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## RETHINKING ROYAL POWER AND THE AMERICAN REVOLUTION

Clement Fatovic \*

ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* (HARVARD UNIVERSITY PRESS 2014). PP. 400. HARDCOVER \$ 29.95.

Thanks in large part to the litany of grievances directed against King George III in the Declaration of Independence, the American Revolution has long been identified with hostility to monarchical power. Despite significant differences between rival schools of interpretation, such as Lockean liberal<sup>1</sup> and republican revisionist accounts<sup>2</sup> that have tended to dominate studies of political thought in this period, there has been general agreement that the revolutionaries were deeply suspicious of executive power. *The Royalist Revolution*, an ambitious and provocative new book by Harvard political theorist Eric Nelson, poses a formidable challenge to standard historiographic depictions of the patriots as Whigs and republicans inimical to royal power. Far from being a revolt against the Crown, Nelson contends, the American Revolution “was, indeed, a rebellion *in favor* of royal power.”<sup>3</sup> In contrast to the seventeenth-century English parliamentarians and Whigs who supposedly inspired and informed American ideas on resistance, Nelson argues that a group of leading patriots, including Benjamin Franklin, John Adams, James Wilson, Alexander Hamilton, and James Iredell, looked to the king—and more specifically to the revival of long-obsolete royal prerogatives—for the protection of

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1. See, e.g., JOYCE APPLEBY, *Liberalism and the American Revolution*, in *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 140 (1992); CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1958); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1991); PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776* (1972).

2. See, e.g., LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); J. G. A. POCOCK, *Civic Humanism and Its Role in Anglo-American Thought*, in *POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 80 (1989); J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *WM. & MARY Q.* 49 (1972); Gordon S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

3. ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 2 (2014) (emphasis added).

liberties threatened by an overbearing and intrusive Parliament. In order to buttress their claims against the legitimacy of parliamentary interference in the colonies, “a great many [patriots] gravitated toward the political and constitutional theory of . . . the reviled Stuart monarchs of the seventeenth century.”<sup>4</sup> Although this ideological strand of the American Revolution suffered a setback after the break with England, Nelson argues, the “neo-Stuart” conception of royal power enjoyed a resurgence with profound consequences for the development of the American presidency. Thus, the expansive powers granted to the president mark the Constitution not as a betrayal of the Revolution, as so many have claimed, but as its consummation. If Nelson is right about the role royalist conceptions of prerogative played in shaping the powers of the presidency, *The Royalist Revolution* would call for a wholesale rethinking of the U.S. Constitution.

In many respects an exemplar of the Cambridge School approach to the study of political thought,<sup>5</sup> the meticulously researched *Royalist Revolution* surveys an extensive range of materials produced on both sides of the Atlantic, including numerous pamphlets and speeches that have been largely neglected in scholarship on the American Revolution. Nelson deftly navigates the reader through various twists and turns in arguments over the status of the colonies, the prerogatives of the king, the basis of representation, and the powers of the presidency. Like much of the republican revisionist scholarship that Nelson challenges, his book treats the ideas articulated in critical political and constitutional debates as sincere expressions of conviction rather than instrumental rationalizations of either crude interest or otherwise predetermined positions. The underlying psychological assumption that the principal actors in the revolutionary drama were principled thinkers seeking to achieve theoretical coherence and consistency is as integral to Nelson’s case for Patriot Royalism as any specific historical claim that is advanced. If, in the years leading up to Independence, leading patriots modified their ideas (as opposed to their core convictions), it was not because they pursued whatever discursive strategies were most likely to be effective at any given moment, but because they were genuinely moved by what Jürgen Habermas would call the “unforced force of the better argument.”<sup>6</sup> As Nelson puts it, “[d]ebates” change what people think and, as a result, they often change what people want.”<sup>7</sup> Accordingly, the focus of *The Royalist Revolution* is on debates that took place in the rarefied air of constitutional theory, rather than the muck of material interest or the events that form the backdrop for and trigger theoretical reflection.<sup>8</sup>

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4. *Id.* at 3.

5. As Nelson notes in his Acknowledgments, he attended Cambridge University to study with its leading intellectual historian Quentin Skinner, to whom he warmly dedicates his book. *Id.* at 377.

6. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 306 (1992). Nelson associates his position on this point with Bernard Bailyn, Gordon Wood, and other scholars who have championed “ideological” or “idealist” explanations of revolutionary thought. *Id.* at 249 n.122.

7. *Id.* at 26.

