

*Forum*  
Patriot Royalism:  
The Stuart Monarchy in  
American Political Thought, 1769–75

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ONE of the more ironic moments in the decade-long conflict between Great Britain and its American colonies occurred on January 26, 1775. In the midst of an acrimonious debate over the wisdom of the Coercive Acts, the House of Commons paused to consider a very different question: whether to instruct its chaplain to preach a sermon on the occasion of “King Charles’s Martyrdom on the 30th of January.” Proponents of the motion argued that they were simply abiding by the terms of an act of Parliament, which required such an observance. They pointedly declined to offer a defense of the observance itself. As for the eighty-three members of Parliament who voted against the motion, their sentiments seem to have been perfectly captured by the remarks of the radical whig John Wilkes, Lord Mayor of London and MP for Middlesex:

The Lord Mayor, Mr. *Wilkes*, said, that he was for the observance of the day, not in the usual manner by fasting and prayer to deprecate the pretended wrath of heaven, but in a very different way from what some other gentlemen had proposed; that it should be celebrated as a festival, as a day of triumph, not kept as a fast; that the death of the first Charles, a determined enemy of the liberties of his country, who made war on his people, and murdered many thousands of his innocent subjects—an odious, hypocritical tyrant, who was, in the great Milton’s words, *ipso Nerone neronior*—should

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be considered as a sacrifice to the public justice of the nation, as highly approved by heaven, and ought to be had in solemn remembrance as the most glorious deed ever done in this, or any country, without which we should at this hour have had no constitution, degenerated into the most abject slaves on the face of the earth, not governed by the known and equal laws of a limited monarchy, but subject to the imperious will of an arbitrary sovereign.<sup>1</sup>

For Wilkes and the other whigs who voted with him, Charles Stuart was the embodiment of arbitrary and absolute monarchy, a latter-day Nero who had laid waste to his own country. Far from producing a martyr, the regicide of 1649 had instead offered up “a sacrifice to the public justice of the nation.”

Wilkes returned to this theme on October 26 of the same year, when he rose in the Commons to deliver his famous speech advocating conciliation with America. His primary argument on that occasion was that war should be avoided on pragmatic grounds, lest “the grandeur of the British empire pass away.” But he also dwelled at length on the injustice of the campaign then being contemplated: “I call the war with our brethren in America an unjust, felonious war, because the primary cause and confessed origin of it is, to attempt to take their money from them without their consent, contrary to the common rights of all mankind, and those great fundamental principles of the English constitution, for which Hampden bled.” John Hampden was the plaintiff in the ship money case—that great symbol of Caroline tyranny and the evil of prerogative powers—who had been mortally wounded while fighting the Stuarts on Charlgrove Field in 1643. In Wilkes’s telling the American colonists were straightforwardly defending the parliamentary principles of the 1640s: the Petition of Right, the rejection of prerogative rule, and popular sovereignty. And Wilkes found their specific demands eminently reasonable: “They justly expect to be put on an equal footing with the other subjects of the empire, and are willing to come into any fair agreement with you in commercial concerns.”<sup>2</sup>

This last statement summarizes the position that scholars have come to know as the dominion theory.<sup>3</sup> Beginning in the wake of the Townshend

<sup>1</sup> T. C. Hansard, ed., *The Parliamentary History of England, From the Earliest Period to the Year 1803* (London, 1813), 18: 183–84 (“King Charles’s Martyrdom,” 18: 183, “Lord Mayor,” 18: 183–84). The first twelve volumes in the series initially appeared as *Cobbett’s Parliamentary History of England*.

<sup>2</sup> Hansard, *Parliamentary History of England*, 18: 735 (“grandeur”), 734 (“I call the war”), 736 (“They justly expect”). John Wilkes, indeed, had been a great hero to the colonists in the mid-1760s, and repeated attempts to deny him a seat in Parliament fueled American suspicions that the British government had become hopelessly corrupt. See Pauline Maier, “John Wilkes and American Disillusionment with Britain,” *William and Mary Quarterly*, 3d ser., 20, no. 3 (July 1963): 373–95; Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* (New York, 1972), 163–69.

<sup>3</sup> The dominion theory is sometimes referred to as the dominion status theory or, rather less satisfactorily, the doctrine of allegiance.

Acts, the patriots had jettisoned their previous insistence that Parliament was sovereign over the colonies but simply lacked authority to legislate for them in particular respects and had come to argue instead that America was “outside of the realm” of Great Britain and that Parliament accordingly lacked any jurisdiction over it whatsoever.<sup>4</sup> What connected the American colonies to Great Britain, on this account, was simply the person of the king, who served the same constitutional role in each part of his dominions and who had granted charters to the various colonizing companies and proprietors by his grace and at his pleasure. The king’s prerogative crossed the ocean, but Parliament’s authority ended at Britain’s shores. The only issue open for discussion concerned the regulation of North American trade, which most patriots were prepared to entrust to Parliament as a concession but not as a matter of right. It was, as we shall see, an extraordinary position, but it was not without precedent. Indeed the argument that America was “outside of the realm” and therefore to be governed by prerogative had famously been made once before in English constitutional history—by the Stuart monarchs James I and Charles I in their acrimonious disputes with Parliament over colonial affairs in the 1620s. The stunning irony of witnessing a radical whig such as Wilkes endorsing the Stuart position on the royal prerogative was not lost on Lord North (Frederick North, 2d Earl of Guilford). Responding to Wilkes and to Charles James Fox (who had likewise cast the Americans as defenders of “Whig” principles), the prime minister replied that “if he understood the meaning of the words Whig and Tory, which the last speaker had mentioned, he conceived that it was characteristic of Whiggism to gain as much for the people as possible, while the aim of Toryism was to increase the prerogative. That in the present case, the administration contended for the right of parliament, while the Americans talked of their belonging to the crown. Their language therefore was that of Toryism.”<sup>5</sup>

In fact, as numerous contemporaries observed, Lord North did not go far enough. The constitutional position embraced by most patriots from 1769 to 1775 was not tory in any recognizable sense—no English tory had advocated anything like it for nearly a century. It represented instead a return to the Royalism of the Jacobean and Caroline courts, and it accordingly forced patriots to develop a radical, revisionist account of seventeenth-century English history.<sup>6</sup> Having spent the better part of the

<sup>4</sup> I use the terms “patriot” and “loyalist” to denote the two sides of the colonial debate with great reluctance, since the first is undeniably question-begging and the second is proleptic. I believe, however, that the popular alternatives (“whig” and “tory”) are even less satisfactory and are far more likely to cause confusion in this context. It is one of my central contentions that most of those we call “opposition whigs” ceased to be whigs in any meaningful sense after 1769.

<sup>5</sup> Hansard, *Parliamentary History of England*, 18: 771. Cf. “A Revolution Whig,” *Scots Magazine* 37 (December 1775): 646.

<sup>6</sup> It should thus be clear that by Royalism I do not mean either a sincere attachment to the monarch or a disposition to regard the “Patriot King” as a defender of English

decade envisioning themselves as heirs to the parliamentary struggle against Stuart absolutism and popery, they now became perhaps the last Atlantic defenders of the Stuart monarchy—and, as their critics noted, found themselves drifting perilously close to Jacobitism. Nor should we dismiss this volte-face as a mere display of forensic opportunism. Patriots of the period did not simply cite Stuart precedents “in passing” without addressing or acknowledging the ideological stakes involved. Quite the contrary: they were in most cases only too happy to emphasize the Stuart pedigree of their new commitments and to reconsider the legacy of the two English revolutions accordingly. Only when we have recognized this fact will we be able to appreciate the true drama of the republican turn in 1776.

A proper reckoning with the story of patriot Royalism should also offer a valuable perspective on the development of the revolutionary crisis more broadly. First and foremost, the contours of the story suggest that, despite the undoubted importance of the social environment in which colonists lived and the institutional peculiarities of political life on the periphery of an Atlantic empire, the constitutional positions taken by patriot writers of the period were primarily the products of *debate*.<sup>7</sup> Their arguments were put forward and then revised or discarded in light of interventions by their opponents, both in North America and in Britain. To be sure, the various shifts in their position throughout the 1760s and 1770s reflected the force of events, but they more immediately reflected the need to answer cogent objections. Perhaps the most important single factor shaping Atlantic political discourse from 1769 to 1775 was the awareness on the part of most patriots that, during the first round of the debate, defenders of the administration had caught them squarely on the horns of a dilemma: either the consent of the governed, delivered through elected representatives, was a necessary condition for the promulgation of legitimate law, or it was not. If it was, then *all* parliamentary attempts to legislate for the colonies were illegitimate (and not simply the ones to which patriots had objected) because the colonists did not elect members to Parliament. If it was not, then the patriot argument against the Stamp Act and the

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liberties. Neither of these postures was remotely inconsistent with whig orthodoxy in the late eighteenth century. Rather I use the term to denote the position of those who defended the Stuarts in their struggle against Parliament.

<sup>7</sup> Prominent studies of the social and institutional context of the Revolution include Peter Shaw, *American Patriots and the Rituals of Revolution* (Cambridge, Mass., 1981); Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (Athens, Ga., 1986); Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville, Va., 1994); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass., 2004); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, N.C., 2005).

Townshend Acts could not be sustained. It was the challenge posed by this dilemma that propelled patriots toward the Stuarts.

This last claim, in turn, points to a second distinctive feature of the account offered here. The standard view of the revolutionary crisis detects in the political writings of American whigs from 1763 to 1776 a gradual, uniform progression toward republicanism.<sup>8</sup> This essay, in contrast, suggests that patriot argument was characterized by rupture rather than continuity. Under the pressure of loyalist polemic as well as the vicissitudes of their political situation, patriot writers who began the 1760s as fairly orthodox whigs lurched first (as it were) to the right by becoming zealous defenders of Stuart Royalism in the early 1770s, and then to the left by becoming republicans in 1776. The first rupture was occasioned by a final attempt to explain how Americans could be British subjects without being subject to Britain; the second occurred when it became clear that the king and his ministers had no interest in endeavoring to square the ideological circle. The patriots thus ended up as disciples of James Harrington, John Milton, and Algernon Sidney, but not before they had taken instruction from James I and Charles I.

IN HIS "MASSACHUSETTENSIS" LETTERS of 1774, loyalist Daniel Leonard offered a cogent, if partisan, account of the manner in which the patriot position had evolved during the course of the 1760s:

When the stamp-act was made, the authority of parliament to impose internal taxes was denied, but their right to impose external ones; or, in other words, to lay duties upon goods and merchandise was admitted. When the act was made imposing duties upon tea, &c. a new distinction was set up, that the parliament had a right to lay duties upon merchandise for the purpose of regulating trade, but not for the purpose of raising a revenue: That is, the parliament had good right and lawful authority, to lay the former duty of a shilling on the pound, but had none to lay the present duty of three pence. Having got thus far safe, it was only taking one step

<sup>8</sup> For a representative statement of this orthodoxy, see Gordon S. Wood, *The Radicalism of the American Revolution* (New York, 1991), 95–168. A recent revisionist account sees in the political thought of the period a very different sort of continuity: that of an attachment to the British monarchy that was only relinquished in 1776. See Brendan McConville, *The King's Three Faces: The Rise and Fall of Royal America, 1688–1776* (Chapel Hill, N.C., 2006). As McConville himself recognizes, however, it would be a mistake to understand attachment to the monarch as a constitutional position. Even if such an attachment was indeed basic to North American political culture throughout the eighteenth century (a debatable claim), it was compatible with extremely different views of the royal prerogative, the legal status of the American colonies, and (of equal importance) the proper understanding of England's great seventeenth-century crisis.

more to extricate ourselves entirely from their fangs, and become independent states; that our patriots most heroically resolved upon, and flatly denied that parliament had a right to make any laws whatsoever, that should be binding upon the colonies.<sup>9</sup>

Despite the sarcasm of the passage, Leonard's summary was more or less accurate. The position of American whigs at the start of the crisis was indeed that Parliament possessed supreme jurisdiction over the colonies but lacked the authority to impose direct, internal taxes. It was on these grounds that patriots denied the legitimacy of the Stamp Act. Some explained the restriction by asserting that taxation was a special sort of legislation requiring the consent of all those concerned (delivered through their representatives), while others argued more broadly that Parliament should be accorded jurisdiction only over the colonies' external affairs. Taxation, on this latter account, was merely one important example of an internal power reserved to the various colonial legislatures.<sup>10</sup> Once the Stamp Act was repealed and replaced with the Townshend Acts in 1767, however, patriots found themselves in something of a quandary. From 1763 to 1766, they had explicitly conceded Parliament's right to regulate imperial commerce and to impose duties on commercial products for that purpose (these were undeniably instances of external legislation).<sup>11</sup> On what grounds, then, could they dispute the legitimacy of a parliamentary bill

<sup>9</sup> Massachusettensis [Daniel Leonard], *The Origin of the American Contest with Great Britain* (New York, 1775), 62–63. The letters had been serialized in 1774.

<sup>10</sup> The archetypal statement of the second view is [Richard Bland], *The Colonel Dismounted* (1764), in Bernard Bailyn, ed., *Pamphlets of the American Revolution, 1750–1776* (Cambridge, Mass., 1965), 1: 293–354, esp. 1: 320–21. At this stage, however, the patriots did not have anything like a coherent account of which laws should count as internal and which external. As Benjamin Franklin observed in 1766, the colonies “have had, from their beginning, like Ireland, their separate parliaments, called modestly assemblies . . . How far, and in what particulars, they are *subordinate* and *subject* to the British parliament . . . are points newly agitated, never yet, but probably soon will be, thoroughly considered and settled.” See Franklin, “On the Tenure of the Manor of East Greenwich,” in Verner W. Crane, ed., *Benjamin Franklin's Letters to the Press, 1758–1775* (Chapel Hill, N.C., 1950), 46–49, esp. 48.

<sup>11</sup> There has been a great deal of debate over the precise character of the initial patriot position of 1763–66. Edmund S. Morgan and Helen M. Morgan argued influentially that, *pace* Leonard and other so-called tories, the colonists in fact made no distinction at this stage between internal taxes and duties on trade—though even the Morgans conceded that they did distinguish between internal and external affairs more generally (Morgan and Morgan, *The Stamp Act Crisis: Prologue to Revolution* [Chapel Hill, N.C., 1953], 119–21). My sense, however, is that the Morgans overstated the case. Though a small number of colonists may have intended to deny Parliament's authority to impose duties on trade (the Morgans' two examples are ambiguous on this point), the vast majority clearly did not—particularly if by “duties on trade” we mean duties that did not have as their purpose the raising of revenue. In general I accept Jack P. Greene's recent characterization of the patriot position during this phase of the controversy. See Greene, *The Constitutional Origins of the American Revolution* (Cambridge, 2010), 67–103.

imposing duties on imports? As Leonard observed, patriots first attempted to address this challenge by endorsing a distinction—proposed by John Dickinson in his *Letters from a Farmer in Pennsylvania* (1768)—between parliamentary duties designed to regulate commerce and those designed to raise revenue. The former, Dickinson argued, were legitimate, whereas the latter were not.<sup>12</sup> In the course of the pamphlet wars of the late 1760s, however, it became clear that this position was untenable. In the first place, it seemed to require an impracticable degree of access to the intentions of those who imposed commercial duties (since both sorts of duties could look the same on paper). More fundamentally, it invited precisely the same challenge that had been leveled so effectively against patriot denials of a parliamentary right of taxation: how could it be that Parliament had the authority to pass laws regulating commerce but lacked the authority to impose duties on trade? Was this not a distinction without a difference?

The patriots solved their dilemma by embracing the dominion theory, according to which Parliament possessed no jurisdiction whatsoever over the colonies. North America was now understood to be “outside of the realm,” a separate dominion within the British Empire. It did not follow, *pace* Leonard, that the colonies were to be regarded as independent states—rather, they were to be understood as dependent solely on the person of the king and not on the “legislature of Great Britain.”<sup>13</sup> James Wilson offered the most concise and explicit statement of this new orthodoxy in his influential

<sup>12</sup> John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* (Boston, 1768), esp. 7–14.

<sup>13</sup> The best account of the broad contours of the dominion theory remains Charles Howard McIlwain, *The American Revolution: A Constitutional Interpretation* (New York, 1923), 114–47. See also Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967), 216–29; Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, N.C., 1969), 344–54; Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York, 1979), 34–41; John Phillip Reid, *Constitutional History of the American Revolution*, vol. 4, *The Authority of Law* (Madison, Wis., 1993); J. C. D. Clark, *The Language of Liberty, 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge, 1994), 93–110; Martin S. Flaherty, “More Apparent than Real: The Revolutionary Commitment to Constitutional Federalism,” *University of Kansas Law Review* 45, no. 4 (July 1997): 993–1014; McConville, *King’s Three Faces*, 250–61; Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass., 2010), chaps. 2–3. Benjamin Franklin endorsed the view that the colonies were dependent on the king rather than Parliament in a well-known letter to his son, William. See B. Franklin to W. Franklin, Oct. 6, 1773, in William B. Willcox et al., eds., *The Papers of Benjamin Franklin* (New Haven, Conn., 1976), 20: 436–39 (quotation, 20: 437). Franklin also intimated this position as early as 1766, during his testimony before a committee of the House of Commons, as well as in subsequent letters to Lord Kames, William Strahan, and Samuel Cooper. See Hansard, *Parliamentary History of England*, 16: 156; Franklin to Lord Kames, Feb. 25, 1767, in Willcox et al., *Papers of Benjamin Franklin*, 14: 62–71, esp. 14: 68; Franklin to Strahan, Nov. 29, 1769, *ibid.*, 16: 243–49, esp. 16: 244; Franklin to Cooper, June 8, 1770, in Albert Henry Smyth, ed., *The Writings of Benjamin Franklin* (London, 1906), 5: 259–62, esp. 5: 260–61. For a retrospective endorsement by James



*Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (written in 1768, though not published until 1774):

To the King is entrusted the direction and management of the great machine of government. He therefore is fittest to adjust the different wheels, and, to regulate their motions in such a manner as to co-operate in the same general designs. He makes war: He concludes peace: He forms alliances: He regulates domestic trade by his prerogative; and directs foreign commerce by his treaties, with those nations, with whom it is carried on. He names the officers of government; so that he can check every jarring movement in the administration. He has a negative in the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws.

The connection and harmony between Great-Britain and us, which it is her interest and ours mutually to cultivate; and on which her prosperity, as well as ours, so materially depends; will be better preserved by the operation of the legal prerogatives of the Crown, than by the exertion of an unlimited authority by Parliament.<sup>14</sup>

This is a remarkable passage. It was not unusual for English or American whigs to express devotion to the king, to look on him as a defender of their liberties, or to assign him what formally remained the constitutional executive powers of the crown (the right to make war, treaties, and so forth), but it was wholly unprecedented in whig discourse to flee from parliamentary authority and seek safety in the “prerogatives of the Crown.”<sup>15</sup> 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 Queen Anne’s reign and which the king did not even enjoy on paper in several of the American colonies—and the power to regulate “domestic trade” (that is, trade within the empire) as well as “foreign commerce.” Wilson is particularly conscious of the radicalism of this final claim, but he boldly defends it nonetheless: “If the Commerce of

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Madison, see “Report on the Resolutions,” in Gaillard Hunt, ed., *The Writings of James Madison* (New York, 1906), 6: 341–406, esp. 6: 373.

<sup>14</sup> [James Wilson], *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (Philadelphia, 1774), 33–34. Wilson’s Scottish background may well have predisposed him to think in these terms: from 1603 (the accession of James I/VI) to 1707 (the Act of Union), Scotland and England had been distinct states sharing a common monarch. On this subject, see LaCroix, *Ideological Origins of American Federalism*, 24–29, 86–87.

<sup>15</sup> For the demonization of prerogative in prerevolutionary America, see Greene, *Constitutional Origins*, 32–33, 60–61.



the British Empire must be regulated by a general superintending power, capable of exerting its influence over every part of it, why may not this power be entrusted to the King, as a part of the Royal prerogative?" This expansive understanding of the prerogative, Wilson assures his readers, is attested in "many authorities."<sup>16</sup>

Just what sort of authorities he has in mind becomes clearer when he offers a striking account of the original colonization of America.

Those who launched into the unknown deep, in quest of new countries and habitations, still considered themselves as subjects of the English Monarchs, and behaved suitably to that character; but it no where appears, that they still considered themselves as represented in an English Parliament, or that they thought the authority of the English Parliament extended over them. They took possession of the country in the *King's* name: They treated, or made war with the Indians by *his* authority: They held the lands under *his* grants, and paid *him* the rents received upon them: They established governments under the sanction of *his* prerogative, or by virtue of his charters.

