BOOK REVIEW
CROWN AND CONSTITUTION


Reviewed by Tara Helfman*

INTRODUCTION

In his first cabinet meeting of 2014, President Obama announced a strategy to bypass the Republican-controlled House of Representatives and advance his social and economic agenda through the discretionary powers of the executive:

We are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help that they need. I’ve got a pen, and I’ve got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward . . . I’ve got a phone that allows me to convene Americans from every walk of life . . . to try to bring more and more Americans together around what I think is a unifying theme: making sure that this is a country where, if you work hard, you can make it.1

Over the course of the year, the President signed executive orders concerning minimum wage rates,2 climate change,3 gay rights,4 and police practices.5 Perhaps most controversially, he announced a series of executive actions expanding protections for undocumented immigrants6 and encouraging selective enforcement by the Department of Homeland Security of certain provisions of federal immigration law.7 The President’s immigration measures prompted eighteen states to file

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7 Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs. et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [http://perma.cc/38EE-JMRR].
suit against the federal government\textsuperscript{8} for violating the Take Care Clause of the Constitution. “This lawsuit is not about immigration,” the states argued. “It is about the rule of law, presidential power, and the structural limits of the U.S. Constitution.”\textsuperscript{9} The suit represents the latest phase of a controversy over the scope of executive power that predates the Constitution of 1789 and, indeed, the American Founding itself.

Professor Eric Nelson’s provocative new work, \textit{The Royalist Revolution: Monarchy and the American Founding}, represents an important contribution to our understanding of the framing of the Article II powers of the Presidency. It argues that these powers found their earliest iteration during the imperial crisis of the 1760s and 1770s, when the very people who would eventually become leaders of the Revolution sought relief from the excesses of parliamentary rule in the revival of royal authority. Nelson argues that from the Stamp Act Crisis of 1765 through the final months leading to the Declaration of Independence, “patriot royalists” such as John Adams, Alexander Hamilton, and James Wilson urged George III to revive the prerogative powers of the Stuart kings in defense of the colonies.\textsuperscript{10} They called upon the Hanoverian king to do as his Stuart predecessors had done — to treat the colonies as his personal dominions and exercise the royal negative to reject bills that violated their traditional rights. According to Nelson:

\begin{quote}
[The turn to the royal prerogative was the formative moment in the history of what would emerge as American constitutionalism. The very same principles that had underwritten the patriot campaign to rebalance the imperial constitution in favor of the Crown demanded in 1787 the creation of a recognizably Royalist constitution for the new United States. This constitution would exclude the office of king — . . . the particular brand of republican political theory that had been unleashed in the colonies in the early months of 1776 required as much — but it would assign its rechris-
\end{quote}


\textsuperscript{9} Id. at 2.

\textsuperscript{10} Professor John Phillip Reid has noted:

Few turns of the revolution controversy have eluded historians more than the apparent royalism of American whigs. They were supposed to be guided by something called “republicanism,” and to see them appealing for protection to the prerogative has provided scholars who doubt they could have been guided by constitutional ideology with convincing evidence of their insincerity.

\textsc{John Phillip Reid, Constitutional History of the American Revolution: The Authority of Law} 154 (1993). Nelson argues that the apparent royalism of colonial Americans was no act of desperation or disingenuousness, but an act rooted in principled constitutional claims (pp. 155–62).
tended chief magistrate far more power than any English monarch had wielded since William of Orange landed at Torbay in 1688. (p. 7)\footnote{Footnotes have been omitted.}

In this sense, President George Washington had more in common with King Charles I than with King George III, and this was by design.

This Review begins with a brief overview of the way historians have treated the ideas of the American Revolution, noting how Nelson’s thesis challenges the prevailing view, advanced most notably by Professor Bernard Bailyn, that the American Revolution was essentially republican in character. It then discusses what Nelson terms the “Neo-Stuart” account of the British constitution, which emerged in the colonies during the 1760s and 1770s. On this account, the crisis of empire could be resolved by restoring to the monarchy the discretionary powers enjoyed by the early seventeenth-century Stuart kings. The Review then considers Nelson’s arguments regarding the impact of eighteenth-century republican theory on patriot-royalist theorists. Finally, it concludes by examining the way arguments over the proper role of the King in the British constitution shaped the framing of executive power in the Constitution of 1789. It attempts throughout to do justice to Nelson’s sophisticated account while bearing in mind the particular interests of the law review readership.

I. REPUBLICANS, ROYALISTS, OR OPPORTUNISTS?

On February 13, 1818, John Adams posed a question that stands at the gates of American history like the Sphinx at the gates of Thebes: “[W]hat do we mean by the American Revolution?”\footnote{Letter from John Adams to Hezekiah Niles (Feb. 13, 1818), \textit{in} \textit{10 The Works of John Adams} 282, 282 (Charles Francis Adams ed., 1856). Niles was the founding editor of the \textit{Weekly Register}, the first weekly news magazine in the United States. A brief biographical sketch can be found in Norval Neil Luxon’s \textit{H. Niles, the Man and the Editor}, 28 MISS. VALLEY HIST. REV. 27 (1941).} Adams was not the first to pose that question, nor would he be the last. Before the gun smoke had settled on Yorktown the nature of the Revolution was being contested in the newly independent nation,\footnote{Footnote has been omitted.} in the towns and