8. The persuasiveness of Nelson’s claims about the royalism of certain patriots will depend to a large extent on whether or not the reader accepts his assumptions about the motivations and behavior of political actors. In anticipation of objections to his interpretation of patriot utterances on royal power, he contends, “We do not regard our principles or arguments as instrumental rationalizations for what we pre-theoretically want. It seems to us that our beliefs very frequently determine what we want, not the other way around.” NELSON, *supra* note

## I. THE NEO-STUART REJECTION OF PARLIAMENTARY AUTHORITY

Nelson demonstrates that Patriot Royalism did not spring forth fully-grown but instead gradually took shape as the shortcomings of different arguments became apparent in the course of debates over the authority of Parliament to legislate for the colonies. Following the passage of the Stamp Act in 1765, many Americans disputed Parliament's jurisdiction over the colonies by developing a series of distinctions that would ultimately prove untenable. First, they drew a distinction between legislation for the purpose of regulating North Atlantic trade (which they generally considered to be valid) and taxation for the purpose of raising revenue (which they denied as illegitimate).<sup>9</sup> Patriots such as John Dickinson of Pennsylvania later developed another distinction between "duties designed to regulate commerce and those designed to raise revenue."<sup>10</sup> According to this line of thinking, Parliament did have the authority to regulate imperial commerce, but jurisdiction over internal affairs (including taxation) rested exclusively with colonial assemblies.<sup>11</sup> But this distinction also proved unsustainable.<sup>12</sup> When Parliament passed the Townshend Revenue Act, which imposed tariffs on colonial imports instead of resorting to direct taxes (as was the case under the repealed Stamp Act), the colonists realized that it was impossible to determine the real intent behind parliamentary acts (i.e., to regulate commerce or to raise revenue),<sup>13</sup> making it impossible to tell valid from invalid exercises of parliamentary authority. In order to escape further parliamentary interference in colonial matters, Nelson maintains that Benjamin Franklin and others finally settled on a controversial argument that denied Parliament any authority at all to legislate for the colonies. According to the "dominion theory," as it came to be known, the colonies were completely beyond the jurisdiction of Parliament.<sup>14</sup> The only thing that connected the colonists to Great Britain was the king.

What is novel about Nelson's interpretation of these debates is not the observation that colonial positions underwent several dramatic shifts before ultimately settling on the dominion theory. Rather, it is his bold assertion that the transition to the dominion theory represented a self-conscious movement toward a "neo-Stuart" understanding of royal power. In advancing the claim that Parliament had no right whatsoever to legislate over the colonies, Nelson argues, patriots promulgated a "revisionist account of seventeenth-century English history" that made them "the last Atlantic defenders of the Stuart monarchy."<sup>15</sup>

Even as Franklin, Wilson, Benjamin Rush, and many others steadfastly denied Parliament's authority over the colonies, contends Nelson, they professed loyalty and even submission to the king. In contrast to seventeenth-century Whigs who looked to Parliament to defend the liberties of Englishmen, these colonists sought protection in the "pre-

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3, at 25.

9. *Id.* at 32.

10. *Id.* at 32-33.

11. *Id.* at 33.

12. *Id.*

13. NELSON, *supra* note 3, at 33.

14. *Id.*

15. *Id.* at 31.

rogatives of the Crown.”<sup>16</sup> In support of this remarkable assertion, Nelson argues that proponents of the dominion theory resorted to a rereading of English constitutional history that echoed the expansive claims of royal power made by the first two Stuart kings, James I and Charles I, in their battles with Parliament over colonial administration.<sup>17</sup> According to this revisionist account, the colonial charters granted to settlements in North America made these lands the private dominion of the Crown, therefore outside the jurisdiction of Parliament.<sup>18</sup> Based on this version of English history, it was not the king but Parliament that exceeded its authority. The king’s rightful dominion over these territories was usurped by an overreaching Parliament that established a dangerous—and illegitimate—precedent for future parliamentary interference in the colonies with the passage in 1651 of the first Navigation Act.<sup>19</sup>

According to Nelson, an anonymously published and now mostly forgotten pamphlet titled *Remarks on the Review of the Controversy between Great Britain and Her Colonies* was critical to the development of the neo-Stuart response to parliamentary interference in colonial affairs.<sup>20</sup> The author of this pamphlet, which was first published in London in 1769 and reprinted just once (in 1771) in North America,<sup>21</sup> was the American-born physician and British spy Edward Bancroft, who briefly lived in British Guiana before settling in London.<sup>22</sup> Despite its limited printing, Nelson argues that Bancroft’s pamphlet “became the most influential patriot text of the early 1770s, and it supplied a definitive template for defenses of the dominion theory.”<sup>23</sup> The key historical claim taken up by many patriots was Bancroft’s finding that the North American colonies were formed as the result of “private contracts between monarchs and the various companies and proprietors” that placed them outside the realm and therefore outside the jurisdiction of Parliament.<sup>24</sup> Another important claim that would find its way into patriot pamphlets was that the Puritans fled England to escape parliamentary persecution and found refuge in the New World “under the king’s protection.”<sup>25</sup> Nelson provides persuasive evidence that several revolutionary texts, including James Iredell’s *To the Inhabitants of Great Britain* (1774) and Hamilton’s *The Farmer Refuted* (1775), reproduced the argument, wording, and even the factual errors contained in Bancroft’s essay.<sup>26</sup>

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16. *Id.* at 36.

17. The debates concerned parliamentary attempts to regulate colonial fisheries and the Virginia tobacco trade. *Id.* at 38-39.

18. NELSON, *supra* note 3, at 39-40. Nelson suggests that the resemblance between the dominion theory advanced in the late 1760s and the claims asserted by the Stuarts is not merely coincidental. Americans, he contends, would have become aware of both the royalist and parliamentary positions on the status of the colonies before the English Civil War thanks to the 1742 publication of debates in the House of Commons during James I’s last parliaments and Charles I’s first parliaments and to David Hume’s widely-read multi-volume *History of England*. *Id.* at 38-39.