<sup>16</sup> [Wilson], *Considerations*, 34 ("If the Commerce"), 35 ("many authorities"). Queen Anne vetoed the Scottish Militia Bill in 1707. The Hanoverian monarchs had of course used the veto to nullify acts of American colonial legislatures, a practice bitterly opposed by colonists before the late 1760s. For the centrality of prerogative in the dominion theory, see the insightful, albeit brief, discussion in Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774–1776* (Princeton, N.J., 1987), 36–39. See also Reid, *Authority of Law*, 151–62, whose discussion is indebted to Marston, as well as the suggestive remarks in Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York, 1988), 244. Other scholars have instead associated the defense of prerogative with the class of imperial agents during the mid-eighteenth century. See for example Daniel J. Hulsebosch, "Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777," *Law and History Review* 16, no. 2 (Summer 1998): 319–79, esp. 328–29. By 1774 most dominion theorists were prepared to argue pragmatically that, though Parliament lacked the right to regulate American trade, such a power might be conceded to it by the colonies as a purely discretionary matter. This power would not, however, include a license to impose "external" taxes (that is, duties). This was, for example, the position taken by the First Continental Congress in article 4 of its Declaration of Rights, though even this concession disappeared in its October 1774 petition to the king. The latter document closed with the insistence that "we wish not a diminution of the prerogative" but rather only to be rescued from parliamentary tyranny (Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774–1789* [Washington, D.C., 1904], 1: 119). Cf. [Richard Wells], *A Few Political Reflections Submitted to the Consideration of the British Colonies, by a Citizen of Philadelphia* (Philadelphia, 1774), 17. See also Rakove, *Beginnings of National Politics*, 58–62; John Phillip Reid, *Constitutional History of the American Revolution*, vol. 3, *The Authority to Legislate* (Madison, Wis., 1991), 265–66. Reid astutely points out that the New York General Assembly's Mar. 25, 1775, petition to the king denied the legitimacy of the Currency Act on the grounds that it constituted "an abridgement of your Majesty's prerogative" to regulate trade (Reid, *Authority to Legislate*, 266).

On this account, the colonial charters were granted by the person of the king and lands granted in them were originally his—and his alone. Colonial governments were established by the king's "prerogative," and Parliament had nothing to do with the matter. America was understood by the chartering monarchs to be outside of the realm—indeed, Wilson adds the crucial claim that "it was chiefly during the confusions of the republic, when the King was in exile, and unable to assert his rights, that the House of Commons began to interfere in Colony matters."<sup>17</sup>

It is worth underlining the drama of this last statement. Wilson's position is that the Stuart monarchs who granted colonial charters, James I and Charles I, had *correctly* understood North America to be a private dominion of the crown, to be dispensed with and governed according to the royal prerogative (and then according to the terms of these freely granted charters)—and that this understanding was no less correct after the Glorious Revolution than it had been before. It was only "when the King [Charles II] was in exile" during the republican interregnum that Parliament had been able to usurp his prerogative "rights" and "interfere in Colony matters" by passing the first Navigation Act in 1651. Here we find the beginnings of an extraordinary revision of the patriot historical imagination. Throughout the 1760s patriot writers had understood the events of their own time as reenactments of the long seventeenth-century struggle against Stuart tyranny: Parliament's claim to tax Americans without their consent was equivalent to the Stuart claim to raise revenue without the consent of Parliament. Both constituted attempts to rule over subjects by prerogative—and to be governed by prerogative was to live at the mere grace and pleasure of a master. It was, as every patriot writer ritually declared, quite simply to be a slave.<sup>18</sup> Thus James Otis chose the pseudonym "Hampden" and thundered in his *Rights of the British Colonies Asserted and Proved* (1764) against the "arbitrary and wicked proceedings of the Stuarts," claiming to defend instead "the present happy and most righteous establishment" that had been "justly built on the ruins which those

<sup>17</sup> [Wilson], *Considerations*, 29 ("Those who launched"), 31n ("it was chiefly").

<sup>18</sup> The classic account of this aspect of the discourse remains Bailyn, *Ideological Origins of the American Revolution*, esp. 55–93. For a standard instance of the claim, see Stephen Hopkins's 1765 *The Rights of Colonies Examined*: "Those who are governed at the will of another, or of others, and whose property may be taken from them by taxes or otherwise without their own consent and against their will, are in the miserable condition of slaves" ([Hopkins], *The Rights of Colonies Examined*, in Bailyn, *Pamphlets of the American Revolution*, 1: 500–522 [quotation, 1: 507–8]). For the Roman provenance of this argument, see Quentin Skinner, *Liberty before Liberalism* (Cambridge, 1997). The notion that a parliament too might rule "by prerogative" and thereby enslave a people had been a staple of Leveller polemic during the mid-1640s. See for example Richard Overton, *An Arrow against All Tyrants*, in Andrew Sharp, ed., *The English Levellers* (Cambridge, 1998), 54–73, esp. 56–57.

princes brought on their family, and two of them on their own heads.”<sup>19</sup> John Adams, in his *Dissertation on the Canon and Feudal Law* (1765), likewise styled himself as a latter-day champion of the parliamentary struggle against “the execrable race of the Stuarts,” explaining that America was first settled by lovers of “universal liberty” who fled to the New World to escape Stuart regal and ecclesiastical tyranny.<sup>20</sup> These sentiments were repeated endlessly.<sup>21</sup> Wilson, however, begins to gesture toward a very different story indeed, one according to which the great seventeenth-century constitutional crisis had pitted the virtuous defenders of royal prerogative against the illicit encroachments of rapacious parliamentarians. Wilson himself does not go quite so far. Though he opines, tellingly, that “Kings are not the only tyrants: The conduct of the long Parliament will justify me in adding, that Kings are not the severest tyrants,” and rejoices that “at the Restoration, care was taken to reduce the House of Commons to a proper dependance on the King,” he still feels it necessary to endorse the “patriotic spirit” of the initial struggle against Charles I.<sup>22</sup> Most patriots writing after 1768 would not follow him in this respect. They would instead argue for the dominion theory by mounting an affirmative defense of the Stuarts against Parliament.

IT IS ONE of the great ironies in this richly ironic story that the raw materials of the patriot defense of the Stuarts were initially provided by loyalists. The year 1742 had seen the first printing in London of the journals of the

<sup>19</sup> James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), in Bailyn, *Pamphlets of the American Revolution*, 1: 409–82 (quotations, 1: 441).

<sup>20</sup> George W. Carey, ed., *The Political Writings of John Adams* (Washington, D.C., 2000), 7.

<sup>21</sup> For several particularly noteworthy instances, see [Joseph Galloway?], *A Letter to the People of Pennsylvania* (1760), in Bailyn, *Pamphlets of the American Revolution*, 1: 249–72, esp. 1: 264; Jonathan Mayhew, *Observations on the Charter and Conduct of the Society for the Propagation of the Gospel in Foreign Parts* (Boston, 1763), 157, 175; [Oxenbridge Thacher], *The Sentiments of a British American* (1764), in Bailyn, *Pamphlets of the American Revolution*, 1: 484–98, esp. 1: 491; [William Hicks], *The Nature and Extent of Parliamentary Power Considered* (New York, 1768), 15–16, 37–38. Due to this paradigm’s dominance in the first five years of the crisis and return to prominence in 1776, the usual assumption has been that the patriot identification with the Puritans and parliamentarians was a consistent feature of revolutionary thought. See for example James C. Spalding, “Loyalist as Royalist, Patriot as Puritan: The American Revolution as a Repetition of the English Civil Wars,” *Church History* 45, no. 3 (September 1976): 329–40; Reid, *Authority of Law*, 52–63; Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Indianapolis, Ind., 1998), 51–57, 71–162. For the American reception of the English revolution after the rupture of 1775–76, see McConville, *King’s Three Faces*, 266–74.

<sup>22</sup> [Wilson], *Considerations*, 8–10 (“Kings are not,” 10, “patriotic spirit,” 9). Wilson also accepts the standard narrative according to which the first settlers “fled from the oppression of regal and ministerial tyranny” (*ibid.*, 16). As we shall see, subsequent patriot writers would reject this account.

House of Commons for the period of James I's final parliaments (1621 and 1624) and Charles I's first parliaments (1625, 1626, and 1628). Readers were reminded that the 1621 parliament—which featured the arrests of the great whig heroes Sir Edward Coke, Sir Edwin Sandys, and John Selden—had foundered in no small measure on a debate over colonial affairs, and that this debate had likewise bedeviled its successor in 1624. At issue were two bills brought forward by Sandys and his allies on behalf of the moribund Virginia Company: the first sought to establish a British monopoly for Virginia tobacco (despite a free-trade treaty with Spain that the king had recently signed) while the second sought to eliminate a royal monopoly on North American fishing that the king had granted to Sir Ferdinando Gorges's Plymouth Colony in the so-called Great Charter of New England (1620).<sup>23</sup> James was incensed that these bills had been carried in the Commons, and his secretary of state, Sir George Calvert (shortly to be created Lord Baltimore), declared on the king's behalf that "if Regall Prerogative have power in any thinge it is in this. Newe Conquests are to be ordered by the Will of the Conquerour. Virginia is not anex't to the Crowne of England And therefore not subject to the Lawes of this Howse."<sup>24</sup> Sandys, along with Coke and Christopher Brooke, denounced Calvert's defense

<sup>23</sup> John Selden, unlike the others, was not yet an MP at the time; he was retained by the House of Lords as an expert on English legal history. For the debates over colonial affairs in the 1621 and 1624 parliaments, see John Thomas Juricek, "English Claims in North America to 1660: A Study in Legal and Constitutional History" (Ph.D. diss., University of Chicago, 1970), chap. 9; Robert Zaller, *The Parliament of 1621: A Study in Constitutional Conflict* (Berkeley, Calif., 1971), esp. 101–4; David Sandler Berkowitz, *John Selden's Formative Years: Politics and Society in Early Seventeenth-Century England* (Washington, D.C., 1988), 55–58; Ian K. Steele, "The British Parliament and the Atlantic Colonies to 1760: New Approaches to Enduring Questions," *Parliamentary History* 14, no. 1 (February 1995): 29–46, esp. 34–35; Theodore K. Rabb, *Jacobean Gentleman: Sir Edwin Sandys, 1561–1629* (Princeton, N.J., 1998), 227–40.

<sup>24</sup> Wallace Notestein, Frances Helen Relf, and Hartley Simpson, [eds.], *Commons Debates 1621* (New Haven, Conn., 1935), 4: 256 (quotation). Cf. Leo Francis Stock, ed., *Proceedings and Debates of the British Parliaments respecting North America* (Washington, D.C., 1924), 1: 30–36. Note that the transcription provided by Notestein, Relf, and Simpson was not available in the eighteenth century; the published journals contained only a summary of the exchange (see *Journals of the House of Commons. From November the 8th 1547 . . . to March the 2d 1628 . . .* [London, 1742], 19 James, Apr. 25, 1621)—quoted below by Thomas Pownall and William Knox. A second record of the debate, published in [Edward Nicholas, comp.], *Proceedings and Debates of the House of Commons, In 1620 and 1621* (Oxford, 1766), 1: 318–19, put the issue even more starkly: "Mr. Secretary saith, that *Virginia, New England, Newfoundland*, and those other foreign Parts of *America*, are not yet annexed to the Crown of *England*, but are the King's as gotten by Conquest; and therefore he thinketh it worthy the Consideration of the House, whether we shall here make Laws for the Government of those Parts; for he taketh it, that in such new Plantations the King is to govern it only by his Prerogative, and as his Majesty shall think fit" (ibid., 1: 318). For Sir George Calvert's role in American colonization more broadly, see L. H. Roper, *The English Empire in America, 1602–1658: Beyond Jamestown* (London, 2009), 103–19.

of prerogative, arguing that the North American colonies were indeed “annexed to the crown” and were therefore part of the realm and within the jurisdiction of Parliament. The debate (which continued bitterly through the next four parliaments, as the fishing bill was constantly reintroduced) thus pitted defenders of the royal prerogative against proponents of parliamentary power and popular sovereignty and focused particularly on the issue of trade.<sup>25</sup> The significance of this fact was underscored in David Hume’s *History of England*—dutifully read by a great number of Americans who participated in the debates of the 1760s and 1770s—which declared that from these “small beginnings” in the 1621 parliament there arose “a mutual coldness and disgust between the king and the commons,” such that “a civil war must ensue.”<sup>26</sup>

The first pamphlet of the 1760s to make use of this material seems to have been the fourth edition of Thomas Pownall’s *The Administration of the Colonies* (1768). Pownall, who had served as royal governor of Massachusetts from 1757 to 1760, put forward a plan to integrate the colonies and other dominions into one “grand marine dominion” under the direction of a central authority in Whitehall.<sup>27</sup> This was a very different scheme indeed from the one shortly to be embraced by patriots: Pownall’s plan would have given the new “American Department” and Parliament itself vast powers over the colonies, including the power to regulate their

<sup>25</sup> For a legal evaluation of the two positions, see Barbara A. Black, “The Constitution of Empire: The Case for the Colonists,” *University of Pennsylvania Law Review* 124, no. 5 (May 1976): 1157–1211, esp. 1188–94. For the repeated reintroduction of the fishery bill during the succeeding Stuart parliaments, see Stock, *Proceedings and Debates*, 1: 58–61, 74–75, 77, 79–95. For Charles I’s insistence in 1625 that Virginia must be considered “outside of the realm,” see Robert M. Bliss, *Revolution and Empire: English Politics and the American Colonies in the Seventeenth Century* (Manchester, Eng., 1990), 18–23.

<sup>26</sup> David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, ed. William B. Todd (Indianapolis, Ind., 1983), 5: 88 (“small beginnings”), 96 (“civil war”). The old conceit that Hume’s *History* was reviled and neglected in colonial America because it was understood to be tory has by now been laid to rest. See for example Mark G. Spencer, *David Hume and Eighteenth-Century America* (Rochester, N.Y., 2005).

<sup>27</sup> Thomas Pownall, *The Administration of the Colonies*, 4th ed. (London, 1768), xv. John Phillip Reid deserves a great deal of credit for having noticed the importance of the 1621 and 1624 precedents in constitutional debate during this phase of the revolutionary crisis. Though the conclusions that I reach in what follows are quite different from his, I am indebted to his scholarship. See Reid, ed., *The Briefs of the American Revolution: Constitutional Arguments between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdoin for the Council and John Adams for the House of Representatives* (New York, 1981), 103–11; his analysis there is repr. in Reid, *Authority to Legislate*, 163–66. See also John Thomas Juricek’s wise remark that “legal-minded Americans like John Adams and James Wilson rediscovered the arcane constitutionalism of the early Stuarts” (Juricek, “English Claims in North America,” 781). On Pownall and his plan, see John A. Schutz, *Thomas Pownall, British Defender of American Liberty: A Study of Anglo-American Relations in the Eighteenth Century* (Glendale, Calif., 1951).

trade. But the two schemes shared a central premise: namely, that America had not originally been annexed to the realm. On Pownall's account, this aberration had resulted from what he regarded as the legally bankrupt practices of early American colonization. Just like other European sovereigns, "so our sovereigns also thus at first assumed against law an exclusive property in these lands, to the preclusion of the jurisdiction of the state. They called them their foreign dominions; their demesne lands in partibus exteris, and held them as their own, the King's possessions, not parts or parcels of the realm, 'as not yet annexed to the crown.'" Pownall makes the provenance of this last fragment perfectly clear:

So that when the House of Commons, in those reiterated attempts which they made by passing a bill to get a law enacted for establishing a free right of fishery on the coasts of Virginia, New-England, and Newfoundland, put in the claim of the state to this property, and of the parliament to jurisdiction over it; they were told in the House by the servants of the crown, "That it was not fit to make laws here for those countries which are not yet annexed to the crown." "That this bill was not proper for this house, as it concerneth America." Nay, it was doubted by others, "whether the house had jurisdiction to meddle with these matters." And when the house, in 1624, was about to proceed upon a petition from the settlers of Virginia, to take cognizance of the affairs of the plantations, "upon the Speaker's producing and reading to the house a letter from the king concerning the Virginia petition, the petition, by general resolution, was withdrawn" . . . the house from this time took no further cognizance of the plantations till the commencement of the civil wars.<sup>28</sup>

Pownall has taken all of this material from the journals of the House of Commons, to which he refers the reader in a footnote. He correctly relates the details of the dispute over the royal prerogative in North America and underlines the point that the Stuarts understood America to lie outside of the realm. For Pownall, to be sure, this was an aberration to be remedied rather than a sound basis upon which to construct a new imperial order. It was, after all, central to his argument that the Stuarts had asserted their colonial prerogatives "against law."<sup>29</sup> But he had nonetheless introduced into the debate a series of materials that others would put to far more radical use.

<sup>28</sup> Pownall, *Administration of the Colonies*, 48–50 ("so our sovereigns," 48, "So that when," 48–49). The first edition of Pownall's work was published in 1764 but did not include this material.

<sup>29</sup> Some patriot writers had made precisely the same case before 1769. See for example William Hicks's claim that each of the colonies "has hitherto been considered



Pownall's argument was first taken up by an anonymous but extremely influential progovernment pamphlet published in London, *The Controversy between Great Britain and her Colonies Reviewed* (1769), now known to have been written by William Knox. Deeply alarmed by the first stirrings of the dominion theory in the colonies, Knox wished to remind patriots that they had stumbled onto a dangerous and disreputable argument.<sup>30</sup> These colonists, he warned, should be careful what they wish for. If the dominion theory were to carry the day, "they ought to reflect, that whatever may be their condition, they cannot apply to parliament to better it. If they reject the jurisdiction of parliament, they must not in any case sue for its interposition in their behalf." "Whatever grievances they may have to complain of," the pamphlet continues, "they must seek redress from the grace of the crown alone; for, should they petition parliament to do them right, they themselves have authorized the crown to tell parliament, as the secretary of state to James the First did the house of commons, 'America is not annexed to the realm, nor within the jurisdiction of parliament, you have therefore no right to interfere.'"<sup>31</sup> Here Knox turns once again to the fateful debate between Calvert (whose later conversion to Catholicism became notorious among whigs) and the great whig heroes, offering a paraphrase of the former's famous statement on behalf of the king—one that would be quoted incessantly over the next five years.

Knox's intention was to isolate what he regarded as a stunning reversal in the patriot position: after five years spent bemoaning the enslaving effects

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as a particular plantation of the crown, and been governed by such loose, discretionary powers as were better calculated to support the *despotism* of a minister than the *liberties* of the settlers" ([Hicks], *Nature and Extent of Parliamentary Power Considered*, 5). Hicks notes in the preface that he composed this pamphlet before the repeal of the Stamp Act.

<sup>30</sup> For early intimations of the dominion theory, see for example [Hopkins], *Rights of Colonies Examined*, in Bailyn, *Pamphlets of the American Revolution*, 1: 511, 519; [Daniel Dulany], *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), in Bailyn, *Pamphlets of the American Revolution*, 1: 599–658, esp. 633–34; Dickinson, *Letters from a Farmer in Pennsylvania*, 5; John Joachim Zubly, *An Humble Enquiry into the Nature of the Dependency of the American Colonies* (Charleston, S.C., 1769), 10. Zubly argued for an analogy between the North American colonies and Ireland that would be much scrutinized during the subsequent debate—the problem with the comparison, from the patriot point of view, was that Sir Edward Coke's decision in Calvin's Case (1608) seemed to hold that Christian lands conquered by the king (for example, Ireland) were indeed subject to the jurisdiction of Parliament once the protections of English law had been extended to them. See for example Black, *University of Pennsylvania Law Review* 124: 1175–84; Bilder, *Transatlantic Constitution*, 35–40. Zubly also made the important point that judicial appeals from British North America were heard not by the House of Lords but rather by the king-in-council. Cf. [Wilson], *Considerations*, 22.

<sup>31</sup> [William Knox], *The Controversy between Great Britain and her Colonies Reviewed* . . . (London, 1769), 7–8 ("they ought to reflect," 7, "Whatever grievances," 7–8). For Knox's career in the late 1760s and his composition of this pamphlet, see Leland J. Bellot, *William Knox: The Life and Thought of an Eighteenth-Century Imperialist* (Austin, Tex., 1977), 71–105.



of prerogative rule, the patriots, in formulating the dominion theory, were now inadvertently (so Knox supposed) choosing to live in utter dependence on “the grace of the crown.” Indeed he went on to note the important fact that the proponents of the two colonial bills in 1621 and 1624 had been the early settlers of Virginia themselves: “How would they be amazed at the madness of their descendants, whom parliament hath taken under its benign protection, and rescued from the cruel fangs of prerogative and arbitrary power, Did they see them labouring with all their might to throw off the jurisdiction of parliament, and return under the unlimited authority of the crown?” Knox elaborates in a crucial passage, which deserves to be quoted at length:

My countrymen will there see [in the journals of the Commons], that the doubts of *the right of parliament to make laws to bind the Colonies*, was raised by the *king’s secretary* . . . The majority of the commons, were so far from doubting of their jurisdiction, that they passed the bill [on freedom of fishing in North America] . . .