\textit{\textit{The Conquest of Canaan} (1785), celebrated the Revolution as a manifestation of God’s will through the fulfillment of biblical prophecy. For discussion, see Richard M. Gamble, \textit{The Last and Brightest Empire of Time}: \textit{Timothy Dwight and America as Vögelin’s “Authoritative Present,” 1771-1787, 20 HUMANITAS 13, 29-33 (2007).} Lester H. Cohen discusses these “patriot histories” of the American Revolution and others in \textit{The Revolutionary Histories} (1980).}
cities of England, in Parliament at Westminster, in Ireland, in the British West Indies, and on the European continent. But to Adams, the Revolution was not merely a political event or a military contest:

The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments of their duties and obligations. While the king, and all in authority under him, were believed to govern in justice and mercy, according to the laws and constitution derived to them from the God of nature and transmitted to them by their ancestors, they thought themselves bound to pray for the king and queen and all the royal family, and all in authority under them, as ministers ordained of God for their good; but when they saw those powers renouncing all the principles of authority, and bent upon the destruction of all the securities of their lives, liberties, and properties, they thought it their duty to pray for the continental congress and all the thirteen State congresses, &c. . . .

This radical change in the principles, opinions, sentiments, and affections of the people, was the real American Revolution.
Successive generations of historians have challenged, investigated, and reinvestigated Adams’s position, but the ideological component of the American Revolution has proven both ineluctable and irrefutable. This section addresses the historiographical controversy over the nature of the American Revolution, noting the unique place of The Royalist Revolution within it.

In 1913 Charles Beard presented the first great challenge to the intellectual commitments of the founding generation, arguing that the new nation was founded not on political ideals but on a bedrock of economic determinism of which the Framers themselves were aware. In 1940 George Dutcher went a step farther than Beard, arguing that “republican government in America developed in 1775 and 1776 from political necessity and not from political theory or public agitation.” The founding generation, he argued, could not possibly have been inspired by republican theory because their access to sources of the tradition was so limited. The only republican government with which the colonists had direct experience was the business corporation and, with the exception of the writings of James Harrington and John Milton, the memory of English republican thought had been all but erased. At best, political thought was secondary to the economic interests of the protagonists of the Revolution. At worst,
it provided a convenient cover for the entrenchment of their personal interests.25

Yet it remains impossible to reconcile these interpretations with the words of the Founders themselves. Adams was not alone in characterizing the Revolution as ideological in nature. Even the radical Tom Paine remarked that the Revolution was the result of “a mental examination” so transformative that Americans “are now really another people.”26 Ideas mattered to the revolutionary generation, and not just as a disguise for crude self-interest. As Professor Gordon Wood has noted, “American colonists were not an oppressed people; they had no crushing imperial chains to throw off. In fact, the colonists knew they were freer, more equal, more prosperous, and less burdened with cumbersome feudal and monarchical restraints than any other part of mankind in the eighteenth century.”27 They had more to lose and less to gain by revolution than the oppressed masses of Tsarist Russia or the growing bourgeoisie of France, where enlightened despots attempted to temper absolutist rule with rationalist social agendas.28

If the Revolution was fueled by ideological commitments, then what were the ideas that American revolutionaries believed were worth dying for, and why did these ideas become so salient during the eighteenth century? Bailyn has located the answers to both questions in Americans’ own understanding of the tradition of liberty to which they were heirs. Examining the pamphlet literature that flourished in the colonies during the eighteenth century, Bailyn has laid bare the deep, unbroken roots of revolutionary-era discourse. The political ideas of the Revolution had taken root in the colonies as early as the 1730s, nourished by seventeenth-century English political theory, by Enlightenment rationalism, by civic humanism, and by a common law tradition that was lived, studied, practiced, and enforced in the colonies.29 In the literature of classical antiquity, colonists found exempla of civic virtue and rustic simplicity to which they looked as models for their own times.30 From the wellspring of Enlightenment rationalism they drew a vocabulary of natural rights and contractarian theory that was in many ways complementary to the legal tradition of which they

25 According to Professor Carl Becker, “from 1764 to 1776, the colonists modified their theory to suit their needs.” CARL L. BECKER, THE DECLARATION OF INDEPENDENCE 133 (1958).
26 Letter from Thomas Paine to the Abbé Raynal (1782), in 8 LIFE AND WRITINGS OF THOMAS PAINE 186, 244 (Daniel Edwin Wheeler ed., 1908).
28 See, e.g., JOHN G. GAGLIARDO, ENLIGHTENED DESPOTISM (1967).
30 BAILYN, supra note 29, at 23–26.
were a part. In the common law, colonists found “a repository of experience in human dealings embodying the principles of justice, equity, and rights; . . . a form of history . . . [that] helped explain the movement of events and the meaning of the present.” And from Protestant theology colonists derived a sense that they held a select place in God’s plan for the world, a plan that had yet to be fully revealed.

At the same time, the vibrant pamphlet press helped disseminate political ideas throughout the colonies with ease, rapidity, and energy. The most influential of these ideas, according to Bailyn, belonged to radical Whig writers of the late seventeenth and early eighteenth centuries. To these theorists, the settlement of the Glorious Revolution of 1688 had simply transferred political authority from one form of tyranny to another, replacing arbitrary rule by royal prerogative with authoritarian rule by a corrupt ministry. They argued that the “Robinocracy” instituted under Prime Minister Robert Walpole was lulling Britons into a dangerous sense of political complacency. Electoral perversities such as rotten boroughs enabled officeholders to buy and sell political power while making government less representative of the governed. Corruption and favoritism proliferated in this political climate, leading to moral and political decay. “Country” Whigs such as John Trenchard and Thomas Gordon challenged the new oligarchy at “Court” by adapting the republican ideas of the English Civil War and Commonwealth periods to contemporary challenges. Tyranny could be avoided, they argued, only by expanding suffrage, enhancing press freedom, and making political representation proportional to population distribution. Britain’s mixed constitution could be purged of corruption by restoring balance and independence to the King, Lords, and Commons.

