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Abstract: This paper focuses on Locke's analysis of the federative power, presented as a distinct juridical category separate from both the ordinary and special (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 between strategy (prudence) and law (norm). While Locke acknowledges the strategic element, he downplays the juridical dimension. This move is unconvincing. It does not fit well with Locke's designation of treaty-making as the power's central feature, nor with the comparatively thick account of natural law that otherwise characterises his political thought. The federative should be seen as the part of the domestic constitution through which the state's external agency is exercised and the location of the state's duties in respect of the jurisgenerative activities in the international sphere. As such, the way Locke buries the legal aspect of federative – through the pairing of federative and executive – is less obvious than he thought. Locke's analysis fails to integrate the federative within a broader constitutional framework, leaving it almost entirely to the discretion of the Prince. I turn to Henry Neville for a contemporary attempt to reconcile the prudential and rule of law elements of the federative suitable for English conditions.

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I. INTRODUCTION

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.¹ These accounts are unsatisfactory for the simple reason that very little within Locke’s theoretical corpus addresses that theme,² at least outside the domain of colonial appropriation.³ 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 organise themselves collectively does not really arise.

But precisely because the inner life of the state is its focus, the theory should be able to indicate how Locke imagined that the state ought to be constructed in respect of its external acts – war and peace, diplomacy and interaction with other states, and so on. It is in this sphere of activity where the state appears most obviously as an agent. An explanation 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. That juridical component implicates a number of core Lockean themes, including the relationship between the state and violence (or disorder). 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 a unique political entity.

It would be idle to claim that answers to all these questions can be conjured out of Locke’s brief account of the federative. This paper argues, however, that Locke did make some important advances, above all in the identification of a distinctive juridical category, one that engages state capacity ‘outside’ the state. In so doing Locke recognised, if only up to a point, that the institutional and normative framework that had hitherto structured this domain of state action might need to

¹ See Richard H. Cox, *Locke on War and Peace* (Oxford: Oxford University Press, 1960); Leo Strauss, *Natural Right and History* (Chicago: Chicago University Press, 1953), 202-51; and more recently David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013), chapter 5.

² Arguably the most perceptive work on Locke’s political theory speaks about ‘Locke’s incoherent and carelessly written work’ on this subject: John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969), 164.

³ See esp. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, ed. Peter Laslett, 1988), Chs V ‘Of Property’ & XVI ‘Of Conquest’. On the colonial element within Locke’s thought see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), ch. 3; Barbara Arneil, ‘Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism’ (1994) 5 *Journal of the History of Ideas* 591.

be revised to fit the demands of his theory of the constitution. Locke ultimately failed to pursue these insights with any real conviction, being too ready to elide the federative with other executive powers, including the prerogative. But a theory of the liberal constitution, with real ambitions to preserve liberty by subjecting discretionary and self-interested politics to legal patterning and institutional control,⁴ must take seriously the threat of equally problematic *raison d'état* politicking in respect of the state's external actions. Examining the work of his contemporary Henry Neville is salutary in this regard, showing that it is not anachronistic to expect more from Locke on this aspect of constitutional design.

II. LOCKE'S CONSTITUTIONALIST PROJECT

We begin by reminding ourselves about the main contours of Locke's constitutional theory, which 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, he says, 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.'⁵ The use of force – for instance, by a conqueror – gives no good title to rule.⁶ 'Conquest is as far from setting up any Government, as demolishing an House is from building a new one in the place.'⁷ And while it is true that paternal power is a kind of natural government, it does 'not at all extend[] itself to the Ends, and Jurisdictions of that which is Political.'⁸ Authority rests instead on foundations that are predominantly consensual and juridical.⁹ It is voluntary agreement¹⁰ that grounds political authority: 'no one can be put out of this Estate [of Nature], and subjected to the Political Power of another, without his own Consent.'¹¹ While consent may be inferred in some instances from silence,¹² the

⁴ See e.g. *Second Treatise*, s.137: where both the central target of the theory and its cure are identified as 'Absolute Arbitrary Power, or Governing without settled standing Laws'.