It is well worthy of remark, that the excluding parliament, from jurisdiction over the Colonies, was at *this time* a matter of pecuniary, as well as honorary consideration with the crown; for as there was then no settled revenue for the support of the king’s civil government, the grant of charters and monopolies were the most important of the king’s methods of raising money independent of parliament; and from the especial provisions in these charters to the Virginia companies, it is evident, that the king then looked to the new plantations in America, as a source for a considerable revenue to himself and his successors, which might, perhaps, enable them to subsist their households in future, without the disagreeable aid of parliament. In these circumstances it is more easy to suppose, that the king or his ministers, would have restrained parliament in its rightful jurisdiction, than have suffered it to *assume* jurisdiction over America, if parliament had not a right to it; and the frequent rejection of the fishing bill is a proof, that such was really the intention of the crown, whereas its frequent renewal is a like proof of an early jealousy in the commons, and of their strict attention to the rights of parliaments, and the true interests of their country.<sup>32</sup>

<sup>32</sup> [Knox], *Controversy*, 7 (“grace of the crown”), [146] (“How would they”), [147–51] (“My countrymen”). This version of events was adopted by several administration spokesmen: see for example [John Lind], *An Englishman’s Answer, to the Address, from the Delegates, to the People of Great-Britain* . . . (New York, 1775), 10. It was also adopted by Lord Mansfield (William Murray, 1st Earl of Mansfield) in his Feb. 10, 1766, speech to the House of Lords: there he raised the issue of the debate over the fishery

Here Knox reminds his American readers that the conflict between the Stuarts and Parliament over prerogative and the colonies had been no isolated affair but rather a central front in the great battle over constitutional principles that resulted in the Civil War. On this account, the tyrannical Stuarts insisted that America was outside of the realm precisely so that they could maintain an independent source of revenue and thereby enable themselves to rule without Parliament (as Charles I proceeded to do for eleven years after 1629). Fortunately, however, the revolution had foiled their nefarious plot, and now “we hear no more of that prerogative language from the crown to parliament.”<sup>33</sup>

Yet the patriots seemed to be associating themselves with precisely such language. They “have been deluded into the absurd and vain attempt of exchanging the mild and equal government of the laws of England, for prerogative mandates: of seeking to enlarge your liberties, by disenfranchising yourselves of the rights of British subjects.” Indeed, as Knox pointed out, the patriot embrace of the Stuart position threatened to point them in an even more perilous and unexpected direction: “I would ask these loyal subjects of the king, what king it is they profess themselves to be the loyal subjects of? It cannot be his present most gracious majesty George the Third, King of Great Britain, for his title is founded on an act of parliament, and they will not surely acknowledge, that parliament can give them a king, which is of all others the highest act of sovereignty, when

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bill, admitted that “a doubt was thrown out, whether parliament had any thing to do in America,” and then pointedly observed that “this doubt was immediately answered, I believe by Coke.” See Hansard, *Parliamentary History of England*, 16: 176. Cf. Sir William Blackstone’s speech to the House of Commons on Feb. 3, 1766 (Stock, *Proceedings and Debates*, 2: 148).

<sup>33</sup> [Knox], *Controversy*, 156. Knox interestingly related this claim to a critique of John Locke’s views on the prerogative (Locke, *Second Treatise of Government*, ed. C. B. Macpherson [Indianapolis, Ind., 1980], chap. 14 [83–88]):

There are some passages in it [*Second Treatise*], which probably the temper and fashion of that age drew from him [Locke], in which I can by no means agree with him, especially when he defines prerogative to be ‘a power in the prince to act according to *discretion* for the public good, without the prescription of the law, and sometimes even against it’ . . . I mean not by this to throw any blame upon Mr. Locke, but merely to shew, that in a work of this extent there must be some inaccuracies and errors, and that it is not an infallible guide in all cases.

[Knox], *Controversy*, 78–80. Knox’s patriot opponents would eagerly cite precisely these passages to recruit Locke as a defender of the dominion theory. See for example [Wilson], *Considerations*, 13. For a recent discussion of the degree to which Locke’s defense of prerogative embodied a rejection of parliamentary political thought, see Quentin Skinner, “On Trusting the Judgement of Our Rulers,” in *Political Judgement: Essays for John Dunn*, ed. Richard Bourke and Raymond Geuss (Cambridge, 2009), 113–30.

they deny it to have power to tax or bind them in any other case.” If the patriots were truly going to deny that they were within the realm and therefore bound by acts of Parliament, would they then find themselves supporting the Catholic Pretender? Knox answers coyly that he has no reason to doubt that the Americans recognized William and Mary after the Glorious Revolution: “I believe they did so, for I never suspected them of Jacobitism, altho’ they must see, that if they reject parliamentary authority, they make themselves to be still the subjects of the abjured Stuart race. This however is too delicate a matter to say more upon.”<sup>34</sup>

It is clear, then, that Knox wrote his pamphlet from a particular point of view: he assumed that patriots would not wish to associate themselves with the Stuart monarchs of the mid-seventeenth century, let alone with the cause of the Pretender, and that they would be embarrassed when they recognized the Jacobean and Caroline provenance of their seemingly novel constitutional theory. He must therefore have been shocked when his patriot opponents responded by explicitly taking up the defense of the Stuarts. The first to do so was the itinerant physician (and subsequent double agent) Edward Bancroft in an anonymous response to Knox, *Remarks on the Review of the Controversy between Great Britain and her Colonies* (1769). This pamphlet, initially published in London and then reprinted in New London, Connecticut, in 1771, became the most influential patriot text of the early 1770s and supplied a definitive template for defenses of the dominion theory.<sup>35</sup> Bancroft’s basic argument is clear: “Though the King’s Prerogative extends, indiscriminately, to all States owing him Allegiance, yet the Legislative Power of each State, if the People have any Share therein, is necessarily confined within the State itself.” He defends this claim by offering a short synopsis of English colonial history, clearly indebted to Pownall’s but differing from it in some crucial respects. Elizabeth and the first two Stuarts had claimed North America as a personal dominion “and no Person will affirm, that the Nation had any Claims thereto, or that that Part of *America*, situated between the 33rd and 40th Degrees of North Latitude, was then annexed to the Realm; and I believe it will be difficult to prove, that it has been since united thereto, or indeed, that any Power, after it had been legally granted to others, could annex it to the Realm without *their* Consent.” It follows that if “the Crown, by Discovery or otherwise, acquired a Title to any Part of *America*,

<sup>34</sup> [Knox], *Controversy*, 201 (“have been deluded”), 137 (“I would ask”), 138 (“I believe”).

<sup>35</sup> This might seem a surprising claim. Edward Bancroft himself is usually regarded as a marginal and conflicted figure in the revolutionary crisis, and his pamphlet was only published once in North America. But, as I will demonstrate, he was read by almost every patriot pamphleteer of the early 1770s, and his analysis, more than any other, gave shape to their arguments.

it belonged to the Crown alone, and could be forever alienated from the Realm, either to Subjects or Foreigners, at the Pleasure of the Crown."<sup>36</sup>

It is worth noting the tension in this argument, since it became a recurring feature of patriot writing during the period. Bancroft does not actually wish to endorse a right of discovery or conquest as a source of title in the New World or to defend the notion that the kings owned North America as a private, feudal possession. What he argues is that the crown's title is the only possible title that could have resulted from the early colonization of America. If that title is dubious, then a fortiori Britain's claim to have absorbed the territory is even more ludicrous. The key point, for Bancroft, is that the colonies were formed on the basis of private contracts between monarchs and the various companies and proprietors.<sup>37</sup> These charters, Bancroft tells us, had left the colonies dependent only upon the crown, not upon Parliament. As for the famous caveat in the various charters stipulating that colonial laws must not be "repugnant" to the laws and statutes of England," Bancroft argues that the Stuart monarchs clearly intended it to mean only that the colonies should be governed according to the basic principles of the English constitution, not that they were subject to acts of Parliament.<sup>38</sup> For evidence he returns to precisely the same incident that Knox had discussed so extensively, although he treats it in a strikingly different manner:

The Charter which provides that the Laws of *Virginia* shall not be contrary to the Laws and Statutes of *England*, bears the Date the 12th of *March*, 1612; and on the 25th of *April*, 1621, soon after the Constitution of *Virginia* had received that Form it has ever since retained, when a Bill was proposed in the House of Commons for granting to the Subjects of *England* free Liberty of Fishing on the Coast of *America*, the House was told by the Secretary of State,

<sup>36</sup> [Edward Bancroft], *Remarks on the Review of the Controversy between Great Britain and her Colonies* (New-London, Conn., 1771), 49 ("King's Prerogative"), 19 ("no Person"). For a similar claim about the crown's right to alienate foreign dominions, see [Gervase Parker Bushe], *Case of Great-Britain and America, Addressed to the King and both Houses of Parliament*, 3d ed. (Dublin, 1769), 3. Bushe, an Irishman who wrote in defense of the patriot position, likewise claimed that "from the earliest times, down to the present, the disposition of foreign territory belonging to Great-Britain, has always been vested in the Executive. It is a power which the Restoration and the [Glorious] Revolution have left unshaken" (ibid.). Bushe did not, however, make any use of the Stuart precedents.

<sup>37</sup> On this point, see the insightful discussion in Michael Kammen, "The Meaning of Colonization in American Revolutionary Thought," *Journal of the History of Ideas* 31, no. 3 (July–September 1970): 337–58, esp. 343–44. Bancroft neglected to address the implications of his constitutional theory for those colonies that did not possess charters, a point raised by his interlocutors (see for example Lind, *Englishman's Answer*, 6).

<sup>38</sup> On this subject, see Bilder, *Transatlantic Constitution*, 40–46 (quotation, 40).

from his Majesty, that *America* was not annexed to the Realm, and that it was not fitting that Parliament should make Laws for those Countries; and though the House was uncommonly solicitous for this Bill, and often offered it for the Royal Assent, it was always refused by the Crown, for those very just and cogent Reasons. And the King's Successor, *Charles* the First, by whom the *Plymouth*, *Massachusetts*, and *Maryland* Charters were soon after granted, when the same Bill was again offered, refused it the Royal Assent, declaring, at the same time, that it was "unnecessary; that the Colonies were without the Realm and Jurisdiction of Parliament, and that the Privy Council would take order in Matters relating to them;" though a little after, when the *Maryland* Charter was granted, he reserved to the Subjects of *England* the same Right of Fishing upon the Coast of that Province, which was intended to be secured by the Bill that was denied the Royal Assent; which abundantly proves, that the King did not refuse the Bill for any secret Reasons, but only because he thought it might afford a Precedent for an unwarrantable Extension of Parliamentary Jurisdiction.<sup>39</sup>

Two important things have happened here. First, Bancroft has introduced an error into the narrative: Charles never actually refused the royal assent to the fishery bill. He surely would have, but the bill died in the Lords in 1625—and although it eventually passed both houses in 1626, it was never presented to the king.<sup>40</sup> But Bancroft has also completely recharacterized the debate itself. Whereas Knox had offered this incident as evidence that the patriots were associating themselves with Stuart tyranny, Bancroft argues that James and Charles had offered "very just and cogent reasons" for prerogative rule in America and had rightly resisted an "unwarrantable" parliamentary assault upon the crown. Indeed Bancroft is at pains to emphasize that this truly was a debate over constitutional principles: it had nothing to do with the merits or demerits of the fishing monopoly, since Charles had been happy to establish a free fishery *by prerogative* in the Maryland charter. The Stuarts resisted the bill only (and correctly) because it would have represented an unacceptable precedent, a usurpation of royal

<sup>39</sup> [Bancroft], *Remarks*, 27–28 (quotation). For a more predictable (and far less incendiary) response to William Knox's invocation of the Stuarts, see Arthur Lee, *Observations on the Review of the Controversy Between Great-Britain and Her Colonies* (London, 1769), 24–26. Lee at this point was still willing to acknowledge Parliament's jurisdiction over American commerce as a matter of right.

<sup>40</sup> In the 1629 parliament, the fishery bill failed to achieve even a first reading. See Conrad Russell, *Parliaments and English Politics, 1621–1629* (Oxford, 1979), 234, 276, 406. The statement attributed to Charles by Bancroft seems to be a paraphrase of James's message to the Commons of Apr. 29, 1624 (referred to by Pownall above). As we shall see, Bancroft passed this error along to his various readers.

prerogative. To be sure, Parliament had finally prevailed in the wake of the regicide and assumed control of American commerce, but this too had been mere usurpation. The Navigation Act, for Bancroft, was no more legitimate than the fishery bill had been: "However extensive the King's Prerogative may be over his foreign Subjects, the *English* Constitution has made no Provision for this Species of National, External Legislation, the Power of Parliament being originally confined to the Limits of the Realm."<sup>41</sup>

But Bancroft does not leave matters there. He proceeds to offer a striking revisionist account of the Puritans' flight to the New World. Jettisoning the traditional understanding that they had fled Stuart absolutism, Bancroft now informs us that the settlement of New England "was occasioned by a noble Disdain of civil and religious Tyranny, the very Object for which it was solely undertaken being an Emancipation from the Authority of Parliament, and those Grievances which they suffered under the Laws of *England*." On this telling the Puritans had fled the tyranny of *Parliament*, not the king. It was for this reason that they had insisted on the king's protection as patron and guarantor of their chartered rights, refusing to allow Parliament to encroach in any way on their new life in America. Even when charters were periodically vacated (as in the case of Massachusetts), the colonists insisted firmly that, in such circumstances, "the King might, by his Prerogative, put the Inhabitants of that Colony under whatever Form of Government he pleased."<sup>42</sup> Did all of this make them de facto Jacobites, as Knox had suggested? Bancroft recognizes the force of the charge and attempts to refute it in a lawyerly manner: Americans owe their allegiance to the king of Great Britain, he argues, and it just so happens that the identity of this person is determined by an act of Parliament. Americans can therefore recognize Parliament as the arbiter of the succession without recognizing its jurisdiction over America.<sup>43</sup> It is a measure of exactly how far the argument had progressed that Bancroft felt it necessary to engage in these particular acrobatics.

In the wake of Bancroft's pamphlet, the defense of the Stuart position became basic to patriot discourse. Consider, for example, the famous debate on constitutional principles between Thomas Hutchinson and the two houses of the Massachusetts General Court in 1773. Though the Council (the upper house) continued to acknowledge Parliament's jurisdiction over North America, denying only its right to impose taxes and

<sup>41</sup> [Bancroft], *Remarks*, 57 ("However extensive").

<sup>42</sup> *Ibid.*, 29 ("was occasioned"), 43 ("King might").

<sup>43</sup> *Ibid.*, 44–45. This discussion of the succession strikingly echoes arguments put forward by advocates of Irish legislative autonomy in the 1690s. See for example William Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (1698; repr., Belfast, 1776), 25, 71–72. I am grateful to Noah McCormack for prompting me to focus on this comparison.

particular sorts of duties, the House of Representatives fully endorsed the dominion theory.<sup>44</sup> Its “Answer” to the governor’s brief was drafted (in all probability) by John Adams, with some assistance from Joseph Hawley and Samuel Adams. The essay begins by retracing Bancroft’s steps, analyzing the status of the first charters, and then offering the following observations:

But further to show the Sense of the English Crown and Nation that the American Colonists and our Predecessors in particular, when they first took Possession of this Country by a Grant and Charter from the Crown, did not remain subject to the Supreme Authority of Parliament, we beg Leave to observe; that when a Bill was offered by the two Houses of Parliament to King Charles the First, granting to the Subjects of England the free Liberty of Fishing on the Coast of America, he refused his Royal Assent, declaring as a reason, that “the Colonies were *without the Realm and Jurisdiction of Parliament*.”

In like Manner, his Predecessor James the First, had before declared upon a similar Occasion, that America *was not annexed to the Realm*, and it was not fitting that Parliament should make Laws for those Countries. This Reason was, not secretly, but openly declared in Parliament. If then the Colonies were not annexed to the Realm, at the Time when their Charters were granted, they never could be afterwards, without their own special Consent, which has never since been had, or even asked.<sup>45</sup>

The story has become a bit muddled here: it was Calvert who had made the famous comment denying that America was “annexed to the realm,” not James I himself. Nonetheless, this material is taken directly from Bancroft, complete with the endorsement of Stuart constitutional theory.<sup>46</sup>

<sup>44</sup> For the context of the debate, consult Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, Mass., 1976), 196–220; John Phillip Reid’s commentary in Reid, *Briefs of the American Revolution*; Clark, *Language of Liberty*, 93–110.

<sup>45</sup> Reid, *Briefs of the American Revolution*, 58–59.

<sup>46</sup> It is for this reason that I cannot accept John Phillip Reid’s assertion that John Adams and his colleagues would have been “embarrassed” had Thomas Hutchinson replied by reminding them that the House of Commons had rejected James’s view of the matter (Reid, *Authority to Legislate*, 165). As we have seen, Bancroft and his readers knew this full well. They focused on this episode precisely because it marked (in their view) the beginning of Parliament’s illicit campaign to deprive the crown of its prerogative rights in America—a campaign that the Stuarts valiantly resisted until the regicide, at which point an unchecked and tyrannical Parliament finally managed to get its hands on the colonies. Unless we recognize this fact, we will fail to register the ideological stakes involved in the deployment of this precedent. Reid makes it his central claim that the patriots were “looking back to the constitution of Sir Edward Coke, to the constitu-



None of this was lost on Hutchinson, who announced in his retort that the authors had taken their arguments from “an anonymous Pamphlet by which I fear you have too easily been misled.” Assuming that James I and Charles I were in fact properly quoted in the house’s reply (Hutchinson noticed the discrepancies between this account and the one in Bancroft and the Commons journals), he posed the following question: “May not such Declarations be accounted for by other Actions of those Princes who when they were soliciting the Parliament to grant the Duties of Tonnage and Poundage with other Aids and were, in this Way, acknowledging the Rights of Parliament, at the same Time were requiring the Payment of those Duties with Ship Money, &c. by Virtue of their Prerogative?”<sup>47</sup> Hutchinson, good whig that he is, here expresses his shock that the patriots would take James and Charles for their constitutional authorities. Did they not realize that the very same view of the royal prerogative had emboldened Charles to circumvent Parliament by collecting ship money? So much for those “great fundamental principles of the English constitution for which Hampden bled.”<sup>48</sup> And Hutchinson reiterates the charge of *de facto* Jacobitism: “If you should disown that Authority which has Power even to change the Succession to the Crown, are you in no Danger of denying the Authority of our most gracious Sovereign, which I am sure none of you can have in your Thoughts?”<sup>49</sup>

This section of Hutchinson’s reply to the house simply rehearses arguments he had first tried out in his unpublished “Dialogue between an

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tion that beheaded Charles I” (Reid, *Authority of Law*, 5 [quotation]; cf. Reid, *Authority to Legislate*, 60). In fact, as we have seen, patriots in the early 1770s were explicitly rejecting that understanding of the constitution—recall that it was Coke himself who led the opposition to James’s assertions of prerogative in the 1621 and 1624 parliaments (most famously in his response to Sir George Calvert about the fishery bill). That is, the notion that the patriots were simply defending the “seventeenth-century” constitution (which emphasized checks on arbitrary power) against the “eighteenth-century” constitution (which assumed parliamentary supremacy) understates the radicalism of their position. They were not merely rejecting the eighteenth-century understanding of the English constitution; they were championing one particular interpretation of the seventeenth-century English constitution against all its rivals. In endorsing a revival of the royal veto in Britain and insisting that the Stuarts had been correct to assert a prerogative right to regulate imperial commerce without Parliament, patriots were taking not a generic seventeenth-century view of the English constitution but rather a Royalist one.

<sup>47</sup> Reid, *Briefs of the American Revolution*, 88 (“anonymous Pamphlet”), 90–91 (“May not such Declarations”).

<sup>48</sup> Hansard, *Parliamentary History of England*, 18: 734. Thomas Hutchinson also quotes Sir Edwin Sandys’s rejoinder in the 1621 debate: “Sir Edwin Sandys, who was one of the Virginia Company and an eminent Lawyer, declared that he knew Virginia had been annexed and *was held of the Crown as of the Manor of East Greenwich* and he believed New-England was so also” (Reid, *Briefs of the American Revolution*, 90).

<sup>49</sup> Reid, *Briefs of the American Revolution*, 99. The House of Representatives replied exactly as Bancroft had (*ibid.*, 139).

American and a European Englishman.”<sup>50</sup> There he had the “American” (his imagined patriot interlocutor) begin by complaining that “from the latter part of the reign of King James the First down to this day, the prerogative of the sovereign has in many instances been lessened.” It had accordingly—and lamentably—been forgotten that “the disposal of new discovered countries hath been left to the prince” by the English constitution. The “American” then cites his constitutional authorities: “I have no doubt that both James and Charles the First supposed they had a right to the part of America which had been discovered under commissions from preceding princes without any control from Parliament.” Answering this intemperate speech, Hutchinson’s “European” insists indignantly that “there is no inferring from the acts of such princes as James or Charles what was the constitution of England.” “Whatever King James might imagine,” a grant of land under his personal prerogative was not “worth one farthing.” British North America was always within the realm, and the colonists owed their allegiance to “the King in Parliament.”<sup>51</sup>

A similarly outraged and incredulous response to the house’s arguments came in John Gray’s 1774 pamphlet *The Right of the British Legislature to Tax the American Colonies Vindicated*. Reflecting on the invocation of the Stuarts in the house’s “Answer,” Gray asks, “Who would have expected to have found such very zealous advocates for royal prerogative among the puritanical inhabitants of New England; but it has happened to them as to Eve, when she first deserted her husband, ‘They fell in love with the first devil

<sup>50</sup> Thomas Hutchinson, “A Dialogue between an American and a European Englishman [1768],” ed. Bernard Bailyn, *Perspectives in American History* 9 (1975): 343–410. Indeed the precision with which Hutchinson recapitulates and then refutes the patriot defense of Stuart constitutionalism in the “Dialogue” suggests that the dating of this manuscript should be reconsidered. Following Malcolm Freiburg, Bailyn assumed that the manuscript was composed during the summer of 1768 (*ibid.*, 350; Bailyn, *Ordeal of Thomas Hutchinson*, 100 n. 39) and that it was intended to answer John Dickinson’s *Letters from a Farmer in Pennsylvania*. Dickinson, however, made no use at all of Stuart precedents in his pamphlet, and I am unaware of any patriot who did so prior to Bancroft in 1769 (and his pamphlet was not published in North America until 1771). Since Hutchinson took himself to be summarizing the patriot position in the “Dialogue,” it therefore seems likely that it was in fact composed no earlier than 1771. More work needs to be done to confirm this conjecture, but the evidence for a 1768 composition date has always been quite slim (as Bailyn pointed out, the “Dialogue” is not mentioned in any of Hutchinson’s papers or in those of his close friends).