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31 Id. at 27–31.
32 Id. at 27.
33 Id. at 32–33.
35 Id. at 29–31.
36 BAILYN, supra note 29, at 283.
37 Id. at 46–51.
38 Such was the term coined by Viscount Bolingbroke to describe Walpole’s monopoly of political power. Id. at 49–50.
39 Id. at 48–51.
40 Id. at 35–36.
41 Id. at 47.
42 Id. at 70–78; see also WOOD, supra note 27, at 98–99.
The writings of these radical Whigs were republished in the colonies, where, according to Bailyn, “Trenchard and Gordon ranked with the treatises of Locke as the most authoritative statement of the nature of political liberty and above Locke as an exposition of the social sources of the threats it faced.” It was in this sense that:

The leaders of the Revolutionary movement were radicals — but they were eighteenth-century radicals concerned, like the eighteenth-century English radicals, not with the need to recast the social order nor with the problems of economic inequality and the injustices of stratified societies but with the need to purify a corrupt constitution and fight off the apparent growth of prerogative power.

It was also in this sense that they were republicans, for they saw the balanced constitution as the best guardian of liberty.

As Wood has demonstrated in *The Radicalism of the American Revolution*, republicanism was a versatile concept during the eighteenth century. It could connote a form of government, as it had (at least briefly) in the Dutch Republic and the cantons of Switzerland. Or it could connote a quality of government that might exist by degree. Thus a monarchical government could be more or less republican in nature depending on the sorts of values and social relationships it embodied. A monarchy whose institutions were free and independent — and whose subjects prized the public good over their private interests — was seen as more republican in nature than a monarchy rooted in patronage, absolutism, corruption, and self-interest. Even radical Whigs like Trenchard and Gordon understood the British monarchy to be essentially republican in character — they were simply agitating to purge it of corruption and dissolution. Wood argues that these republican ideals had settled so deeply into the intellectual life and political experience of the North American colonies that “[t]he

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43 BAILYN, supra note 29, at 36. In this sense, Bailyn terms them the “intellectual middlemen” who transferred opposition political thought to the colonies. Id. at 35.
44 Id. at 36. Through his exhaustive analysis of the colonial pamphlet literature, Bailyn has concluded:

Opposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists. From the earliest years of the century it nourished their political thought and sensibilities. There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics.

Id. at 43.
45 Id. at 283.
46 WOOD, supra note 27, at 95–103.
47 See id. at 96.
48 See id. at 97–100.
49 Id. at 101–03.
50 Id. at 99–101.
Americans did not have to invent republicanism in 1776; they only had to bring it to the surface. It was there all along.\footnote{Id. at 109.}

But in The Royalist Revolution, Nelson challenges these views of the intellectual underpinnings of the American Revolution, arguing that the patriots were not “radical whigs, or republicans-in-waiting, who were motivated by a terror of crown power and executive corruption” (p. 6). Rather, he argues, many of the Revolution’s most influential protagonists had a deeper affinity with seventeenth-century Stuart monarchism than with eighteenth-century English radicalism (p. 7). As Parliament passed law after law governing the internal affairs of the colonies, patriot leaders repeatedly appealed directly to the King, asking him to assert his prerogative powers in defense of his dominions. They implored him to use the royal negative, which had not been exercised since the reign of Queen Anne, to veto bills that encroached upon the King’s own powers over the colonies (pp. 55–56). To the colonists, the problem was not that the King was exercising too much royal power, but too little. In this sense, Nelson argues, the American Revolution was a deeply conservative one that had at its heart a struggle to revive the powers of the King vis-à-vis Parliament (pp. 22–23). It is to this aspect of Nelson’s thesis that we now turn.

II. THE NEO-STUART IMPERIAL CONSTITUTION

The events leading to the Revolutionary War are familiar to every student of American history,\footnote{For a concise overview, see Edgar J. McManus & Tara Helfman, Liberty and Union 35–57 (2014).} but three events in particular precipitated ideological crisis and transformation in the North American colonies. The first was the passage of the Stamp Act in 1765,\footnote{Duties in American Colonies Act, 1765, 5 Geo. 3, c. 12 (Gr. Bril.).} Parliament’s first attempt to levy a direct revenue tax on the North American colonies — or, for that matter, on any colony or territory that was not represented in London.\footnote{John Phillip Reid, The Concept of Representation in the Age of the American Revolution 26 (1989).} Resistance to the tax in the colonies was swift, organized, and frequently violent,\footnote{Lawrence Henry Gipson, The Coming of the Revolution, 1763–1775, at 86–94 (1954).} resulting in the repeal of the law.\footnote{For discussion of the Stamp Act Congress and Parliament’s response, see id. at 95–115.} However, the taxation controversy was not resolved by repeal; it was simply deferred when Parliament passed the Declaratory Act, which asserted that that the colonies “have been, are, and of right ought to be, subordinate unto, and dependent upon the
imperial crown and parliament of *Great Britain*” and were therefore subject to all Acts of Parliament.57

