and radical vice in the construction of the existing Confederation” (2001, 71 – emphasis in the original; see also, for example, Robert R. Livingston (1788 [Bailyn 1993, 776]). Not surprisingly, then, Hamilton also deplored the idea of electing representatives in the likeness of their electors and argued in favor of representatives that would refine the views of their electors and be able to transcend interest groups politics. According to him, lawyers were best equipped to fulfill these requirements, as they were not attached to any particular interest-group. Furthermore, he argued that increasing the ratio of constituents to representatives would rather ensure the election of the ‘best’ men (Yarbrough 1979; see also Livingston 1788, 777-78).

The concentration of power having the potential to bring about corruption did not worry Hamilton, who accused the other side of exaggerated cynicism: “They [the Antifederalists] seem to suppose that the moment you put men into the national council, they become corrupt and tyrannical, and lose their affection for the fellow-citizens” (Hamilton 1788 [Bailyn 1993, 798). On the contrary, it was the “concentration of democracy” that he perceived as the greatest danger. In a letter written the day before he met Aaron Burr in his mortal duel, he confessed his belief that “diluting” democracy by spreading it over a large territory was the only “relief to our real disease, which is *democracy*, the poison of which, by a subdivision, will only be the more concentrated in each part, and consequently the more virulent” (quoted in Stourzh 1970, 40 – emphasis in text).

In the end, the difference between the two camps boiled down to different expectations about the possibility of human nature to excel once men are placed in a position of power. The radical Whig assumption was that all men would be “good” if they were deprived of power, and “bad” if they wielded it (Stourzh 1970, 186). On the contrary, despite their present-day reputation as hardcore “realists,” the Federalists were in effect the ones who had to defend themselves against accusations of excessive optimism and even idealism, for having more faith than their adversaries in the ability of (some) representatives to serve the common good rather than factional interests. Discussing Melanchton Smith’s concern that only the natural aristocrats, mentioned above, would be at the helm of the new government, Livingston argued with sarcasm:

I hope, Sir, we are all aristocrats. (…) But who, in the name of common sense, will he have to represent us? (…) Why, those who are not virtuous, those who are not wise; those who are not learned (…) Where will he find them? Why, he must go out into the highways, and pick up the rogue and the robber … (Livingston 1788 [Bailyn 1993, 779]).

Obviously, Livingston exaggerated for dramatic effect, and Smith went on to reply vigorously, but the fact of the matter remains: The Federalists tended to have more hope that great statesmen would have the power to resist corruption and the willingness to work for the common good.

As the Puritans before them, the Federalists believed that no government, no matter how well devised, could survive absent the existence of virtuous men, able to apply general laws to particular circumstances. However, they were hardly idealists, as their adversaries often implied. As Hamilton argued, “men will pursue their interests. It is as easy to change human nature as to oppose the string current of selfish passions.” However, “*a wise legislator will gently divert the channel, and direct it, if possible, to the public good*” (Hamilton 1788 [Bailyn 1993, 814] - emphasis added). In direct opposition to “men of little faith,” Hamilton claimed that “the supposition of universal venality in human nature, is little less an error in political reasoning, than that of universal rectitude.(…) [T]here is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence: and experience justify the theory” (Federalist 79). According to this view, if the charge of lack of realism ought to have been placed anywhere, it should have been in the camp of those under the illusion that well-devised institutional arrangements would make “the aristocracy of merit” unnecessary (Stourzh 1970, 181; see also Federici 2012, for a similar interpretation of Hamilton).

**In Lieu of Conclusion**

On the one hand, throughout the Middle Ages “the people” was understood exclusively as One, a corporation of corporations hierarchically structured, allegedly ruled by reason for the common good, while the people as Many was relegated to the position of an unreliable and irrational mob. On the other hand, starting with early modernity, the success of different versions of social contract theories, swung the pendulum in the direction of the Many. People as collections of equal individuals, manifesting their wills by vote, came to be apprehended as the basis of any legitimate political authority, while political elites became inherently suspicious.

Different from both, the idea of the People’s Two Bodies suggests a way of reevaluating both the role of the masses and the ones of the elites. As we have seen, in accordance with the Puritan understanding, individuals were equally endowed with the freedom and wisdom required to voluntarily enter into a covenant or compact meant to create a political body and/or a society (*pactum societatis*). But, by the same token, once these new bodies were formed, the political contract (*pactum subiectiones*), took preeminence. The specific form of the government and its running was trusted in the hands of the best qualified, who promised in exchange to use their offices for the promotion of the common good. This was not to say that the people qua voting majority had no right to depose their representatives if they failed to fulfill their role. Yet this power of the majorities ought not to be abused. For, as Hamilton would argue more than a century later, “the same state of the passions which fits the multitude, who have not a sufficient stock of reason and knowledge to guide them, for opposition to tyranny and oppression, very naturally leads them to a contempt and disregard of all authority” (quoted in Stourzh 1970, 24). In contrast, as Larry Bartels observes, nowadays “much of political writing is not very well-suited to dealing with those kinds of interactions [between masses and elites] because the role of elites isn't very integrated into the overall way of thinking about what's going on. They are almost by necessity a kind of illegitimate piece of the system in a lot of popular thinking about the way politics works” (quoted in Illing 2017).