<sup>51</sup> Hutchinson, *Perspectives in American History* 9: 374 (“from the latter part”), 376 (“there is no inferring”), 377 (“King in Parliament”). It is thus particularly ironic that, five years earlier, it had been Thomas Hutchinson who tried in vain to prevent the removal of Charles I’s portrait from the Massachusetts Council chamber. Hutchinson opposed the gesture not because he had any sympathy for the Stuarts but rather on the grounds that all English kings were entitled to have their portraits displayed in a chamber of state (see Bailyn, *Ordeal of Thomas Hutchinson*, 138). The radicals who demanded the removal of the portrait, on the other hand, would shortly find themselves defending Charles I.

they met,/And out of pique ev'n help'd to damn themselves." He then turns to address the specifics of the argument: "The charters of the colonies, they say, are granted by the crown; and, for many years after their first establishment, the sovereigns of England governed them without the interference of parliament. What follows from all that? The sovereigns of England, at that time, were also endeavouring to govern Great Britain without the interference of parliament; and both were unconstitutional . . . How absurd then is it to found the independency of any British colony upon the principles and actions of kings, subversive of the general liberty of the subject."<sup>52</sup>

Like Hutchinson, Gray argues that the Stuarts' position on royal prerogative in the colonies was fundamentally linked to their position on royal prerogative at home.<sup>53</sup> It was an outrage against whig principles to ground a constitutional theory on the tyrannical utterances of such enemies to liberty. This denunciation was echoed in the same year by the loyalist Jonathan Boucher, who thundered in his *Letter from a Virginian* that "from this parliamentary authority, they [the colonists] never wished, until of late, to be emancipated, but would rather have fled to it for protection, from the arbitrary encroachments of a James, or a Charles, armed with the usurpations, and abuses, of privy seals, benevolences, proclamations, star chambers and high commission courts, and from the enormities of the two succeeding reigns." For Boucher the only possible conclusion is "that such were the practices of the times, when our early charters bear their dates, that if they were not granted by parliamentary Kings, they were granted by tyrants, and we shall gain nothing by recurring to first principles."<sup>54</sup>

<sup>52</sup> [John Gray], *The Right of the British Legislature to Tax the American Colonies Vindicated* (London, 1774), 18–19 ("Who would have expected," 18, "charters of the colonies," 18–19). It is worth noting the historical conflation that was occurring here: the charters of Virginia, Plymouth, and Massachusetts Bay were all granted before 1629 (the beginning of the Personal Rule).

<sup>53</sup> Scholars have occasionally taken the same view. Robert Schuyler, for example, argued in his reply to Charles Howard McIlwain that "it may be that the first two Stuart sovereigns, with their lofty conceptions of royal prerogative and their numerous controversies with the House of Commons, convinced themselves that the American colonies did not lie within the range of parliamentary authority," but this, on Schuyler's account, was merely an absolutist delusion. See Schuyler, *Parliament and the British Empire* (New York, 1929), 22. Schuyler added in a footnote that "on the eve of the American Revolution it was urged by Americans who disputed Parliament's right to interfere in colonial affairs that James I and Charles I had held this opinion" (*ibid.*, 229 n. 78). His reference was to the debate between Hutchinson and the Massachusetts House of Representatives.

<sup>54</sup> [Jonathan Boucher], *A Letter from a Virginian . . .* (Boston, 1774), 13. The administration pamphleteer John Lind likewise argued in his *Remarks on the Principal Acts of the Thirteenth Parliament of Great Britain* (London, 1775) that

the *one great* condition on which the capitulation or the charter is granted is, that the conquered or acquired country becomes *subject* of the *realm* of Great Britain.

Yet such protests did not deter the patriots. North Carolina lawyer (and future U.S. Supreme Court justice) James Iredell proceeded to argue in his 1774 essay *To the Inhabitants of Great Britain* that “the king had a right to all uninhabited countries that should be discovered and possessed by any of his subjects” and that the charters he freely granted to American companies had explicitly denied any “latent claims of a British Parliament.”<sup>55</sup> As evidence Iredell offers the following observation: “King James, and King Charles the First, it is well known, both prohibited Parliament from interfering in our concerns, upon the express principle *that they had no business with them*. In any contract can the nature of it be better ascertained than by certainly discovering the sense of the parties?”<sup>56</sup> In the current crisis, Parliament was thus straightforwardly attempting “to deny the king the constitutional right over this country,” whereas the patriots were seeking to vindicate it.<sup>57</sup> This argument was likewise reproduced in an anonymous public letter to Lord North, published in Williamsburg in May 1774 under the pseudonym “Edmund Burke.” Its author begins by

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The unconstitutional maxims adopted by the Stuart family, threw no small obscurity on this question. They were wont to consider all conquered or acquired countries as belonging to the king *alone*; as being part of his foreign dominions, in the same manner as Gascony or Normandy, and as subject therefore to the authority of the king alone.

Lind also included a lengthy discussion of the fishery bill, as well as a pointed reminder that the parliamentarians of the 1640s and 1650s (“men whose names are delivered down to us with the endearing epithets of Champions of liberty, and defenders of the rights of mankind”) had “considered our colonies in America as subject in *all things* to the supreme power of England.” *Ibid.*, 1: 38–39 (“*one great condition*”), 192 (“men whose names”), 193 (“considered our colonies”), 174–84.

<sup>55</sup> Griffith J. McRee, *Life and Correspondence of James Iredell, One of the Associate Justices of the Supreme Court of the United States* (New York, 1857), 1: 213. James Iredell had emigrated from England in 1767 at the age of seventeen.

<sup>56</sup> *Ibid.*, 1: 213–14. Iredell makes a striking move in the passage that immediately follows this one. Having established that jurisdiction over North America is limited to the crown, he next addresses the question of whether Parliament could legitimately interfere in colony matters provided that it had the king’s permission to do so. His answer is no, on the grounds that the terms of any given charter are binding on *both* the colony and the chartering monarch (along with the latter’s successors). But did James and Charles agree? “In the case of James and Charles,” Iredell writes, “it may be said, those kings perhaps thought that *they*, in the plenitude of their power, had authority to revoke the charters, if necessary, or to make any other regulations for us they might think proper. They were indeed sufficiently arbitrary in their tempers to form an idea of that sort; but it does not appear that *they did*, and our ancestors were certainly not fools enough to consider the only foundation of their security as alterable at pleasure by one of the contracting parties” (*ibid.*, 1: 214). Here, having just cited James and Charles as his constitutional authorities, Iredell feels it necessary to concede that they were “sufficiently arbitrary in their tempers” to have supposed that the charters might be altered at their whim—only to insist in the next breath that the Stuarts did not in fact take this “arbitrary” view.

<sup>57</sup> *Ibid.*, 1: 214.

asserting that “at the discovery of *America*, no person imagined any part of that Continent to be within the Realm of *England* . . . and the Sovereign then had, and still has, an undoubted prerogative right, to alienate for ever from the Realm without consent of Parliament, any acquisition of foreign territory.” “Conformable to this prerogative right,” he continues, “King *James* the First, and *Charles* the First, did alienate unto certain persons large territories in *America*, and by the most solemn compacts, did form them into separate civil States.” The “Royal intention” of the Stuart monarchs was that these newly created colonies would be “dependent on the Crown, but not on the Parliament of *England*.” The author then proceeds to offer a straightforward paraphrase of Bancroft:

Conformable to this intention, we find that when a bill was several times brought into the House of Commons, to secure the people of *England* a liberty of fishing on the coasts of *America*, messages were sent to the Commons by those Monarchs, requiring them to proceed no further in the matter, and alleging that “*America* was without the Realm and jurisdiction of Parliament;” and on this principle the Royal assent was withheld, during all those reigns, from every bill affecting the Colonies. These and other facts, which appear on the journals of Parliament, joined to the charters of the Colonies, fully demonstrate that they were really and intentionally created distinct States, and exempted from the authority of Parliament.

It was only “after the death of King *Charles* the First,” the author explains, that “the Commonwealth Parliament, which usurped the rights of the Crown, naturally concluded, that by those rights they had acquired some kind of supremacy over the Colonies of *America*.”<sup>58</sup> Once more, the assertion

<sup>58</sup> Edmund Burke [pseud.], “To the Right Honourable Lord North,” in M. St. Clair Clarke and Peter Force, eds., *American Archives*, 4th ser. (Washington, D.C., 1837), 1: 337–40 (“at the discovery,” 1: 338, “after the death,” 1: 339). The author then adds an interesting twist to the argument: he suggests that, after subduing the southern colonies that had “held out for the King,” the Commonwealth parliament settled for only a “nominal” degree of “supremacy” over them. This fact demonstrates, for the author, that “even those who had brought a Monarch to the scaffold, had the moderation and justice to *respect*, and preserve those rights” that the colonies had been given by the crown in their charters. *Ibid.*, 1: 339. There is some truth to this claim: in the 1640s and 1650s, the overwhelmingly anti-Royalist General Court of Massachusetts Bay continued to insist on the importance of their charter, despite the fact that it had been issued by Charles I, whom they roundly despised. But at no point during this period did the General Court deny Parliament’s jurisdiction over the colonies—and Parliament unambiguously asserted its jurisdiction, at least in relation to trade. On this subject, see Mark Peterson, *The City-State of Boston: The Rise and Fall of an Atlantic World, 1630–1865* (New Haven, Conn., forthcoming), chap. 1.

of Parliament's jurisdiction over America is rooted in a "usurpation" of the royal prerogative.

Turning northward again, we find precisely the same account being offered by the Connecticut minister Moses Mather in his 1775 pamphlet, *America's Appeal to The Impartial World*. The various American charters, he insists, "were entered into and granted by the King for himself only . . . no mention is made in them of the parliament." For Mather, all of this is simply a matter of understanding that, in addition to the king's rights in his private capacity, "in his political capacity he also hath certain prerogatives, royal rights and interests, which are his own, and not the kingdom's; and these he may alienate by gift or sale, &c." The Stuart kings had done so in the various charters, and at no time was America annexed to the realm. Indeed, as Mather insists,

it was declared by James the first and Charles [the] first, when a bill was proposed in the House of Commons, and repeatedly and strenuously urged, to give liberty to the subjects of England to fish on the coast of America; "that it was unnecessary, that the colonies were without the realm and jurisdiction of parliament, and that the Privy Council would take orders in matters relating to them." And liberty of fishing in America, is reserved in some of the charters that were afterwards made; which shews that without such reservation, they would not have had a right to fish on the coast of the colonies.

As to the objection that "the settlement of the crown is by act of parliament; and the colonies do acknowledge him to be their King, on whom the crown is thus settled, consequently in this they do recognize the power of parliament," Mather replies (as Bancroft had) that "the colonies do and ever did acknowledge the power of parliament to settle and determine who hath right, and who shall wear the crown of Great-Britain; but it is by force of the constitutions of the colonies only, that he, who is thus crowned King of Great-Britain, becomes King of the colonies. One designates him the King of the colonies, and the other makes him so."<sup>59</sup>

Alexander Hamilton likewise recapitulated Bancroft's arguments, and those of the Massachusetts house, in his pamphlet debate with the loyalist Samuel Seabury. The latter had made a point of stressing the absolutist implications of the dominion theory in *A View of the Controversy between Great-Britain and her Colonies* (1774). "To talk of being liege subjects to

<sup>59</sup> [Moses Mather], *America's Appeal to The Impartial World* (Hartford, 1775), 44 ("were entered"), 45 ("political capacity"), 31 ("it was declared"), 46 ("settlement of the crown").

King George, while we disavow the authority of parliament," he argued, "is another piece of whiggish nonsense. I love my King as much as any whig in America or England either, and am as ready to yield him all lawful submission: But while I submit to the King, I submit to the authority of the laws of the state, whose guardian the King is . . . There is no medium without ascribing powers to the King which the constitution knows nothing of—without making him superior to the laws, and setting him above all restraint."<sup>60</sup> Hamilton, who fully embraced the dominion theory, took up the challenge in his 1775 *Farmer Refuted*. The king, on this account, "is the only Sovereign of the empire," such that "the part which the people have in the legislature, may more justly be considered as a limitation of the Sovereign authority . . . Monarchy is universally allowed to predominate in the constitution." As for the colonies, "it is an invariable maxim, that every acquisition of foreign territory is at the absolute disposal of the king." It follows that the king "must have been the original proprietor of all the lands in America, and was, therefore, authorized to dispose of them in what manner he thought proper."<sup>61</sup> In accordance with this principle, the Stuart kings had voluntarily entered into contractual agreements with the first settlers, and these charters had not bestowed any jurisdiction on Parliament.<sup>62</sup> How do we know that the caveat in the charters stipulating that colonial laws may not be "repugnant" to the laws of England did not mean to extend any such jurisdiction? Hamilton gives the by-now-familiar answer:

But the true interpretation may be ascertained, beyond a doubt, by the conduct of those very princes, who granted the charters . . . In april, 1621, about nine years after the third Virginia charter was issued, a bill was introduced into the house of commons, for indulging the subjects of England, with the privilege of fishing upon the coast of America; but the house was informed by

<sup>60</sup> [Samuel Seabury], *A View of the Controversy between Great-Britain and her Colonies* (New York, 1774), 10–11.

<sup>61</sup> [Alexander Hamilton], *The Farmer Refuted; Or, A more impartial and comprehensive View of the Dispute between Great-Britain and the Colonies* (New York, 1775), 16 ("only Sovereign"), 25 ("invariable maxim"), 26 ("original proprietor"). Cf. John Cartwright, *American Independence the Interest and Glory of Great Britain . . .* (London, 1774), 10. The colonists settled "in those regions, which, by the prerogative, were the property of the crown, and which the King, by the same prerogative, had the power of alienating without the consent of the people of England, particularly when such alienation was made to a part of his own subjects" (*ibid.*, 10).

<sup>62</sup> Alexander Hamilton likewise confronts the charge of Jacobitism, which Samuel Seabury had raised: "Admitting, that the King of Great Britain was enthroned by virtue of an act of parliament, and that he is King of America, because he is King of Great-Britain, yet the act of parliament is not the *efficient cause* of his being the King of America: It is only the *occasion* of it. He is King of America, by virtue of a compact between us and the Kings of Great-Britain" ([Hamilton], *Farmer Refuted*, 9).



the secretary of state, by order of his majesty King James, that “*America was not annexed to the realm, and that it was not fitting that parliament should make laws for those countries.*” In the reign of his successor, Charles the first (who granted the Massachusetts and Maryland charters), the same bill was again proposed, in the house, and was, in the like manner, refused the royal assent, with a similar declaration that “it was unnecessary; that the colonies *were without the realm and jurisdiction of parliament.*” Circumstances which evidently prove, that these clauses [in the charters] were not inserted to render the colonies dependent on the Parliament; but only (as I have observed) to mark out a model of government, for them.

Hamilton then scrupulously paraphrases Bancroft’s revisionist account of the settlement of New England: it “was instigated by a detestation of civil and ecclesiastical tyranny. The principal design of the enterprize was to be emancipated from their sufferings, under the authority of parliament, and the laws of England.”<sup>63</sup> Once again the Puritans fled not from Charles Stuart (whom Hamilton calls merely “unfortunate”) but from the tyrannical Parliament. Indeed Hamilton adds that his account of the Puritan settlement “ought to silence the infamous calumnies of those, who represent the first settlers in New-England, as enemies to kingly government; and who are, in their own opinions, wondrous witty, by retailing the idle and malicious stories that have been propagated concerning them; such as their having erased the words *King, Kingdom*, and the like, out of their bibles, and inserted in their stead, civil magistrate, parliament, and republic.”<sup>64</sup>

<sup>63</sup> *Ibid.*, 30–31 (“true interpretation,” 30–31, “was instigated,” 31). It is worth underlining that the first part of Hamilton’s answer is a virtual quotation from Edward Bancroft’s essay. Hamilton had certainly read it, as had Moses Mather, the author(s) of the Massachusetts house’s “Answer” (a point recognized by Thomas Hutchinson, as we have seen), the author of the “Edmund Burke” letter, and quite probably James Iredell as well. This is a striking fact, given that recent scholarship has stressed the degree to which patriots were often not able to consult each other’s pamphlets. See for example Trish Loughran, *The Republic in Print: Print Culture in the Age of U.S. Nation Building, 1770–1870* (New York, 2007).

<sup>64</sup> [Hamilton], *Farmer Refuted*, 72 (“unfortunate”), 32n (“ought to silence”). For a fascinatingly different use of the Stuart precedent, see Joseph Hawley’s Mar. 2, 1775, essay “To the Inhabitants of the Massachusetts Bay. No. V,” in Clarke and Force, *American Archives*, 4th ser., 2: 18–24. Hawley (who is thought to have contributed to the Massachusetts house’s “Answer”) likewise cites the debate over the fishery bill and other precedents to show that “*Charles the First* [who granted the first Massachusetts charter] viewed the Colonies as independent of the Empire, and exempt from the authority of Parliament, even in the matter of regulating Trade.” But, unlike the writers we have been considering, he follows loyalists in attributing this attitude of the Stuarts to their tyrannical cast of mind. For Hawley, it is precisely because James and Charles attempted to “govern the Nation by the terrors of Royalty” and by loathsome “prerogatives” that it

At this point it is worth anticipating a possible confusion about the argument I have just been tracing. One could be forgiven for supposing that, despite all their talk about the Stuarts and the royal prerogative, the patriots in question had no real interest in augmenting the king's authority over the colonies. Their real purpose, it might be thought, was rather to establish the autonomy of the colonial legislatures.<sup>65</sup> To this end certain patriots did indeed assert that, at the moment of first settlement, the king had enjoyed a prerogative right to dispose of North America at his pleasure (hence their defense of the Stuarts against Parliament), but they were far more interested in what happened next: the king entered into contractual agreements with the various chartering companies and proprietors, in which he guaranteed that the resulting colonies would be governed by laws of their own choosing. This right, once granted, was irrevocable, and the British government was therefore obliged to respect it. The dominion theory, on this view, merely sought to export the settlement of the Glorious Revolution to the colonies. Each colony was to be ruled by the king *in its legislature* in precisely the same manner that Britain was now governed by the king-in-Parliament.

As it happens, this is not an implausible characterization of Bancroft's own position: despite his embrace of the prerogative and his vigorous defense of the Stuarts, he actually left very little role for the crown in his proposed revision of the imperial constitution.<sup>66</sup> But, as we have seen, those patriots who took up Bancroft's arguments in 1774 and 1775 were emphatically not arguing that the king should play the same constitutional role in

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is so implausible to assume that they intended to grant Parliament any jurisdiction over America in the charters. As for the loyalist riposte that this construction of the charters would leave America wholly at the mercy of an unencumbered crown, Hawley answers coyly that "the present question is not what is best, but what is in reality the fact." And, anyway, "it is infinitely better to have but one tyrant than a million." *Ibid.*, 2: 23 ("Charles the First," "prerogatives"), 21 ("govern the Nation"), 22 ("present question").

<sup>65</sup> This is the view most recently advanced by Jack P. Greene (see Greene, *Constitutional Origins*, esp. 134–39). Greene echoes Barbara A. Black's claim that "the [patriot] desire for sole external authority in the king (and Privy Council) resulted from the perception that under those conditions there would shortly be no external authority with any force whatever" (Black, *University of Pennsylvania Law Review* 124: 1193). See also Ernest Barker, "Natural Law and the American Revolution," in *Traditions of Civility: Eight Essays* ([Hamden, Conn.], 1967), 263–355, esp. 305. For an eloquent critique of this view, see Reid, *Authority of Law*, 152–56.