19. Significantly, this occurred during the Interregnum when there was no monarch to challenge this usurpation of power. *Id.* at 37.

20. *Id.* at 43.

21. *Id.*

22. See THOMAS J. SCHAEFER, EDWARD BANCROFT: SCIENTIST, AUTHOR, SPY (2011).

23. NELSON, *supra* note 3, at 43.

24. *Id.* at 44.

25. *Id.* at 46.

26. *Id.* at 45, 51-54 (noting that defenders of the dominion theory reproduced Bancroft’s erroneous account

Having established what they considered the correct view of the legal status of the colonies, argues Nelson, these pamphleteers urged George III to revive the prerogative powers that his predecessors had used to thwart parliamentary meddling and protect the liberties of his subjects.<sup>27</sup> In particular, they beseeched King George III to exercise a veto power that had not been used since Queen Anne withheld her assent from the Scottish Militia Bill in 1707. The implications of this argument were not lost on critics at the time: in urging the king to wield his prerogative powers to check Parliament, these self-styled Whigs were essentially repudiating the settlement achieved by the Glorious Revolution of 1689.

As Nelson himself acknowledges, it is possible to reject all this neo-Stuart talk of prerogative as a rhetorical tactic aimed simply at reducing Parliament's authority in America.<sup>28</sup> However, he insists that proponents of the dominion theory were sincere in urging the restoration of a Stuart understanding of prerogative because they understood that "the king could not serve as a superintending power for the empire unless his Jacobean and Caroline prerogatives were restored to him."<sup>29</sup> The preservation of the empire committed them to "an enhanced royal prerogative" that was alone capable of securing "even the most basic legislative coherence across its constituent parts."<sup>30</sup> Nelson makes a compelling case for the claim that leading patriots sought to revive the long-dormant veto power, but he does not elaborate on any other powers associated with royal prerogative. As I discuss below, a closer look at the royal powers that Nelson ignores raises serious doubts about his claim that that any of the patriots were "neo-Stuarts."

## II. REPRESENTATION AND AUTHORITY

Nelson's case for Patriot Royalism does not rest solely on the arguments revolutionaries forwarded against parliamentary interference in the colonies. In an outstanding chapter on the conceptions of representation that informed American understandings of the colonies' relationship to the king and Parliament, Nelson argues that many revolutionaries rejected the parliamentarian theory of representation espoused by seventeenth-century thinkers such as the republicans Marchamont Nedham and John Milton in favor of the royalist theory of representation.<sup>31</sup> His delineation of the theoretical differences between these rival conceptions of representation, which is as sophisticated and informative as any scholarly analysis on the concept of representation, sharply clarifies the limitations associated with each approach. Once again, seventeenth-century English political thought provided the template for eighteenth-century American political argumentation. The parliamentarian position closely followed the influential English political theorist and barrister Henry Parker's argument that genuine representation is possible only in an assembly that actually resembles or reflects the people and their interests, regardless of how many citizens actually participate in elections. The royalist theory, which would re-

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of the context and outcome of the debate between King Charles and Parliament over a fishery bill).

27. *Id.* at 4.

28. NELSON, *supra* note 3, at 55.

29. *Id.* at 58.

30. *Id.* at 57.

31. *Id.* at 105.

ceive its most famous articulation in Thomas Hobbes's *Leviathan* (1651), held that representation is based not on likeness to the people, but solely on prior authorization. Whereas advocates of "virtual representation" relied on the likeness theory to argue that colonists were as well-represented as any subject in England—whether or not an Englishman actually voted in parliamentary elections—patriots ultimately adopted a version of the authorization theory. Building on the historical claims that Bancroft had made about the origins of colonial relations with the realm, patriot Royalists such as Iredell and Hamilton were able to claim that submission to George III did not make them slaves because the colonial charters "had fully authorized the king to exercise his prerogative rights over British America."<sup>32</sup> Like other aspects of royalist ideology, argues Nelson, this one would form the basis of the Federalist conception of representation during debates over the ratification of the Constitution.

It is hard to dispute Nelson's claim that most patriots and (later) Federalists embraced the authorization theory of representation. However, it is far from certain that they came to this theory by way of royalism. The notion that authorization is a necessary (if not sufficient) condition for representation would become a feature of much non-royalist thought familiar to and openly embraced by the founders.<sup>33</sup> The idea that "true representation . . . required authorization"<sup>34</sup> was an essential feature of John Locke's famous (if muddled) theory of government by consent. Although the legislature was supreme in Locke's theory, there is little question that he also considered the executive the representative of the people as a result of their consent (express or tacit). In a discussion on the relation between legislative and executive powers in the *Second Treatise of Government*, the liberal philosopher drew upon elements of both the authorization and resemblance theories of representation to argue that the executive would be justified in re-apportioning a legislature that has become unrepresentative (e.g., through the emergence of rotten boroughs). Locke's diagnosis of this problem follows the parliamentary theory, but his prescription is based on the authorization theory.<sup>35</sup> Yet no one has thought to accuse Locke of royalism for that reason. Whatever the origins of the authorization theory, it was no longer distinctively royalist by the time Americans began invoking it.

