# Locke on Executive Power and Liberal Constitutionalism

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Today, we typically associate constitutionalism with many or most of the following characteristics: a fundamental law expressed in a written constitution drafted by a special convention or assembly, ratified by the people and amendable only by an extraordinary supra-legislative process, which prescribes the rule of general standing laws produced by representative institutions operating on the basis of some form of separation of powers and limited by a charter recognizing judicially enforceable basic rights reserved by individuals. In sum, liberal constitutionalism is practically inseparable from the principle that any legitimate political order must be governed by a fundamental law governing and regulating the persons and institutions that make and execute the law.

By this standard, John Locke is often seen as a problematic, or at least deeply ambiguous, theoretical forbear of modern liberal constitutionalism. Although he is generally recognized as a seminal thinker in the development of the liberal idea of rights, many commentators challenge Locke's liberal constitutionalist credentials on the grounds that not only did he understand the rule of law as identical to the rule of the law-making body, but he also endorsed the extra-legal power of executive prerogative, which allows the executive "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it" (Locke 1988, II: 160; hereafter treatise and section). This fundamental tension between legislative supremacy and executive prerogative is frequently seen as the theoretical core of

**Acknowledgments:** The author would like to thank the directors of the Program in Constitutional Government at Harvard University, Harvey Mansfield and Delba Winthrop, for their generous support of this research, as well as Ann Ward, Barbara DeVlieger and the anonymous reviewers of the JOURNAL for their comments and assistance.

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*Canadian Journal of Political Science / Revue canadienne de science politique*
**38:3 (September/septembre 2005) 719–744**

Locke's constitutional problematic. As one observer notes: "One of the great challenges to a reading of Locke's work as essentially democratic and liberal is his explicit teaching of the prerogative of the executive" (Josephson, 2002: 231). Far from being one of the founders of liberal constitutionalism, in the judgment of many, Locke uncomfortably straddled a major conceptual divide, with one foot in modern legalism and the other firmly planted in the prerogatives of England's monarchical heritage.

In the effort to account for the legitimation crisis of Lockean constitutionalism, marked by the conflicting claims of omnipotent legislatures and executive majesty, commentators have typically produced two contrary interpretations of Locke's teaching on executive power: a "broad" and "narrow" interpretation. In the *broad* view of executive power, prerogative is interpreted to signify Locke's endorsement of extra-constitutional power as a requirement of effective or enlightened political leadership. In his assessment of political contingency, harsh natural necessity and the need to direct popular consent to the rational directives of the law of nature, so the argument goes, Locke registered his criticism of the harmful legalism encouraged by the notion of legislation as the sole regulative principle of common political life (Arnhart, 1979: 122–5; Fatovic, 2004: 278–84; Josephson, 2002: 240–1; Pasquino, 1998: 198–201; Seliger, 1968: 367–72). For their part, proponents of the *narrow* interpretation of Lockean executive power minimize the significance of prerogative by arguing that he intended the executive to be purely ministerial in relation to the supreme legislature, and thus even prerogative must be seen in terms of a merely temporary measure which is subject to the validation or reversal by the legislature once it is convened (Ashcraft, 1987: 187–90; Tuckness, 2002: 118, 121–6; Vile, 1998: 72; Waldron, 1999: 66; Weaver, 1997: 426–8, 431–4). While the *broad* and *narrow* interpretations of executive power are in one sense radically divergent, viewing it as either an extraordinary authority to set aside law at discretion or an entirely subordinate function bound tightly to the service of all-powerful legislatures, they are similar in another, perhaps more fundamental sense, inasmuch as both strands of interpretation rest on the premise that Locke conceived of law and constitution as co-extensive. For some, Locke's identification of constitutional government and legislative supremacy means that executive discretion to discard or even violate law must make prerogative an essentially extra-constitutional power. For others, it is precisely Locke's concern to maintain legislative supremacy over the executive that reduces prerogative to a largely ministerial function. In either view of Locke's executive power, the constitution is what the legislature says it is.

This study proposes that Locke is much more of a liberal constitutionalist than the typical interpretive framework would allow. I shall argue

**Abstract.** Locke's teaching on executive power is widely seen as one of the most problematic features of his constitutional theory. It is generally interpreted to be either an endorsement of extra-constitutional prerogative or a statement of radical legislative supremacy. However, the primary assumption underlying both of these positions—namely, that Locke saw law and constitution as coextensive—is mistaken. On the contrary, Locke's treatment of executive power illuminates his conception of constitutional authority that is distinct from and superior to normal legislation, but also confines prerogative within fundamental legal limits. Locke thus adumbrated many of the key elements of liberal constitutionalism familiar to us today.

