THE SCRIPT OF ALLIANCE: LOCKE ON THE FEDERATIVE

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Abstract: The paper addresses Locke's analysis of the federative power, presented as a distinct constitutional category separate from both the ordinary and special or prerogative powers of the executive in that it relates to the 'external' capacities of the state. The operation of the federative is marked by the interplay of prudence and law. Locke acknowledges the prudential element, but seems on one reading to downplay the juridical dimension. That reading does not fit well with Locke's designation of making treaties or compacts (*foedera*) as the power's central feature, nor with his account of natural law as a moral condition that includes the capacity to incur binding obligations. The federative should be seen rather as the part of the constitution through which the state's external agency is exercised and the location of the state's duties in respect of the law-generating activities in the international sphere. Its institutional specification should be framed accordingly.

Locke is hardly an understudied political thinker. But his analysis of what he called, with a little diffidence, the 'federative power' has not received much attention. Most of the relevant literature alights on the federative as a means to exploring what Lockean international relations might look like.[3] These accounts are unsatisfactory for the simple reason that very little

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[3] See e.g. D. Armitage, Foundations of Modern International Thought (Cambridge, 2013), Chapter 5; Richard H. Cox, Locke on War and Peace (Oxford, 1960); A.S. Tuckness, 'Punishment, Property, and the Limits of Altruism:

within Locke's theoretical corpus addresses that theme,[4] outside the domain of colonial appropriation.[5] The main theoretical interest lies with the internal architecture of the state, its special concern being the legitimacy of government and the preservation of freedom in the context of authoritative rule. The question of how states so constituted might organize themselves collectively does not arise directly.

But precisely because the inner life of the state is its focus, the theory should be able to indicate how the state ought to be constructed in respect of its external acts – war and peace, diplomacy, and interaction with other states. It is in this sphere of activity where the state appears most obviously as an agent. Explaining that agency requires both an institutional account of the structures through which the relevant aspects of the state's power are engaged and a juridical account of how the state comports itself as an agent among other states.[6] That juridical component implicates a number of core Lockean themes, including the relationship

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Locke's International Asymmetry', American Political Science Review, 102 (2008) pp.467–479; L. Ward, 'Locke on the Moral Basis of International Relations', American Journal of Political Science, 50 (2006) pp.691-705.

[4] One the most perceptive works on Locke's political theory speaks about 'Locke's incoherent and carelessly written work' on this subject: J. Dunn, The Political Thought of John Locke (Cambridge, 1969), p.164. D. Armitage refers to Locke's international political thought as being 'like the puzzle of the dog that did not bark in the night': 'John Locke's International Thought' in ed. I. Hall and L. Hill, British International Thinkers from Hobbes to Namer (London, 2009), p.33.

[5] See esp. J. Locke, 'Second Treatise' in Two Treatises of Government, ed. P. Laslett (Cambridge, 1988), Chapters V 'Of Property' & XVI 'Of Conquest'. On the colonial element within Locke's thought see J. Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge, 1995), Chapter 3; B. Arneil, 'Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism', Journal of the History of Ideas, 5 (1994) pp. 591-609.

[6] Though the condition of the law of nations in Locke's time was somewhat rudimentary, it was a post-Gentili and post-Grotius age. His Oxford colleague, Regius Professor of Civil Law Richard Zouche (1590-1661), had published what is recognised by many as the first proper international law treatise, *Juris et Judicii Fecialis sive juris inter gentes et quaestionum de eodem expliciatio* (Oxford, 1650). The claim that Zouche is 'the second founder of the law of nations' rests on his being the first to make systematic use of the term *jus inter gentes* instead of the older and more ambiguous term *jus gentium*: C. Phillipson, 'Richard Zouche', Journal of the Society of Comparative Legislation, 9 (1908), 281-304, p.284. For legal analysis of the period see e.g. M. Koskenniemi, 'International Law and *Raison d'État*: Rethinking the Prehistory of International Law' in B. Kingsbury and B. Straumann (eds), The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire (Oxford, 2010), pp.305-310.

between the state and violence or disorder.[7] But it also asks us to consider the epistemic properties of the state, the means by which it 'comes to know'. Of interest here is not only the question of how the state can be said to form a coherent mind-like structure capable of effective action – how it comes to know *things* – but also how it can be said to come to know *itself* as an autonomous political association.

It would be idle to claim that answers to these questions can be conjured out of Locke's brief account of the federative, although I do claim that it offers a suggestive starting point. As such, after familiarising ourselves with Locke's constitutionalist project, the central target of which was 'Absolute Arbitrary Power, or Governing without settled standing Laws',[8] the article examines his presentation of the federative as a category separate from ordinary and special (prerogative) executive powers. In one of the rare treatments of the federative, even then as part of an analysis of the Lockean prerogative, Pasquale Pasquino claims that the federative, deriving 'from the punitive power of the state of nature', is centrally about the decision to wage war.[9] I argue to the contrary that the use of the word 'federative' in Chapter XII signals Locke's willingness to explore a different conception of this external power, one that centres more on the state's compact-making capacities than on power to declare war. Exploring the Ciceronian roots of the federative discloses a script of alliance operationalised aimed

[7] See e.g. C. Fatovic, 'Constitutionalism and Contingency: Locke's Theory of the Prerogative', History of Political Thought, 25 (2004) pp. 276-297.

[8] Locke, 'Second Treatise', s.137.

[9] P. Pasquino, 'Locke on King's Prerogative' Political Theory, 26 (1998) 198-208, p.204. Pasquino mirrors the interpretation of Leo Strauss and many his followers for whom the key to Locke's political thought lies in the paramountcy of natural rights. Natural law obligations, they claim, apply only where our own preservation is not in conflict, a situation which they understand as rarely if ever applying in the sphere of international relations. See L. Strauss, Natural Right and History (Chicago, 1953), pp.202-246.

at securing good faith (*fides*) and friendship (*amicitia*) between peoples through the practice of concluding *foedera* (treaties).

I argue that Locke's under-explored federative power is not merely a dimension of the executive power to be used according to the executive's judgments of prudence and national interest, but is better understood as the power of the state to enter into promissory relationships with other political entities within the world community. Since the world community is governed by natural law no less than (domestic) political communities are, the federative power is a richly normative power that makes it possible for political communities to make and hold one another accountable within the natural legal order that binds and secures the good of all. Moreover, and relatedly, even though it is right to think of Locke's federative power as a power to engage with other entities that with respect to which any particular political community is in a state of nature, Locke's state of nature 'has a law to govern it' and is emphatically not (necessarily) a state of war. Locke's federative power is thus not best understood within a framework of Hobbesian strategy or realpolitik, but rather as a fully integrated feature of Locke's natural law framework which is, like the rest of that framework, richly textured with structures of mutual accountability and collective preservation.