<sup>66</sup> See [Bancroft], *Remarks*, 118–28. Bancroft proposes that (as a necessary evil) the colonies should "submit their Trade to the absolute Government of the *British* Parliament, (without desiring a Representation therein,) to be restrained and directed by its Laws for the general Good" (*ibid.*, 122). And though he allows the king a veto over the acts of his proposed pancolonial "Assembly," he does not directly propose reviving the veto in Britain, and he suggests that judicial appeals should be heard not by the king-in-council but rather by the colonial legislatures, though the king-in-council would continue to judge in cases of "any Difference between the Colonies and any other of his Majesty's Subjects, or Allies" (*ibid.*, 127).

each of the colonies that he currently played in Great Britain itself. The king in Britain had not enjoyed the veto for seventy years, and certainly no one in Britain dreamed of assigning him a prerogative right to “alienate for ever from the Realm without consent of Parliament, any acquisition of foreign territory” or the authority to govern all of imperial commerce without any legislature (as Wilson had proposed).<sup>67</sup> These patriots were arguing instead that something strongly resembling the monarchy of James I and Charles I should be reestablished in Britain and then generalized to the colonies.<sup>68</sup> Thus Hamilton invoked the Stuart example in order to denounce his contemporaries for “losing sight of that share which the King has in the sovereignty, both of Great-Britain and America,” and Benjamin Franklin likewise complained that the Lords and Commons “seem to have been long encroaching on the Rights of their and our Sovereign, assuming too much of his Authority, and betraying his Interests.”<sup>69</sup> Indeed it is highly revealing that, although the First Continental Congress was initially prepared to concede Parliament a power (as opposed to a free-standing right) to regulate America’s “external commerce,” this concession disappeared in its petition to the king of October 1774.<sup>70</sup> The latter document closed instead with the insistence that “we wish not a diminution of the prerogative . . . Your royal authority over us and our connexion with Great-Britain, we shall always carefully and zealously endeavour to support and maintain.”<sup>71</sup> As John Phillip Reid observed long ago, these were perhaps “the most revolutionary statements made by the First Continental Congress.”<sup>72</sup>

Patriots were drawn to this Royalist position for perfectly intelligible reasons. An empire governed according to the dominion theory without an enhanced royal prerogative would, they realized, be unable to secure even the most basic legislative coherence across its constituent parts. Each colonial legislature would make its own decisions about matters of com-

<sup>67</sup> Burke [pseud.], “To the Right Honourable Lord North,” in Clarke and Force, *American Archives*, 4th ser., 1: 338 (quotation).

<sup>68</sup> Thus William Markham, archbishop of York, argued that the patriots “have maintained, that a charter which issues from the king’s sole pleasure, is valid against an act of parliament. They have maintained, that a king of England has the power to discharge any number of his subjects that he pleases, from the allegiance that is due to the state. They used their best endeavours, to throw the whole weight and power of the colonies into the scale of the crown.” According to Markham, they therefore rejected the results of “the glorious revolution.” It was simply through “God’s good providence, that we had a prince upon the throne, whose magnanimity and justice were superior to such temptations.” See Markham, *A Sermon Preached before the Incorporated Society for the Propagation of the Gospel in Foreign Parts* (London, 1777), 22 (“have maintained”), 23 (“God’s good providence”).

<sup>69</sup> [Hamilton], *Farmer Refuted*, 16 (“losing sight”); Franklin to Cooper, June 8, 1770, in Smyth, *Writings*, 5: 260–61 (“long encroaching”).

<sup>70</sup> In Rakove, *Beginnings of National Politics*, 58.

<sup>71</sup> Ford, *Journals of the Continental Congress*, 1: 119.

<sup>72</sup> Reid, *Authority of Law*, 153.

mon concern; there would be no “superintending power” to coordinate policy for the empire as a whole. One way out of the impasse was of course to assign this role to Parliament, but the whole point of the dominion theory had been to deny its jurisdiction over the colonies. All that remained was the king. As Hamilton put it, “there must indeed be some connecting, pervading principle; but this is found in the person and prerogative of the King . . . His power is equal to the purpose, and his interest binds him to the due prosecution of it.”<sup>73</sup> Yet the king could not serve as a superintending power for the empire unless his Jacobean and Caroline prerogatives were restored to him. The patriots accordingly undertook to bring about this restoration—and in doing so, they left the whig inheritance far behind them.<sup>74</sup>

TO BE SURE, some patriot pamphleteers declined to take up the cause of the Stuarts in the manner of John Adams, Edward Bancroft, Alexander Hamilton, et al.—and the exceptions are as revealing as the rule.<sup>75</sup> One of these exceptions was Thomas Jefferson, whose *Summary View of the Rights of British America* (1774) is frequently cited as an archetypal defense of the dominion theory.<sup>76</sup> Yet, seen in the context of Bancroft’s pronounced influence over patriot writing during this period, Jefferson’s essay appears idiosyncratic rather than representative. Indeed this text directly attacks the standard view we have been reconstructing. On Jefferson’s account, the

<sup>73</sup> [Hamilton], *Farmer Refuted*, 16. Another possible route to legislative coherence involved the creation of a grand new imperial constitution, along the lines proposed by Joseph Galloway, which would entrust the regulation of American affairs to a new legislative body, but this approach failed to gain traction. See LaCroix, *Ideological Origins of American Federalism*, 105–31.

<sup>74</sup> For a similar development among English “radicals” at roughly the same time, see Reid, *Authority of Law*, 156–62. As John Phillip Reid points out, however, English reformers of the period sought to balance the royal prerogative by lobbying the House of Commons to resume its power of impeaching royal officials. No such balance existed in the patriot position.

<sup>75</sup> It is worth noting, however, that the list of authors just discussed is quite diverse. A number were New Englanders (Adams, Bancroft, Joseph Hawley, and Moses Mather), but an equal number (Hamilton, James Iredell, James Wilson, and, presumably, the author of the anonymous Virginia letter to Lord North) were not. It is a point of interest that Hamilton, Iredell, and Wilson were all born outside of North America (and Bancroft spent several years in British Guiana), but they came from very different places. In short the phenomenon of patriot Royalism does not seem to have been confined to a particular region of the country or to those of a specific background.

<sup>76</sup> See Kammen, *Journal of the History of Ideas* 31: 349; Clark, *Language of Liberty*, 108; McConville, *King’s Three Faces*, 261. As we shall see, J. C. D. Clark’s claim that by invoking the dominion theory “Americans accepted the monarchical tie only in order to exploit its apparent weakness, and open the way for a natural-law rejection of the common-law sovereign” is a perfectly good characterization of Thomas Jefferson’s tactic in the *Summary View*, but that tactic was deeply uncharacteristic of contemporary defenses of the dominion theory (Clark, *Language of Liberty*, 108).

Stuart monarchs—a “family of princes” whose “treasonable crimes against their people brought on them afterwards the exertion of those sacred and sovereign rights of punishment reserved in the hands of the people for cases of extreme necessity”—had presumptuously “parted out and distributed” the lands of North America among their favorites “by an assumed right of the crown alone.” This practice, Jefferson argues, was wholly illicit. As a matter of law, the colonies did not emerge from freely granted charters given under the royal prerogative. Rather, free Englishmen had independently settled North America in precisely the same manner in which “their Saxon ancestors . . . had possessed themselves of the island of Britain.” The resulting colonies became commercially important to the mother country at a certain point, and accordingly Parliament “was pleased to lend them assistance against an enemy [France], who would fain have drawn to herself the benefits of their commerce, to the great aggrandizement of herself, and danger of Great Britain.” This was precisely the same sort of assistance that Britain had previously given to “other allied states.” The last phrase is important: for Jefferson, the colonies were never truly British dominions but rather “allied states,” which, for their own purposes, had opted to “continue their union” with the mother country “by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied.”<sup>77</sup>

Thus, despite Jefferson’s formal acceptance of the dominion model, his account of it was deeply heterodox. Even his well-known claim in the *Summary View* that the king should revive the negative voice by striking down laws passed “by any one legislature of the empire, which might bear injuriously on the rights and interests of another” is followed immediately by an attack on the king for his “wanton exercise of this power . . . on the laws of the American legislatures”—chiefly in refusing his assent to bills designed to abolish the slave trade. Jefferson was happy to entertain the thought of the king vetoing parliamentary bills, but in the case of the colonies he concluded that the king’s “shameful” abuse of the negative voice would “if not reformed” require “some legal restrictions.”<sup>78</sup> He also pointedly denied what other dominion theorists had enthusiastically acknowledged to be the king’s authority to dissolve the various imperial legislatures.<sup>79</sup> On issue after issue, Jefferson insisted, the king seemed to

<sup>77</sup> [Thomas Jefferson], *A Summary View of the Rights of British America* (Williamsburg, Va., 1774), 6–8 (“family of princes,” “was pleased,” 7, “parted out,” 8, “their Saxon ancestors,” 6). For an endorsement of Jefferson’s position, see Joseph Warren’s “Oration” commemorating the fifth anniversary of the Boston Massacre, Mar. 6, 1775, in Clarke and Force, *American Archives*, 4th ser., 2: 38–44, esp. 2: 38.

<sup>78</sup> [Jefferson], *Summary View*, 16 (“any one legislature”), 17 (“shameful”).

<sup>79</sup> *Ibid.*, 18–19. To take just one example, patriots had decried the 1765 suspension of the New York legislature partly on the grounds that Parliament, rather than the king, had ordered it. As John Dickinson summarized the complaint, “The crown might have

demand that Virginians, and Americans more broadly, should “submit themselves the absolute slaves of his sovereign will.”<sup>80</sup> This attack on regal, rather than parliamentary, tyranny places Jefferson definitively outside the mainstream of patriot discourse in this period. His distinctive radicalism was already present for all to see.

The other great exception is equally illuminating, though exceedingly different: the figure of John Dickinson. Like Jefferson, Dickinson offered a tepid and somewhat convoluted defense of the dominion theory in his 1774 *Essay on the Constitutional Power of Great-Britain Over the Colonies*, but his reservations about it, unlike Jefferson’s, were fundamentally conservative in character. He rejected the patriot embrace of royal prerogative not to reimagine the colonies as mere “allied states” of Britain but rather to anchor the debate over their future in the “Revolution principles” of 1688. Dickinson’s pamphlet in fact embodies a plea to return to an orthodox whig understanding of seventeenth-century English history: one in which both the Stuarts and the Long Parliament had been tyrants in turn, and only the settlement of the Glorious Revolution had established the proper equipoise between king and Parliament. Thus he first endorses the understanding of the American crisis that had been so familiar in the 1760s and virtually absent thereafter: the colonists, on this account, were simply struggling to avoid the fate that “the people of *Great-Britain* would have been reduced to, had *James* the first and his family succeeded in their scheme of arbitrary power.” If we substitute “the word *Stuarts* for *parliament*, and *Britons* for *Americans*,” Dickinson tells us, the analogy becomes clear. But Dickinson likewise fumes against the “*illegal*” Commonwealth parliament, which had first asserted “a boundless right” over the colonies. A proper whig would hold both of these thoughts in his head at the same time, just as he would recognize that, though Parliament cannot be regarded as “the supreme legislature over these colonies,” nonetheless the “power of regulating our trade” is “legally vested in parliament” as the “full *representative* of the parent state”—not in the king’s prerogative, as James Wilson had claimed.<sup>81</sup>

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restrained the governor of *New-York*, even from calling the assembly together, by its prerogative in the royal governments. This step, I suppose, would have been taken, if the conduct of the assembly of *New-York* had been regarded as an act of disobedience to the crown alone; but it is regarded as an act of ‘disobedience to the authority of the British Legislature.’ This gives the suspension a consequence vastly more affecting. It is a parliamentary assertion of the *supreme authority* of the *British* legislature over these colonies” (Dickinson, *Letters from a Farmer in Pennsylvania*, 5). On Jefferson’s unusual attack on royal, rather than parliamentary, tyranny in the *Summary View*, see the wise remark in Greene, *Constitutional Origins*, 176.

<sup>80</sup> [Jefferson], *Summary View*, 18.

<sup>81</sup> [John Dickinson], *An Essay on the Constitutional Power of Great-Britain Over the Colonies* . . . (Philadelphia, 1774), 70–73 (“people of *Great-Britain*,” 70–72, “the word

To sustain his argument, Dickinson felt that he had to address head-on the patriot defense of the Stuarts and, in particular, the American reception of the Stuart parliaments of the 1620s. Recall that both the patriots and their opponents agreed that James I and Charles I had originated the view that America was outside of the realm—the crucial principle of the dominion theory—in the course of their great conflict with Parliament. Loyalist writers claimed that this pedigree revealed the argument to be tyrannical and potentially Jacobite, whereas patriots argued that James and Charles had been quite right to defend their undoubted prerogatives against rapacious parliamentarians. It was vitally important for Dickinson to change the terms of this debate, to show that one did not need to defend the Stuarts in order to defend the dominion theory. He attempts this in a fascinating three-page footnote. The note observes that “the author of ‘the controversy’” (i.e., William Knox) provides “a good many fragments of proceedings in the house of commons from the year 1614 to 1628. The amount is this, that the ministers of the crown insisted, that parliament could not make laws for *America*; that the commons doubted; but at length in 1724 [*sic*], came to an opinion, that the king’s patent for ‘a *monopoly* of fishing on the *coasts of America* was a *grievance*,’—that a ‘*clause of Forfeiture*’ against those who interfered in the fishery was void—and past a bill ‘for a *free* liberty of *fishing*’ &c.” But Dickinson proceeds to argue that, *pace* Knox, this debate has been badly misconstrued:

It appears in the debates that the fishery was free *before the patent was granted*—These extracts do not shew, what became of the bill in the house of lords. One Mr. *Brooke* said in 1621—“We may make laws here for *Virginia*, for *if the king gives consent* to this bill past here and by the lords, this will controul the patent.”

It seems, as if the notion of the king’s regulating power still prevailed, but, that “a clause of *forfeiture*” in such regulations was void. So much had the power of parliament grown since king *John*’s reign. Nor does it appear to have been unreasonable, as commerce became of more consequence. The instance here mentioned, related to a regulation of trade; and however the king

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*Stuarts*,” 72–73), 108 (“*illegal*”), 111 (“supreme legislature”). Cf. Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* (London, 1774), e.g., 15. It is noteworthy, however, that at one point even Dickinson flirts with the notion of assigning the regulation of trade to the royal prerogative: “Time forbids a more exact enquiry into this point [where the constitutional authority to regulate commerce resides]: but such it is apprehended, will on enquiry be found to have been the power of the crown, that our argument may gain, but cannot lose. We will proceed on a concession, that the power of regulating trade is vested in parliament” ([Dickinson], *Essay on the Constitutional Power*, 116–18).



might have accommodated the point, with the other branches of the legislature, the whole proceeding is immaterial. If it was a right actually enjoyed by *Englishmen* to fish on the coasts of a plantation—and a grant by the crown on the fishery to the people of the plantation excluding the people of *England*, could not *divest them* of their right—or, “if by the king’s giving his consent to a bill passed by lords and commons,”—“the patent might be controuled”—it does not follow, that the king, lords and commons could divest the people of the plantations of all *their* rights.

The prose is rather opaque, but Dickinson is arguing that there was in fact no dispute between the Stuarts and Parliament over whether America was outside of the realm. All agreed that it was. The bills in question concerned the “regulation of trade,” which, on Dickinson’s account, remained with the king-in-Parliament, despite the fact that America was not annexed to Great Britain. James and Parliament were debating two much narrower questions: first, whether the king possessed the power to “divest” *Englishmen* of a right “actually enjoyed by” them to fish off the coast of America, and second, whether acts of Parliament could alter the terms of a patent if the king gave his assent. No one in this debate, according to Dickinson’s rather fanciful reconstruction, asserted either that America was within the realm or that “king, lords and commons” had complete jurisdiction over America.<sup>82</sup> Dickinson thus denied the Stuart pedigree of the dominion theory in order to render it respectable. His was the posture of a true whig.

IF THE STORY of patriot Royalism is surprising, the story of what happened next is quite familiar. In the wake of George III’s dismissal of the various petitions of the First and Second Continental Congresses, and under the shadow of the bloodshed at Lexington and Concord, the phase of the American crisis sometimes known as “the flight to the king” ended abruptly.<sup>83</sup> Throughout the first half of the 1770s, patriots had continued to regard the king as a “loving father” who had simply been misled by

<sup>82</sup> [Dickinson], *Essay on the Constitutional Power*, 117–18n (“author,” 117n, “It appears,” 117–18n). The claim that Parliament had complete jurisdiction over North America, Dickinson informs us, was first made by the illegal Commonwealth parliament (ibid., 108).

<sup>83</sup> See for example William Liddle, “A Patriot King, or None: American Public Attitudes towards George III and the British Monarchy, 1754–1776” (Ph.D. diss., Claremont Graduate School, 1970), 379–83; Pauline Maier, *From Resistance to Revolution*, 198–208; Richard L. Bushman, *King and People in Provincial Massachusetts* (Chapel Hill, N.C., 1985), 212–26; Andrew Jackson O’Shaughnessy, “‘If Others Will Not Be Active, I Must Drive’: George III and the American Revolution,” *Early American Studies* 2, no. 1 (Spring 2004): 1–46, esp. 9–16; McConville, *King’s Three Faces*, 250–61.

“designing and dangerous” ministers and parliamentarians.<sup>84</sup> They had placed all their hopes in him, fervently believing that once he understood the truth of the conflict, he would act swiftly to vindicate the American cause. Yet once word reached North America that the king had declared the colonies to be in a state of rebellion, this cherished fiction could no longer be maintained. The same patriot pamphleteers who had written as champions of the Stuarts and the royal prerogative only a few months earlier now turned on the king and, in many cases, on monarchy itself.<sup>85</sup> Indeed the ideological rupture that took place during this six-month period seems so jarring and dramatic that it raises an obvious question about the patriot defense of the Stuarts: namely, did they really mean it? We have seen that patriots deployed Stuart precedents systematically and deliberately, with full awareness of their ideological significance, but that leaves open the question of whether they did so with genuine conviction. Perhaps they were simply “driven” to make the patriot Royalist argument by the exigencies of the political situation in which they found themselves.

To consider this possibility, we first have to distinguish between two different senses in which someone might be said to be “driven by events” to make a particular argument. This phrase might be taken to mean that the person dislikes or rejects the argument in question but, given the circumstances, feels compelled to offer it anyway for tactical reasons. We would say of such a person that he or she was arguing “instrumentally” or “forensically,” perhaps even “cynically.” But we could also mean something else by the phrase. We might simply be claiming that, absent a particular series of events, the person would not have gravitated toward the argument in question. This latter construction leaves open the possibility that the person *accepts* the argument at the moment that he or she offers it, even though it is not the sort of argument to which he or she might have been attracted under different circumstances.

I have no doubt that, in this latter sense, patriots were indeed driven by events to make the patriot Royalist argument. That is, I find it highly unlikely that they would have emerged with this particular constitutional theory had Parliament not precipitated an Atlantic crisis in 1763. But I also

<sup>84</sup> Ford, *Journals of the Continental Congress*, 1: 120 (“loving father”), 118 (“designing and dangerous”).

<sup>85</sup> Already in the spring of 1775 John Adams, who had enthusiastically contributed to the defense of the Stuarts in the answer of the Massachusetts house, declared himself in the “Novanglus” letters to be a defender instead of the “revolution principles” of “Sidney, Harrington, and Locke”—those same principles that had animated the struggle “against the Stuarts, the Charleses, and the Jameses, in support of the Reformation and the Protestant religion; and against the worst tyranny that the genius of toryism has ever yet invented; I mean the Roman superstition” (Carey, *Political Writings of John Adams*, 26–28 [“revolution principles,” 26, “against the Stuarts,” 28]). Cf. [Matthew Robinson-Morris, Lord Rokeby], *Considerations on the Measures Carrying on with Respect to the British Colonies in North America* (London, 1774), 10; Samuel Sherwood, *The Church’s Flight into the Wilderness* (New York, 1776), 16.

find this observation uninteresting. Political thought never develops in a vacuum; it is always highly responsive to the force of political events, even as it shapes those events in crucial ways. To take an example from an earlier period, it is undoubtedly the case that the intensifying fury of the English revolution and the ultimate execution of Charles I in 1649 prompted English republicans to consider radical new arguments about the proper form of political life—arguments they would never have seriously considered even five years earlier. One can admit as much without being at all drawn to the view that English republicanism was merely epiphenomenal or that English republicans were not sincere about the political arguments they made. Political crises change the way that people look at the world. They put pressure on received commitments, realign affections, and focus attention on new and different dangers. More to the point, political *debates* have their own governing dynamics and their own momentum: arguments are made, countered, revised in light of forceful objections, countered again, and so on. Each intervention reflects the state of play at a particular moment: the question is always, what is the right move for me to make in light of the last one made by my opponent? Since the most serious debates involve many such moves, it should not surprise us that participants often emerge at the end with arguments very different from the ones with which they began—and that they routinely fail to register the ideological distance they have traveled.