**Résumé.** On a tendance à voir dans la doctrine de Locke sur le pouvoir exécutif l'un des éléments les plus problématiques de sa théorie constitutionnelle. Le plus souvent, on l'interprète soit comme une validation de la prérogative extra-constitutionnelle, soit comme une expression de suprématie législative radicale. Cependant, l'hypothèse fondamentale sous-jacente à ces deux positions, selon laquelle, pour Locke, loi et constitution seraient coextensives, est erronée. Au contraire, la façon dont Locke traite le pouvoir exécutif met en lumière sa conception d'une autorité constitutionnelle qui est à la fois distincte de la législation normale et supérieure à elle et qui confine, en même temps, la prérogative dans des limites légales fondamentales. Il s'ensuit, donc, que Locke laissait pressentir de nombreux éléments clés du constitutionnalisme libéral que nous connaissons aujourd'hui.

that the fundamental assumption underlying the current debate about Locke and executive power—namely, that he conceived of law and constitution as co-extensive—is mistaken. Whereas the focus of the debate generally relates to the perceived tension between natural and civil law (whether or not Locke grants the executive natural law authorization to transgress civil law), the connected and we shall suggest equally important question of what Locke meant by the term *constitution* has received much less attention (but see Faulkner, 2001: 11–12; Mansfield, 1989: 187–8). I shall argue that the theoretical core of Locke's executive power teaching is neither prerogative nor legislative supremacy, but rather his conception of a principle of constitutional legitimacy that is distinct from and superior to normal legislation. In Locke's formulation, executive prerogative is a potentially enormous extra-legal power, but it is not in the most crucial sense extra-constitutional. Rather Locke understood "just" prerogative as a constitutionally authorized discretionary power delegated by the people to be exercised on trust within the parameters of legitimacy defined by the fundamental laws and structures of a given constitutional order. Once we recognize Locke's subordination of the formal principle of legislative supremacy to the substantive principle of constitutionality, it is possible to understand both the broad and narrow reading of executive power as consistent with the normative and legal framework embedding executive power in the multi-form institutions originating in the constituent power of the individuals in society.

By examining Locke's treatment of executive power from its conceptual root in his foundational state of nature account through to his analysis of the civil executive and the relation between prerogative and the constitution, this study will argue that Locke's theory of executive power

frames many of the core principles of liberal constitutionalism familiar to us. This is true in two senses. First, Locke contends that the fundamental rules constituting the legislature established by the people are in most cases unalterable by the legislature. Second, Locke employed the concept of the separation of powers in a way that allows the non-legislative elements of the constitution legal standing not dependent on the authority of the legislature. Locke's theory *permits*, although it does not *require*, the people to entrench constitutionally the executive's power. For example, in his account of supreme executive power, Locke suggests that an executive acting in his or her executive capacity may have not only a legally prescribed, but also a constitutionally protected role in the government.

We will conclude, however, by demonstrating that Locke's constitutional theory was fundamentally incomplete, even on its own terms, inasmuch as he did not formulate or recognize clear constitutional limits on the substance of what government does, as opposed to how it is constituted. The omission from Locke's argument of an explicit statement of substantive constitutional limits on government action is not due to his supposed commitment either to prerogative or legislative supremacy, but rather to his inability or unwillingness to complete his constitutional theory with a systematic account of the structural mechanics of constitutional framing and his surprising reticence about the legitimating principle of general suffrage. Locke was a harbinger of a more democratic and distinctively liberal form of constitutionalism than he himself explicitly endorsed. However, it will be suggested that there is nothing in the logic of Locke's argument that rules out the possibility of written constitutions, charters of rights and clear statements of the constitutionally protected set of non-legislative executive and judicial powers; indeed, his concept of delegated powers and constituent authority is a theoretical precondition for liberal constitutionalism as we understand it. Locke's great achievement, then, was to adumbrate these important elements in the development of nascent liberal constitutionalism and bequeath a rich body of constitutional thought to his intellectual heirs in the eighteenth- and nineteenth-century Age of Revolution and Reform, and even to our own time.

## The Natural History of Executive Power

In order to understand the role of executive power in Lockean constitutionalism we need to begin with Locke's reflections on the origin and development of political power *per se*. For Locke, "Political, or Civil Society" (II: 89) must be understood largely by reference to two pre-political conditions reflecting distinct modes of human experience: the state of nature and pre-political society.