⁵ *First Treatise*, s.81.

⁶ The exception being

⁷ *Second Treatise*, s.175.

⁸ *Second Treatise*, s.170.

⁹ And – it should be said – ultimately religious. *Second Treatise*, s.1 refers to God's donation to Adam as 'the Fountain of all Power'. See also John Locke, *Essays on the Law of Nature* in W. von Leyden (ed.), *John Locke: Essays on the Law Of Nature and Associated Writings* (Oxford: Oxford University Press, 1988), VI, 183: 'ultimately, all obligation leads back to God'. See further Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2008).

¹⁰ *Second Treatise*, s.173: 'Voluntary agreement gives ... Political Power to Governours for the Benefit of their Subjects, to secure them in the Possession and Use of their Properties.'

¹¹ *Second Treatise*, s.95.

¹² *Second Treatise*, s.119. But see also s.122: 'submitting to the Laws of any Country, living quietly and enjoying the Priviledges and Protection under them, makes not a Man a Member of that Society ... Nothing can make any Man so, but his actually entering into it by positive Engagement, and express Promise and Compact.' The difference is land-holding. As Locke points out in s.120, when the person 'by Inheritance, Purchase, Permission, or otherways enjoys any part of the Land, so annext to it, and under the Government of that Commonwealth, must take it with the Condition it is under; that is, of submitting to the Government of the Commonwealth, under whose Jurisdiction it is, as far forth, as any Subject of it.'

paradigm of consent is active agreement, understood in terms of the legal form that is contract – the ideal is of agents ‘actually entering into it by positive Engagement, and express Promise and Compact’.¹³

Political Power then I take to be a Right of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good.¹⁴

This emphasis on the artificial nature of political authority has much in common with other early-modern state theorists, including Hobbes. But whereas Hobbes was decisive in his articulation of the state as a purely artificial person,¹⁵ drawing a stark contrast between natural and civil conditions, Locke’s position is more tempered and gradualist. Political authority is more artificial than natural, certainly. But the former ought to be seen both as a sedimentary layer that builds on more natural structures of authority and in so doing transforms them in key respects. He grants more normative content to the natural condition than Hobbes was prepared to – his view of natural law is much ‘thicker’ – and also allows for more of that normative quality to persist once we transition into the civil condition, a move made to remedy structural deficiencies in the natural condition relating to security and the stability of property. This theme – of natural law’s relative thickness and its ongoing salience – becomes important later in our discussion. But the point to emphasise now is that the theory being largely if not exclusively juridical corresponds in practice to a system of ‘establish’d, settled, known law’¹⁶ that contains first-order rules that pattern relations among legal agents and second-order rules structuring and limiting the jurisdictional capacities of office holders.¹⁷ The whole edifice rests on the principle that political power is held on trust (another legal device) for a people who retain ultimate sovereignty.¹⁸ Political power is subject to constitutional limits that condition even the supreme legislative.¹⁹ These limits are ultimately enforceable via the exercise of the right of resistance.

Locke’s commonwealth is not just a juridical framework. 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’ (italics added). This more active

¹³ *Second Treatise*, s.122. See also s.14.

¹⁴ *Second Treatise*, s.3.

¹⁵ See Quentin Skinner, ‘Hobbes and the Purely Artificial Person of the State’ (1999) 7 *Journal of Political Philosophy* 1.

¹⁶ *Second Treatise*, 124.

¹⁷ *Second Treatise*, 137.

¹⁸ *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.’

¹⁹ *Second Treatise*, 131 & 135.

dimension of state action relates to a bottom-up account of how political power is generated and how it is lost – the idea being that the commonwealth is ultimately an exercise of *sustained* collective will. This juxtaposition of force and law remains an important theme 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 really ‘unjust and unlawful *Force*’ that can justly be opposed by force.²⁰ Only this substantive conception of legality is sufficient to secure against arbitrary authority, the absence of which is the key difference between freedom and servitude.²¹ To rely only on a formal principle of legality – as Locke accuses Hobbes of doing – would be as though in escaping the natural condition men had taken care ‘to avoid what Mischiefs may be done them by Pole-Cats, or Foxes’ but ‘are content, nay think it Safety, to be devoured by Lions.’²² The law ought not to be seen as a hedge or fence, as Hobbes urged,²³ since its ultimate end is not to restrain ‘but *to preserve and enlarge Freedom*’.²⁴