The second critical event was the passage of the Townshend Revenue Act (Townshend Duties), through which Parliament made good on the Declaratory Act’s threat. Instead of imposing a direct tax, this time Parliament imposed tariffs on colonial imports.58 The distinction was important. During the Stamp Act Crisis, colonials argued that the authority to impose internal taxation on the colonies rested exclusively with the colonies themselves. However, they conceded that Parliament had the authority to regulate imperial commerce.59 The Townshend Duties were, by this line of argument, a lawful exercise of Parliament’s authority. This put colonials in a challenging predicament. Much like a direct tax, the purpose of the Townshend Duties was to raise revenue; but the duties took the form of a regulation that the colonists themselves had conceded was legitimate.60 Nelson shows that when confronted with the Townshend Duties it was all but impossible for colonists to prove the real intentions behind the measures (p. 33). The internal/external distinction was proving unworkable and, more importantly, it failed to capture precisely the nature of colonial grievances.

According to Nelson, colonial theorists responded to this challenge by reconceptualizing the position of the colonies within the imperial constitution altogether (p. 33).61 By 1766, Benjamin Franklin was suggesting that the colonies were separate dominions within the empire, outside the realm of Great Britain and subject to the authority of the Crown, not Parliament (pp. 33–35). Franklin was not alone in this theoretical enterprise. Reflecting on the initial planting of the colonies, James Wilson and Benjamin Rush observed that the early Stuart kings had granted colonial charters exclusively through the exercise of the...

57 An Act for the Better Securing the Dependency of His Majesty’s Dominions in America upon the Crown and Parliament of Great Britain, 1765, 6 Geo. 3, c. 12 (Gr. Brit.).

58 For a comparison of the colonial responses to the Stamp Act and Townshend Duties, see Bailyn, supra note 29, at 99–111.

59 See, e.g., Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, supra note 34, at 596, 637 (“It appears to me that there is a clear and necessary distinction between an act imposing a tax for the single purpose of revenue and those acts which have been made for the regulation of trade and have produced some revenue in consequence of their effect and operation as regulations of trade.”); Stephen Hopkins, *The Rights of Colonies Examined* (1765), in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, supra note 34, at 499, 521 (“The Parliament, it is confessed, have power to regulate the trade of the whole empire . . . .”).

60 Reid has argued that the internal/external distinction can be misleading. The colonials objected to the imposition of any revenue tax by Parliament, regardless of whether it was internal or external. John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* 34–59 (1987).

61 Professor Charles Howard McIlwain explored the contours of this enterprise in his seminal work *The American Revolution* (1923).
royal prerogative (pp. 35–38). Parliament had no part in the process of granting these charters, and the original settlers understood that Parliament had no authority on American soil (pp. 33–34). But over the course of nearly 150 years, Parliament gradually usurped the authority of the King over his colonies. The process, Rush and Wilson argued, began with the Navigation Act in 1651, which stipulated that only British-flagged vessels could carry goods from outside Europe into British ports (pp. 36–38). It was no coincidence that this was the first time Parliament passed a law directly governing colonial affairs; Parliament had executed Charles I only two years earlier, so there was no King to stop them.

To these colonial theorists, Nelson argues, the revolutionary convulsions that shook seventeenth-century England undermined the imperial constitution by strengthening Parliament at the expense of the Crown. He identifies a 1769 pamphlet by Edward Bancroft, *Remarks on the Review of the Controversy Between Great Britain and Her Colonies*, as the first full-throated neo-Stuart account of the imperial constitution. Notwithstanding the author’s “relative obscurity” (p. 43), the pamphlet became, according to Nelson, “the most influential patriot text of the early 1770s, and it supplied a definitive template for defenses of the dominion theory” (p. 43). In it, Bancroft argued that the colonies were founded through contracts between the King and the colonial proprietors and companies (p. 44). Because Parliament had no privity in these contracts, all legal rights and obligations flowed between the King and his colonies — and this was exactly how the settlers wanted it. On Bancroft’s account, characterized by Nelson as revisionist, the Puritans settled the colonies not to escape Stuart tyranny but to escape oppressive laws passed by Parliament (pp. 45–46). What is more, the early Stuarts were fiercely protective of their colonies against encroachments by the legislature (p. 45). Bancroft points to instances in which James I and his successor, Charles I, exercised the royal negative to block parliamentary bills granting English subjects fishing rights off the coasts of various colonies. The Stuarts supported granting fishing rights to English subjects, Bancroft explained, but they negatived the bills because those rights were not Parliament’s to give under the terms of the colonial charters.62

Bancroft’s contemporaries, including John Adams, Alexander Hamilton, and James Iredell, adopted and further publicized his account of the early Stuarts (pp. 49–58). Their revisionist account of Stuart history did two things: First, it provided a clear theory of the

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62 Nelson points out that Bancroft was right about James I’s exercise of the negative but he was wrong about Charles I. Fishery bills were introduced in 1625 and 1626, but they stalled in Parliament. Nelson notes that had the bills been passed, Charles I would likely have negatived them (pp. 44–45).
status of the colonies under the British constitution. Founded under charter agreements with the King, the colonies were beyond the legislative authority of Parliament. The colonies would legislate for themselves, but the person and prerogative of the King would serve as a harmonizing force between them (pp. 57–58). Second, the neo-Stuart account of the imperial constitution served as an exhortation to George III to revive prerogative powers that had atrophied for so long (pp. 58, 63). By the patriot-royalist account, the crisis of empire could be resolved if only George III behaved a little more like James I.63