The celebrated state of nature is the theoretical core of Locke's political philosophy, an analytical postulation that defines the concept of natural rights and supplies the measure of legitimacy for any political institution. It is also, however, an inauspicious seedbed for constitutional government, because it is a condition characterized primarily by the absence of civil law (Scott, 2000: 554–5; Simmons, 1993: 20). The state of nature is a "State of perfect Freedom" and "also of Equality" (II: 4), wherein there is no natural principle of rule or authoritative institutions. Although consent is the only basis for political rule, Locke maintains that there is a natural moral rule governing the state of nature, which is based on "Reason, which is that Law, [and] teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another" (II: 6). In addition to the no-harm command, the law of nature also enjoins: "Everyone as he is bound to preserve himself ... so by like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind" (II: 6). The central moral reality of the state of nature is "the Power to Execute" (II: 7), the law of nature by which the individual is authorized to punish aggressors who violate the no-harm principle of the natural law. Thus, the transgression of the no-harm command of the natural law in particular cases is justified only in service of this same principle in the general sense, for otherwise, Locke concludes, the law of nature would "be in vain" if no one in "the State of Nature, had a Power to Execute that Law" (II: 7).

Three main points emerge from Locke's discussion of executive power in the state of nature. First, he indicates that the execution of the unwritten natural law does not imply a form of rule, that punishment does not contradict the principle of natural equality, and thus, that any understanding of government must be rooted in consent. Second, the natural executive power of the law of nature is by definition a wholly discretionary power, whereby the individual is authorized to punish another human being without the sanction of any political or religious institution (II: 87). The rational individual is authorized to act purely on the basis of auto-interpretation of the natural law. Third, Locke identifies in this natural power of individuals the primal root of civil executive power, inasmuch as from the individual natural right to punish violators of the natural law "which right of punishing is in everybody," comes the legitimate power of the civil magistrate "who hath the common right of punishing put into his hands" (II: 11). The source of political power is the natural executive power of individuals (Tully, 1993: 15, 21). As is well known, this natural executive power is both the source of government and, for Locke, the source of the serious "Inconveniences" in the state of nature such as hasty, irrational and self-serving punishments that make society both desirable and in a sense necessary

(II: 13, 21, 123–7). Not only is executive power the innate political phenomenon, in its original form in the state of nature, executive power is also conceptually coeval with prerogative.

The second important element in Locke's natural history of executive power is pre-political society, or the condition of human sociability prior to or independent of the formal creation of civil society and government. Executive power and prerogative play a central role not only in the largely analytical device of the state of nature, but are also crucial in Locke's more anthropo-historical account of patriarchal and monarchical rule in pre-political society. Locke indicates that the pre-political condition contains a degree of social organization and hierarchy, but it lacks the authoritative legislative institutions characterizing civil government. The rule of fathers and the first kings was "nearly all prerogative" (II: 162). The pre-political form of rule is essentially non-legal and based in filial deference to paternal discretion. Even though grown children, like all individuals in the pre-political condition, retained their natural executive power, they would routinely submit to the father's authority "and joyn with him" in punishing wrongdoers because "the Custom of obeying him, in their Childhood, made it easier to submit to him, rather than to any other" (II: 105). Paternal prerogative, then, directed the natural executive power of the individuals in a relatively tight network of blood relations, and thus historically served to stabilize somewhat the inconveniences inherent in the state of nature.

It was the trusting passivity encouraged by patriarchalism, Locke claims, that accustomed people in the pre-political condition to one-man rule over the extended social unit. In the simpler ways of pre-political society, individuals had few possessions to protect and hence had "no need of many laws" to decide disputes that arose among them. The purpose of rule set by "the equality of a poor way of living" was tied almost exclusively to the needs of communal defense "against Foreign Force" (II: 107). Thus, pre-political peoples "used their natural freedom" to select as leader "the wisest and bravest man to conduct them in Wars" (II: 105, 107).