I turn to the institutional and constitutional implications of a foreign relations power so understood. A constitution like Locke's which aims to preserve liberty by subjecting discretionary power and private-interest politics to legal patterning and institutional control must take

seriously the parallel threat of *raison d'état* politicking in respect of the state's external actions.[10] Locke specifies in Chapter XIII of the *Second Treatise* that the same supervisory framework which structures ordinary executive power applies also to the federative. This entails, specifically, that the Legislative, being constitutionally supreme, has the power to recall, replace and punish the holder of the federative power if they are unhappy with its actions.

LOCKE'S CONSTITUTIONALIST PROJECT

Locke's theory starts with the denial of paternalist and conventionalist bases for legitimate rule. It is not enough to tell me that I must obey someone who wields power, for a 'man can never be oblig'd in Conscience to submit to any Power, unless he can be satisfied who is the Person, who has a Right to Exercise that Power over him'.[11] The use of force – for instance, by a conqueror – in general gives no good title to rule.[12] While paternal power is a kind of natural government, it does 'not at all extend[] it self to the Ends, and Jurisdictions of that which is Political'.[13] Authority rests instead on foundations that are predominantly consensual

[10] See e.g. F. Meinecke, Machiavellism: The Doctrine of *Raison d'État* and its Place in Modern History (New York, 1965; orig., 1924); M. Viroli, From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250-1600 (Cambridge, 1992). Influential sixteenth-century French figures, such as the writers Guez de Balzac and Jean de Silhon, the jurist Cadin Le Bret, the diplomat Philippe de Béthune and, perhaps most important of all, Henri, duc de Rohan, are extensively discussed in W.F. Church, Richelieu and Reason of State (Princeton, 1972). Probably the best known text within this genre is G. Botero, The Reason of State, ed. B. Bireley (Cambridge, 2017; orig.; 1589), though it largely adopts its vocabulary and themes in order to subvert them.

[11] Locke, 'First Treatise', s.81.

[12] Locke, 'Second Treatise', s.175.

[13] Locke, 'Second Treatise', s.170.

and juridical.[14] While consent may be inferred in some instances from silence, the paradigm of consent is active agreement, as seen through the legal prism of contract.[15]

This emphasis on the artificial nature of political authority has much in common with other early-modern state theorists, including Hobbes. But whereas Hobbes drew a stark contrast between natural and civil conditions,[16] Locke's position is more tempered and gradualist.[17] The relationship is perhaps best understood in terms of sedimentary layers, in which artificial modes of authority sit on top of more natural structures of authority and transform them in so doing. Locke also grants more normative content to the natural condition than does Hobbes, his conception of natural law, being considerably thicker, allows for more normative substance to persist after the transition into the civil condition.

This theme of natural law's relative thickness and its continued salience becomes important later in my argument. Of more immediate concern is the largely juridical mode in which Locke operates.[18] The theory is juridical not only in terms of its point of departure (state of nature),

[14] And, it should be said, ultimately religious. See J. Locke, 'Essays on the Law of Nature', in ed. W. von Leyden, John Locke: Essays on the Law Of Nature and Associated Writings (Oxford, 1988), VI, p.183: 'ultimately, all obligation leads back to God'; and J. Waldron, God, Locke, and Equality: Christian Foundations in Locke's Political Thought (Cambridge, 2008).

[15] Locke, 'Second Treatise', s.122.

[16] For the significance of this position to inter-state relations see J. Olsthoorn, 'Why Justice and Injustice have No Place Outside the Hobbesian State', European Journal of Political Theory, 14 (2015) 19-36. Compare T. Christov, Before Anarchy: Hobbes and His Critics in Modern International Thought (Cambridge, 2015), Chapter 4.

[17] See e.g. R.W. Grant, 'John Locke on Custom's Power and Reason's Authority'. The Review of Politics, 74 (2012) pp.607–629.

[18] See R. Harrison, Confusion's Masterpiece: An Examination of Seventeenth Century Political Philosophy (Cambridge, 2003); P. Sagar, The Opinion of Mankind: Sociability and the Theory of the State from Hobbes to Smith (Princeton, 2018), pp.110-16.

conceptual vocabulary (natural law)[19] and structuring devices (contract) but also in what it delivers (the equal legal status of citizens, institutional authority structured and limited by law).[20] It corresponds in practice to a system of 'establish'd, settled, known law'[21] that contains first-order rules that pattern relations among legal agents and second-order rules structuring and limiting the jurisdictional capacities of office holders.[22] The whole edifice rests on the principle that political power is held on trust[23] (another legal device)[24] for a people who retain ultimate sovereignty.[25] Political power is subject to constitutional limits that condition even the supreme legislative.

Locke's commonwealth is not merely a juridical entity (*potestas*). Political power includes the power to employ 'the force of the Community, in the Execution of such Laws, and in defence of the Common-wealth' (*potentia*).[26] This more active dimension of state action relates to a bottom-up account of how political power is generated and lost, the idea being that the commonwealth is ultimately an exercise of *sustained* collective will. The combination of force and

[19] A.S. Brett, Changes of State: Nature and the Limits of the City in Early Modern Natural Law (Princeton, 2011), p.62: for almost all early-modern natural law thinkers, 'the construction of human being as free being coincides with the construction of the subject of law.'

[20] John Marshall refers to 'Locke's juristic egalitarianism': John Locke: Resistance, Religion and Responsibility (Cambridge, 1994), p.276.

[21] Locke, 'Second Treatise', s.124.

[22] On the distinction between duty-imposing and power-conferring rules see H.L.A. Hart, The Concept of Law (Oxford, 1962), Chapter 5.

[23] 'Second Treatise', s.149: 'For all Power given with trust for attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.'

[24] See e.g. R. Hardin, Trust and Trustworthiness (New York, 2002); M. Harding, 'Manifesting Trust', Oxford Journal of Legal Studies, 29 (2009) pp.245–265.

[25] See e.g. J. Dunn, 'The Concept of Trust in the Politics of John Locke' in R. Rorty, J.B. Schneewind and Q. Skinner (eds), Philosophy in History: Essays on the Historiography of Philosophy (Cambridge, 1984), 279-301.