III. THE FEDERATIVE POWER

The federative power appears in Chapter XII of the *Second Treatise*. The chapter continues a discussion of the institutional arrangements of the commonwealth, which itself may take different basic forms. Locke has already told us that the ‘first and fundamental positive Law’ is to establish legislative power as the ‘supream power of the Commonwealth’.²⁵ This equates to a superior capacity to pass general laws.²⁶ Legislative power is defined as ‘that which has a right *to direct* how *the Force of the Commonwealth* shall be employ’d for preserving the Community and the Members of it.’²⁷ That power is superior only among constituted powers, for as we have seen it is a fundamental feature of the theory that the people retain ultimate sovereignty.²⁸

Attention turns, briefly, to ordinary executive power. (Special executive power, discussed under ‘prerogative’, gets a chapter to itself.²⁹) The executive power exists principally to ensure that the laws are given constant and lasting force, closing the gap between normative order and social reality. While its key conceptual qualities are constancy and subordination, Locke’s more practical proposals give the

²⁰ *Second Treatise*, 204.

²¹ *Second Treatise*, 17.

²² *Second Treatise*, s.93.

²³ *Second Treatise*, ss 57 & 93. See Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, ed. Richard Tuck, 1996), 240.

²⁴ *Second Treatise*, s.57.

²⁵ *Second Treatise*, s.134.

²⁶ *Second Treatise*, s.136.

²⁷ *Second Treatise*, s.143.

²⁸ *Second Treatise*, s.149.

²⁹ *Second Treatise*, Chapter XIV, *Of Prerogative*. I have discussed that power in previous work: see Thomas Poole, ‘Constitutional Exceptionalism and the Common Law’ (2009) 7 *International Journal of Constitutional Law* 247.

executive considerably more independent scope than this initial impression might convey,³⁰ especially if we factor in prerogative.

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, he says, ‘may be called the Federative, if any one pleases’.³¹ 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, Locke asserts, as the individual was to other individuals within the state of nature.³²

Though distinct, Locke claims that the executive and federative are 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’.³³ Partly for that reason, the two powers are ‘always almost united’ – they form separate jurisdictions within the same office (the executive). Locke gives two overlapping reasons to support this arrangement. The federative (i) ‘is much less capable to be directed by antecedent, standing, positive, Laws, than the Executive’ and so (ii) it must be ‘left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.’³⁴

IV. LAW AND THE FEDERATIVE

Locke’s identification of the federative as a formally distinct capacity marks a conceptual advance. It provides a basis for thinking about the operative conditions of state power in the ‘external’ dimension of its range of action. In so doing it enables us to explore questions of institutional design, and the possibility of oversight and control, when this aspect of state power is engaged. While Locke himself made some steps at the level of descriptive analysis, his mistakes on this score prefigure his failure to attend to the normative side of the federative.

Let us turn first to the positives. I think Locke is right to isolate a special capacity within the commonwealth to act to the best of its ability in its interactions with other political communities to secure the commonwealth’s interests.³⁵ We can

³⁰ 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 the Legislative – 154-156 – important and controversial powers in Locke’s time.

³¹ *Second Treatise*, s.146.

³² *Second Treatise*, s.145.

³³ *Second Treatise*, s.147.

³⁴ *Second Treatise*, s.147.

³⁵ On the theme of interest in Locke’s political thought see Peter N. Miller, *Defining the Common Good: Empire, Religion and Philosophy in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1994), 77-80.

call this the external capacity of the state. But we should remember that most of the relevant action really occurs within the commonwealth's own institutions and pathways. This is so even if some of the commonwealth's agents – e.g. diplomats, soldiers – are operating in territory that is the commonwealth does not control. It is the commonwealth that is the agent that decides whether and how to act, and the acts of those extra-territorial agents are ascribed to it. What is distinctive about this form of state power is not so much where it is actioned, then, but that the 'external' exercise of state power seems necessarily to involve a modification of ordinary political logic by virtue of certain factors that condition its exercise. The objective is different here – 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. Federative powers, as Locke puts it, are for 'the management of the *security and interest of the publick without*'. Agency is also different here, the primary agents being a plurality of formally equal commonwealths over which no one of them has superior jurisdiction.