There are two striking features of Locke's account of monarchy in pre-political society. First, while the early kings were not limited by law, Locke argues that the terms of their rule were narrowly construed to being "little more than Generals of their Armies," who may have enjoyed sweeping prerogative over matters of war, but "at home and in times of peace, they exercised very little Dominion" (II: 108). Locke implies that so strictly confined was the power of these captains to issues of war that early monarchy and patriarchal rule over families were probably mutually compatible and overlapping kinds of rule in the informal web of pre-political authority. Locke's second point, however, is

that both patriarchal and early monarchical rule must be understood as essentially consensual. The considerable discretionary power of patriarchs and chieftains was "tacitly submitted to" by the inhabitants of pre-political society, who demonstrated their implied consent by both their compliance and the bare fact of non-resistance (II: 110). In pre-political society Locke identifies a measure of social organization and the principle of command, but not civil government in the full sense, because generals and *paterfamilias* do not have the authority to make laws carrying the power of life and death regulating the actions of an entire community in the manifold aspects of life (I: 129, II: 3). Locke explicitly contrasts these simple forms of social existence with the formal bonds of civil society, which depend upon "the consent of Individuals, to joyn and make one Society" with a "common establish'd Law and Judicature" (II: 106, 87). The prevalence of prerogative in patriarchal and early monarchical rule is thus a function of the political minimalism in the pre-civil condition, one defined essentially by the absence of a shared legislative power. By the standards of legitimacy applicable to civil government, the almost uniformly discretionary rule in pre-political society, that "Government without Laws" (II: 219), is for all intents and purposes no government at all.

The theoretical import of Locke's account of pre-political society as it relates to his teaching on civil government is that it establishes the basis for his crucial conceptual distinction between executive power and prerogative. While these two ideas are practically coterminous in the state of nature, Locke deduces from the historical experience of patriarchy and early monarchy a developing political awareness as individuals in pre-political society become conscious of the need to set "express limits" on the discretion of rulers and to devise "Methods of restraining any Exorbitances" of prerogative through "balancing the power of Government, by placing several parts of it in different hands" (II: 112, 107; 162–6). In contrast to the tendency of early monarchy, in which the rule of one reduces inexorably to unlimited prerogative, Locke maintains that the intellectual root of civil government derives from the recognition that individuals and their property "could never be safe" until "every single person became subject, equally with other the Meanest Men, to those Laws, which he himself, as part of the Legislative had established" (II: 94). Locke indicates that the idea of civil government is born in the repudiation of unlimited prerogative, and thus the central features of the establishment of civil government necessarily involve both the disentangling of executive power and prerogative, and the articulation of natural political power, which in its original form is wholly executive, into discrete legislative and executive functions with a distinct institutional expression. Civil government presupposes a radical transformation in the nature of executive power.

**The Constitution of Government**

Locke's account of the creation of civil government involves a complex and multi-layered process. The first step it requires is that when a people decide to form civil society, they obtain the "consent of every individual" (II: 96). The form of consent in this process differs markedly from the tacit consent characterizing pre-political society, primarily because deliberate and "express consent" is the necessary precondition for any individual to become a full member of society and to register conscious authorization of the transfer of his or her natural executive power to the community (II: 119, 121).[1] The creation of civil government, however, involves not societal unanimity, but rather communal majority-rule, insofar as society authorizes the majority to act for "the whole" in the construction of government (II: 96–99). As both a practical and moral principle, the express delegation of natural authority and the structuring of communal will represent the very core of the process of making government. The converse of this distinct process of forming civil society and government is the possibility of its "dissolution," a theoretical postulation applying to civil life that is inconceivable for either the state of nature or pre-civil society, precisely because these conditions lack the formal consensual bonds of social union underlying civil government. The central decision, reserved exclusively for the majority in society, is where to locate the "Legislative Power," for the common "Umpire" supplied by a legislature is both the "soul" of the political society and the one institution most clearly demarcating civil government from the pre-political condition (II: 132, 87, 212).

We must be careful not to interpret Locke's conception of the creation of society and government as two completely different processes. Despite the difference between the universalist basis of society and the majoritarian ground of government, they are best understood as conceptually distinct but interdependent processes of social unification and delegation of power (Mabbott, 1973: 155). Locke presents civil society as both a contractual relation produced by an explicit and express form of consent, and as the sole moral and jural entity that is capable of creating civil government. Properly speaking, pre-political social existence differs from "civil society" because only the latter condition contains the element of express consent, which generates the immanent possibility of civil government. Unlike pre-political society, Lockean civil society is in a sense a form of government, the original form of all government, majority-rule democracy (Tarcov, 1981: 205). However, the majoritarian foundation of civil government does not necessitate the formation of a democratic regime. Locke indicates that democracy is only one of three pure forms of government, as well as an infinite number of compound forms, available to societal choice (II: 132). The majority in society may

locate the legislative power in a variety of structures and persons, including hereditary offices. The majoritarian activity of constituting government may indeed have deeply counter-majoritarian political implications (Kendall, 1941: 124). Lockean civil society is the workshop of constitutional government: society makes government.