[26] See C.H. McIlwain, 'Sovereignty' in McIlwain, Constitutionalism and the Changing World (Cambridge, 1939). On the public law significance of the distinction between *auctoritas* and *potentia* see M. Loughlin, The Foundations of Public Law (Oxford, 2010), Chapter 3.

law recurs throughout the *Two Treatises*. A purported law that does not accord with both formal and substantive principles of legality is not law in Locke's view, but rather 'unjust and unlawful *Force'* that can justifiably be opposed by force.[27] Only this richer conception of legality is sufficient to secure against arbitrary authority, Locke argues, the absence or presence of which determines whether I live freely or in servitude. To follow Hobbes in relying upon a purely formal conception of legality[28] would be like escaping the 'Mischiefs [that] may be done them by Pole-Cats, or Foxes' while being 'content, nay think it Safety, to be devoured by Lions'.[29]

THE FEDERATIVE POWER

The federative power appears in Chapter XII of the *Second Treatise*. That chapter continues an institutional analysis of the commonwealth. Locke has said that the 'first and fundamental positive Law' is to establish legislative power – the capacity to pass general laws – as the 'supream power of the Commonwealth'.[30] Attention turns to ordinary executive power. (Special executive power, or 'prerogative', gets a chapter to itself.) Executive power exists principally to ensure that the laws are given constant and lasting force, closing the gap between

[27] Locke, 'Second Treatise', s.204.

[28] See M.C. Murphy, 'Was Hobbes a Legal Positivist?', Ethics, 105 (1995), 846-873; D. Dyzenhaus, Hobbes on the Authority of Law' in ed. D. Dyzenhaus and T. Poole, Hobbes and the Law (Cambridge, 2012), 186-209.

[29] Locke, 'Second Treatise', s.93.

[30] Locke, 'Second Treatise', s.134.

normative order and social reality. While its key conceptual qualities are constancy and subordination, Locke's more practical proposals give the executive considerably more independent scope than this initial impression might convey,[31] especially if we factor in prerogative.[32]

Locke then identifies another power, distinct from both ordinary executive power and prerogative, which 'contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth'. This power 'may be called the Federative, if any one pleases'.[33] We might call this federative power 'natural', he continues, in that it corresponds to the power that every human has before the institution of the commonwealth. Every state is in a broadly similar position in relation to other states as the individual was to other individuals within the state of nature.

Though distinct, Locke sees the executive and federative as intimately related. The former comprehends 'the Executive of the Municipal Laws of the Society within its self, upon all that are parts of it', he says, while the latter 'the management of the security and interest of the publick without'. The two powers are 'always almost united' in that they form separate functions that tend to be concentrated within the same organ or branch of government (the executive). Locke gives two overlapping reasons in support of this institutional arrangement.

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[31] See esp. 'Second Treatise', s.151, discussing (with approval) the independent authority and supremacy of the English monarch. Unless the Constitution specifies it, the executive also has the power to decide when to convoke and dismiss or prorogue the Legislative – ss.154-156 – important and controversial powers, even in Locke's time.

[32] Harvey J. Mansfield Jr understands Locke to be commending a double-facing conception of the executive which combines theoretical weakness with practical strength. Generalising the point, he argues that the modern executive trades on precisely this ambiguity. The modern, constitutional executive connotes 'not weakness but the semblance of weakness, a presumed drawing of its own strength from the strength of another: the retiring disguise, combined with the efficient activity, of the *éminence grise*': Taming the Prince: The Ambivalence of Modern Executive Power (New York, 1989), p.13.

[33] Locke, 'Second Treatise', s.146.

The federative 'is much less capable to be directed by antecedent, standing, positive, Laws, than the Executive' and so it must be 'left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good'.[34]

Identifying the federative as a distinct constitutional capacity offers the germs of a different way of conceptualising the 'external' dimension of state power. It enables us to explore questions of institutional design, and the question of oversight and control, when this power is engaged. Locke's considerable advances in this area deserve more recognition than they have received. Almost all comparable writers, including Montesquieu,[35] allowed the federative power to disappear phagocytized by the executive power. Isolating the federative immerses us in the *longue durée* history of state building not only from the inside out but also to an extent from the outside in.[36] The prominence of the language of *interest* in the discussion of federative power suggests that Locke is open to thinking about the state against the background of the interplay of competing objectives, or sovereign wills, that allow no transcendent solution.[37] But Locke's federative also offers glimpses of a possible way forward, one that

[34] Locke, 'Second Treatise', s.147.

[35] 'In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over things depending on civil right.' He immediately associates the second and third of these functions with the office of the Prince. C. de Secondat, Baron de Montesquieu, The Spirit of the Laws, trans. and ed. A.M. Cohler, B.C. Miller and H.S. Stone (Cambridge, 1989), Part 2, Book 11, Chapter 6, p.156.

[36] See e.g. C. Tilly, Coercion, Capital, and European States, AD 990-1990 (Oxford, 1990).

[37] See e.g. Henri de Rohan, *De l'intérêt des princes et des Etats de la chrétienté* [1638]. On the influence of writings inspired by the French wars of religion on seventeenth-century English political debates see J.H.M. Salmon, The French Religious Wars in English Political Thought (Oxford, 1959). Salmon discusses the influence of French writings, especially the *Vindiciae contra Tyrannos* [1579], on the *Second Treatise* (though Locke does not refer directly to this or any other French justification for resistance) at pp.136-37 and the differences between them at pp.165-167. See also J.A.W. Gunn, Politics and the Public Interest in the Seventeenth Century (London, 1969), ix & pp. 266-67.

harnesses the legal capacity and civilising energies of the Lockean commonwealth in an effort to pattern international affairs on more stable and peaceful lines.

DEFINING THE FEDERATIVE

The federative isolates what we might call the state's external capacity. But we should realise that most of the relevant action occurs within the commonwealth's own institutions and pathways. This is so even if some of the commonwealth's officials - e.g. diplomats, armed forces - operate in territory which the commonwealth does not control. Even in such cases, the commonwealth is the agent that decides whether and how to act, and the actions of those extra-territorial officials are ascribed to it.

What makes this form of state power distinctive, then, is not so much where it is exercised or where its effects might be most visible, but because it operates according to a political logic that differs in significant ways from the standard model whereby official conduct occurs within a framework of general laws. This modification is due to certain features of the international (or inter-polity) landscape which condition the exercise of this 'external' capacity. The context is different: less about using the collective strength of the commonwealth to prescribe and enforce rules of justice than about using that strength to secure the interests of the collective. The vertical structure of authority that conditions the standard model is absent in this external sphere. Here, the primary agents are a plurality of commonwealths, horizontally ordered in as much as they ordered, over which no one of them has superior jurisdiction.

But Locke does more than specify a distinctive space within which the external capacity of the state is to take effect. He also identifies it using a term that has a particular meaning and resonance. He might have patterned this space in terms of the primordial question of war. Hobbes seems to have done exactly this when he wrote in *Leviathan* that, 'in all times, Kings and Persons of Soveraigne authority, because of their independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is the posture of War.'[38] Hobbes does not say much about this aspect of state power. What he does say is that the state's external domain corresponds to a state of nature (or one version thereof)[39] from which the escape route to a Leviathan global-state is blocked, so that the state ineluctably exists in a 'condition of warre one against another', and hence subsists in a condition of preparedness for war.[40] Once constituted, it would appear that for Hobbes the artificial person of the state took on the characteristics of the fearful and defensive individuals who instituted it.