Locke does more than specify a distinctive space in which the external capacity of the state is to take effect. He also identifies it using the term that has a particular meaning and resonance. He might have defined this space in terms of the primordial question of war. Hobbes had done something of this sort in *Leviathan* where he wrote that 'in all times, Kings and Persons of Sovereigne 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.'³⁶ But Locke chooses a different route. The central case of the federative is not for him the decision to declare war but the capacity to make binding agreements. The term 'federative' derives from the Latin *foedus/foedera* meaning agreement/s or pact/s. By selecting it as a 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.

An important consequence of demarcating this aspect of the commonwealth as a *federative* power is that Locke in so doing not only identifies a property, or set of properties, that are a necessary feature of the commonwealth and its domestic constitution. He also isolates certain basic features of what we might call the *federative terrain* – that is, the international (or less anachronistically, interstate) political space produced by the meeting of and interaction between a plurality of commonwealths exercising their respective federative capacities.

The primary feature of the federative terrain on Locke's model is the possibility of effecting bilateral (and by extension multilateral) agreements between states. That feature relies on the proposition that such agreements can at least plausibly result in

³⁶ *Leviathan*, 90. Among twentieth-century thinkers, Carl Schmitt went on to develop this line of inquiry, arguing that the friend/enemy distinction was not only at the heart of international relations but provided the conceptual core of politics *tout court*. See his *The Concept of the Political* (Chicago: University of Chicago Press, trans. George Schwab, 1996).

action consistent with such agreements among those commonwealths who are party to them. This proposition in turn presupposes two basic conditions – what we might call statecraft (strategy) and legal agency (law). Locke explicitly acknowledges the first of these elements. The federative, he says, corresponds to a domain of strategic action characterised by the interplay of ‘the variation of designs of interests’ of states.³⁷ This situation requires an ability to react to a fluid situation, and it follows 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.’³⁸

By contrast, Locke seems reluctant to give much legal colour to the federative terrain. Or so it would appear. We have already encountered his claim that each commonwealth finds itself in a similar predicament in relation to other states as the individual does to other individuals in the state of nature. But we also saw how Locke’s natural condition is not the normative desert outlined in *Leviathan*.³⁹ Lockean natural law is considerably thicker than in Hobbes. It has more predictable and meaningful effects on the practical reason of agents and thus on patterns of social interaction. It certainly recognises a capacity to make binding promises. If individuals make promises to one another in the state of nature, they must consider themselves bound by them, Locke writes, ‘for truth and keeping of faith belong to men as men, and not as members of society.’⁴⁰ He talks elsewhere about men in the natural condition building ‘the Duties they owe one another’⁴¹ through binding expressions of their moral agency. By analogy, the long-term operation of these natural law capacities ought to correspond within the international state of nature – where things are simpler than in the individual state of nature – to an environment capable of sustaining a relatively stable (though imperfect) order produced and populated by state agents who can effectively bind themselves to one another through the exchange of promises: ‘But though this be a *State of Liberty*, yet it is *not a State of Licence*’.⁴²

Let us assume, then, that the international state of nature forms a basic normative structure capable of sustaining an environment in which binding agreements (treaties) can be effected between agents (states). Even these spare normative foundations allow for the possibility of more complex forms of interstate 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. That story itself has two threads - first, a narrative about the development of how we came to

³⁷ *Second Treatise*, s.147.

³⁸ *ibid.*

³⁹ Which itself may not be as normatively sparse as some tend to imagine. See e.g. David Dyzenhaus, ‘Hobbes on the International Rule of Law’ (2014) 28 *Ethics & International Affairs* 53.