In arguing that societal choice regarding the location of the "Power of making Laws" determines the form of government, Locke firmly establishes the efficient cause of government in the consent of the majority in society. However, the key to understanding the meaning of Locke's account of the creation of civil government is to recognize his crucial distinction between "the *Constitution* and *Laws* of the Government," between two separate forms of activity—constituting and legislating—and the particular kinds of enactment that emerge from these distinct processes (II: 226). When Locke identifies the "Constitution of the Legislative" as the "first and fundamental Act of Society" (II: 212), he is referring to the active principle of constituent power, which involves the consent of the majority of society and is, as we have seen, entirely distinct from the activity of civil legislation that may, and perhaps most likely will, be performed by representative institutions that are not necessarily democratic in character.

Locke's use of the term "constitution" is one of the most striking features in his account of the origin of civil government. He routinely employs some form or cognate of *constitution* to designate the primal act of legislation by which "the Legislative constituted by Society" (II: 214) comes into being. This "First and Fundamental Positive Law" is unique, however, in the realm of legislative possibilities precisely because the actions of society that produce the legislative are logically and existentially prior to the instantiation of civil legislative power (II: 134). Locke indicates that the legislature is capable of acting only by virtue of a fundamental law providing and delimiting prior societal authorization to specific persons and institutions. The act of constituting government does not, however, necessitate the complete surrender of the regulative power of the community, because not only may the community resume its constituent authority upon the dissolution of government (II: 243), but society may also delegate its authority to government as a strictly temporary power "if the Legislative Power be at first given by the Majority to one or more Persons only for their Lives, or any limited time" (II: 132).[2] Locke suggests that civil legislative power is so intrinsically a creature of the community that it may have a shelf life pre-determined by society in the original act of constituting government.

The conceptual distinction between constituting and legislating pervades Locke's use of the terms "Constitution" (II: 153, 168, 226), "Positive Constitution" (II: 50), "Constituted Commonwealth" (II: 143, 149, 152–3, 205), as well as related terms such as "Forms of Government"

(II: 198) or "Frame of Government" (II: 107, 156, 159, 192, 230; cf. Faulkner, 2001: 11–12; Mansfield, 1989: 187–8). In each of these instances Locke is referring to the constitutional root of the legislative branch, to the formal structures and rules establishing a system of laws connecting enactments, institutions and authorized persons in a matrix of legitimate authority that is distinct from both pre-political society and the species of positive law generated by ordinary legislatures. In his use of the term constitution to designate the extraordinary law created by civil society to govern the government, Locke appears to have envisioned something like the liberal principle of constitutional supremacy over ordinary legislative power.

Locke's openness to a wide variety of legitimate governments, including mixed popular and monarchical forms, reflects a clear theoretical bias toward the importance of constitutional foundations in consent. However, Locke is concerned not only to demonstrate the importance of consent, but also to show that a logically consistent theory of consent to some extent limits the choice of government available to the people. For example, Locke allows two logical alternative accounts for the process of constitutional framing. On the one hand, there is the readily identifiable process of constitutional formation, in which the constituent power of society generates a legislature that then, by its own authority, creates other constitutional actors such as the executive. In this *direct delegation* model of consent, the "first and fundamental positive Law" (II: 134) that creates the legislature represents the sum total of the community's direct participation in the act of constitutional framing. In this account, the legislature created by society originally acts like a constituent assembly that formulates and implements a constitutional plan for the community. The direct delegation model suggests a view of government that takes the constitution and law as being more or less co-extensive, at least insofar as the constitution is what the legislature says it is and the executive is, at least formally, subordinate as a delegated power of the legislature. Although Locke insists that every legislature is subject to certain natural law limits consistent with the proper end of government (II: 135–42), constitutionally speaking the legislative power, in this view, is dominant because the community has little alternative.

Locke's theory of consent also, however, allows for a more refined and graduated process of constitutional framing that emphasizes the broad range and scope of societal constituent power rather than the omnicompetence of the legislature. In this *articulated delegation* model of consent, the "first and fundamental" act by which society creates the legislature is the necessary, but by no means sole, expression of societal choice. The act of constituting civil government can extend beyond simply the creation of a legislature toward the more comprehensive activity of complex constitutional design for the entire "Frame of Government"

(II: 159). In this model of consent the people may delegate their authority in a manner unmediated by the legislature so as to authorize a variety of institutions performing a multitude of political functions stipulating discernible limits and specific goals (Tuckness, 2002: 128, 132–3, 140). It is in terms of this articulated model of delegated powers that Locke offers his most important reflections on the civil executive and the nature of constitutionalism by presenting a conception of constitutional government in which *both* the legislative and executive power may be understood as having independent sources of legitimacy rooted in constituent authority and ultimately accountable to the community.