This view of the prerogative gained particular salience during the third critical phase in the shaping of revolutionary commitments: the colonial response to the Coercive Acts. Passed as punitive measures to bring Massachusetts back into obedience after the Boston Tea Party, the Coercive Acts closed the Port of Boston to trade, allowed the quartering of troops in vacant buildings, placed the government of Massachusetts under the direct control of Great Britain, and allowed the Crown to avoid local juries by removing trials to other colonies or to Great Britain.64 Dubbed the Intolerable Acts in North America, they triggered a wave of violent resistance in Boston and prompted the colonies to summon the First Continental Congress.65 On July 5, 1775, the Congress petitioned the King, pledging its loyalty to him and rejecting the authority of Parliament.66 Congress appealed to the King to use his authority to secure relief from the abuses of Parliament on behalf of his dominions.67

63 Indeed, in 1774, an anonymous writer reflected on the irony of this turn in the alignment of British party politics:

The contest with America seems to have produced a strange overturn in the political systems of the two great parties who divide this kingdom. — The Tories, by acknowledging the supreme power of the British parliament over the whole British empire, appear to be turned Whigs; and the Whigs, in attempting to extend the power of the King’s prerogative beyond the control of his parliament, shew themselves to be Tories.


64 See Neil R. Stout, The Perfect Crisis 42–64 (1976) (providing an overview of the statutes that collectively made up the Coercive Acts).

65 See, e.g., id. at 89–98 (providing an overview of the aftermath of the Intolerable Acts, especially of the Port Act).


67 See id. at 166 (“We, therefore, beseech your Majesty that your royal authority and influence may be graciously interposed to procure us relief from our afflicting fears and jealousies, occasioned by the system before mentioned, and to settle peace through every part of your dominions, with all humility submitting to your Majesty’s wise consideration whether it may not be expedient for facilitating those important purposes, that your Majesty be pleased to direct some mode by which the united applications of your faithful colonists to the throne, in pursuance of their common councils, may be improved into a happy and permanent reconciliation; and that, in the mean time, measures may be taken for preventing the further destruction of the lives of your Majesty’s subjects, and that such statutes as more immediately distress any of your Majesty’s colonies may be repealed.”).
The King refused to entertain the petition, throwing his support behind Parliament and pledging his commitment to a constitutional order in which the colonies were subject to the sovereign authority of the King, Lords, and Commons. Moreover, the King derided colonial royalism as a mere ploy, saying of the petitioners: "They meant only to amuse by vague expressions of attachment to the Parent State, and the strongest protestations of loyalty to me, whilst they were preparing for a general revolt." This rebuff was, according to Nelson, the tipping point for the patriot royalists. "Traumatized and disillusioned, the same patriot writers who had championed the Stuarts and the royal prerogative only a few months earlier now turned on the king, and in some cases, on monarchy itself" (p. 64).

III. THE REPUBLICAN TURN

In some ways, the King’s own disbelief in the sincerity of the patriot royalists foreshadows the skepticism shared by historians of revolutionary ideology. Did the colonists really mean what they were saying when they advocated the revival of a neo-Stuart constitutional monarchy? At one extreme of disbelief lies the paranoia of George III’s speech and the cynicism of parliamentary Whigs. At the other lies a more benevolent skepticism. For Professor John Phillip Reid, the flight to the King was essentially a strategy born of “constitutional helplessness — of having no alternative to the king.” He notes that petitioners in England occasionally employed this strategy when they felt aggrieved, so it should not be surprising that petitioners in North America did the same.

By contrast, in The King’s Three Faces, Professor Brendan McConville explains the flight to the King as a natural response given the culture of monarchy in the colonies:

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68 For discussion of George III’s support of Parliament during the Revolutionary Crisis, see H.T. Dickinson, George III and Parliament, 30 PARLIAMENTARY HIST. 395, 411–12 (2011); Andrew Jackson O’Shaughnessy, "If Others Will Not Be Active, I Must Drive": George III and the American Revolution, 2 EARLY AM. STUD. 1, 9–17 (2004).


70 See supra note 69 and accompanying text.

71 Professor Edmund Morgan wrote that, to some “[t]he colonists in fact seemed to be a ridiculous group of hypocrites, who capered from one pious notion of their rights to another. Their conduct was shameful and their efforts to justify it even more so.” Edmund S. Morgan, Colonial Ideas of Parliamentary Power, 1764–1766, 5 WM. & MARY Q. 311, 311 (1948).

72 REID, supra note 10, at 158.

73 See id.
The Stamp Act opened what had been invisible fissures in constitutional understanding. Forced to adapt intellectually by the continuing pressures over taxation and sovereignty, provincials quickly abandoned any pretense of parliamentary supremacy in the empire and began voicing faith that the king they loved could somehow save America from legislative tyranny. Their charters, they came to insist, derived from the king’s absolute right to the lands of the empire and embodied the values of the Protestant political culture. In certain ways, the imperial crisis between 1764 and 1774 can be understood as a flight to the king’s love and justice.74

McConville attributes this flight neither to a coherent theory of the imperial constitution nor to a clear conception of political liberty. Rather, what drove Americans to seek royal protection was “[t]he love of the king inculcated during the long British peace.”75 Decades of habituation to the pomp, ritual, and public ceremony of monarchy in the colonies instilled in Americans a deep affection for and trust in the person of the King.76