⁴⁰ 14. Compare *Leviathan*

⁴¹ 5. See also Dunn, *Political Theory of John Locke*, 106-7.

⁴² 6.

rely on law in the first place and, second, an account of the genesis of the normative and attitudinal structures necessary to sustain it.

Applying this reading to the federative, we can suggest that the state falls under a duty to do what it can to foster the developing framework of legality both within and outside its borders.⁴³ This reading effects a shift in the core meaning of the federative. What appears at first sight to be a purely strategic capacity that operates within a legally inchoate sphere, the federative properly understood becomes that bit of domestic constitutional architecture through which the state's rights and duties in respect of the jurisgenerative business of international (or interstate) law are exercised and which performs a vital role in connecting the internal legal order of the state with the external legal order of the international realm.

V. INSTITUTIONS AND THE FEDERATIVE

We can summarise our findings so far. Locke isolates a property of the state and its constitutional order relating to external matters. He identifies the central case of that property as lying in the capacity to make agreements or pacts with other constitutional orders ('federative'). In so doing, he tells us not only about an important part of the constitution but also indicates something about how the corresponding properties of multiple constitutional orders are likely to interact (the 'federative terrain'). What a state does federatively is likely to be mirrored in the federative practices of other states. The particular environment in which the federative operates – in which a plurality of states operate, none of them sovereign – makes the federative terrain a mix of law and strategy. It has these basic features. (a) The state has a capacity to identify its own best interest and act to secure it in the fluid and plural situation of international (or interstate) order. (b) Such action is exemplified by (but not limited to) the operation of the state's treaty-making power. (c) The ability to engage that treaty-making power presupposes a legal capacity on the part of the state, which allows it credibly to hold itself out as an agent capable of making binding promises. (d) The capacity to make treaties also presupposes a situation in which promises can be assumed often enough to stick. There is a general normative commitment among state actors that agreements among them are taken to be binding.

One question that follows is that if Locke's analysis of the federative can be unpacked in this way why do we not know more about it? Part of the answer may lie in Locke's concern to minimise the implications of his original insight. He did so by a rather hurried elision between two of the institutions of the commonwealth that he had just managed to separate – the federative and the executive. This move obscured his conceptual innovation, but it might also be said to comprise his wider

⁴³ Not too dissimilar in other words to what Ronald Dworkin identified as the international obligations of states: 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2.

constitutionalist agenda. To explain why, we need to return to what Locke said about the relationship between federative and executive.

The close institutional pairing of federative and executive looks natural at first sight. Certainly it would have appeared so for Locke's contemporaries, who would have seen both powers as expressions of sovereign capacity bundled up in the figure of the Prince.⁴⁴ (Though Locke himself was among an increasing number who objected to the way in which at least some princes exercised those powers.⁴⁵) Despite his general project of exposing the state's component parts to the glare of reason in order the better to reconsider them against the requirements of the liberal constitution, Locke could not or would not escape convention in this part of the *Two Treatises*. But the more you consider the executive/federative pairing against Locke's wider theoretical endeavour the less convincing it appears.

We saw earlier how Locke defines the executive as a subordinate power that comes under the legislative power in the constitution. But the federative is not an inferior jurisdiction in anything like the same way, as it clearly engages sovereign capacities. It follows that a more theoretically consistent pairing would be that between federative and *legislative* since both are superior jurisdictions that engage core aspects of the commonwealth's collective power in a way that ordinary executive power does not. Despite recognising that 'in the well or ill management of [the federative] be of great moment to the commonwealth',⁴⁶ Locke seems oblivious to the fact that the assertion that an inferior institution ought to exercise superior powers runs counter to logic of his own constitutional theory.