Nelson's case for Patriot Royalism does not rest on the political thought of the Revolution. Further proof that patriot Royalists were sincere in calling for the restoration of the king's powers (and were not just trying to limit British interference in the colonies) is that they continued to advocate Royalist claims long after they escaped parliamentary authority. Even after the break with England, patriot Royalists never gave up their "radical, anti-whig vision of independent prerogative power."<sup>36</sup> Nelson cites the persistence of royalist arguments in works by Iredell and Wilson as evidence against counter-arguments that colonists "merely adopted their constitutional argument out of

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32. *Id.* at 101.

33. As Hanna Fenichel Pitkin observes in her classic study, Hobbes's authorization theory was just the "first . . . version of a view of representation which continues to appear from time to time in the history of political thought." HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 38 (1967).

34. NELSON, *supra* note 3, at 85.

35. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 372-74 (1988).

36. NELSON, *supra* note 3, at 149.

forensic necessity.”<sup>37</sup> Even Jefferson, whom Nelson describes as “a deeply heterodox, conflicted proponent of the Royalist position,”<sup>38</sup> repeated royalist arguments when there was no strategic reason to do so. The evidence appears in a passage from *Notes on the State of Virginia* where Jefferson traced the origins of the conflict with England back to Parliament’s usurpation of royal authority over the colonies with the passage of the Navigation Act in 1651.<sup>39</sup> According to Nelson, this reference to the “fatal precedent” provided “as full-throated an endorsement of the patriot Royalist position as had any writer of the early 1770s.”<sup>40</sup> Nelson contends that the royalist theory of representation also persisted after Independence. The Massachusetts Constitution, drafted principally by John Adams, “unmistakably repudiated the whig theory of representation” and established a powerful governor who was described in royalist terms as “the Representative of the whole People.”<sup>41</sup>

In Nelson’s telling, Patriot Royalism explains virtually every major development in the movement towards independence and the subsequent formation of American constitutionalism. In fact, he argues, it helps explain the suddenness and vehemence of the patriots’ repudiation of George III in 1776.<sup>42</sup> They rejected him because he rejected their pleas to expand his powers. “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.”<sup>43</sup> In Nelson’s view, the bitter condemnations of George in the Declaration of Independence make sense only against the background of Patriot Royalism. The king’s refusal to exercise his powers on behalf of the colonists aggravated their sense of betrayal and added to their list of grievances. Far from exemplifying the Revolution’s antimonarchism, the Declaration, which Jefferson described in retirement as “an expression of the American mind,”<sup>44</sup> actually “stands as the final Royalist brief of the imperial crisis.”<sup>45</sup>

### III. THOMAS PAINE AND THE REPUBLICAN TURN

How, then, did the Revolution come to be identified with republicanism and the repudiation of monarchy? Nelson credits the publication of Thomas Paine’s *Common Sense* in January 1776 with the dramatic shift in opinion against both the person of George III and the very institution of monarchy.<sup>46</sup> Although Nelson is hardly the first to note the tremendous impact that Paine’s pamphlet had in transforming American opinion, he does develop an original and fascinating account of the nature of its influence. What made Paine’s pamphlet so explosive was its use of Scripture to castigate monarchy

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37. *Id.*

38. *Id.* at 156.

39. *Id.* at 157.

40. *Id.*

41. NELSON, *supra* note 3, at 175.

42. *Id.* at 109.

43. *Id.* at 64.

44. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), reprinted in JEFFERSON: WRITINGS 1500, 1501 (1984).

45. NELSON, *supra* note 3, at 65.

46. ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 108 (2014).



in any form as an abomination in God's eyes. Despite all that has already been written about this enormously influential pamphlet, Nelson's account makes an important contribution to our understanding of Paine and the significance of his text by tracing its wholesale rejection of monarchy to the tradition of Hebraic exclusivism endorsed by John Milton in *Pro populo Anglicano defensio* (1651). Following the lessons of rabbinic exegesis surrounding passages in *Deuteronomy* 17 and *1 Samuel* 8,<sup>47</sup> the Puritan poet rejected all forms of monarchy as illegitimate because they involve the sin of idolatry. Thanks to Paine's popularization of the Hebraic theory he admitted to learning from Milton, an alternative conception of republicanism began to gain ascendancy. In contrast to neo-Roman theories of republicanism, which rejected prerogative as an illegitimate means of exercising power because its discretionary character leaves subjects vulnerable to the arbitrary will of the monarch but did not necessarily view monarchy per se as an inherently illegitimate form of government, "the Hebraizing exclusivist theory anathematized kings while remaining agnostic about prerogative."<sup>48</sup> Nelson makes a persuasive case that this turn against monarchy helps account for the hostility to executive power exhibited in newly adopted state constitutions, which generally created very weak governors, and in the Articles of Confederation, which made no allowance for an independent executive at all.<sup>49</sup> Whether this one particular departure from seventeenth-century Whig understandings of monarchy justifies describing the ideology of *Common Sense* as "anti-whig," however, is another matter.<sup>50</sup> After all, this is the same text that endorsed such basic Whig tenets as government by consent, individual liberty, limited government, the rule of law ("in America the law is king"<sup>51</sup>), and the right of popular resistance to tyranny, to name just a few of its other main ideas.