FOUNDATIONS OF THE FEDERATIVE

[38] T. Hobbes, Leviathan, ed. R. Tuck (Cambridge, 1996), p.90.

[39] The connection between the law of nature, 'the natural law of men', and the law of nations, 'the natural law of commonwealths', that is, between the pre-political and the extra-political, is particularly clear in *De Cive*. 'The precepts of both are the same: but because commonwealths once instituted take on the personal qualities of men, what we call a natural law in speaking of the duties of individual men is called the right of Nations, when applied to whole commonwealths, peoples or nations': T. Hobbes, On the Citizen, ed. R. Tuck and M. Silverthorne, (Cambridge, 1998), p.156.

[40] Exactly what this entails is a matter of some dispute. Options vary from the exceptionally arid (e.g. Olsthoorn, 'Why Justice and Injustice Have No Place Outside the Hobbesian State', 9) through the minimally social (e.g. R. Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant (Oxford, 1999) pp.126-135; Christov, Before Anarchy, Chapters 1-4) to the more richly juridically and contractually patterned (e.g. D. Dyzenhaus, 'Hobbes on the International Rule of Law', Ethics & International Affairs 28 (2014) pp.53-64; L. May, Limiting Leviathan: Hobbes on Law and International Affairs (Oxford, 2013).

In naming the state's external capacities the 'federative', Locke opens up a different path. The central case of the power becomes not the decision on war and peace but the capacity to form binding agreements. The term 'federative' derives from the Latin *foedera* (sing. *foedus*) meaning agreements, compacts or treaties. In choosing it as the constitutive element of foreign relations, Locke suggests that the paradigmatic feature of this dimension of state power is not the capacity to wage war but the ability to make more or less formal alliances with other commonwealths. This is not to deny the significance of war in this field of state action. Locke says explicitly that the federative 'contains the Power of War and Peace' and the *Second Treatise* accepts elsewhere that war can under certain circumstances be lawful.[41] But to conclude with Pasquale Pasquino that the federative is centrally about the decision to wage war, deriving 'from the punitive power of the state of nature',[42] is to miss what is distinctive in Locke's analysis.

My reading reveals the Ciceronian roots of the federative to suggest (a) that it operates in a space characterised by the interplay of the legal and the prudential, rather than the prudential alone; (b) that its central case is the state's capacity to make alliances through compacts and not its capacity to wage war; and (c) that understanding the state's war-making capacity as subordinate to its compact-making power makes it possible to align the internal constitutional order of states and the external legal order that operates between them. This reading is to be preferred because it fits with Locke's willingness to analyse inter-polity relations in

[41] See e.g. 'Second Treatise', ss.85, 180 & 185.

[42] Pasquino, 'Locke on King's Prerogative', 204. Pasquino's case is not assisted by some exegetical errors. He states that 'it is especially in the domain of foreign affairs that the prerogative appears' (p.202) when, as we have seen, Locke is at pains to separate the federative from the prerogative. There is also some confusion on p.201 where the text says that prudential (as opposed to legal) power 'is deployed predominantly in the domain of foreign affairs' whereas the accompanying diagram seems to present the opposite conclusion.

juridical terms in other contexts such as conquest and colonialism, but also because it fits with Locke's conception of the state of nature which, while not secure, is categorically not a state of war.[43] War may have been the baseline human condition for Hobbes; but for Locke it was fragile but peaceful co-existence.

Locke almost certainly derived the term federative from Cicero,[44] who was a major influence.[45] Reading Cicero reveals a sophisticated Roman tradition of law and practice on treaty-making powers.[46] War-making and treating-effecting powers inhabit the same juridical framework ('the laws of war and peace') which was embedded within the republican constitution, as exemplified in the rule that only the People could recognise a treaty as sacrosanct.[47] Such a position was consistent with a foundational belief that peace and not war was the natural condition amongst peoples. For Cicero, it was precisely this normative imperative for peace, from which stemmed limitations and formalities attending war, which represented the difference between man and animal: 'in the case of a state in its external relations, the rights of war must be strictly observed. For since there are two ways of settling a dispute: first, by discussion; second, by physical force; and since the former

[43] Locke, 'Second Treatise', s.19: 'Men living together according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*. But force, or a declared design of force upon the Person of another, where there is no common superior on Earth to appeal to for relief, *is the State of War*'.

[44] It is possible that the influence was mediated through a third source. For instance, his Oxford colleague, Richard Zouche, in an influential treatise *Juris et Judicii Fecialis* published in 1650 refers to the law of nations as 'fecial law'. The origin is effectively the same. The priestly official who had a vital role in overseeing the *foedus* (compact-making ritual) was the *fetial* from whose name stems the adjective *fetial* or *fecial* to denote something pertaining to the compact-making process.

[45] At his death, Locke possessed more copies of works by Cicero than any author other than Boyle and himself, including seven different editions of *De Officiis*. Locke had also at some point worked out an exact chronology of Cicero's life and works. The only other figure for whom Locke did this was Jesus Christ: J. Marshall, *John Locke: Resistance, Religion and Responsibility* (Cambridge, 1994), p.276.

[46] M.T. Cicero, 'Pro Balbo' in Cicero, *Orations: Pro Caelio, De Provinciis Consularibilis, Pro Balbo*, trans. R. Gardiner (Harvard, 1958), v.5, where Cicero praises Pompey's 'most remarkable knowledge of treaties, of agreements, of terms (*in foederibus, pactionibus, condicionibus*) imposed upon peoples, kinds, and foreign races, and, in fact, of the whole code of law that deals with war and peace (*in universo deinque belli iure atque pacis*).' Grotius took the title of his masterpiece *De Jure Belli ac Pacis* (Paris, 1625) from this passage.