## The Civil Executive

Locke's complex treatment of consent not only has a direct bearing on his theory of the separation of the executive and legislative powers, it also establishes the general rubric of legitimacy by which we can deduce the particular characteristics of Lockean constitutionalism. As we recall, Locke indicates that one of the crucial distinctions between civil government and pre-political society is the act of "balancing ... the Power of Government by placing parts of it in different hands," a solution that characterizes all "well order'd Commonwealths" (II: 107, 143). He argues that insofar as the primal root of the powers of government is the natural power of individuals in the state of nature, the creation of civil government necessitates a bifurcated transmission of this natural authority. The natural right to do "whatever" is necessary for self-preservation and the preservation of the "rest of Mankind," Locke claims, is surrendered in part to the legislature to be "regulated by Laws" so far as self-preservation and the good of society "shall require" (II: 129). Typically society places this legislative power in "collective Bodies of Men, call them Senate, Parliament, or what you please," so that "no man in civil society" will be exempt from the law (II: 94). However, the individual must "wholly" surrender his or her discretionary natural executive power in order "to assist the Executive Power of the Society, as the Laws thereof shall require" (II: 130). Civil executive power, then, is necessarily less discretionary than the natural executive power enjoyed by individuals prior to the separation of the legislative and executive functions (Arnhart, 1979: 124). The act of constituting civil government appears to be the moral and logical antipode of prerogative, the example of collective deliberation, common intentions and regularized social cooperation *par excellence*. Both the conceptual and historical movement from the state of nature to civil government seems to be defined chiefly by the diminution of discretionary power and prerogative.

However, Locke affirms that executive power and prerogative retain their salience in his constitutional teaching, although both are transformed dramatically from their pre-political expression. Legislative and executive power are both delegated powers, but Locke argues that they are distinguishable by their respective functions and ends. In terms of formal construction, the executive is emphatically subordinate to legislative power. As such, the legislature is supreme because, while the government subsists, what gives laws and direction to the other elements of government must be superior (II: 150). Executive subordination to the legislature is axiomatic inasmuch as executive power is essentially a derivative function that logically can only execute laws previously enacted by the legislative power. Whereas the legislature has a right to direct "the Force of the Commonwealth," Locke describes the executive power as little more than "the Image, Phantom, or Representative of the Commonwealth ... [which] has no Will, no Power, but that of the Law" (II: 143, 151). Perhaps the most telling piece of evidence demonstrating the formal subordination of executive power is that in Locke's list of the limits on legislative power, such as the prohibition on arbitrary decrees and the confiscation of property without due process (II: 135–41), there is no mention of the executive. Civil executive power is simply not by its nature an intrinsic check on legislative power.

Locke does, however, suggest two significant qualifications on executive subordination. The first relates to what he identifies as "Federative Power," which involves the direction of society with respect to foreign relations and is, Locke claims, "always almost" united with executive power (II: 145–6). Locke's insistence on the near fusion of executive and federative power reserves some, and potentially a great deal of, discretionary power to the executive, given that foreign relations are "much less capable" of being directed by antecedent positive law than domestic affairs, although Locke eschews identifying this discretion with prerogative, preferring to call it "Prudence" (II: 147). The second, and constitutionally speaking more fundamental, qualification on executive subordination is Locke's account of supreme executive power. In a thinly veiled allusion to the English constitutional practice of royal assent, Locke argues that the executive may also have "a share in the Legislative" (II: 151). This practice suggests that a constitutionally authorized person may serve multiple political functions. If the executive does not share the legislative power, then she or he is "visibly subordinate and accountable to it," and may be replaced, removed or punished by the legislature for "mall-administration against the laws" (II: 151, 153). But Locke indicates that if the executive does possess some share of legislative power, this person may in a "tolerable sense" be called "Supream" (II: 151), inasmuch as all inferior magistrates derive their authority from him or

her and since by virtue of the veto power this executive may be said to command all and receive commands from none.