The great irony of *Common Sense's* success in rendering monarchy inconceivable in America, according to Nelson, is that it made it "possible for Americans to reconcile republicanism with prerogative."<sup>52</sup> Paine had thoroughly discredited the label "king" without undermining its substance. Americans were supposedly so fixated on the name that they failed to protect themselves against what stood behind it because, in Jefferson's words, they "imagined everything republican which was not monarchy."<sup>53</sup> This clever argument enables Nelson to account for the apparent persistence of royalist thinking without denying the indisputable impact of Paine's ideas.

#### IV. THE CREATION OF THE PRESIDENCY AND THE TRIUMPH OF ROYALISM

According to Nelson, the royalist position made a triumphant comeback during the struggle over the Constitution. He argues that patriot Royalism would have its most pro-

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47. In its simplest terms, exegetical debates over these passages involved the question whether the Israelites sinned in asking for the wrong kind of king or in asking for a king at all.

48. NELSON, *supra* note 3, at 115.

49. *Id.* at 144, 146-47.

50. *See, e.g., id.*

51. THOMAS PAINE, *Common Sense*, reprinted in THE COMPLETE WRITINGS OF THOMAS PAINE 29 (1945).

52. NELSON, *supra* note 3, at 144.

53. Thomas Jefferson, quoted in NELSON, *supra* note 3, at 144.

found and long-lasting effects in the creation of the American presidency. He proclaims that “the turn to the royal prerogative was *the* formative moment in the history of what would emerge as American constitutionalism.”<sup>54</sup> Numerous critics of the Constitution at the time (and many scholars since then) remarked on the presidency’s disturbing resemblance to monarchy. But Nelson goes beyond this observation by arguing that many of the powers given to the president would actually exceed those that the British monarch enjoyed at the end of the eighteenth century. Whereas the king’s formal powers to withhold his assent from legislation, negotiate treaties, appoint officers, and make war and peace were either curtailed or exercised by ministers who held power by virtue of their positions in the House of Commons, the president would have an effective (albeit qualified) veto power over all federal legislation, would share treaty-making power with the Senate, would nominate officers, and would be commander-in-chief of the military. And in defiance of basic Whig principles, the president would be able to exercise his share of these powers independent of the legislature. It is exactly these features that prompted critics such as Patrick Henry to protest that the presidency “squints toward monarchy.”<sup>55</sup>

Many readers will be tempted to cite *The Royalist Revolution* in current debates over the meaning of the Constitution and the extent of the president’s powers. For some, it will provide support for broad readings of the president’s power to act unilaterally across a number of different areas in both foreign and domestic affairs.<sup>56</sup> For others, it will add yet another charge in the growing list of indictments against the founders for creating a dangerous office inconsistent with basic tenets of democracy.<sup>57</sup> But before anyone seizes on the claims Nelson makes about the origins or scope of the president’s powers, it is necessary to take a closer look at the actual powers of the monarchy in the seventeenth century.

There is no doubt that the Constitution gave the president a range of specific and undefined powers that rivaled those of George III, but whether they merit the designation “Royalist” depends on the extent to which they were actually based upon the conception of power defended by the Stuarts and their supporters. Nelson’s contention is not that the U.S. presidency was modeled after the British monarchy of the eighteenth century, as many scholars have argued, but instead on the ideas of seventeenth-century royalists. Yet other than Charles I himself, Nelson rarely mentions any of these royalists by name.<sup>58</sup> To

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54. NELSON, *supra* note 3, at 7.

55. PATRICK HENRY, THE VIRGINIA CONVENTION (June 5, 1788), <http://www.patrickhenrycenter.com/Speeches.aspx>.

56. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

57. See, e.g., BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005); Robert A. Dahl, *How Democratic Is the American Constitution?* (2001); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

58. See NELSON, *supra* note 3, at 239, 240. Royalism refers to different things in different parts of Nelson’s book. In some places it is narrowly defined as “the political and constitutional theory of those who defended Charles I,” in others it is used even more narrowly to refer to the ideas of “those who took up the King’s cause during the English Revolution of 1642-1660,” and in yet others it is applied to the Stuarts and their supporters more generally.

label revolutionary leaders and proponents of a strong presidency as “neo-Stuarts” implies that they actually embraced most if not all of the key positions adopted by the Stuart monarchs and their supporters. Nelson says as much in the concluding paragraph of his book, where he writes that the Constitution invested the president “with *the very same prerogative powers* that Charles I had defended against the great whig [sic] heroes of the seventeenth century.”<sup>59</sup>

#### V. THE PLURALITY AND PARTICULARITY PREROGATIVE POWERS

Unfortunately, Nelson provides little evidence that any American actually endorsed all or even most prerogative powers exercised or defended by Charles I or any other Stuart monarch. Too much of Nelson’s argument relies on reasoning by synecdoche whereby the veto power becomes a stand-in for prerogative *tout court*. However, one’s position on the veto does not necessarily tell us anything about that individual’s position on other prerogatives. Just because Americans endorsed the establishment of some prerogatives (e.g., the veto power) does not make them royalists any more than John Locke’s endorsement of the king’s right to issue an Act of Indulgence to religious nonconformists (i.e., to suspend the operation of the repressive measures that comprised the Clarendon Code) made him a royalist.<sup>60</sup> Although Nelson’s entire argument revolves around the claim that the /powers patriot Royalists endorsed were more or less the same ones that seventeenth-century royalists defended, there is surprisingly little discussion of what those prerogatives actually were.