To be sure, the Crown’s symbolic presence in the colonies was pervasive. Good feeling toward the King surged in the wake of the British victory in the Seven Years’ War.77 But the imperial constitution did not live on love alone and, by McConville’s account, the failure of George III to intercede on behalf of his colonies spelled the end of colonial commitment to monarchy as a desirable form of government.78

According to Nelson, the colonial appeal to George III was only the beginning of a renewed commitment to royal authority (p. 239 n.29). The patriot royalists’ flight to the King was not simply an appeal to his love, mercy, and charity. It was something more potent than that:

75 Id. at 253; cf. RICHARD B. MORRIS, THE EMERGING NATIONS AND THE AMERICAN REVOLUTION 13 (1970) (“The American Revolution culminated almost two generations of ideological opposition to monarchy, although attachment to the Crown remained the one tie to empire that most Patriots abandoned with greatest reluctance.”); WOOD, supra note 27, at 111 (“Royal authority operated much of the time on the surface of American life, masking the confused reality of decentralized institutions and localized authorities that made up the central governance of the colonies. The harmonious compromise between central and local authorities that had developed in Britain since 1688 was not duplicated in America. The crown always seemed to the colonists to be an extraneous overlaid power antagonistic to their local institutions, especially the provincial assemblies.”).
76 MCCONVILLE, supra note 74, at 256. McConville shows that public celebrations of the monarchy were a regular part of life in the North American colonies even as they were on the decline in Britain. Id. at 76-80; see also JERRILYN GREENE MARSTON, KING AND CONGRESS 13-14 (1987) (discussing such rituals); cf. id. at 15-16 (noting in addition that “while few [colonial Americans] preferred a monarchial form of government in theory, many considered it to be the most workable system in practice,” id. at 15).
77 See, e.g., William Henry Drayton, Chief Justice of S.C., A Charge, On the Rise of the American Empire 4 (1776) (“Never were a People more wrapped up in a King, than the Americans were in George the Third in the Year 1763. They revered and obeyed the British Government, because it protected them — they fondly called Great-Britain — Home!”).
78 See MCCONVILLE, supra note 74, at 249-50.
the patriot royalists were urging him to discharge constitutional duties that they articulated with clarity, force, and rigor (pp. 7–9). In 1774, James Wilson explained, “inhabitants of Great Britain and those of America . . . are under allegiance to the same prince; and this union of allegiance naturally produces a union of hearts.”

But that common allegiance:

[It] is also productive of a union of measures through the whole British dominions. To the king is intrusted the direction and management of the great machine of government. . . . He makes war: he concludes peace: he forms alliances: he regulates domestick 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 on the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws.

The connexion 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.

The King, on this view, was more than an affective symbol of colonial ties to the mother country. In the eyes of the colonists, he possessed legitimate constitutional authority over them, and it was to that authority that Americans appealed during the crises of the 1770s.

Nelson shows that the astonishing thing about Wilson’s appeal — and the appeals of patriots like him — is that:

[It] was wholly unprecedented in whig discourse to flee from parliamentary authority and seek safety in the “prerogatives of the Crown.” It was equally stunning to include among those prerogatives the dreaded “negative voice” — which had not been exercised by a British monarch over a parliamentary bill since the reign of Anne, and which the king did not even enjoy on paper in several of the American colonies — as well as the power to “regulate domestic trade” . . . . (p. 36)

The neo-Stuart account of the imperial constitution was thus a novel one. But the thing that suggests that the neo-Stuart account was not merely an argument of convenience, the thing that suggests that the patriot royalists were deeply committed to this account of monarchy, is that they remained committed to it long after they ceased to be patriot royalists and instead became patriot revolutionaries (pp. 149–83).

Even in rejecting the King, Nelson argues, the patriots adhered to the neo-Stuart account of monarchy. In fact, it was because of the pa-

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80 Id. at 243–44.
81 Footnotes have been omitted.
triot royalists’ views of monarchy that they so rapidly rejected George III in the spring of 1776. Colonial grievances were predicated on the survival through the eighteenth century of powers that had belonged to the early Stuarts. George III had failed to exercise the powers allocated to him under the Stuart charters when he refused to exercise the royal negative to veto parliamentary taxation and punitive measures. Because George III had abdicated his prerogative in the colonies, he was no longer a lawful ruler (pp. 109–11).

But it is one thing to reject the King; it is quite another to reject monarchy. Nelson explains how the flight to the King took a republican turn in 1776, reminding us that republicanism took many forms in early-modern political thought. Key among these conceptions was the neo-Roman view of the republic as a commonwealth without a king. Under this account, the presence of a king in government posed a threat to the liberty of the people because the king could, by abuse of his power, enslave them. Kingship was not inherently unlawful according to this view; it was just more susceptible to corruption and abuse of power (pp. 115–17). A rival theory of republicanism, Hebraic exclusivism, conceived of monarchy as inherently sinful. Rooted in biblical texts and in the tradition of rabbinical exegesis surrounding Deuteronomy 17 and 1 Samuel 8, this view thought of monarchy as tantamount to idolatry (pp. 117–21).82 Nelson shows that just as Milton drew upon this tradition in defending the execution of Charles I, so too did Paine draw upon it to delegitimize the very institution of monarchy (pp. 117–36).83

Bailyn has characterized Common Sense as “a work of genius — slapdash as it is, rambling as it is, crude as it is.”84 John Adams was less generous, writing to Thomas Jefferson: “What a poor, ignorant, malicious, short-sighted, crapulous mass is Tom Paine’s ‘Common Sense’ . . . . And yet history is to ascribe the American Revolution to Thomas Paine!”85 Nelson does not, as Adams feared, go so far as to ascribe the American Revolution to Paine’s pamphlet; but, in a curious twist, he attributes the enduring success of the Revolution to Paine’s exclusivist account of republicanism. Common Sense, he argues, “so effectively altered the focus of political debate — from the enslaving effects of kingly powers to the idolatrous pretensions of the office of king — that it later became possible for Americans to reconcile repub-

84 BERNARD BAILYN, FACES OF REVOLUTION 67 (1992).
licanism with prerogative (a reconciliation that Paine himself de-
plored)” (p. 144).