But to admit that patriot argument in the 1770s was driven by events in this sense is not to concede that it was cynical or insincere. Should we be tempted by this further claim? Did patriots simply conclude that the only available route to their preferred political outcome was through the unwelcome terrain of Stuart constitutionalism, and did they therefore resolve to make the patriot Royalist argument while, as it were, holding their noses? The possibility cannot be foreclosed, of course, but there are good reasons for doubting it. To begin with, it was perfectly possible to defend the dominion theory without defending the Stuarts, just as it was perfectly possible to do so without defending an extravagant account of the royal prerogative. The efforts of Jefferson and Dickinson attest to these facts. If Stuart constitutional theory provided one possible path to a defense of the patriot position, it by no means provided the only available path—or, indeed, the safest. Moreover, a cynical account of patriot Royalism would seem to do great violence to the texts we have been considering. The authors of these pamphlets, outraged at a decade of parliamentary abuses and yet deeply attached to the British Empire, sincerely focused their hopes on the person of the king and began to reimagine the history of the English seventeenth century in light of that experience.<sup>86</sup> Their great wish remained what it had always been: to find a way to reconcile their conviction that

<sup>86</sup> For similar reflections on the dominion theory as a whole, see Marston, *King and Congress*, 38–39; Reid, *Authority of Law*, 154–56; McConville, *King's Three Faces*, 250–61.

they were being abused with their insistence that they were British subjects. In this instance, as in so many others, the wish was the mother of conviction. That so many patriots rallied to the cause of the Stuarts in the 1770s should remind us of that wish's extraordinary power.

There is, however, a further reason for doubting that patriot Royalism should be dismissed as a tactical maneuver forced on reluctant whigs by a specific political impasse. If the patriots in question were truly arguing instrumentally and cynically, then surely they ought to have jettisoned their defense of prerogative once and for all when the events of 1776 rendered these debates about the imperial constitution otiose. But, as it happens, they did not. To be sure, the patriot Royalist perspective had no place in the frenzied months leading up to the Revolution, yet if we shift our gaze instead to the 1780s the story becomes rather different. It is certainly no coincidence that those patriots who most vigorously defended the Stuarts and their prerogatives in the early 1770s—John Adams, Alexander Hamilton, James Iredell, and James Wilson—would all become leading Federalists a decade later. Flying in the face of republican orthodoxy, they would passionately defend the creation of an “energetic” American chief magistrate with sweeping prerogative powers, including the negative voice, the power of clemency, the right to make treaties, the right to issue executive orders, and the dazzling authority of commander in chief.<sup>87</sup> Their chief magistrate was to be no mere “executive.”<sup>88</sup> His powers would not resemble those enjoyed by the British king in the late eighteenth century so much as those *asserted* for the crown by dominion theorists in the twilight of Britain's Atlantic empire. Perhaps it is in the patriot defense of the Stuarts that we should seek the ideological origins of the American presidency.

<sup>87</sup> Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York, 1961), 423 (no. 70).

<sup>88</sup> For the nonexecutive character of the presidency, see Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (New York, 1989), 247–78. Indeed it is worth recalling that Hamilton originally wished to assign the president an “absolute” negative over acts of Congress and argued that he should be elected for life. See Harold C. Syrett and Jacob E. Cooke, eds., *The Papers of Alexander Hamilton* (New York, 1962), 4: 192–94. Later, writing as “Publius,” Hamilton would defend the president's “qualified,” rather than “absolute,” negative on the grounds that it would increase the power of the prerogative by making it less costly to exercise. His counterexample would be the “king of Great Britain,” who in theory possessed an absolute negative but in effect possessed none at all. See Hamilton, Madison, and Jay, *Federalist Papers*, 444–45 (no. 73; “qualified,” 445, “king of Great Britain,” 444). Note also that Madison (who retrospectively endorsed the patriot Royalist position) freely used the language of prerogative in his speeches during the Constitutional Convention. See LaCroix, *Ideological Origins of American Federalism*, 150–51. For some suggestive remarks on the general topic of monarchy in the early Republic, see Gordon S. Wood, *Monarchism and Republicanism in the Early United States* (Melbourne, 2002). However, Wood's interest is in the complex American relationship to the ceremonials and trappings of monarchy, rather than in the idea of prerogative powers.

# The Problem of Sovereignty

Gordon S. Wood

THOSE of us interested in legal and constitutional history have to welcome the publication in the *William and Mary Quarterly* of Eric Nelson's article. Perhaps this is a sign that the profession's interests are starting to shift away from the topics that have dominated it during the past several decades.

Nelson's argument is clever but, as they like to say in the Oxbridge common rooms, perhaps too clever by half. The issues he deals with are not new. I think they were first taken up by modern scholarship in Randolph Greenfield Adams's *Political Ideas of the American Revolution*, an important work that Nelson never cites. But more astonishing than this oversight is his failure in the article to deal with the doctrine of sovereignty—that is, the belief, articulated most forcefully by Sir William Blackstone in his *Commentaries on the Laws of England*, that there must be in every state “a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.”<sup>1</sup> For the British this sovereignty lay with the king-in-Parliament, since not only were all the estates of the realm—crown, lords, and people—present in Parliament but the logic of the doctrine dictated that sovereignty had to be located somewhere in every state. Though this doctrine of sovereignty was the most important concept of political science in eighteenth-century British culture and one that underlay the entire imperial debate, Nelson scarcely mentions it. It was the colonists' inability to overcome the British insistence on the sovereignty of Parliament—that the colonists had to be totally under Parliament's authority or totally outside it—that ultimately drove them to create what has been called the dominion or commonwealth theory of the empire.

The colonists began the imperial debate (and Nelson is quite right in saying that it was a debate) by trying to explain their previous experience in the empire. They knew that since the seventeenth century they had accepted parliamentary regulation of their trade. But with the Stamp Act in 1765 the colonists also knew instinctively that they could never accept

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<sup>1</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford, 1765), 1: 49; Randolph Greenfield Adams, *Political Ideas of the American Revolution: Britannic-American Contributions to the Problem of Imperial Organization, 1765–1775* (Durham, N.C., 1922).

Parliament's right to tax them and said so emphatically in the resolutions of the Stamp Act Congress. At the same time, however, they declared that they owed Parliament "all due subordination"—presumably in matters of the Navigation Acts.<sup>2</sup>

British officials, believing that the Americans had rejected an "internal" tax such as the stamp tax but would accept "external" taxes such as duties on imports, were surprised by colonists' stiff opposition to the Townshend duties. But Americans, as John Dickinson made clear in his *Letters from a Farmer in Pennsylvania* (1768), opposed all forms of parliamentary taxation. Yet Dickinson was willing to recognize Parliament's right to levy duties in order to oversee the commerce of the empire; after all, it had always done so. The distinction between one kind of duty and the other, said Dickinson, would be based on the intention of the act, whether it was to raise revenue or to regulate trade. So the colonists tried to argue that Parliament had some authority over them but not the authority to tax them. All this Nelson recognizes. It is on the next step that he stumbles, for he jumps right to the dominion theory without dealing with the issue of sovereignty.

To counter all the colonists' halting and fumbling efforts to divide parliamentary authority, the British offered a simple but powerful argument based on the sovereignty of Parliament. Since they could not conceive of the empire as anything but a single, unified community, they found absurd and meaningless all these American distinctions between trade regulations and taxation, between external and internal taxes, and between separate spheres of authority. If Parliament even "in one instance" was as supreme over the colonists as it was over the people of England, wrote subcabinet official William Knox in 1769, then the Americans were members "of the same community with the people of England." On the other hand, if Parliament's authority over the colonists was denied "in any particular," then it must be denied "in all instances," and the union between Great Britain and the colonies must be dissolved. "There is no alternative," Knox concluded. "Either the Colonies are a part of the community of Great Britain, or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British parliament."<sup>3</sup>

Nelson cites Knox's pamphlet but not on this point of sovereignty. He is much more interested in showing how the colonists were moved to adopt a Stuart conception of the crown's authority that Knox described. Knox, of course, was seeking to embarrass the colonists by showing them

<sup>2</sup> "The Declarations of the Stamp Act Congress (19 October 1765)," in David C. Douglas, ed., *English Historical Documents*, vol. 9, *American Colonial Documents to 1776*, ed. Merrill Jensen (London, 1955), 672–73 (quotation, 672).

<sup>3</sup> [William Knox], *The Controversy between Great Britain and her Colonies Reviewed* . . . (London, 1769), 50–51 ("in one instance," 50, "Either the Colonies," 50–51).

that such a Stuart conception of the crown was precisely what the rejection of parliamentary sovereignty would push them into. Yet it was Knox's argument about sovereignty, one repeated by Governor Thomas Hutchinson in his speeches to the Massachusetts General Court in January 1773, and not a desire to return to the Stuart monarchy that drove the colonists to concoct their so-called dominion theory of the empire. When Hutchinson declared that he knew of "no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies: it is impossible there should be two independent Legislatures in one and the same state," the House of Representatives could only conclude that "we were thus independent."<sup>4</sup> By 1774 most of the patriots (though not Dickinson) despaired of trying to divide the indivisible or separate the inseparable and finally accepted the logic of sovereignty—that there had to be in every state one final, supreme lawmaking authority. Two legislatures in the same state, concluded Alexander Hamilton in a typical reckoning of 1774, "cannot be supposed, without falling into that solecism of politics, of *imperium in imperio*."<sup>5</sup> Parliament, the patriots concluded, had no final authority over them in any respect, and they were thus connected to the empire solely through their allegiance to the king.

Surrendering to the logic of sovereignty and adopting this dominion theory meant that the colonists were not able to account for Parliament's previous and acknowledged regulation of their trade; hence their connection to the crown alone was not a very satisfactory explanation of past experience in the empire. (This was why James Wilson was led to make his odd proposal of entrusting commercial regulation to the king's prerogative.)<sup>6</sup> The best most colonists could do was to allow Parliament to regulate their external commerce, as the Continental Congress awkwardly put it in 1774, "from the necessity of the case, and a regard to the mutual interest of both countries."<sup>7</sup>

Nelson is correct in saying that the colonists' argument was "characterized by rupture rather than continuity." Despite his suggestion that he has discovered something new and contrary to "the standard view of the revolutionary crisis," I know of no scholar who has not recognized this dramatic shift in the Americans' position in the debate—a shift that

<sup>4</sup> [Alden Bradford, ed.], *Speeches of the Governors of Massachusetts from 1765 to 1775* . . . (Boston, 1818), 340 ("no line"), 363 ("we were"), 351.

<sup>5</sup> [Alexander Hamilton], *The Farmer Refuted; Or, A More Impartial and Comprehensive View of the Dispute Between Great-Britain and Her Colonies* (1775), in Harold C. Syrett and Jacob E. Cooke, eds., *The Papers of Alexander Hamilton* (New York, 1961), 1: 81–165, esp. 1: 164.

<sup>6</sup> James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), in Robert Green McCloskey, ed., *The Works of James Wilson* (Cambridge, Mass., 1967), 2: 719–46, esp. 2: 746. Wilson claimed that his pamphlet was written in 1768.

<sup>7</sup> "The Declaration of Colonial Rights and Grievances (1 October 1774)," in Jensen, *American Colonial Documents*, 805–8 (quotation, 807).



occurred because the colonists could not overcome the British contention that Parliament was sovereign. Where scholars are most apt to disagree with Nelson is when he says that the Americans argued for the dominion theory “by mounting an affirmative defense of the Stuarts against Parliament.”<sup>8</sup>

Nelson attributes great significance to an obscure pamphlet by Edward Bancroft, published first in London in 1769 and republished once in New London in 1771. He claims that this pamphlet was “the most influential patriot text of the early 1770s and supplied a definitive template for defenses of the dominion theory.” In a note he admits that “this might seem a surprising claim,” but he goes on to say that Bancroft “was read by almost every patriot pamphleteer of the early 1770s, and his analysis, more than any other, gave shape to their arguments.”<sup>9</sup>

It is indeed a surprising claim. Though some scholars, including Jack P. Greene, have used the pamphlet, no American spokesman at the time, as far as I know, ever explicitly cited or referred to it. It is certainly possible that when Hutchinson referred to “an anonymous Pamphlet,” he meant Bancroft’s work.<sup>10</sup> Nevertheless Nelson seems to have placed an undue burden on the pamphlet. His evidence that nearly every patriotic pamphleteer read it is based on a similarity of phrasing having to do with the colonies in the seventeenth century being created by the crown outside the realm. But some participants in the debate actually anticipated Bancroft’s arguments, even his language. As early as 1766, Benjamin Franklin suggested that “the Colonies are not supposed to be within the realm; they have assemblies of their own, which are their parliaments.”<sup>11</sup> In 1768 Thomas Pownall published the fourth edition of his *Administration of the Colonies*, in which he dealt with the American claim that the colonies were outside the realm and explored their seventeenth-century origins with arguments and language similar to those used by Bancroft and others.<sup>12</sup>

Once the patriot leaders, including some very shrewd lawyers, had reluctantly accepted the logic of sovereignty, they were driven to find some way

<sup>8</sup> Eric Nelson, “Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75,” *William and Mary Quarterly*, 3d ser., 68, no. 4 (October 2011): 533–72 (“characterized by rupture,” 537, “mounting,” 543). Nelson says that I ignore the “rupture” in the debate that took place in the early 1770s and represent “the standard view of . . . a gradual, uniform progression toward republicanism” (ibid., 537). In fact I argued more than forty years ago that adopting the dominion theory constituted “a fundamental shift in the American position.” Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, N.C., 1969), 352.

<sup>9</sup> Nelson, *WMQ* 68: 550 (“most influential”), 550 n. 35 (“this might seem”).

<sup>10</sup> Ibid., 555.

<sup>11</sup> Benjamin Franklin, “Examination before the Committee of the Whole of the House of Commons” (1766), in Leonard W. Labaree, Helen C. Boatfield, and James H. Hutson, eds., *The Papers of Benjamin Franklin* (New Haven, Conn., 1969), 13: 124–62 (quotation, 13: 153).

<sup>12</sup> See esp. Thomas Pownall, *The Administration of the Colonies*, 4th ed. (London, 1768), 45–50.

of legally explaining how they were tied solely to the crown. This is what accounts for their explorations into the seventeenth-century constitutional origins of the colonies. Whatever Stuart precedents they dug up were based on this need and not on some atavistic desire to return to Stuart Royalism.<sup>13</sup>

Nelson, however, is insightful in suggesting that the dominion model of the empire influenced subsequent American thinking about their federal system. Not only did Americans conceive of the Confederation Congress as a substitute for the British Crown (which is why it lacked the powers to tax and regulate trade) but James Madison came to believe that the national government he proposed in 1787, with its negative over all state laws, might play the same superpolitical role the British king ideally was supposed to have played in the empire, that of a “disinterested & dispassionate umpire in disputes between different passions & interests.”<sup>14</sup>

<sup>13</sup> See John Adams’s dazzling display of legal learning in his “Novanglus” essays, in which he emphatically denied the tory claim (the same claim Nelson is making) that existing outside the realm was meant to “build up absolute monarchy in the colonies.” Adams, “Novanglus VII, VIII, IX, X, XI, XII,” in Gordon S. Wood, ed., *John Adams: Revolutionary Writings, 1755–1775* (New York, 2011), 536–43 (quotation, 540), 510–30, 546–56, 574–83, 588–614.

<sup>14</sup> James Madison to George Washington, Apr. 16, 1787, in Jack N. Rakove, ed., *James Madison: Writings* (New York, 1999), 80–85 (quotation, 81). See also Madison’s eloquent praise of the British king’s “prerogative,” by which the crown maintains “the harmony & subordination of the various parts of the empire” and “stifles in the birth every Act of every part tending to discord or encroachment,” in Max Farrand, ed., *The Records of the Federal Convention of 1787* (1911; repr., New Haven, Conn., 1937), 2: 28.

# Whigs against Whigs against Whigs: The Imperial Debates of 1765–76 Reconsidered

Pauline Maier

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

For Nelson, however, Model B—or dominion theory—looked not to the future but to the past. It affirmed a position asserted by Charles I and James I in the 1620s and recorded in portions of the journals of the House of Commons that were first published in 1762. To a considerable extent the Stuart kings' acrimonious conflict with Parliament turned, it seems, on colonial affairs. In the course of those fights, James I's spokesman, Sir George Calvert, insisted that Virginia, and by implication the other colonies, was ruled by the king's prerogative powers and was not subject to the laws of Parliament since "Newe Conquests are to be ordered by the Will of the Conquerour."<sup>1</sup> His opponents, like those of Charles I, said the colonies were part of the realm and therefore within Parliament's jurisdiction. The

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<sup>1</sup> Wallace Notestein, Frances Helen Relf, and Hartley Simpson, [eds.], *Commons Debates 1621* (New Haven, Conn., 1935), 4: 256.

story of that altercation, Nelson shows, echoed through the pamphlet literature and other forms of political argument 150 years later.

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

The emergent colonial position did, however, demand that the king reclaim a right to veto acts of Parliament that had not been used since 1707 to prevent any part of the empire from violating the rights of another and, as Wilson put it, to "prevent any repugnancy in their different laws."<sup>2</sup> A long footnote in Wilson's *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* even suggested that the king might regulate trade as part of his prerogative powers.<sup>3</sup> To advocate so dramatic an extension of royal power could easily seem like an effort to reverse the Glorious Revolution of 1689, which curtailed the crown's power to act independently of Parliament. And if, as Lord North put it, whigs had traditionally argued for the rights of Parliament while "the aim of Toryism was to increase the prerogative," the colonists had adopted the language of Toryism.<sup>4</sup>

Nelson does not go so far as to call the American defenders of Model B Tories or Jacobites: no colonist defended the divine right of kings or the Pretender's claims to the British Crown. He does, however, say that in the early 1770s the colonists had become "zealous defenders of Stuart Royalism" and, consequently, that the "patriot argument was characterized by rupture rather than continuity." The colonists "began the 1760s as fairly orthodox whigs," then "lurched . . . to the right by becoming zealous defenders of Stuart Royalism in the early 1770s," and finally in 1776 essentially jagged to the left by becoming radical republicans. During their supposed lurch to the right, Nelson says, they "left the whig inheritance far behind them."<sup>5</sup>

<sup>2</sup> [James Wilson], *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (Philadelphia, 1774), 33.

<sup>3</sup> *Ibid.*, 34–35n. By contrast the First Continental Congress, which also said the provincial legislatures had "a free and exclusive power of legislation . . . subject only to the negative of their sovereign," was willing to "cheerfully consent" to Parliament's regulation of commerce for the good of the empire. See "Statement of Violations of Rights" [Resolves of the First Continental Congress], Oct. 14, 1774, in Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774–1789* (Washington, D.C., 1904), 1: 63–73 (quotations, 1: 68).

<sup>4</sup> T. C. Hansard, ed., *The Parliamentary History of England, From the Earliest Period to the Year 1803* (London, 1813), 18: 771.

<sup>5</sup> Eric Nelson, "Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75," *William and Mary Quarterly*, 3d ser., 68, no. 4 (October 2011): 533–72 ("zealous defenders," 537, "whig inheritance," 565).

Nelson identifies an interesting strain in the colonial argument that has generally gone unnoticed, but he takes his argument too far. Context is critical: to approve a Stuart argument against Parliament in the 1620s was altogether different from doing so 150 years later. In the 1770s the primary threat to American rights seemed to lie less with the king than with a Parliament that claimed a right to bind the colonists “in all cases whatsoever,” as the Declaratory Act of 1766 asserted.<sup>6</sup> That claim of parliamentary absolutism—not, as Nelson claims, a need to answer loyalist arguments—prompted Hicks to undertake his 1768 inquiry into the “Nature and Extent of Parliamentary Power.”<sup>7</sup> Similarly, Wilson began his landmark *Considerations* (published in 1774, but written before 1770) by questioning Parliament’s “supreme, irresistible, absolute, uncontrouled authority.” He made his case against Parliament in terms that were quintessentially whig—and much like those Congress would adopt in 1776: “All men are, by nature, equal and free: No one has a right to any authority over another without his consent: All lawful government is founded on the consent of those, who are subject to it: Such consent was given with a view to ensure and to encrease the happiness of the governed.” Parliament’s attempt to exercise absolute authority over the colonists would not increase their happiness, nor was it “consistent with their liberty.”<sup>8</sup> Iredell’s argument was much the same.<sup>9</sup>

Wilson thought the harmony and interests of the British people would be better preserved under “the *legal* prerogatives of the Crown” than “an unlimited authority by Parliament,” but neither he nor any other colonial writer thought of the prerogative as a means of subjecting the people, as Nelson assumes, to “the mere grace and pleasure of a master.”<sup>10</sup> Wilson insisted that the British constitution created a “limited monarchy” and that the king’s legal prerogative could be used only for the benefit of the people and, with regard to the Americans, in ways that were consonant with the agreements contracted previous to the colonies’ settlement.<sup>11</sup> Parliament, he said, could check abusive exertions of royal power over the king’s subjects within Great Britain, but not those in America. Only the popularly elected provincial legislatures could perform that function for their constituents.<sup>12</sup> In effect dominion theory—Model B—did not reject the British constitution of

<sup>6</sup> “The Declaratory Act (18 March 1766),” in David C. Douglas, ed., *English Historical Documents*, vol. 9, *American Colonial Documents to 1776*, ed. Merrill Jensen (London, 1955), 695–96 (quotation, 696).

<sup>7</sup> [William Hicks], *The Nature and Extent of Parliamentary Power Considered . . .* (New York, 1768).

<sup>8</sup> [Wilson], *Considerations*, 2 (“supreme”), 3 (“All men are”), 4 (“consistent”).

<sup>9</sup> James Iredell, “To the Inhabitants of Great Britain” (September 1774), in Griffith J. McRee, *Life and Correspondence of James Iredell . . .* (New York, 1857), 1: 205–20.