Nelson does give ample attention to the veto as a discrete power, but his account usually presents prerogative as if the Stuarts or their supporters understood it as a general, undifferentiated power. However, as historian Glenn Burgess explains, there was a consensus in the early seventeenth century on “the particularity of prerogative,” even though there were bitter disagreements over the scope and content of these prerogatives.<sup>61</sup> But even some of Nelson’s references to the veto power obscure the extent to which political and constitutional debates in England revolved around the king’s use of other specific prerogatives. For instance, his dubious assertion that the veto power was “the single prerogative power that the parliamentary tradition had *most thoroughly stigmatized*”<sup>62</sup> begs a comparison with other prerogatives, but none is forthcoming. Indeed, hardly any other prerogatives are mentioned at all in *The Royalist Revolution* until some late passing references in the chapter on the creation of the Constitution.<sup>63</sup> As a result, the reader comes away with the mistaken impression that the king’s ability to withhold assent from legislation was the most controversial royal prerogative during the sev-

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59. *Id.* at 232 (emphasis added) It is anachronistic to describe opponents of Charles I as “Whigs” since there was no such thing as a Whig before the Exclusion Crisis that occurred near the end of his eldest son’s reign.

60. See RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS AND LOCKE’S TWO TREATISES OF GOVERNMENT* 111-13 (1986). (On Locke’s support for the use of the dispensing power to extend religious toleration to dissenters.); G.M. TREVILYAN, *THE ENGLISH REVOLUTION, 1688-1689* 24-26 (1938).

61. GLENN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION* 141-51 (1996).

62. NELSON, *supra* note 3, at 162 (emphasis added).

63. See, e.g., *id.* at 189, 201, 216.

enteenth century. No mention is made of the suspending power, the dispensing power, the imposition of levies and forced loans, or the Star Chamber, all of which involved far more controversial exercises of royal prerogative.<sup>64</sup> Instead, the veto power—which was never formally abolished—comes to stand for all the multifarious powers, privileges, and immunities defended by seventeenth-century royalists.

One reason Stuart royalism comes across as relatively mild and therefore plausibly appealing to many Americans in Nelson's account is that he takes the "canonical statement of Royalist constitutionalism" to be *His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament*, a pamphlet response to a set of Nineteen Propositions issued without Charles's assent by the two houses of Parliament on June 1, 1642.<sup>65</sup> *The Nineteen Propositions* petitioned Charles to accept a variety of limits on royal power that, in David Hume's estimation, would have "amounted to a total abolition of monarchical authority."<sup>66</sup> *His Majesties Answer* has garnered a great deal of scholarly attention because it promulgated a theory of mixed monarchy that described the king as just one of three essential estates that shared power. However, that was not a position that Charles had previously endorsed.<sup>67</sup> Nor was it one that all royalists accepted after the fact.<sup>68</sup> It was not even the most widely circulated royalist document.<sup>69</sup> Although Nelson acknowledges in a footnote that other royalists rejected this theory and that Charles himself "probably did regret the *Answer's* endorsement of 'estates theory,'"<sup>70</sup> he never discusses alternative statements of royalist thought that were more widely accepted by supporters of the Stuarts. Holding out this comparatively moderate text, which was issued by a desperate and embattled king, as the "canonical statement of Royalist constitutionalism" conveniently allows Nelson to ignore more aggressive defenses of seventeenth-century royalism that even the most outspoken American supporters of strong executive power would have been loath to accept.<sup>71</sup>

At one point Nelson concedes that none of the patriot Royalists "ever wished to assign their chief magistrate a prerogative to establish legislative districts, appoint members to one branch of the legislature, or to govern an established church,"<sup>72</sup> but there is no discussion of these prerogatives and little mention of the numerous other prerogatives that divided parliamentarians and royalists in the seventeenth century. The royal preroga-

64. See, e.g., MARGARET ATWOOD JUDSON, *THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645* (1949). The veto power hardly figures in most accounts of the major constitutional battles of the seventeenth century.

65. NELSON, *supra* note 3, at 10.

66. DAVID HUME, *THE HISTORY OF ENGLAND VOL. V* 384 (1983).

67. See Corinne Comstock Weston, *The Theory of Mixed Monarchy under Charles I and After*, 75 *ENG. HIST. REV.* 426 (1960).

68. J. G. A. POCOCK AND GORDON J. SCHOCHET, *Interregnum and Restoration*, in *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800* 149-50 (1993).