Paine’s fervent antimonarchism prevailed in the marketplace of
revolutionary ideas, Nelson argues, making possible a new type of
conversation about royal authority. By persuading Americans that
monarchy was an unlawful form of government, the pamphlet effec-
tively untethered the concept of prerogative power from the office of
the King. It became possible, Nelson argues, for the patriot royalists
to conceive of a republican form of government led by a single magis-
trate with powers much like the prerogatives of the Stuart monarchs.
In short, Paine’s republican exclusivism made possible the neo-Roman
synthesis of the Philadelphia Convention.

IV. A ROYALIST CONSTITUTION?

Nelson writes that for the patriot royalists, “the new frame of gov-
ernment embodied the apotheosis of their Revolutionary commitments,
not a repudiation of them, although they uniformly regretted that the
final document adopted by the convention did not go even further in
the direction of pure Royalism. The Constitution, we might say, up-
held the spirit of ’75” (p. 185). It did so, he argues, by creating an ex-
ecutive consisting of a single chief magistrate and by conferring upon
that executive prerogative powers typically enjoyed by the King. It is
here that Nelson’s subtle exploration of patriot-royalist thought takes a
powerful, if surprising, turn. Having thus far presented patriot royal-
ism as a dominant view in the colonies, Nelson notes that it is not rep-
resentative of the entire body of revolutionary thought. To the con-
trary, he writes:

The patriots who led the opposition to Britain and waged the Revolution-
ary War had agreed on a small number of central claims — that the Brit-
ish constitution had become hopelessly corrupt, that the colonists were not
represented in Parliament, and so on — but they had disagreed sharply,
and fatefully, among themselves as to precisely why or in what sense these
claims were correct. (pp. 184–85)86

In what appears to be a moment of agreement with McConville’s
thesis, Nelson argues that the reception of Paine’s trenchant antimo-
narchism, coupled with the signing of the Declaration of Inde-
pendence, led to a revival of Whig theory in the colonies. And, to the dis-
taste of the patriot royalists, these ideas had a formative influence on
state constitutions of the revolutionary era. The whiggish notions of

86 See also p. 148 (“[T]he ideology of the revolutionary movement is perhaps best described as
the product of an ‘overlapping consensus.’ All of its proponents were able to agree on two basic
propositions: (1) Parliament did not represent the colonies; and (2) the English constitution had
become hopelessly corrupt. But patriots had evolved very different understandings of precisely
why these claims were correct.”).
legislative supremacy that had once enabled Parliament to tyrannize
the colonies were now being deployed to protect the newly independent
Americans from tyranny by homegrown monarchic power (pp. 146–49); and once again the patriot royalists resisted. When South
Carolina drafted a constitution in 1778 that removed the veto from the
President of the General Assembly, then-President John Rutledge re-
 fused to approve it and resigned from office. He was duty-bound to
uphold the existing constitution of the state of South Carolina, he said.
But equally importantly, he would not invite the sort of legislative tyr-
anny that had emerged more than a century before in England by
stripping the president of his only check on the legislature (pp. 146–
47). Similarly, Wilson, Iredell, Hamilton, and Adams all responded to
the state constitutions of 1776 with deep concern. With the exception
of South Carolina, the state constitutions of 1776 denied the governor
a negative over the legislature (p. 163).

New York and Massachusetts were the first states to reject such clear legislative supremacy. In 1777, the New York Constitution
established a governor elected by popular vote with a veto power subject to
override by a legislative supermajority (p. 166). In 1780, the Massa-
chusetts Constitution established a governor who would be “emphati-
cally the Representative of the whole People, being chosen not by one
Town or Country, but by the People at large” (p. 175). This, accord-
ing to Nelson, marked the end of the wilderness years for the patriot
royalists. “A single chief magistrate,” he writes, “could perfectly well
count as a representative of the people. Indeed, only a single chief
magistrate could reliably speak for ‘the whole people,’ since he would
be beholden to no single faction or segment of society” (p. 175).

The failure of both the state constitutions and the Articles of Con-
federation in the wake of the Revolutionary War forced a reconsidera-
tion of the nature of executive power in the new nation (pp. 180–83).
This reassessment culminated in the Constitutional Convention at
Philadelphia during the summer of 1787. There, it was James Wilson
who led the movement for the creation of a strong executive consisting
of a single person.88 When Edmund Randolph objected to having an
executive consisting of one person, Wilson reminded him: “The people
of America did not oppose the British King but the parliament — the
opposition was not against an Unity but a corrupt multitude” (p.

87 The author quotes Address of the Convention (Mar. 1780), in THE POPULAR SOURCES OF
POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780,
at 437–38 (Oscar Handlin & Mary Flug Handlin eds., 1966). Internal quotation marks have been
omitted.
88 Nelson suggests that the “single person” language was inherited from key constitutional in-
struments of the Interregnum (pp. 185–86).
It was a powerful invocation of the constitutional principles that had underpinned colonial resistance to Parliament during the 1760s and 1770s. But whatever the nature of the former conflict with Britain, a principal obstacle now was concern that a strong executive was thoroughly incompatible with republican government (pp. 146–83).