But this does not exhaust the resources of Locke's account. He might accept the lack of perfect fit between the federative and the executive – he told us, after all, that the two capacities were distinct – and fall back on the functional or prudential reasons he gave for that pairing. So, what are those reasons? First, the terrain the federative occupies is unregulated by (positive) law; and, second, it ought (as such) to be left to the wisdom and prudence of the executive. He might choose to push the point I challenged earlier – that the federative terrain is essentially extra-legal space. If that is so, and federative is all about strategy and not law, then its real twin is arguably not the ordinary executive power but the prerogative, which is still in the hands of the Prince (or republican equivalent). Locke defines prerogative precisely as an extra-legal power: 'This Power to act according to discretion, for the publick good, without the prescription of Law, and sometimes even against it'.⁴⁷ And as

⁴⁴ Jean Bodin, *The Six Bookes of a Commonwealthe* [1576] trans. Richard Knolles, 1606 (Cambridge, MA: Harvard University Press, ed. Kenneth Douglas McRae, 1962), Bk I, ch.10. Locke advised his students at Oxford to read Bodin: W.H. Greenleaf, *Order, Empiricism and Politics: Two Traditions of English Political Thought* (Oxford: Oxford University Press, 1964), 125.

⁴⁵ See Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton: Princeton University Press, 1986).

⁴⁶ 147.

⁴⁷ 160: 'This Power to act according to discretion, for the publick good, without the prescription of Law, and sometimes even against it, *is* that which is called *Prerogative*.'

with the federative, the exercise of prerogative is ascribed to the judgement (or ‘wisdom and prudence’) of its bearer.

But this alternative pairing is also problematic. Locke is clear that the prerogative is a reserve power – its central case is the emergency⁴⁸ – whose assertion leads to fundamental and often freighted questions of authority and trust. ‘In the exercise of prerogative, at every point, sovereign and individual confront each other directly.’⁴⁹ And even though Locke is prepared to accept prerogative as an essential feature of government, he also sees that it is dangerous. The idea of a normal ‘standing’ Lockean prerogative is oxymoronic. Its exercise is interstitial – it presupposes a working framework of positive laws – otherwise it is simply a form of arbitrary rule (and therefore tyranny). To equate the federative with prerogative, then, would be to give the former category something of the character of a permanent state of emergency, which the analysis of the federative power seemed at pains to deny.

I said earlier that I prefer an interpretation that describes the federative power as a mix of strategy and law because it fits better with the rest of Locke’s theory. But in one sense it does not matter. Either way – whether we think that the federative terrain operates within a normative environment that has at least the capacity for law or if we see it as only about strategy – we are left with a constitutional lacuna. Locke accepts that the exercise of the federative is ‘of great moment to the commonwealth’. But the theory fails to identify institutional controls. The federative must be ‘left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good’. But if this is all there is, there is a real risk that it effectively opens the back door to a princely reason of state style of politics on which Lockean constitutionalism had closed the front door. There is always the option of exercising the right of rebellion, or threatening to do so. But this is to leave us with an all-or-nothing, do-or-die scenario that lacks sophistication at the level of constitutional design.⁵⁰

If this seems unfair to Locke, or the criticism anachronistic, let us turn to another political writer of the time who was not only conscious of the dangers of reason of state politicking but tried to design the constitution in order to counter them. A number of republican writers – who, as opponents of Stuart authoritarianism, were Locke’s fellow travellers – had given these matters serious attention since the 1640s.⁵¹ But I focus on a text called *Plato Redivivus* by Henry Neville, a colleague and disciple of the greatest of these republican writers, James

⁴⁸ 159: ‘For since many accidents may happen, wherein a strict and rigid observation 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) ... ’tis fit, the Ruler should have a Power, in many Cases, to mitigate the severity of the Law’.

⁴⁹ Dunn, *Political Thought of John Locke*, 151.

⁵⁰ This is a general flaw in Locke’s constitutional design. See Dunn, *Political Theory of John Locke*, 52: the ‘only effective sanction offered by Locke against the systematic abuse of executive power by the crown is the residual threat of revolution’.

⁵¹ Poole, *Reason of State*, chapter 3. So had the Levellers in the 1640s: see e.g. John Lilburne, William Walwyn, Thomas Price and Richard Overton, *An Agreement of the Free People of England Tendered as a Peace-Offering to this Distressed Nation* in Andrew Sharp (ed.), *The English Levellers* (Cambridge: Cambridge University Press, 1998).