The significance of Locke's treatment of supreme executive power is two-fold. First, it indicates that while Locke views the executive function as naturally subordinate to the legislative, this does not necessarily mean that the executive must be institutionally subordinate to the legislature. The constitutional arrangement of power may delegate legislative authority to distinct persons or bodies. Locke's theory of consent suggests that the very essence of constitutional government is to alter and compound the natural functions of government in a mix of persons and institutions: constitutionalism means that nature must give way to human artifice. The second important feature of this discussion is Locke's insistence that the source of supreme executive power is not the fusion of legislative and executive power, but rather the independence of the executive (II: 153).[3] Locke's allusion to England's hereditary monarchy suggests that he believes the most important component of supreme executive power is precisely its independence from the legislative assembly. But from where, then, does Locke derive the source of supreme executive power, if not from the legislative?

As we have seen, Locke's theory of consent offers two possibilities for the origin of supreme executive power. According to the direct delegation model, the legislature may create an independent executive as part of the original process of constitutional formation. This is a theoretical possibility but, as Locke reveals, rather implausible in practice. Given his assessment of the self-regarding character of political office-holders (not to mention human beings more generally), it is no more likely that a legislature would respect the independence of an executive who is its creature, than a supreme executive would voluntarily defer to legislative authority. Locke slyly opines that the altruistic self-limitation exercised by such an executive "one may conclude will be but very little" (II: 152).[4] Another indication that the supreme executive is likely not a creation of the legislature is that Locke explicitly states that the legislative power can create subordinate magistrates (II: 152), but he makes no mention of any legislative competence to create a supreme executive or refer to any legislative reservation of plenary power with respect to such an executive.

The more plausible account of the origins of supreme executive power lies in the articulated delegation model of consent, whereby society delegates partial shares of the legislative power to distinct persons or bodies as part of the process creating the "Original Constitution" (II: 153–4). The natural law, which forbids the legislature from transferring any of its own authority from where the community first placed it by the "positive voluntary Grant" of society (II: 141), effectively precludes the possibility that the legislature could legitimately parcel out its own authority to anything other than a merely subordinate body.[5] Conversely, Locke's

theoretical grounding for the naturalness of legislative supremacy means that the supreme executive is constitutionally prohibited from exercising full legislative power, and thus keeping in part with the traditional argument for legislative supremacy, Locke affirms that prerogative can never assume the character of law solely on the basis of executive authority. In his account of executive power, Locke not only eschews the trans-legal categories in the traditional discourse of sovereignty (Scott, 2000), he further clarifies the salience of law by maintaining that, in contrast to Hobbes for instance, executive judgment is not coterminous with law. Hobbes saw executive and legislative power as practically identical expressions of sovereignty, precisely because he maintained that the sovereign is the one uncontracted agent in the commonwealth and thus his or her authority is natural—deriving from unmediated natural right—and cannot be construed as delegated from the people (Hobbes, 1994: 172–8, 204).[6] For Locke, on the other hand, the proposition of the conventionality of civil executive and legislative power flows from the basic premise of delegated powers deriving in a mediated way from the natural power of individuals (II: 11, 129–31). Lockean political power has both a natural root and a legal fiduciary character, and thus even the royal veto with which Locke associates the supreme executive is not a power inherent in executive authority, but rather must be understood as a latent possibility permitted, if not required, in the act of constitutional framing produced by societal choice.

In his treatment of the civil executive, we recognize that the ideas of constitution and legislation are not only very different for Locke, but that their relation is essentially the archetype for his teaching on constitutional supremacy and subordination. Even the theoretical possibility of supreme executive power reflects Locke's idea of the delegation of authority to a multitude of institutions constitutionally separated from each other and having discernible limits and goals set by the constituent power of the community. One such delegated authority uniquely in the executive is prerogative.

## Prerogative and the Constitution

The issue of prerogative pervades Locke's entire discussion of the civil executive and serves more clearly than any other element of his constitutional theory to illuminate the fundamental distinction between constitution and law. For Locke, the prerogative power "to act according to discretion, for the publick good, without the prescription of law, and sometimes even against it" (II: 160, 164) is implied in the very notion of a supreme executive with a share of the legislative power. Locke claims that the existence of an executive to some extent independent of the

legislative power is a feature of all "well-framed Governments" and generally indicative of intelligent constitutional design (II: 159). The heart of the debate among commentators is whether Locke conceived of prerogative narrowly, as essentially a ministerial function performed by the executive on an *ad hoc* basis until the legislature can be convened to validate or nullify the measure, or if Locke intended prerogative to be understood broadly as a discretionary power admitting few if any substantive institutional or legal checks on the executive. However, neither alternative accurately reflects Locke's conception of prerogative. In order to solidify this claim it is crucial to consider who or what, in Locke's view, authorizes prerogative and whether it is compatible with the rule of law and constitutional government.