The consequences have both theoretical and practical implications. For example, on the theoretical side, David Ciepley has recently argued persuasively that the U.S. Constitution “is neither a contract among individuals to form a people,” as many scholars are still arguing, “nor a contract between a people and a ruler.” Instead, it “should be seen as a popularly issued corporate charter.” Ciepley 2017, 419). Persuasively and correct as it is, Ciepley’s argument remains partial. As we have seen, the simultaneously appeal to chartering *and* to the ruler/political compact was a common trope during the Founding era. As for the Constitution, Madison wrote in a letter dated 15 February 1830, that “[t]he original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to Government over them. These two compacts may be considered as blended in the Constitution of the United States” (quoted in Rosen 1999, 20).

Thus it appears that—at least for the protagonists—the distinction between charter and political contract was not as clear-cut as Ciepley suggests. He claims that “a sovereign (the People) promulgates a charter (a written constitution) that establishes a government with juridical personhood. […] Substitute ‘king’ or ‘Parliament’ for ‘People,’ and this description … is indistinguishable from a description of the formation and operation of an 18th century corporation” (Ciepley 2017, 419). Yet Donald Lutz’s approach appears both more complex and more accurate:

Take a charter … and replace the king as the highest civil authority with “the people.” The people as grantor give a monopoly of political power to government officials, who collectively become the grantee, or government. […] Establish institutions whereby the grantee can make all collective decisions … as long as the decisions are agreeable to the grantor and not contrary to the provisions in this “charter” that serves as a kind of higher law. In outline form, you have described how a charter lends himself to structuring a constitution with a legally enforceable content and the overtones of a contract (Lutz 1988, 38-39).

The People’s Two Bodies paradigm, that came to characterize the American founding, not only downplays the distinction between charters and political contracts, a distinction by and large overlooked at that time, but also implies for the corporate people a role that is not self-limited, as Ciepley claims, to the promulgation and the amending of the Constitution. Thus, for the elites (or for the technocrats,) claims to speak or to act in the name of a people who’s will is not always to be decided by majority of votes retain today, as they did so many times during the Founding, a theoretical legitimacy.

On the practical side, scholars such as Caramani, Achen, and Bartles suggest that the solution to the challenges of populism and elitism could be found in the balance between responsiveness and responsibility. According to them, a rethinking of the party model of representative government can provide such a balance, by aggregating group interests and by providing satisfactory policies to identity politics. While the People’s Two Bodies paradigm does not specifically address the party model, in many respects it does much more. It offers an alternative perspective to think and talk about the rule *by* the people (with populism as its extreme) and *for* the people (with elitism or technocracy as its extreme,) in other words, to overcome the either-or approach to responsiveness (*to* the people) *and* responsibility (*for* the people).

On the one hand, like the modern contractarian paradigm, it provides the voluntary component of popular sovereignty, thus justifying the calls to hear “the people’s voices.” On the other hand, it also provides the elites with a more sophisticated understanding of the people as a corporation of corporations, in counter distinction to the homogeneity of a people understood as a mere collection of equal (and equally abstract) individuals. As things stay now, both populism and elitism are hostile, in Hobbes words, to any “many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man” (Hobbes 1994, Ch.29, 218). Furthermore, if Bartels is right that “the biggest limitation at the moment is that we don't know how to incorporate the role of political elites in a constructive way into the governing process or to somehow make it possible to ensure that they're working on behalf of the interests of ordinary people,” the paradigm of the People’s Two Bodies might be the suitable way to overcome this limitation (quoted in Illing 2017).

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1. One could argue that the “People’s Two Bodies” label is inaccurate, since as a multitude the people have not *one* distinct body, like they do in the corporate understanding. However, the expression “the body of the people” is currently used mostly in reference to a multitude of voices, which makes the distinction implied by the label even more useful. [↑](#endnote-ref-1)
2. The interpretation offered here differs drastically from both Sheldon Wolin (1981) and Eric L. Santner’s (2011) usage of “the people’s two bodies.” On the one hand, Wolin identifies in the American tradition a politically active, democratic body, and an essentially passive, economic, and intentional antidemocratic one. On the other hand, Santner focuses on the modern transference of sovereignty from the King’s Two Bodies to the People’s Two Bodies, from mainly a psychoanalytical perspective centered on the idea of “corporeality.” [↑](#endnote-ref-2)
3. Marsilius of Padua, for example, uses the term “*valentior pars*” (weightier part). [↑](#endnote-ref-3)
4. The same observation applies to later documents, such as the Virginia Bill of Rights or the Declaration of Independence. [↑](#endnote-ref-4)
5. Many scholars see Locke as theorizing both a social and a political compact, despite the fact that Locke himself uses the word compact only in the first case. However, all subtleties aside, what is important to notice is Locke’s blatant avoidance of any reference to an aristocracy of merit or to any hierarchy of virtues, skills, and so forth—the backbone, as we have seen, of all previous understandings of a people involved in a political contract with its rulers. [↑](#endnote-ref-5)
6. *The Novanglus Essays* by John Adams – www.thefederalistpapers.org [↑](#endnote-ref-6)
7. Blackstone was the second most quoted author during the revolutionary era, right after Montesquieu, and significantly ahead of John Locke (Lutz 1988, 142). [↑](#endnote-ref-7)
8. Although Zuckert (2003) also discusses Blackstone’s impact on the American Revolution, he fails to notice the governmental or political contract mostly referred at by Blackstone. Other scholars did the same. None of them mentions Stourzh (1970), most likely because Stourzh’s original text appeared in German. [↑](#endnote-ref-8)