Harrington. The work, a dialogue on government written around 1681, shared many of Locke's preoccupations and also the belief that the solution to the 'craziness of our polity'⁵² lay in government in the public interest and the rule of law. (There is a chance that Locke was the inspiration for the 'Doctor', one of three characters in the dialogue. Locke was a physician associated with the Whig leader, the Earl of Shaftesbury, and shared many of the Doctor's politics, especially on the exclusion of James as heir to the throne.⁵³) But Neville is often bolder on matters of constitutional reform, calling on Parliament to effect a fairly radical, if not quite root and branch, reworking of the existing constitution.⁵⁴

Unlike some of his republican predecessors, Neville accepts a continued political role for the king as central executive authority (perhaps as a second-best solution). The most fascinating element of his constitutional reform programme concerns the royal prerogative, which Locke's theory leaves largely untouched. Neville's alter ego in the dialogue resists the proposal to abolish the prerogative altogether. Prerogatives are necessary to government, he says, and require prudent ad hoc handling. There are shades of Locke here without question. But Neville then considers how such powers, necessary though they are, might nonetheless be brought more firmly within the constitutional fold. He does not replicate Locke's distinction between ordinary executive, federative and prerogative, but he does identify key areas of prerogative authority, which he separates out as the 'four great *magnalia* of government' – foreign affairs, control of the armed forces, appointment of officials, and fiscal powers. Previously at the discretion of the king, these powers were now to be exercised by four separate parliamentary councils, chaired by the king or his representative, and answerable to Parliament for their actions.⁵⁵ Save for trade and industry and colonial affairs – significant omissions, as it turned out given

⁵² Henry Neville, *Plato Redivivus or, A Dialogue concerning Government* [1681] in Caroline Robbins (ed.), *Two English Republican Tracts* (Cambridge: Cambridge University Press, 1969), 158.

⁵³ Gaby Mahlberg, *Henry Neville and English Republican Culture in the Seventeenth Century* (Manchester: Manchester University Press, 2009), 165.

⁵⁴ Other proposals included radical reform of the House of Lords – in a system where peerages would now be granted by Parliament not the king – and annual parliaments. A substantial difference between Neville and Locke is that the former, as a student of Harrington, was concerned to the point of obsession with property ownership and what we might today call large disparities of wealth.

⁵⁵ Although the details of Neville's scheme are novel, there were two sources of inspiration. First, the (single) Council of State, on which Neville sat for a year from November 1651, which directed domestic and foreign policy under the Rump Parliament from 1649-53. This may well itself have been a response to the New Model Army's Heads of the Proposals drawn up by the army in 1647 and submitted to Charles I, independently of Parliament as a basis for a constitutional settlement after the King's defeat and in which Neville had a hand. Second, the monarchical element of the mixed constitution elaborated in Harrington's *Oceana* appeared only in the 'executive function of "magistracy"', lying in four councils elected by the legislative, which would deal with matters of state, of war, of religion, and of trade respectively. See James Harrington, *The Commonwealth of Oceana* (Cambridge: Cambridge University Press, ed. J.G.A. Pocock, 1992); Blair Worden, 'James Harrington and "The Commonwealth of Oceana", 1656' in David Wootton (ed.), *Republicanism, Liberty and Commercial Society, 1649-1776* (Stanford: Stanford University Press, 1994). There is a chance that Neville collaborated with Harrington in writing *Oceana*. Hobbes thought so. The diarist John Aubrey reported Hobbes as suspecting Neville 'had a finger in that pye': *Brief Lives* (Harmondsworth: Penguin, ed. Oliver Lawson Dick, 3rd ed., 1958), 124.

England's subsequent history⁵⁶ – which the king would continue to exercise through his own privy council, the constitution would recognise no other prerogative – or 'state-affairs' – powers exercisable by the king.⁵⁷ Members of these parliamentary councils serve relatively short non-extendable terms and Neville also suggests a range of controls aimed at preventing both the intimidation and the co-option of council members by the king.