[47] 'Pro Balbo', xiv.33: 'nothing can be sacrosanct save what has been enacted by the People or by the Commons [i.e. the *comitia populi* or the *concilium plebis*]'.

is characteristic of man, the latter of the brute, we must resort to force only in case we may not avail ourselves of discussion.'[48]

The friendship paradigm was the key concept in the construction of ancient interstate relations.[49] But *foedera* did not just relate to foreign affairs. The concept was ubiquitous, carrying a moral and political resonance that fed on its use as a legal concept. Bill Gladhill identifies three main contexts where this 'script of alliance' operated: *foedera humana*, *foedera civilia*, and *foedera naturae/mundi* (human *foedera*, political *foedera* and *foedera* of nature/the world). The original treaty-making *foedus* denotes not just the terms of an agreement between two polities, often to end hostilities, but represents also the act of binding. Overseen by special priests called *fetiales*, alliances actualised *fides* (faith, loyalty, trust - originally the faith one is capable of radiating[50]) through ritual dialogue, songs and blood sacrifice. 'In essence', Gladhill observes, '*foedus* is the performative and perfective side of fides, the completed action between two parties who grant and accept *fides*.'[51] The sacrificial element, which typically involving a young piglet, links *foedus* both symbolically and etymologically not just to fides but also to *foeditas* (foulness). There seems to have been a connection in the Roman imaginary between the sacrificial acts of *foedera* and consequent bloodshed when they were violated.[52] Cicero reserves the term *foedifragus* (*foedus*-breaker) for the very worst type of political enemy, suggesting in so doing that individuals who break *foedera* become themselves foul.

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[48] M.T. Cicero, *De Officiis*/On Duties, trans. Walter Miller (Harvard,1913), I.xi.34.

[49] P.J. Burton, Friendship and Empire: Roman Diplomacy and Imperialism in the Middle Republic (353-146 BC) (Cambridge, 2011), p.25. See also C. Ando, Law, Language, and Empire in the Roman Tradition (Philadelphia, 2011), Chapter 4.

[50] A. Schiavone, *The Invention of Law in the West* (Harvard, 2012), p.146.

[51] B. Gladhill, *Rethinking Roman Alliance: A Study of Poetics and Society* (Cambridge, 2016), p.22.

[52] Clifford Ando extrapolates that the fetial ritual could also serve the function of inaugurating wars that the Romans regarded as just: Law, Language, and Empire in the Roman Tradition, 51.

The Romans associated these ritual *foederal* practices with the two-faced god Janus. Book 12 of *The Aeneid* is devoted to a ritual alliance between Aeneas, Virgil's protagonist and on his telling founder of Rome, and Latinus, king of the Latins, the indigenous inhabitants of the area settled by the people who became the Romans. The significance attached to this moment in the poem suggests how natural it was for Romans to see political association in terms of successive *foedera*. During the course of the ritual, Aeneas swears to keep the terms of the truce 'by Latona's twin offspring, and by two-faced Janus' (*Latonaque genus duplex Ianumque bifrontem*).[53] Virgil's objective seems to have been to bring the first 'historical' treaty into alignment with the first 'mythical' treaty between Tatius, king of the Sabines, a rival tribe, and Romulus, twin-brother slayer and founder of Rome. After that treaty had been struck, the ancient commentator Servius relates, Tatius and Romulus built a temple to Janus. The god's two faces symbolise treaty-making: 'the faces represent a *coitio* (meeting) of the two kings or symbolise the 'reversion' to peace by parties who are about to embark on war.'

This gloss - Janus as the imago of *foedera* - explains the familiar association between the Temple of Janus and war and peace, and matches the Ciceronian conception of an alliance-constructed peace being the natural or default normative condition. It also suggests an origins story in which a single polity is able to reach beyond itself, even to the point of deep imbrication with another, through the ritual jurisprudence of alliance. The figure of Janus represents perhaps above all, then, 'the idea of making two nations one, the idea that this unification is the mixing of cultures into a novel syncretism'.[54]

53 Virgil, *Aeneid 7-12*, trans. H.R. Fairclough and G.P. Gould (Harvard, 2001), 12.198.

54 Gladhill, *Rethinking Roman Alliance*, 128-29.

What emerges from this Ciceronian excursus is a template for the ordering of external relations that makes alliance rather than war its central case. Stripping away the ancient ceremonial aspects reveals its basic elements. The root conviction is that peace not war is the natural condition among polities. That conviction is not naïve: in fact it may be especially pertinent in times, like Cicero's own, when the doors of the Temple of Janus never seem to be closed. The alternative, embraced by the Hobbesian motif that '*Man is a wolf to Man'* in relations among peoples,[55] not only denies the possibility of a meaningful escape from conditions of enmity but also risks condemning us, in our inter-national interactions, to the status of beasts.

The federative idea thus juxtaposes a universe governed by fate and war to one that at least has the capacity to be patterned by human creations – by *foedera*. Whereas on the opposing reading no compacts worth the name are possible outside the commonwealth, when properly construed the federative presents a vision of order slowly mastering chaos through the consistent application of a 'script of alliance'. Peaceful coexistence, natural in a moral sense, is not something that just happens but can only be achieved through artificial means. Many federal moments are necessary to create a web of alliances, and each strand of that web must be understood as precious for the hoped-for relations of trust (*fides*) to emerge.[56] These demanding requirements are necessary given the precariousness of horizontal lawmaking. The

[55] A phrase used by Plautus and Ovid famously applied to the law of nations by Hobbes in the dedication to *De Cive*.

[56] Peace and pact are etymologically related. The chapter *De bellis*, 'On War', of Isidore of Seville's 7th century text Etymologies (18.1.11) closes with this observation: 'The term "peace" [*pax*] seems to be taken from *pactum*, pact. Moreover, a peace is agreed upon later; first, a *foedus*, a treaty is entered into. A treaty is a peace made between warring parties; it derives from *fides*, trust, or from *fetiales*, that is, the priests of that name.' Quoted in Ando, Law, Language, and Empire in the Roman Tradition, 60.

federative remains perched on the edge of foulness (*foeditas*). Compacts between nations easily collapse allowing disorder to re-emerge.

Another way of expressing this point is to say that the federative model offers the prospect of peace through law. For the Hobbesian model too, the goal is peace. But whereas that model offers a juridical solution to the problem of endemic conflict within the domestic arena – namely, the artificial man of the state – it is anti-juridical when it comes to external affairs in that it denies any jurisgenerative (law-making) capacity to transform the natural condition of conflict in that sphere of action. The federative model, by contrast, offers a solution that is aligned in both the inter-national and the national spheres. The existing situation can be improved only by artificial means (law), ideal-typically through an open exchange of promises (compact), a moment that in principle leads to the development of a set of institutions and the normative and social condition necessary to sustain them (e.g. trust, the rule of law). The central difference lies in the associational form that each is designed to achieve. The internal compact aims to produce *concordia,* the harmony of the citizen body as a whole; while external compacts aim for *amicitia,* friendship between peoples that remain independent of each other, since in the latter context the unity of interest that characterises the polity is absent.

INTERNATIONAL STATE OF NATURE

Identifying an aspect of state action as a *federative* power has the consequence of demarcating a property or set of properties that are a necessary feature of the commonwealth and its domestic constitution. But Locke also briefly indicates certain basic features of 'international'

politics produced by the meeting of and interaction between a plurality of commonwealths exercising their respective federative capacities.