<sup>10</sup> [Wilson], *Considerations*, 34 (“*legal* prerogatives,” my emphasis); Nelson, *WMQ* 68: 542 (“mere grace”).

<sup>11</sup> [Wilson], *Considerations*, 11.

<sup>12</sup> *Ibid.*, 11–19.

king, lords, and commons, which was supposedly rebalanced by the revolution of 1689, but reconfigured its constituent parts. As Nelson puts it, the dominion theory “sought to export the settlement of the Glorious Revolution to the colonies” by having each colony “ruled by the king *in its legislature*” just as Britain was governed by “the king-in-Parliament.” That was the way Bancroft and other defenders of Model B understood the imperial constitution. Their conception hardly “left the whig inheritance far behind.”<sup>13</sup>

Dominion theory nonetheless seemed like an abandonment of the whig tradition to loyalists and others who understood parliamentary supremacy as a product of the Glorious Revolution. In fact the doctrine of parliamentary supremacy (or sovereignty) was far younger: it won acceptance in Britain only in the mid-eighteenth century and remained contested thereafter. By the mid-1770s, however, the indivisible and complete sovereignty of Parliament had become a nonnegotiable item of faith for those in power, including members of Parliament who had once justified colonial opposition to the Stamp Act.<sup>14</sup>

Against that ascendant orthodoxy, the colonists built a case for separate dominion status that had solid roots in English law and tradition. Most colonies were founded on the basis of charters or other contractual arrangements with the king alone in the early or mid-seventeenth century, quickly established legislatures that assumed power to regulate their internal affairs, and were in fact administered by the crown. The rights they claimed—“no taxation without representation,” above all—were well established among the “Ancient Rights and Liberties” listed in the English Declaration of Rights.<sup>15</sup> And “the foundation of English liberty, and of all free government,” the First Continental Congress said, “is a right in the people to participate in their legislative council.”<sup>16</sup> Ireland had

<sup>13</sup> Nelson, *WMQ* 68: 563 (“sought to export”), 565 (“whig inheritance”). Nelson concedes the point for Edward Bancroft. See also Jack P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge, 2011), 126.

<sup>14</sup> On the theory of parliamentary supremacy as an eighteenth-century development, see Greene, *Constitutional Origins*, 39, which cites the work of Barbara Black, Jennifer Carter, and H. T. Dickinson. See also Alison L. LaCroix’s observation that “the nature of sovereignty was a contested, not a settled, issue in Anglo-American constitutional thought” of the late eighteenth century. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass., 2010), 19. On the triumph of parliamentary supremacy in England, see Edwin G. Burrows and Michael Wallace, “The American Revolution: The Ideology and Psychology of National Liberation,” *Perspectives in American History* 6 (1972): 167–306, esp. 235–42; Greene, *Constitutional Origins*, 105.

<sup>15</sup> The English Declaration of Rights (1689), in Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston, 1998), 43.

<sup>16</sup> [Resolves of the First Continental Congress], Oct. 14, 1774, in Ford, *Journals of the Continental Congress*, 1: 68. The Congress’s statement that it was declaring the colonists’ rights and liberties “as Englishmen, their ancestors in like cases have usually done” (*ibid.*, 1: 67) echoed a very similar statement in the English Declaration of Rights, which declared the “Ancient Rights and Liberties” of Englishmen as “their Ancestors in like Case have usually done.” See the English Declaration in Rakove, *Declaring Rights*, 43.

a separate parliament, as did Scotland from 1603 to 1707, when it was in effect a kingdom separate from England but under the same king. Scottish writers had probed at length the advantages of a “confederal” or “federal” system over an “incorporating” union of states, and the colonists could also cite Continental writers who envisioned an empire of states with substantial local autonomy.<sup>17</sup> The Americans’ case for dominion status under the crown was therefore not dependent on the arguments of James I and Charles I. It rested firmly on history, precedent, and the ancient constitution of England, which imposed limits on power inconsistent with the claims of parliamentary supremacy.

Some forty years ago, Mary Beth Norton demonstrated that the American loyalists were ideological whigs who framed even their criticisms of their “patriot” countrymen in whig terms.<sup>18</sup> Clearly, Lord North saw himself as a whig since he supported the power of Parliament. So did the leading defenders of the American case against Parliament and, ultimately, the king. From their treatises against the Stamp Act through the Declaration of Independence, they affirmed the existence of basic rights and the principles of contractualism and consent that were at the heart of the seventeenth-century English case against Stuart absolutism. That all contenders in the imperial conflict could work within the same ideological tradition suggests at once the capaciousness of whiggism and its utter triumph by the 1770s. Only when the principles of Stuart Royalism had been thoroughly defeated could colonial writers claim that, a century and a half earlier and on a single, limited point, the first Stuart kings had been right.

<sup>17</sup> LaCroix, *Ideological Origins of American Federalism*, 26 (quotations). Note that James Wilson cited cases in English law that, he argued, exempted Ireland, Jamaica, and Virginia from parliamentary legislation because they had their own elected legislatures. The claim of parliamentary supremacy, he concluded, was “repugnant to the essential maxims of jurisprudence” as well as “to the ultimate end of all governments, to the genius of the British constitution, and to the liberty and happiness of the Colonies.” See [Wilson], *Considerations*, 19–24 (quotations, 19). In 1719 Parliament passed an act “for the better securing the dependency of the kingdom of *Ireland* upon the crown of *Great Britain*” that said the British king and Parliament had “full power and authority to make laws and statutes of sufficient force and validity, to bind the kingdom and people of *Ireland*,” apparently without limit. See “The Declaratory Act (Ireland), 1719,” in Douglas, *English Historical Documents*, vol. 10, 1714–1783, ed. D. B. Horn and Mary Ransome (London, 1957), 683. However, Parliament never attempted to pass tax laws for Ireland and in general deferred to the Irish Parliament’s authority with regard to Ireland’s internal governance. See Greene, *Constitutional Origins*, 45, which draws on the scholarship of J. C. Beckett. On Scotland, see LaCroix, *Ideological Origins of American Federalism*, 24–29. LaCroix also notes that colonial writers could and did draw on Continental writers such as Hugo Grotius, Samuel von Pufendorf, Emerich de Vattel, and Montesquieu, who saw the possibility of dividing authority within a “system of states” in a way that was at odds with the vision of a single central sovereign Parliament (*ibid.*, 27).

<sup>18</sup> Mary Beth Norton, “The Loyalist Critique of the Revolution,” in *The Development of a Revolutionary Mentality: Papers Presented at the First [Library of Congress] Symposium [on the American Revolution], May 5 and 6, 1972* (Washington, D.C., 1972), 127–48.



# The Plural Prerogative

Daniel J. Hulsebosch

ERIC Nelson analyzes a strand of late-colonial protest literature that propounded a Royalist dominion theory of the British Empire in which the colonies were “outside the realm” of England, connected only by their separate ties to the crown and beyond the legislative jurisdiction of Parliament. This turn to the king is well known, but Nelson offers the most ambitious attempt yet to understand Royalist constitutionalism on its own terms.<sup>1</sup> He finds that it was no “mere display of forensic opportunism” but instead revealed a sincere commitment to a conception of the empire espoused by James I and Charles I when they battled an aggressive House of Commons in the 1620s. In a “stunning irony,” the American colonists circa 1770 “became perhaps the last Atlantic defenders of the Stuart monarchy.”<sup>2</sup>

An initial reaction might be to accept Nelson’s interpretation of the dominion theory but resist his methodological claim that the colonists were sincere rather than opportunistic. My response is the reverse. The essay’s great strength is its methodological premise: the colonists’ constitutional arguments mattered, and to understand how they mattered requires full comprehension of the historical and performative contexts in which they were made. Nelson’s interpretation of the nature of the colonists’ dominion theory, however, is debatable. It is one thing to demonstrate that colonists embraced the prerogative origins of their colonies, and even that they endorsed the continued exercise of specific prerogative powers that, in Britain, had fallen into disrepute. It is another to conclude that they embraced a Stuart conception of monarchy. The trouble may stem from the conceptually and historically elastic term that lies at the center of Nelson’s story but receives little analysis: the prerogative.

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<sup>1</sup> Other attempts to understand Royalist constitutionalism include Charles Howard McIlwain, *The American Revolution: A Constitutional Interpretation* (New York, 1923), esp. 122–47; John Phillip Reid, *Constitutional History of the American Revolution*, vol. 4, *The Authority of Law* (Madison, Wis., 1993), 151–62. See also Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass., 2010), 85–87.

<sup>2</sup> Eric Nelson, “Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75,” *William and Mary Quarterly*, 3d ser., 68, no. 4 (October 2011): 533–72 (“mere display,” “perhaps the last,” 536, “stunning irony,” 535).

“Patriot Royalism” rests on a genuinely original historical insight. Nelson traces the elaboration of the dominion theory to the publication, in the early 1760s, of House of Commons journals from the 1620s that included debates on bills regulating the colonial fisheries and Virginia’s tobacco trade. The Stuart kings and their advisers opposed these bills on the principle that Parliament lacked authority to regulate the colonies; the bills passed the House of Commons, then failed in the House of Lords. The episode was therefore useful to both sides in the imperial debate a century and a half later. To Parliament’s defenders the debates demonstrated that the House of Commons had claimed the power to regulate the American colonies from the time of their foundation. To the colonists, however, the important point was that Parliament’s early attempt to regulate the colonies had failed. Only after executing Charles I, they contended, did Parliament begin to regulate colonial trade.<sup>3</sup>

Nelson observes that defenders of parliamentary power first invoked the Stuart-era debates.<sup>4</sup> William Knox, for example, parsed the Stamp Act resolutions and concluded that the colonists sought to escape Parliament by embracing the crown and its prerogative: they sounded like the early Stuarts. This ironic interpretation of colonial constitutionalism may have reached its high-water mark in Lord North’s famous syllogism in which he equated whiggism with the rights of the people and toryism with the prerogative, and then observed that his administration “contended for the right of parliament, while the Americans talked of their belonging to the crown.” It followed that “their language therefore was that of Toryism.”<sup>5</sup> The deduction committed the fallacy of four terms, though North probably intended to produce laughter rather than logic.

In rebuttal the colonists argued that Parliament’s defenders misconstrued the 1620s precedent, and along the way they articulated a full-fledged dominion theory of empire. Here is where Nelson’s method pays off. He traces the debate’s gathering momentum in the late 1760s and early 1770s as

<sup>3</sup> A few historians have noted the use of these 1620s debates but none has traced the generative influence of their publication. See for example Barbara A. Black, “The Constitution of Empire: The Case for the Colonists,” *University of Pennsylvania Law Review* 124, no. 5 (May 1976): 1188–90; John Phillip Reid, *Constitutional History of the American Revolution*, vol. 3, *The Authority to Legislate* (Madison, Wis., 1991), 163–66. Nelson implicitly separates the historical question of parliamentary jurisdiction from the contemporary imperial debate about it. Probably the most famous exchange on the historical issue remains McIlwain, *American Revolution*; Robert Livingston Schuyler, *Parliament and the British Empire: Some Constitutional Controversies Concerning Imperial Legislative Jurisdiction* (New York, 1929).

<sup>4</sup> Common-law judges Sir William Blackstone and Lord Mansfield seem to have been first. See Nelson, *WMQ* 68: 548–49 n. 32. Then the Stuart-era debates got wider dissemination through the pamphlets of seasoned imperial agents Thomas Pownall and William Knox.

<sup>5</sup> Quoted in Nelson, *WMQ* 68: 535.

“arguments [were] made, countered, revised in light of forceful objections, countered again, and so on.” Each of the colonists’ moves from one claim to another was sincere, even though they ended up traveling a great “ideological distance” and arrived at a place they had never intended to reach or even knew existed.<sup>6</sup>

Despite that ideological journey, they stood firm on their underlying constitutional position: substantial self-governance. Accordingly, the colonial pamphleteers argued that what Parliament’s defenders saw as an ironic position—using the prerogative to defend liberty—was in fact a paradox that could be resolved. To them it was not incongruous to claim that the colonies were founded on the prerogative and also to assert that the colonists enjoyed English liberties, including government by consent. The accession, disposal, and, to a limited extent, governance of overseas territories were prerogatives of the crown, not matters for Parliament. Historically, though, the crown had disposed of its territories in charters that delegated governmental authority to the colonists, reserving for itself only minimal powers of appointment and oversight. It was a two-stage constitutional process: the colonies originated in the prerogative, but their charters granted substantial self-government and insulated them from many specific prerogative powers as well as the prerogative writ large—the discretionary royal rule that was the *bête noire* of the whig history that colonists and parliamentarians shared.<sup>7</sup>

Edward Bancroft led the way.<sup>8</sup> He argued that the original colonists retained all the liberties of Englishmen and that their charters guaranteed these liberties for future generations. Those instruments were “fundamental,

<sup>6</sup> *Ibid.*, 571. For a different interpretation of these moves that emphasizes common-law gradualism and the constitutional avoidance canon, see Reid, *Authority to Legislate*, 151–62.

<sup>7</sup> The nature of that discretion was central to constitutional debates in the seventeenth century. Glenn Burgess argues that even most Stuart defenders believed that the king’s discretion under his prerogative was circumscribed by fundamental law. See Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven, Conn., 1996).

<sup>8</sup> James Wilson may have been first in time, but his 1768 essay—characteristically brilliant and idiosyncratic—was not published until 1774 and did not refer to the 1620s debates. Eric Nelson’s proof of Edward Bancroft’s influence rests on a comparison of the texts. He could have noted that Alexander Hamilton, while at King’s College, borrowed a copy of Bancroft’s essay from Alexander McDougall and reported that it was stolen from his room. See Hamilton to McDougall, [1774–76], in Harold C. Syrett et al., *The Papers of Alexander Hamilton* (New York, 1979), 26: 353–54, esp. 26: 353. Bancroft’s later activities as a British spy do not raise suspicions about his prerogative argument; rather they suggest the earnestness of his attempt to resolve the imperial dispute. See Thomas J. Schaeper, *Edward Bancroft: Scientist, Author, Spy* (New Haven, Conn., 2011), 14–24. However, Bancroft’s ultimate loyalism does suggest that the terms “patriot” and “loyalist” are too strongly suggestive (as Nelson recognizes), which is why I use “colonial” and “parliamentary,” though these terms have their own limitations. See Nelson, *WMQ* 68: 535 n. 4.

and consequently infeasible Acts, equally binding on the Prince and Subjects." In the third Virginia charter, for example, King James I "divested himself of all Share in the Legislative and Executive Authority of any *American Colony*." Precisely because "the Royal Prerogative could afterwards have no Power," James added a provision specifying that the crown retained the right to review colonial statutes for their "Conformity" to English law. The crown retained specific prerogative powers—the veto, legislative review, diplomatic powers—but could not govern the colonies by the prerogative writ large. As Bancroft put it, the guarantee of self-governance meant that the colonists had no fear of "falling into the Hands of Prerogative."<sup>9</sup>

Parliament's defenders either ignored this distinction between prerogative origins with chartered self-government, on the one hand, and prerogative rule, on the other, or believed that Parliament's power was implied in all charters. One route of implication was the Glorious Revolution. If Parliament could crown a king, then it could govern colonies established under the king's prerogative. Colonists responded that this logic did not follow because the authority to appoint a ruler did not necessarily include the subordinate power to control how the ruler's power was exercised in every case, especially retroactively, or to rule with discretion unbounded by law.<sup>10</sup> Instead, the colonies were separate, equal, and largely self-governing dominions. In sum the colonists reinterpreted the newly available precedents to support a vision of the empire that, when seen in its totality, was quite new and not Jacobean or Caroline. They were seeking a more perfect union.

Nelson concludes with the striking suggestion that the American presidency owes a debt to the Stuart prerogative. Though it might be impossible to demonstrate this thesis, it reminds us that one of the great unwritten works of constitutional history is an account of how the framers distributed the specific powers associated with the crown's prerogative across the federal government while investing no single branch with the general prerogative's unbounded discretion. The Constitution's executive certainly was stronger than that of the Articles of Confederation or the state

<sup>9</sup> Edward Bancroft, *Remarks on the Review of the Controversy Between Great Britain and her Colonies* . . . (New-London, Conn., 1771), 11 ("fundamental"), 24 ("divested himself"), 12 ("falling"), 7–9, 20, 44–45, 75. The young Alexander Hamilton stated the claim to "inherent right" to legislative power more strongly: "It is the unalienable birth-right of every Englishman, who can be considered as a *free agent* to participate in framing the laws which are to bind him." See [Hamilton], *The Farmer Refuted; Or, A more impartial and comprehensive View of the Dispute between Great-Britain and the Colonies* (New York, 1775), 22 ("inherent right"), 10 ("unalienable birth-right"). John Phillip Reid details the overlapping constitutional arguments supporting a "migration contract" in Reid, *Constitutional History of the American Revolution*, vol. 1, *The Authority of Rights* (Madison, Wis., 1986), 139–45 (quotation, 139), 114–31, 159–68.

<sup>10</sup> The latter is the major theme of John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison, Wis., 1986–93).

constitutions. The president was made legible under the law of nations to foreign governments as a leader capable of executing diplomacy and war in accordance with that law and without interference from the states or, in limited instances, Congress.<sup>11</sup> However, the executive was subject to many checks and, like all federal officers, was removable by impeachment or at regular elections.<sup>12</sup> James Wilson, for example, told his fellow delegates in Philadelphia that “he did not consider the Prerogatives of a British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”<sup>13</sup> This was the consensus view, as traditional executive powers such as declaring war, regulating the military, and organizing and calling up the militia were given to the legislature.<sup>14</sup> In addition Congress could override a president’s veto.<sup>15</sup> The president and Senate shared the treaty power.<sup>16</sup> The judiciary was formally separated from the executive; Congress received the power to create lower federal courts.<sup>17</sup> Federal legislators could not accept executive appointments and top executive officials were subject to Senate approval, a combination that cut to the core of the executive’s power to influence—or corrupt—government.<sup>18</sup> Most germane to Nelson’s essay, Congress received the power to admit new states into the Union as well as “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>19</sup> The American president would not enjoy the very prerogative power that was the basis of patriot Royalism.

<sup>11</sup> On this theme, see David M. Golove and Daniel J. Hulsebosch, “A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition,” *New York University Law Review* 85, no. 4 (October 2010): 932–1066.

<sup>12</sup> U.S. Constitution, Article II, Sections 1, 4. Jack N. Rakove uses John Locke’s notion of the distinct “federative power,” largely encompassing foreign affairs powers, to analyze the framers’ redistribution of prerogative powers between the executive and legislative branches. See Rakove, “Taking the Prerogative Out of the Presidency: An Originalist Perspective,” *Presidential Studies Quarterly* 37, no. 1 (March 2007): 85–100 (quotation, 85).

<sup>13</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, Conn., 1911), 1: 65–66.

<sup>14</sup> U.S. Constitution, Article I, Section 8.

<sup>15</sup> *Ibid.*, Article I, Section 7.

<sup>16</sup> *Ibid.*, Article II, Section 2.

<sup>17</sup> *Ibid.*, Article III; Article I, Section 8.

<sup>18</sup> *Ibid.*, Article I, Section 6; Article II, Section 2.

<sup>19</sup> *Ibid.*, Article IV, Section 3 (quotation).

# Taking Them Seriously: Patriots, Prerogative, and the English Seventeenth Century

Eric Nelson

LET me begin by offering my sincere thanks to Professors Gordon S. Wood, Pauline Maier, and Daniel J. Hulsebosch for having engaged so thoughtfully and constructively with my essay. It is a rare privilege to find myself in dialogue with such distinguished scholars on matters of paramount importance to the history of the American Revolution. “Patriot Royalism” argues that the prerevolutionary debate in British North America necessarily took the form of a debate about seventeenth-century English history. Both patriots and their opponents in the 1770s understood that they were confronting precisely the same constitutional questions that had divided king and Parliament in the 1620s and 1640s. Yet patriots unexpectedly found themselves on the Royalist side of this divide, defending an expansive, century-old conception of the royal prerogative both in Britain itself and in the colonies—and insisting with increasing fervor that the hated Stuarts, James I and Charles I, had understood the English constitution far better than either their parliamentarian opponents or their whig successors. The patriot embrace of Stuart “prerogativism,” I suggest, left a profound and lasting imprint on American constitutional thought. Each of my critics raises a number of important questions about this argument. I shall confine my remarks to what I take to be the most pressing issues before us.

PROFESSOR WOOD raises two specific objections to my essay as well as two more general ones. His first specific objection is that I do not cite Randolph G. Adams’s 1922 *Political Ideas of the American Revolution*. This is certainly true, but I am not clear why Professor Wood should find my practice in this respect objectionable, let alone “astonishing.”<sup>1</sup> Adams’s formidable book, with which I am quite familiar, is now ninety years old. It does not anticipate any of my arguments, and its presentation of the constitutional issues at stake in the 1770s was almost immediately surpassed by Charles

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<sup>1</sup> Gordon S. Wood, “The Problem of Sovereignty,” *William and Mary Quarterly*, 3d ser., 68, no. 4 (October 2011): 573–77 (quotation, 573).