We have no idea whether this set of proposals might have worked. But as an exercise of constitutional design it amounts to a sustained attempt to take the distinctive properties of what Locke called the prerogative and the federative seriously. It accepts the premise that these powers contain a large and irreducible strategic component and that their operation is best served by a small body capable of acting speedily and if need be under conditions of secrecy. As such, it represents what Neville's intellectual biographer calls 'an attack on the royal prerogative in general'.⁵⁸ But it nonetheless attempts to devise a solution that fits the conditions of England's parliamentary constitution. At the heart of this process is the institutionalisation and constitutionalisation of prerogative, with the relevant powers being brought within the parliamentary context and made subject to parliamentary oversight and approval. In subordinating these important executive functions to the constitutionally superior agent – the legislature – Neville seeks to ensure a solution consistent with the logic of modern liberal constitutionalism as developed under local conditions. This solution gains added political protection through the application of familiar republican principles of rotation and fragmentation of power – and it desacralizes the king by making him first among equals within the various cabinets. It also enhances the rule of law not just in its overall ambition of subjecting power to legal (parliamentary) control, but also more specifically by denying the existence of any reserve discretionary power outside the law.

VI. CONCLUSION

This paper has focused on a relatively understudied aspect of Locke's political thought – his analysis of the federative power in Chapter XII of the *Second Treatise*. Locke presents the federative as a distinct juridical category, separate from the ordinary and special (prerogative) powers of the executive in that it relates to the 'external' capacities of the state. In choosing the word 'federative', Locke suggests that the primary feature of this category is the power to effect agreements (treaties) with other states. In doing so, he indicates something not only about this aspect of the state's constitutional powers but also something about how the corresponding

⁵⁶ Even at the time, these were already matters of major constitutional (as well as commercial) concern: see e.g. *East India Company v Sandys* (1683) and the discussion in Poole, *Reason of State*, chapter 5.

⁵⁷ *Plato Redivivus*, 185-90.

⁵⁸ Mahlberg, *Henry Neville and English Republican Culture in the Seventeenth Century*, 181.

properties of multiple constitutional orders are likely to interact (what I called the ‘federative terrain’).

The operation of the federative – and thus of the federative terrain – is marked by the interplay between strategy (prudence) and law (norm). But while Locke acknowledges the strategic element, he downplays the juridical dimension. But this apparent lack of legal colour to the federative is unconvincing. It does not fit well with the designation of this power as centrally involving a treaty-making capacity, which seems to implicate some legal capacity on the part of those who exercise it. It does not fit either with other core aspects of the theory, notably a comparatively thick account of natural law that includes the capacity to generate binding normative obligations.

We can push the point further. We can conceive of the broader story that Locke’s theory tells – from the natural to the civil condition – as one about the progress of law, both the normative mechanisms and institutions through which it functions and the attitudes requires to sustain them. Against that background, the federative can be seen not only as the feature of the domestic constitution through which the state’s external agency is exercised but also the location of the state’s duties in respect of the jurisgenerative activities on the federative terrain.

If Locke’s account of the federative can be unpacked so profitably, it remains something of a mystery why it has not received more scholarly attention. Some of the fault lies with Locke himself, who chose not to follow through on his insight. He sought instead to all but strangle his discover at birth by reconnecting the federative to the ordinary domestic powers of the executive. That move was comfortable to those brought up with the idea of the Prince controlling a wide range of sovereign and executive capacities. But from the standpoint of modern liberal constitutional theory of the sort that Locke sought to instantiate, the pairing of federative and executive is much less obvious. First, the federative engages sovereign capacities in a way that is not true of the ordinary executive power. Second, while the prudential element of federative calls for flexibility, continuity and nuance in its application, the legal element also needs to be integrated within a broader constitutional and institutional framework. This Locke’s analysis fails to achieve, leaving the federative almost entirely to the discretion of the Prince. Some of Locke’s contemporaries were more consistent than Locke on this score. Developing earlier republican experiments, his contemporary Henry Neville called for a reconciliation of the prudential and rule of law elements of the federative suitable for English conditions. He did this by means of a conciliar structure based on a division of federative and prerogative functions and through their thorough legal and political immersion within the parliamentary sphere of operations.