69. LINDA LEVY PECK, *Kingship, Counsel and Law in Early Stuart Britain*, in *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800* 83 (1993).

70. NELSON, *supra* note 3, at 241.

71. See, e.g., BURGESS, *supra* note 60, at 75-79, 110-11, 114-15; HUME, *supra* note 66, at 198-99; JUDSON, *supra* note 64, at 107-217; PECK, *supra* note 69, at 102-13. (Robert Filmer, Thomas Hobbes, Roger Manwaring, Robert Sibthorpe, and others developed far more expansive and aggressive defenses of royal power than the position outlined in *His Majesties Answer*.)

72. NELSON, *supra* note 3, at 189.

tives asserted by the Stuarts included the power to prorogue and dismiss Parliament (i.e., to extend the life of or to dissolve Parliament),<sup>73</sup> the power to dispense with legislation (i.e., to exempt particular persons or corporations from the obligations of statutory law),<sup>74</sup> the power to suspend the operation of the law altogether (i.e., to abrogate a statute, as in the granting of indulgences to religious dissenters),<sup>75</sup> the power to issue ordinances (i.e., to make laws without Parliament),<sup>76</sup> the power to grant monopolies,<sup>77</sup> the power to restore boroughs to membership in Parliament,<sup>78</sup> and the power to raise revenue without the consent of Parliament,<sup>79</sup> among others. Leading patriots would have been well informed about these frightening prerogatives and the enormous controversies they engendered from widely available sources such as David Hume's *History of England*, which Nelson correctly points out was one of their main sources of information about seventeenth-century debates concerning the status of the colonies.<sup>80</sup>

In fairness, the lack of specificity in Nelson's account of prerogative often reflects the rather amorphous way in which American thinkers often used this term. However, some of the sources Nelson cites do, in fact, contain very specific references to distinct royal prerogatives. And those references are often negative. The claim that Jefferson was a royalist, "heterodox" or otherwise, is difficult to accept when one considers what he actually had to say about particular expressions of royal prerogative. In his draft constitution for the state of Virginia, which he included as an appendix to *Notes on the State of Virginia*, Jefferson proposed the establishment of a governor whose powers would be purely executive in function (i.e., those "which are necessary to execute the laws (and administer the government)"). Lest anyone think these powers include all of those enjoyed by English monarchs, Jefferson included a list of "prerogative powers" that would expressly be *denied* the governor. These included the:

powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, light-houses, and sea-marks; of laying embargoes, of establishing precedence, of retaining within the state or recalling to it any citizen thereof, and of making denizens, except so far as he may be authorized from time to time by the legislature to exercise any of

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73. DAVID HUME, HISTORY OF ENGLAND, VOL. VI 377 (The power to dissolve Parliament did not disappear after the Glorious Revolution. George III exercised this power in 1783.). G. M. TREVELYAN, *supra* note 59, at 193-94.

74. FREDERIC WILLIAM MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 303-04, (1926); Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597-1689*, 29 AM. J.L. LEGAL HIST. 197 (1985) (This was a power the judiciary upheld as late as the reign of James II.). See G. M. TREVELYAN, *supra* note 60, at 67; JUDSON, *supra* note 64, at 59.

75. MAITLAND, *supra* note 74, at 305-06; HUME, *supra* note 73, at 481, 274-75 (1983); G. M. TREVELYAN, *supra* note 60, at 67-68; Edie, *supra* note 74, at 220-24, 228.

76. MAITLAND, *supra* note 74, at 187-88.

77. JUDSON, *supra* note 64, at 57, 240; MAITLAND, *supra* note 74, at 261; Edie, *supra* note 74, at 211-14.

78. MAITLAND, *supra* note 74, at 289-90.

79. *Id.* at 309 (This power was affirmed in the famous *Ship Money* Case.). See, e.g., *id.* at 298-99; PECK, *supra* note 69, at 102-113; CONRAD RUSSELL, THE CRISIS OF PARLIAMENTS: ENGLISH HISTORY, 1509-1660 320-22 (1971).

80. NELSON *supra* note 3, at 38-39.

these powers.<sup>81</sup>

Jefferson certainly was in some respects a “heterodox” thinker, but in denying the executive these prerogatives he was fairly representative of his countrymen—even those characterized by Nelson as patriot Royalists. The specificity of Jefferson’s enumeration is significant because it suggests that Americans at the time were aware enough of the particularity of prerogative that the Virginian thought it was important to take special precautions against the danger that these powers would automatically be attributed to the executive.