The primary feature of this 'federative terrain' is the possibility of effecting compacts between polities. The assumption that such compacts can plausibly result in action consistent with the terms of those compacts among the polities who are party to them rests on two basic conditions, prudence and law.[57] Locke readily acknowledges the first condition in his discussion of the federative. The federative corresponds, he says, to a domain of strategic action characterised by the interplay of 'the variation of designs of interests' of states. Since state actors must be able to react to a fluid environment, Locke concludes that the corresponding powers ought to 'be left in great part to the Prudence' of governors 'to be managed by the best of their Skill, for the advantage of the Commonwealth'.[58]

We can push back against a reading of Locke that refuses to give much if any legal colour to this federative terrain. Reading the text carefully reveals that Locke does not eliminate law entirely from international politics. What he actually says is that the federative 'is *much less capable*' of being legally patterned than national politics. That statement does not exclude a role for law in international affairs. To have done so would have put the passage on federative in stark tension with related parts of the *Second Treatise*, which clearly envisage a role for law. For instance, the passage discussing the independence of states refers specifically to binding alliances between polities: 'I have named all governors of "independent" communities, whether they are, or are not, in league with others; for it is not every compact that puts

[57] Prudence as a prism through which to think about politics and (especially) statecraft was a staple of the early-modern period: see e.g. Botero, Reason of State, 34-57 & 148-150.
[58] 'Second Treatise', s.147.

an end to the state of Nature between men, but only this one of agreeing together mutually to enter into one community and make one body politic'.[59]

Even if we accept that Locke does not deny the possibility of more extensive legal patterning of relations between polities using their respective federative capacities, it still might seem the case that his characterisation of the federative suggests an international politics dominated by prudential calculation, in which law plays a minimal role. But I intend to press the case in favour of a more juridical rendering of the federative by considering it as an integrated feature of Locke's natural law framework.

The important quality of that framework is that it provides a structure of mutual accountability and collective preservation. Natural law provided 'the moral framework in terms of which Locke examined society and civil government'.[60] Locke used it to evaluate political contexts - that is, decision-making under conditions of sovereign order - to determine, for instance, the limits of legitimate authority. But he also used it to pattern extra-political contexts, in which sovereign order does not pertain. These include the original state of nature, out of which legitimate government is taken to arise, and the account of the reversion back to that original state in circumstances where government ceases to be legitimate.[61] Neither scenario corresponds to a normative vacuum as, in both, rules of natural law provide relatively viable guides for conduct. The substance of these rules may be similar to Hobbes's laws of nature,[62] but their normative quality is quite different. While in the Hobbesian state of nature they bind us

[59] 'Second Treatise', s.14.
[60] John W. Yolton,'Locke on the Law of Nature', The Philosophical Review 67 (1958), pp.477–498, 488.
[61] 'Second Treatise', ss.212–17 & 222.
[62] Hobbes, Leviathan, Chapters 14 & 15.

only in conscience,[63] in the equivalent Lockean context natural law has binding force. The absence of a 'common judge with authority'[64] is not fatal, since it is 'not fear of punishment, but a rational apprehension of right puts us under an obligation'.[65]

The extra-political context that concerns us is international relations, which Locke understands as largely but not entirely dominated by sovereign polities (or states). Since they are universal rules of just conduct, the same natural law rules also apply here: 'all princes and rulers of "independent" governments all through the world are in a state of nature'.[66] Each state finds itself in a similar predicament in relation to other states as the individual does to other individuals in the natural condition. As it does in that condition, natural law provides a functional, if somewhat crude and incomplete, normative code for co-existence between peoples.

The international state of nature can be patterned through the application of the natural capacity to effect binding promises. Locke acknowledges the existence of this category of promissory agreements when discussing the special type of agreement that creates the commonwealth. There are, he says, 'other promises and compacts, men may make one with another, and yet still be in the state of nature … For truth and keeping of faith belongs to men as men, and not as members of society.'[67] People may make promises and contracts with one another,

[63] As he writes in Leviathan, Chapter 15: 'The Lawes of Nature oblige *in foro interno*; that is to say, they bind to a desire they should take place: but *in foro externo*, that is to the putting them in act, not alwayes.' He also says that in the state of nature 'the notions of right and wrong, justice and injustice, have there no place'.

[64] 'Second Treatise', s.19.

[65] Locke, Essays, p. i85. Though as A.S. Tuckness points out, 'if the law of reason is to be effectual it must have punishment attached to it; God can provide these while reason cannot': 'The Coherence of a Mind: John Locke and the Law of Nature', Journal of the History of Philosophy 37 (1999), pp.73–90, 75.

[66] 'Second Treatise', s.14.

[67] 'Second Treatise', s.14.

transfer rights and undertake obligations, without leaving the state of nature. They can build the duties they owe one another through binding expressions of their moral agency. It follows that, in the international state of nature, polities can make promises and compacts with each other and that the promises contained within that compact are binding on them. Such promise-making generates real rights, i.e. Hohfeldian claim-rights,[68] with the corresponding duties of others to refrain from interfering with their exercise.

But it is one thing to say that compact-making practices are possible in the international arena, another that they will be successful. Ultimately the depth of trust engendered through this promise-making structure depends, as in all Lockean state of nature scenarios, on the good faith and consistency of the agents who make use of it.[69] Locke's theory gives us reasons for cautious optimism when considering the performance of federative compacts and alliances between polities. He understood, as Patrick Coby has observed, 'that nations are capable of greater restraint and greater justice than are individuals when left to their own resources in the state of nature' since 'the individual lacks the barest margin of security' where the state generally does not.[70] Human life, moreover, Locke saw in purposive terms, always in movement, striving towards a certain state of being.

Purposefulness is an important dynamic element within Locke's state of nature.[71] He had argued in the *Essays on the Law of Nature* that we can, from our knowledge of the created

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[68] A. John Simmons, 'Locke's State of Nature', Political Theory 17 (1989), pp.449-470, 464.

[69] See also A. Sidney, Discourses Concerning Government, ed. T.G. West (Indianapolis, 1996), Ch.II, s.20, 295: 'Human societies are maintained by mutual contracts, which are of no value if they are not observ'd'.

[70] P. Coby, 'The Law of Nature in Locke's *Second Treatise*: Is Locke a Hobbesian?' The Review of Politics, 3 (1987), pp.3-28, 20.