Howard McIlwain's 1923 *The American Revolution*—a work that I cite as the best, not the only, early-twentieth-century account of the dominion theory. It is of course possible that Professor Wood has in mind an argument or a piece of evidence presented by Adams (and not by any of the later scholars cited in my essay) that, in his view, should have figured in my discussion. But he offers no example.

His second specific objection has to do with my characterization of the role played by Edward Bancroft's *Remarks on the Review of the Controversy between Great Britain and her Colonies* (1769) within patriot discourse in the 1770s. He disputes my argument that this pamphlet "supplied a definitive template for defenses of the dominion theory" on the grounds that "no American spokesman at the time . . . ever explicitly cited or referred to it."<sup>2</sup> Quite right: the patriots in question simply plagiarized it verbatim. It was certainly (and not possibly) the "anonymous Pamphlet" referred to by Thomas Hutchinson in his debate with the Massachusetts House of Representatives, and, as I demonstrate in detail, most of the pamphlets discussed in my essay are structured by block quotations and straightforward paraphrases from Bancroft.<sup>3</sup> His pamphlet was anything but "obscure" in the 1770s.<sup>4</sup> The issue is not, as Professor Wood would have it, the repetition of the stock phrase "outside of the realm" but rather the wholesale replication of Bancroft's historical argument about the Stuart parliaments and the prerogative. Indeed even Bancroft's mistakes proved influential: we should notice that John Adams, Alexander Hamilton, James Iredell, and the author of the "Edmund Burke" letter all simply reproduce his erroneous claim that Charles I refused the royal assent to the New England fishery bill.

I turn now to Professor Wood's more general objections to my argument. He first takes issue with my account of what motivated the turn to the dominion theory. On his view, the theory should be understood as a belated attempt by patriots to make their peace with "the doctrine of sovereignty." The British asserted, with Sir William Blackstone, that in every political community there must be one "supreme, irresistible, absolute, uncontrolled authority," while the patriots initially denied this. By 1774, however, Professor Wood tells us that the colonists "despaired of trying to divide the indivisible or separate the inseparable and finally accepted the

<sup>2</sup> Eric Nelson, "Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75," *WMQ* 68, no. 4 (October 2011): 533–72 ("supplied a definitive template," 550); Wood, *WMQ* 68: 576 ("no American spokesman").

<sup>3</sup> John Phillip Reid, ed., *The Briefs of the American Revolution: Constitutional Arguments between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdoin for the Council and John Adams for the House of Representatives* (New York, 1981), 88 (quotation). Consider for example the lengthy passage quoted from Alexander Hamilton's *The Farmer Refuted* in Nelson, *WMQ* 68: 561–62.

<sup>4</sup> Wood, *WMQ* 68: 576.



logic of sovereignty” by taking up the dominion theory.<sup>5</sup> Yet this assertion strikes me as misleading. The patriots I discuss were archetypal theorists of mixed monarchy, not undivided sovereignty. They proposed to divide political authority in North America between colonial legislatures and a king invested with sweeping prerogative powers, just as they proposed that Britain itself should revive its Jacobean and Caroline mixed constitution. In jettisoning their initial position and embracing the dominion theory, the patriots were not exchanging a scheme of divided sovereignty for a scheme of absolute, unitary sovereignty; rather, they were exchanging a proposal that divided sovereignty between colonial legislatures and Parliament for one that divided it between colonial legislatures and the crown.<sup>6</sup> The anxiety about imperium in imperio echoed throughout both phases of the prerevolutionary debate, and I highlight its importance at the start of my essay. But it was not a change of heart on the doctrine of sovereignty that propelled patriots toward the prerogative. It was, as I explain, the logic of their argument about the relationship between consent and legitimate law.

Professor Wood next disputes my characterization of the patriot position itself. Here he appears to be of two minds. On the one hand he claims to see nothing new in my account of a “rupture” in patriot discourse—he “know[s] of no scholar who has not recognized this dramatic shift in the Americans’ position in the debate.”<sup>7</sup> Yet on the other hand he dismisses as “too clever by half” my contention that the patriots abandoned the whig tradition in the 1770s and adopted a straightforwardly Royalist constitutional position. It is hard at first to see how these two claims fit together: how can the same argument be both banal and outlandish? The answer to the riddle is that Professor Wood and I understand different things by the word “rupture.” We both acknowledge that the dominion theory represented a departure of some kind in patriot argument (this is indeed not a new thought), but whereas Professor Wood sees it as a mere shift in whig strategy, I regard it as a profound ideological realignment. This is the right debate to have, but, so far as I can see, Professor Wood does not offer any reasons for rejecting my position. Instead he offers assertions: the patriots, he announces, were not in fact driven by “some atavistic desire to return

<sup>5</sup> *Ibid.*, 573 (“doctrine of sovereignty”), 575 (“despaired”).

<sup>6</sup> Note that, in the passage Professor Wood quotes (Wood, *WMQ* 68: 575), Hamilton is discussing the existence of two *legislatures* in the same jurisdiction. On his account, the king (not Parliament) shares the sovereign authority over North America with the colonial legislatures ([Hamilton], *The Farmer Refuted; Or, A more impartial and comprehensive View of the Dispute between Great-Britain and the Colonies* [New York, 1775], 16–17). Another way of putting the more general point is that the theory of the king-in-Parliament could only deliver a Blackstone-style solution to the sovereignty dilemma once the king had become a pure “executive.” It was precisely this development that patriots proposed to undo.

<sup>7</sup> Nelson, *WMQ* 68: 537 (“rupture”); Wood, *WMQ* 68: 575 (“know[s] of no scholar”).

to Stuart Royalism,” they had no interest in defending “the Stuarts against Parliament,” James Wilson’s argument for the royal prerogative was merely “odd,” and so on.<sup>8</sup> He seems to be defending an a priori view of what the patriots *must* have been saying rather than trying to take seriously what they *were* in fact saying. He is therefore unmoved by the evidence presented in my essay.

PROFESSOR MAIER has written a wide-ranging and sympathetic critique of my position.<sup>9</sup> She is willing to concede that I have “identifie[d] an interesting strain in the colonial argument that has generally gone unnoticed” but concludes that I “[take the] argument too far.” We might describe the disagreement between us as one about the significance of the patriot argument in question, rather than about its content. Professor Maier’s first characterization of this disagreement is as follows: “Context is critical: to approve a Stuart argument against Parliament in the 1620s was altogether different from doing so 150 years later. In the 1770s the primary threat to American rights seemed to lie less with the king than with a Parliament that claimed a right to bind the colonists ‘in all cases whatsoever.’”<sup>10</sup> This is certainly true, but I do not see its force as an objection to my argument. To say that the Stuart position seemed less dangerous to Americans in the 1770s than it had to parliamentarians in the 1640s is not to deny that, in taking it up, patriots were departing quite dramatically from whig constitutional and political theory.

But Professor Maier does indeed wish to deny this, and she defends her view in several different ways. She first argues that the patriots remained whigs because they continued to speak the language of consent and rejected arguments from divine right. By way of a reply, I should begin by pointing out that many Royalists defended their constitutional position without recourse to divine right arguments—and that divine right arguments themselves came in any number of shapes and sizes, many of which incorporated contractarian commitments to a significant degree. But Professor Maier is surely right to notice a dissonance between patriot views about the legitimacy of law and patriot views of the prerogative.<sup>11</sup> Indeed the whole of

<sup>8</sup> Wood, *WMQ* 68: 573 (“too clever”), 577 (“some atavistic desire”), 576 (“Stuarts against Parliament”), 575 (“odd”).

<sup>9</sup> I am doubly grateful to Professor Maier, who also generously served as a referee for my article. Her various comments and suggestions have greatly improved it.

<sup>10</sup> Pauline Maier, “Whigs against Whigs against Whigs: The Imperial Debates of 1765–76 Reconsidered,” *WMQ* 68, no. 4 (October 2011): 578–82 (quotations, 580).

<sup>11</sup> It seems to me, however, that Professor Maier elides two different questions when she observes that “writers such as Edward Bancroft, James Iredell, and Alexander Hamilton attributed the king’s exclusive power not, like Calvert, to the right of conquest but to the charters and contracts negotiated with the crown by companies and proprietors in the early seventeenth century” (Maier, *WMQ* 68: 579). It is true that these writers agreed that the king’s authority over his American *subjects* derived from the charters, but there was serious disagreement within the group concerning the origins of the

my article could be seen as an exploration of this tension. As I explain, it was precisely because patriots concluded that the consent of the governed (delivered through elected representatives) was a necessary condition for the promulgation of legitimate law that they came to deny Parliament's right to legislate for the colonies. But the deep irony is that they elected to solve the resulting constitutional dilemma by seeking to be governed, to a significant degree, by something other than law—namely, by the royal prerogative. Nor does it diminish the radicalism of their position that they claimed to embrace only “the *legal* prerogatives of the Crown.”<sup>12</sup> So did Charles I. The question we need to ask is, what, on their view, *were* the legal prerogatives of the crown? Their answer to this question derived straightforwardly from Royalist sources and embodied a sweeping rejection of the century-long whig crusade to subject the king to Parliament.

Professor Maier next argues that my view is implausible because neither James Wilson “nor any other colonial writer thought of the prerogative as a means of subjecting the people, as Nelson assumes, to ‘the mere grace and pleasure of a master.’”<sup>13</sup> The problem here is that Professor Maier has taken this quotation out of context. The passage in question offers my reconstruction of what tends to be called the neo-Roman critique of prerogative: the notion that to be governed by prerogative is to be ruled by will, rather than law, and that the condition of being dependent on the will of another is slavery. Colonial opposition writers in the early 1760s made constant use of this argument, whereas patriots in the 1770s rejected it entirely. My point was not that patriots somehow came to accept enslavement but rather that they came to deny (like their Royalist predecessors) that being ruled in part by prerogative constituted enslavement. Again, I am not certain why this fact should cause us to deny the discontinuity between their earlier and later positions.

Professor Maier's final argument is that we should not characterize the patriot position as a rejection of the whig inheritance because it “rested firmly on history, precedent, and the ancient constitution of England.”<sup>14</sup> The question of whether the patriots were in fact “right on the law” is a very old one, and my argument does not presuppose any particular answer to it (indeed, my instinct is to say that the question itself is badly posed<sup>15</sup>).

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king's authority over the land itself (that is, his right to grant charters and proprietary colonies in the first place). Hamilton, for one, took quite seriously the claim that “every acquisition of foreign territory is at the absolute disposal of the King” ([Hamilton], *Farmer Refuted*, 25). Hamilton's term “acquisition” itself elides the crucial distinction between discovery and conquest.

<sup>12</sup> Quoted in Maier, *WMQ* 68: 580.

<sup>13</sup> *Ibid.* (quotation); Nelson, *WMQ* 68: 542.

<sup>14</sup> Maier, *WMQ* 68: 582.

<sup>15</sup> On this point, see for example David Ammerman, “The British Constitution and the American Revolution: A Failure of Precedent,” *William and Mary Law Review* 17, no. 3 (Spring 1976): 473–501.

But it is perfectly possible to argue that the patriots were both radical and right. There was indeed a case to be made that the English constitution empowered the crown to govern overseas possessions by prerogative, to veto parliamentary bills, to regulate imperial commerce, to alienate territories from the realm, to exempt subjects from the jurisdiction of Parliament, and so on.<sup>16</sup> But to wish to restore these prerogatives to the crown—and to assert that the Stuarts had rightly defended them against parliamentary encroachments during “England’s troubles”—was to cease to be a whig in any recognizable sense of the term.<sup>17</sup> It was not merely to concede that “on a single, limited point, the first Stuart kings had been right.”<sup>18</sup>

I HAVE LEARNED a great deal from Professor Hulsebosch’s scholarly reply, not least the fascinating detail that Alexander Hamilton borrowed a copy of Edward Bancroft’s pamphlet from Alexander McDougall while at King’s College (a fact that bears directly on my exchange with Professor Wood).<sup>19</sup> As a general matter, Professor Hulsebosch accepts the broad contours of my argument and then poses several important questions about its implications. The first is similar to a point raised by Professor Maier: is it not implausible to argue that the patriots became Royalists when we clearly see that they retained a commitment to “substantial self-governance” and “government by consent”—that they used “the prerogative to defend liberty?”<sup>20</sup> My

<sup>16</sup> This final prerogative—the king’s right to exempt subjects from obedience to parliamentary law—was a crucial issue in the debate. Patriots claimed that James I and Charles I had legally removed British subjects in America from the jurisdiction of Parliament by means of the various colonial charters. British administration spokesmen and loyalists argued in contrast that these monarchs had possessed no such authority and that if such a prerogative were granted, it would imply an unrestricted dispensing power in the crown. An acknowledgment of this kind would, in turn, represent a complete betrayal of Revolution principles, unworthy of “any descendant of the associates of Pym or Hamden.” See [William Knox], *The Claim of the Colonies to an Exemption from Internal Taxes Imposed By Authority of Parliament . . .* (London, 1765), 8. Cf. Country Curate, *American Resistance Indefensible. A Sermon, Preached on Friday, December 13, 1776 . . .* (London, [1776]), 18–19.

<sup>17</sup> As Charles Howard McIlwain put it ninety years ago, “America’s final constitutional position was not Whig at all: it was a position in some respects not merely non-Whig, but anti-Whig” (McIlwain, *The American Revolution: A Constitutional Interpretation* [New York, 1923], 159).

<sup>18</sup> Maier, *WMQ* 68: 582.

<sup>19</sup> This important fact is also noted in a new biography of Bancroft, which appeared after my essay had gone to press. See Thomas J. Schaeper, *Edward Bancroft: Scientist, Author, Spy* (New Haven, Conn., 2011), 21–22. Several pamphlets were stolen from Hamilton’s room, including Bancroft’s. Hamilton described it as “the most valuable of them.” See Hamilton to Alexander McDougall, [1774–76], in Harold C. Syrett et al., *The Papers of Alexander Hamilton* (New York, 1979), 26: 353–54 (quotation, 26: 353).

<sup>20</sup> Daniel J. Hulsebosch, “The Plural Prerogative,” *WMQ* 68, no. 4 (October 2011): 583–87 (quotations, 585). It is also worth underscoring the limits of this patriot commitment to “substantial self-governance.” Recall Bancroft’s argument that “though the

answer is that Royalists had always defended the prerogative as an instrument for the protection of liberty. If we consult, for example, the statement of constitutional principles that Charles I ordered published in his name in 1642 (the *Answer to the XIX Propositions*), we find the claim that the king's prerogative powers constitute that "Authority, without which [he] would be disabled to preserve the Lawes in their Force, and the subjects in their liberties and proprieties." Furthermore, in defending his veto—"the freedom of Our Answer, when We have as much right to reject what We think unreasonable, as you have to propose what you think convenient or necessary"—Charles was not denying the substantial self-governance afforded to his subjects in Parliament. He acknowledged, for example, that the House of Commons was "solely intrusted with . . . the Leavies of Moneys" and the right of impeachment. What he rejected was its right to transform him from "a King of England" into "a Duke of Venice"—that is, into a mere executive.<sup>21</sup> In proposing to check the tyrannical encroachments of a legislature by reasserting the Stuart conception of the prerogative, the patriots were firmly within what had always been the Royalist mainstream.

I would also dispute Professor Hulsebosch's suggestion that the patriots in question simply wished to vindicate the prerogative of the seventeenth-century chartering monarchs to create (virtually) independent colonies, not to give the king any substantial role in colonial governance in their own time. Professor Hulsebosch is certainly right to say that we encounter something like this view in Bancroft's pamphlet—I make the same point in my essay—but it seems clear to me that the patriots of the 1770s were indeed committed to a greatly expanded role for the crown in colonial governance and, crucially, in the government of Britain itself. To propose reviving the veto, along with the king's right to alienate territory from the realm and his prerogative to regulate imperial commerce, was not to assign the crown "only minimal powers of appointment and oversight."<sup>22</sup> The Declaration

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King's Prerogative extends, indiscriminately, to all States owing him Allegiance, yet the Legislative Power of each State, if the People have any Share therein, is necessarily confined within the State itself" ([Edward Bancroft], *Remarks on the Review of the Controversy between Great Britain and her Colonies* [New-London, Conn., 1771], 49). The "if" in this sentence is quite extraordinary. Cf. Alexander Hamilton's claim that the king "is the only Sovereign of the empire," such that "the part which the people have in the legislature, may more justly be considered as a limitation of the Sovereign authority . . . Monarchy is universally allowed to predominate in the constitution" ([Hamilton], *Farmer Refuted*, 16).

<sup>21</sup> *His Maiesties Answer to the XIX Propositions of both House of Parliament* (London, 1642), 11 ("Authority," "solely intrusted"), 8 ("freedom of Our Answer"), 10 ("King of England").

<sup>22</sup> Hulsebosch, *WMQ* 68: 585. It is worth stressing that the patriots in question argued not only that the king should revive his veto power in Britain but also that, in exercising this power throughout his dominions, he should act independently of his ministers. As Thomas Jefferson put it (addressing the king directly): "You are sur-

of Independence, after all, indicted George III as a tyrant partly on the grounds that he had “combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws [that of Parliament]; giving his Assent to their Acts of pretended Legislation.”<sup>23</sup> That is, the king had behaved tyrannically by refusing to revive a prerogative power (the veto) that had gone into abeyance seventy years earlier. Again, it is perfectly true, as Professor Hulsebosch notes, that patriots did not propose to be governed by the prerogative *alone* or by an unbounded prerogative. But neither had the Royalists, as he himself seems to recognize.<sup>24</sup>

Last, Professor Hulsebosch engages with my parting comments about the degree to which John Adams, Hamilton, James Wilson, et al., seem to have created the American presidency in the image of their reimaged Stuart monarchy. I realize that this suggestion may strike readers as counter-intuitive. We are accustomed to thinking of the presidency as “monarchy lite,” a tamed and circumscribed version of the more domineering British original. But it seems to me that there is as much, if not more, to be said for the contrary view: seen in relation to the eighteenth-century British monarchy, the presidency is “monarchy plus.” The British monarch had no effective veto, whereas the president received one.<sup>25</sup> It is indeed significant that the presidential veto is “qualified” rather than “absolute,” but it is equally significant that both Hamilton and Wilson defended this alteration on the grounds that it would strengthen, rather than weaken, the prerogative.<sup>26</sup> Professor Hulsebosch also points to the fact that the Constitution divides what had been important executive powers of the crown (related to war, treaties, and so forth) between Congress and the president. But in the eighteenth-century British context, these remained powers of the crown in only a purely formal sense. Decisions about war and treaties were cabinet decisions, taken by ministers who had to enjoy majority support in the House of Commons. The king had no independent authority to wage or

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rounded by British counsellors, but remember that they are parties. You have no ministers for American affairs, because you have none taken from among us . . . It behoves you, therefore, to think and to act for yourself and your people” ([Jefferson], *A Summary View of the Rights of British America* [Williamsburg, Va., 1774], 22). On this, see William D. Little, “‘A Patriot King, or None’: Lord Bolingbroke and the American Renunciation of George III,” *Journal of American History* 65, no. 4 (March 1979): 951–70, esp. 964–65.

<sup>23</sup> David Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass., 2007), 168.

<sup>24</sup> Hulsebosch, *WMQ* 68: 585 n. 7.

<sup>25</sup> The monarch’s negative voice was never formally abolished, but it went into abeyance in Britain after 1707.

<sup>26</sup> Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York, 1961), 444–45 (no. 73). Cf. James Wilson, *Lectures on Law*, in Bird Wilson, ed., *The Works of the Honourable James Wilson, L.L.D.* (Philadelphia, 1804), 1: 449.

declare war, to negotiate or ratify treaties.<sup>27</sup> By assigning a substantial share of these responsibilities to a single executive outside of the legislature, the architects of the presidency created an office far more powerful than the British monarchy of their time and exhibited a continuing attachment to the “prerogativism” that many of them had first championed in the imperial crisis of the 1770s.<sup>28</sup>

<sup>27</sup> It is precisely because the king himself lacked such authority that contemporaries regarded George III's conduct during the later stages of the Revolutionary War as so extraordinary. In 1779, for example, he became the first monarch since Queen Anne to summon and address his own cabinet. On this subject, see Andrew Jackson O'Shaughnessy, “‘If Others Will Not Be Active, I Must Drive’: George III and the American Revolution,” *Early American Studies* 2, no. 1 (Spring 2004): 1–46, esp. 33. Yet even at this stage George was unable to take any direct control of the war. See, more generally, John Brewer, “Ministerial Responsibility and the Powers of the Crown,” in *Party Ideology and Popular Politics at the Accession of George III* (Cambridge, 1976), 112–36.

<sup>28</sup> Professor Hulsebosch's final point—that the Constitution assigns Congress the right to dispose of territories “belonging to the United States,” thus detaching from the executive the crucial power of alienation that had undergirded the dominion theory—is an important one and ought to remind us of how easily theories can become detached from the concerns that initially motivated them (U.S. Constitution, Article IV, Section 3). But the issue is also a bit tricky. The dominion theorists, after all, never denied Parliament's right to dispose of territories “belonging to Great Britain”—they rather denied that overseas possessions did in fact belong to Great Britain.