The major exception to *The Royalist Revolution*’s general silence on prerogatives other than the veto power (and some sporadic references to the appointment power) is an analysis of Hamilton’s defense of the presidency in *Federalist*, No. 69. In that essay, Hamilton argued that there was no comparison between the powers of the president and that of the current British monarch because the latter possesses the powers to prorogue and dismiss Parliament, select his own ministers, “erect corporations,” “establish fairs and markets,” “coin money,” and do many other things that are denied to the former. In spite of his insistence that “historical agents generally mean what they say,”<sup>82</sup> Nelson brushes off as “mere burlesque” Hamilton’s attempt to show that the president’s powers would not be as great as the king’s.<sup>83</sup> Nelson is correct in claiming that Hamilton overstated the powers that the king actually enjoyed at the end of the eighteenth-century, but a comparison of the president’s powers to the king’s powers in the seventeenth-century (i.e., under the Stuarts) is what matters in demonstrating the existence and impact of patriot Royalism as Nelson uses the label. Although this is the only place in the entire book where most of the prerogatives enumerated by Hamilton are ever mentioned, Nelson insists that they fairly represent patriot Royalist ideas about “what the monarchy should be like under the proper construal of the English constitution” and are “perfectly continuous with what patriot Royalists such as Hamilton had been arguing since the imperial crisis.”<sup>84</sup> If this were indeed the case, it would have been useful to see some examples of these specific prerogatives being endorsed in revolutionary writings. As Nelson notes in his discussion of Hamilton’s essay *The Farmer Refuted*, the young revolutionary vigorously defended the idea that the royal charters placed the colonies completely outside the jurisdiction of Parliament.<sup>85</sup> However, this text does not contain the defense of Stuart-era prerogatives one would expect from such a supposedly staunch royalist. Instead, Hamilton reminds readers that the royal charters guaranteed the colonists certain liberties and immunities and required the king to exercise his jurisdiction by means of a council.<sup>86</sup>

The use of history by American thinkers points to another problematic feature of

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81. THOMAS JEFFERSON, *Draught of a Fundamental Constitution for the Commonwealth of Virginia*, reprinted in NOTES ON THE STATE OF VIRGINIA 214-15 (1995).

82. NELSON, *supra* note 3, at 25, 224 (quoting THE FEDERALIST NO. 69 (Alexander Hamilton)).

83. *Id.* at 224.

84. *Id.*

85. *Id.* at 102-03.

86. ALEXANDER HAMILTON, *The Farmer Refuted*, reprinted in THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON 41-141 (2008).

Nelson's argument in support of the royalist thesis. The plausibility of his argument often depends on a questionable elision between historical analysis and normative theorizing. There is no denying that historical analysis and normative theorizing are often closely intertwined and mutually reinforcing, but making a particular historical claim—no matter how controversial—does not necessarily commit the author or speaker to a particular normative position. Yet part of Jefferson's brief narrative of the political history of Virginia during the Interregnum is offered up by Nelson as proof that he sided with the "Royalist cause."<sup>87</sup> What Nelson does not mention is that Jefferson goes on to reprint in its entirety a set of articles drafted by Virginians asserting their rights against the Commonwealth that replaced the monarchy. If Jefferson took the position that the colonies were attached to England through the king, not through Parliament, it is because his ancestors took that position, not because he sought to defend any particular conception of royal power.<sup>88</sup> In any case, it is an odd form of royalism that finds Jefferson just a few pages later criticizing "subsequent kings and parliaments" alike for violations of a convention asserting the rights of the Virginia colony.<sup>89</sup> Criticisms of the king were not a standard feature of seventeenth-century Stuart thought.

## VI. CONCLUSION

Jefferson's and Hamilton's remarks in the preceding paragraphs provide a useful reminder that the highest priority of the patriots was to secure the rights of the colonists. Although their means varied, their ends were more or less the same. *The Royalist Revolution* makes a powerful case that leading patriots made effective use of seventeenth-century royalist ideas on representation, the proper relation of the colonies to the realm, and the king's long dormant veto power in pursuit of their ends. But to contend that "many British Americans rebelled" "for the sake of this constitutional theory"<sup>90</sup> is to confuse means and ends. The figures central to Nelson's story—including Hamilton, Wilson, and Franklin—relied on a variety of different means to advance their primary political aims. The same founders who invoked royalist conceptions of representation or called on King George to exercise the veto power also invoked civic republican ideas of political freedom, liberal Lockean notions of natural rights, and common law understandings of historical rights. In short, they relied on a variety of different (and not always consistent) theoretical traditions and political idioms in support of the colonial cause.<sup>91</sup>

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87. NELSON, *supra* note 3, at 157.

88. JEFFERSON, *supra* note 81, at 114. As the Virginia colonists asserted in the fourth article, "Virginia shall have & enjoy the antient bounds and Lymitts granted by the charters of the former kings, and that we shall seek a new charter from the parliament to that purpose against any that have intrencht upon the rights thereof." *Id.* at 161.

89. JEFFERSON, *supra* note 81, at 117 (After Jefferson concluded his overview of Virginia's political history, he turned to an analysis of the constitution it adopted after independence. Because Virginians "were new and inexperienced in the science of government" when they formed that document, it contained several "capital defects," including the unrepresentative nature of the legislature, the concentration of power in the legislature, and inadequate checks on the legislature. Despite the fact that it had a relatively weak governor checked by strict term limits and advised by a council, Jefferson did not call for strengthening the powers of the executive.)

90. NELSON, *supra* note 3, at 3 (emphasis added).

91. See ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS LIBERALISM: POLITICAL IDEOLOGY IN LATE*

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Because the founders were an intellectually polyglot lot, contemporary debates about the dominant traditions and ultimate meaning of the founding are not likely to be resolved any time soon.