[71] See e.g. Tuckness, 'The Coherence of a Mind', 83.

world, observe that it is purposeful: 'since on the evidence of the senses it must be concluded that there is some maker of all these things whom it is necessary to recognise as not only powerful but also wise, it follows from this that he has not created this world for nothing and without purpose.'[72] In the *Second Treatise*, this sense of purpose grounds the injunction that, the state of nature being a state of liberty not of licence, 'no one ought to harm another in his life, health, liberty or possessions'.[73] It follows, as Knud Haaskonssen argues, that we must understand our moral powers, our rights 'in ourselves and in the world around us, as well as the further rights which we create by contractual means', as being geared to the preservation of humanity in others as well as ourselves.[74]

There is overwhelming textual support for the idea that the Lockean international state of nature is capable of supporting an environment in which binding compacts can be effected between polities through the exercise of their federative capacities. Especially if we combine these last two points - that is, the relative security of the international state of nature and the duty not to harm the life, liberty or property of others - it is easy to imagine the federative terrain so engendered might produce more complex forms of inter-polity lawmaking. One way to read the story of the movement away from the natural to the civil condition is to understand it as a story about the progress of law.[75] That story has two threads - first, a narrative about the development of how we came to rely on law in the first place and, second, an account of the genesis of the normative and cultural or attitudinal structures necessary to

[72] Locke, Essays, 157.

[73] Locke, 'Second Treatise', s.6.

[74] K. Haakonssen, Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment (Cambridge, 1996), p.55.

[75] Jeremy Waldron, though not talking directly about the rule of law, highlights the historical or narrative aspects of the *Second Treatise* in 'John Locke: Social Contract Versus Political Anthropology', The Review of Politics 51 (1989), pp.3-28.

sustain it. Here again law's creative potential is to the fore. Contrasting this more substantive and dynamic view of law with Hobbes's formal conception, Locke argued that the law ought not to be seen as a hedge or fence, as Hobbes had urged, since its ultimate end is not to restrain "but *to preserve and enlarge Freedom*".[76]

Applying this general reading to the federative, it would seem that the Lockean common-wealth falls under a duty, deriving from the law of nature, to do what it can to foster the developing framework of legality both within and outside its borders, and in respect of both its 'internal' and 'external' constitutional capacities. This interpretation effects a shift in the core meaning of the federative. What might seem on a cursory reading to be a prudential capacity operating in a legally inchoate space is revealed, once fully integrated within the theory, as that bit of domestic constitutional architecture through which the state's rights and duties in respect of the law-generating aspects of international law are exercised. Rather like the airlock on a ship, the federative power performs a vital role in connecting the internal legal order of the state with the external legal order of the international realm.

CONSTITUTIONALIZING THE FEDERATIVE

I have offered a reading which, by integrating it with other aspects of Locke's theory, suggests a more substantial juridical element to the federative than tends to be assumed by rival read-ings. The question remains: to what extent, if at all, does the theory specify controls on the

[76] Locke, 'Second Treatise', s.57.

exercise of this federative capacity? Locke accepts that the exercise of the federative is 'of great moment to the commonwealth'. If it remains uncontrolled, the risk is that the operation of the federative opens the back door to the kind of princely reason of state politics that Locke's constitution was designed to keep out.

It might seem, on a cursory reading, that Locke remains largely within the framework established a century earlier by Bodin, codifying existing practice,[77] which assumed that the largely unfettered conduct of foreign affairs was a hallmark of sovereignty, the sovereign state, and the person of the sovereign.[78] The main passage on the federative in Chapter XII, considered in isolation, seems to leave it to the discretion of the executive power. Since its operation cannot meaningfully be circumscribed by antecedent positive laws, Locke says here, the federative 'must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good'.[79] Even if this were all that the text had to say, we would still have to factor in the right of rebellion. But the resulting combination would leave us with an all-or-nothing, do-or-die scenario that replicates medieval constitutionalism, which relied in the absence of genuine constitutional checks on 'the salutary threat of revolution against an oppressive government',[80] and lacks credibility at the level of constitutional design.

[77] J. Bodin, The Six Bookes of a Commonwealthe [1576] trans. R. Knolles, 1606, ed. K. Douglas McRae (Harvard, 1962), Bk I, ch.10, where the right of making peace and war comes high up the list of attributes of sovereignty. Locke advised his students at Oxford to read Bodin: W.H. Greenleaf, Order, Empiricism and Politics: Two Traditions of English Political Thought (Oxford, 1964), p.125.

[78] See F. Oakley, The Watershed of Modern Politics: Law, Virtue, Kingship, and Consent (1300-1650) (Yale, 2006).

[79] Locke, 'Second Treatise', s.147.

[80] C.H. McIlwain, 'Constitutionalism in the Middle Ages' in McIlwain, Constitutionalism: Ancient and Modern (Indianapolis, 2007), 81.

Fortunately that is not all the text has to say. Chapter XIII discusses in more detail the relationship between governmental powers, and contains the following observations:

> When the *Legislative* hath put the *Execution* of the Laws, they make, into other hands, they have a power still to resume it out of those hands, when they find cause, and to punish for any mal-administration against the Laws. The same holds also in regard of the *Federative* Power, that and the Executive being both *Ministerial and subordinate to the Legislative*, which as has been shew'd in a Constituted Commonwealth, is the Supream.[81]

There are a number of points to be made about this passage. The first and most obvious is that it clearly envisages the federative power being subject to constitutional constraint. It gives the Legislative a constitutional power to recall, replace and punish the holder of the federative power if they are unhappy with the way it has been exercised. Legislators do not have to wait for the Executive to assemble them (assuming the constitution gives it that power) in order for this supervisory capacity to be engaged, but can act on their own initiative. As the passage continues, legislators 'may *assemble and exercise their Legislature*, at the times that their original Constitution, or their own Adjournment appoints, or when they please; if neither of these hath appointed any time, or there be no other way prescribed to convoke them.'[82]

This arrangement is consistent with my case for the federative having a substantial juridical component. More importantly, it brings the 'internal' and 'external' dimensions of the Lockean constitution into alignment. True, the account lacks detailed specification.[83] But the passage also contains

[81] Locke, 'Second Treatise', s.153.
[82] Locke, 'Second Treatise', s.153.
[83] Compare, for instance, the republican Henry Neville's contemporaneous proposal for the dispersal of key areas of prerogative authority - or what he calls the 'four great *magnalia* of government' - four separate parliamentary councils, chaired by the king or his representative and with other members serving relatively short non-extendable terms, answerable to parliament for their actions: Plato Redivivus or, A Dialogue concerning Government [1681] in ed. C. Robbins, Two English Republican Tracts (Cambridge, 1969), 158.

an important, if embryonic, statement of general principle, which is that supervision and control of the federative is to operate on the same basis as supervision and control of ordinary executive power. Though distinct, both are ordinary powers. 'Ordinary' in the sense of being quotidian (they must 'always in being' for the commonwealth to function) but also in that they correspond straightforwardly to the normal constitutional principle whereby the executive is the legislative's agent (they are 'ministerial and subordinate to the Legislative'). The presumption is that the arrangements the constitution makes for the supervision and control of executive power should apply with equal force to the federative.