The transformative moment came when Wilson told the Convention that “all know that a single magistrate is not a King” (p. 190). Nelson characterizes this as “a breathtakingly deflationary move, made possible . . . by the distinctive, Hebraizing form of antimonarchism unleashed by Paine’s *Common Sense*” (p. 190). Even those who viewed the very institution of monarchy as illegitimate would have to agree that republicanism did not preclude the presence of a powerful magistrate. But patriot royalists realized that the royal prerogatives could not be transplanted wholesale into the figure of a chief magistrate. Certain prerogatives, like the power to appoint members to the legislature or the power to serve as the head of an established church, were incompatible with free government in the United States and were therefore abandoned (pp. 189–90). Other prerogatives — namely, the war powers, the treaty powers, and the powers of appointment — were divided between the legislature and the executive. But the chief magistrate alone would wield the commander-in-chief power, the veto power, and the clemency power, making him a more powerful chief magistrate than King George III himself.

**Conclusion**

Nelson is to be congratulated for his elegant and illuminating treatment of this important body of patriot revolutionary thought. He provides a persuasive rebuttal to the conventional wisdom that “[t]he crown always seemed to the colonists to be an extraneous overlaid power antagonistic to their local institutions.” However, in recasting the American Revolution as royalist in nature, he may be asking the patriot-royalist literature to carry more weight than it can bear. Bancroft’s neo-Stuart account of monarchy, influential as it was on patriots such as Adams, Hamilton, Iredell, Rush, and Wilson, seems a fragile basis upon which to recast America’s leading revolutionaries as monarchists. It is possible that Bancroft’s account of the imperial constitution held particular salience in making the case to George III for energetic intervention on behalf of his colonies. But it is not altogether

89 The author quotes 1 *Records of the Federal Convention of 1787*, at 71 (Max Farrand ed., 1911). Internal quotation marks have been omitted.
90 The author quotes from 1 *Records of the Federal Convention of 1787*, *supra* note 89, at 96. Internal quotation marks have been omitted.
91 *Wood*, *supra* note 27, at 111.
clear that the neo-Stuart account carried much weight in persuading Americans nurtured on the radicalism of the broader pamphlet literature, which was generally hostile to the exercises of royal prerogative that were present in the colonies. The writs of assistance, so roundly and publicly deplored by the colonists and so central to their claims against Britain, could only be defied at the risk of committing an act of contempt against the King’s prerogative.92 And the vice-admiralty courts, in which maritime smuggling cases were adjudicated, were subject to royal influence.93 It is uncertain whether the patriot royalists attempted to reconcile these odious exercises of the prerogative with their support of more salutary exercises thereof.

The tension between radical and royalist currents in revolutionary-era literature becomes particularly evident in Nelson’s discussion of Paine’s *Common Sense*. His analysis of the pamphlet as part of the tradition of Hebraic exclusivism is, like his treatment of patriot-royalist thought itself, a welcome and valuable contribution to the history of ideas. But characterizing the Revolution as royalist even after Paine made the very possibility of kingship untenable in the colonies is puzzling. Was it really royalism of which the Framers spoke in 1787? Or were they simply reallocating authority in a new political structure?94 Wilson’s insistence at the Convention that “[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers”95 and that “he was not governed by the British Model”96 seem to suggest the latter.97 Whatever the case, Nelson’s discussion of the debate over the executive at Philadelphia will

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92 Writs of assistance were generalized search warrants that could be used by officials at any time in any place against any person without a showing of probable cause. They expired six months after the death of the king. When George II died in 1760, colonists seized upon the opportunity to ask his successor not to renew the writs. The issue reached a point of crisis in 1761 with the Writs of Assistance case. Contemporaries looked back on the case, argued by James Otis, as one of the first storm warnings of the Revolution to come. O. M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION, supra note 16, at 40; James M. Farrell, *The Writs of Assistance and Public Memory: John Adams and the Legacy of James Otis*, 79 NEW ENG. Q. 533, 540–43 (2006). On the writs of assistance in colonial Boston, see Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996).


94 It is surprising to find that the Articles of Confederation are given relatively short shrift in Nelson’s analysis. America’s first constitution created not a monarchy in republican clothes, but a government by legislature — and a legislature without real power to govern, at that. The adoption of a vigorous executive in 1787 may have had less to do with neo-Stuart constitutionalism than with the fact that the new republic had come to the brink of self-destruction because of the Confederation’s impotence.

95 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 89, at 65.

96 Id. at 66.

97 Nelson discusses Wilson’s claims at pp. 189–90.
be of inestimable value to scholars of constitutional law and history. For it is here that he maps with great depth and subtlety the way that royal authority informed the Framers’ understanding of America’s chief magistracy. And as scholars and statesmen alike continue to debate the scope of the President’s discretionary authority, the ideas that helped shape the powers of the executive in 1787 become all the more relevant today.

98 For scholarly discussions of executive discretion, see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008); PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT (2002); LOUIS FISHER, PRESIDENTIAL WAR POWER (3d ed. 2013); JACK GOLDSMITH, POWER AND CONSTRAINT (2012); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION (2003); JOHN YOO, CRISIS AND COMMAND (2009).