The contrast Locke plays up in Chapter XIII is between these ordinary powers (executive and federative) and the special executive power of prerogative, which is treated towards the end of the chapter as a separate case. Prerogative describes, for Locke, the discretionary power that remains 'in the hands of the Prince' to act to protect the constitution when necessary in situations of 'unforeseen and uncertain Occurrences'.[84] On Locke's reading, developed in Chapter XIV, prerogative is both extraordinary and exceptional: it is a reserve power, used principally in emergencies,[85] which operates outside the normal legal framework.[86] By its nature, prerogative complicates the principal/agent relationship between legislative and executive. Here, the latter acts in its capacity as 'the Prince', exercising sovereign capacities, under conditions of necessity, in its own right. Normal rules governing the authorisation and supervision of public power do not necessarily apply, and it is largely left to the people directly to judge whether or not this power is used wisely.[87]

[84] Locke, 'Second Treatise', s.158.
[85] Locke, 'Second Treatise', s.159: 'For since many accidents may happen, wherein a strict and rigid observance of the Laws may do harm; (as not to pull down an innocent Man's House to stop the Fire, when the next to it is burning) and a Man may come sometimes within reach of the Law, which makes no distinction of Persons, by an action, that may deserve reward and pardon; 'tis fit, the Ruler should have a Power, in many Cases, to mitigate the severity of the Law, and pardon some Offenders'.
[86] Locke, 'Second Treatise', s.160: 'This power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*.' See also s.164.
[87] Locke, 'Second Treatise', s.168.

This pairing of ordinary executive power and the federative on one side, and prerogative on the other is the opposite of what Pasquino and others influenced by Strauss suggest. For them, prerogative and federative are natural bedfellows. The textual evidence is decisively against them. The institutional analysis in Chapter XIII confirms that the federative was not for Locke a reservoir of untamed defensive violence - the foreign relations analogue of the domestic prerogative - but retains the character of a systematic and structured normative power, and ought to be treated as such by the constitution.

CONCLUSION

This paper has focused on the constitutional signification of the state's external capacity, its main source of inspiration being an understudied aspect of Locke's political thought: the analysis of the federative power in Chapter XII of the *Second Treatise*. Locke presents the federative as a distinct constitutional category, separate from the ordinary and special (prerogative) executive powers. In choosing the word 'federative', Locke signals that its central case is the capacity to enter into compacts or treaties with other polities. Retracing the federative's Ciceronian roots reveals the deep social and political significance within the Roman world of the 'script of alliance' represented by the practice of concluding compacts or *foedera* with other peoples. These compacts sought to turn situations of conflict into conditions capable of sustaining *fides* (good faith, trust) and therefore of establishing peaceful co-existence among nations.

Examination of these Roman foundations also reinforced the perception that the operation of the federative is marked by the interplay between strategy and law. Locke acknowledges

the prudential element in the *Second Treatise*, but on one reading seems radically to downplay the juridical dimension. That reading does not fit well with the designation of this power as essentially a compact-making capacity, which implies legal capacity. It also ignores the connection between the federative and other core aspects of the theory, in particular an account of natural law as a moral condition of man that includes the capacity to incur binding obligations. The federative provides exactly the jurisgenerative property necessary to bridge the distance that otherwise subsists between the legal sanctity of one commonwealth and that of another. It draws on the legal and moral resources of commonwealths to create the conditions of peace that ought to subsist between nations, a move seemingly foreclosed by Hobbes but consonant with Locke's overarching theory.

All this is consistent with the broader story Locke tells about the move from the natural to the civil condition being one about the progress of law, including the norms and institutions through which it functions and the cultural and attitudinal environment necessary to sustain them. The federative can be seen against that background not only as the feature of the domestic constitution through which the state's external agency is exercised, but also the point through which the state's duties in respect of its external law-making activities are received and actualised.

My reading is reinforced by Chapter XIII, in which Locke investigates how legislative, executive, federative and prerogative powers might be integrated as a matter of constitutional design. In that discussion, Locke clearly yokes federative together with ordinary executive power. Both are 'ministerial' powers and subject as such to the same supervisory principles. Just as clearly, he separates those two 'ministerial' powers from the 'princely' prerogative,

which he sees as an extraordinary and exceptional power which operates according to its own distinct political logic. This chapter speaks decisively against the argument that Locke saw the federative as a foreign relations analogue to the domestic prerogative, giving the Prince with a reservoir of unchecked discretionary authority, and strengthens a reading of federative as a normative and constitutional power, to be institutionalised accordingly.

While the paper has focused largely on Locke, its motivating concerns are not antiquarian. We like to think that we inhabit normative and institutional structures that are broadly Lockean, where sovereignty lies with the people and where political institutions, limited by law, exist principally to supply a framework of general laws under which persons can live effectively. But we also operate in a world marked by unprecedented regimes of transnational and international law, which raise with great urgency conceptual and practical questions about the relationship between the inside and the outside of those constitutional spaces.

An idea of the federative as a distinct constitutional category, capable of mediating between the national and the international, may be useful in exploring those questions. Many writers on law and politics today tend to assume the validity of what is in fact a constitutionally dissonant position. They recognise the juridical nature of the state and the need to subject state power to constitutional protection while simultaneously assuming that the external capacities of the state are essentially strategic in nature and so left to the prerogative of the prime minister or president, placing the power in effect in constitutional limbo.[88]

[88] See e.g. E.A. Posner and A. Vermeule, The Executive Unbound: After the Madisonian Republic (New York, 2011).

The reading of the federative power presented here opens up a different way forward, one capable of connecting domestic law and international law as distinct but overlapping, and ideally mutually reinforcing, bodies of legal authority. It shares with Locke's theory the sense of a direction of travel, towards further cooperation externally and stable legal orders internally. In a significant late foray into the field, Ronald Dworkin identified two structuring principles of international legal order: the duty on states to mitigate the failures and risks of the sovereign-state system; and the principle of salience, requiring a state to subscribe to a practice agreed upon by a significant number of states where to do so would improve the legitimacy of that state and the whole international order. To look at international law in terms of these principles yields a useful interpretative strategy, Dworkin argued. 'We should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system.'[89] What the federative may provide, and which Dworkin's analysis lacks, is a basic conceptual unit capable of bringing the national and international into juridical alignment.

[89] Ronald Dworkin, "A New Philosophy of International Law," *Philosophy & Public Affairs* 41 (2013) 2, 22.