Prerogative almost by definition involves extra-legal authority, because it is an exercise of executive judgment not directly determined by general standing laws. However, Locke indicates that it also must be understood in terms of a trust invested in the executive by the community, in which the trustee is assigned a function or goal to perform and given some discretion as to how this goal is reached (II: 158, 164; Harrison, 2003: 212). For example, the executive is allowed some "latitude" to act for the public good in situations where either the law is no guide or when the legislative body is not in session (II: 160). In these situations societal trust permits executive discretion in order to fulfill the intentions of law, such as in the case of the executive convening the legislature at unusual times in order to meet "the Exigencies of the Publick" (II: 154). On the basis of the fiduciary relationship between governors and the governed, Locke not only allows the executive to mitigate legal sanctions or pardon offenders, but even to break the law him or herself in dire emergencies, for example, by pulling down "an innocent Man's House to stop the Fire" threatening to envelop an entire district (II: 159). Both the pardon and emergency power conform to the narrow interpretation of prerogative by which Locke endorses executive discretion to apply judgment to particular cases that are not fully accounted for in the generality of law, but are subject to the approval or disapprobation of the legislature once it "can conveniently be Assembled to provide for it" (II: 159; Weaver 1997: 426, 428; Waldron 1999: 66).[7] Prerogative in this sense is an extra-legal power that is justifiable only insofar as it furthers the preservationist intention of law, which is to protect the "rights of all members of Society" (II: 222).

In contrast to Locke's broad conception of prerogative in the state of nature or pre-civil society, the civil executive exercises prerogative in a context of legality embedded in the framework of laws comprising constitutional legitimacy.[8] For example, Locke suggests that executive discretion must not be construed to undermine the constitutional role of "indifferent and upright," "known authoris'd Judges" to "decide

Controversies" about "the rights of the subject" on the basis of standing laws (II: 131, 136). Indeed, Locke cites undue executive interference with the judiciary as one of the hallmarks of tyranny (II: 20, 208). Another very basic, but crucial, element of the legal basis of prerogative is Locke's insistence that the constitution determines who is permitted to exercise discretion (Dunn, 1969: 51). Locke holds that no one can "by his own Authority, avoid the force of Law" (II: 94) and therefore prerogative cannot legitimize "Usurpation," which he defines as the exercise of constitutionally delegated and perfectly legitimate authority by unauthorized persons or bodies (II: 198). The legitimacy of prerogative presupposes its exercise by authorized agents designated by law. Locke is clear, however, that the principle of legality framing prerogative need not be restricted to normal legislation and can, in fact, reside in the fundamental law "which had its establishment originally from the people" (II: 198). He even goes so far as to suggest that "in all lawful Governments" the specific powers delegated to particular structures and persons are prescribed by "the First Framers of the Government" (II: 156). The outer limit of executive prerogative is the dimensions of constitutional authority.

The constitutional basis of prerogative belies the vision of a sweeping natural force often presented in the *broad* interpretation of Lockean executive power. However, Locke's treatment of prerogative articulates a conception of executive power that also extends in range and vitality well beyond the purely ministerial role maintained by the *narrow* interpretation. Far from being simply a power entirely subject to *ex post facto* approval or disapprobation by the legislative body, Locke's most instructive examples of prerogative involve the executive's considerable capacity to regulate the manner in which the legislature fulfills its representative function. The first relates to the executive power to convoke and dissolve the legislature. Locke argues that it is neither necessary, "nor so much as convenient" (II: 153) that the legislative body be in perpetual session, given his fear of the legislators assuming an interest distinct from society by not being subject to its own laws. Locke suggests that in order to overcome this natural disability facing any legislature, there are several possibilities to regulate its assembly and dissolution. The legislature may, by an "Act of their Supreme Power," reconvene when "their own Adjournment appoints" or whenever "they please," if "no other way [is] prescribed to convoke them" (II: 153). With both of these possibilities the legislature is manifestly supreme and there is no substantive discretionary role for the executive.

However, Locke also indicates a third alternative, in which the legislature may be required by the "Original Constitution" to assemble and dissolve "either at certain appointed Seasons, or else when they are summon'd to it" (II: 154). If the terms of the assembly or the specific periods for new elections are set by the original constitution, Locke

concludes that the executive power to call and dissolve the legislature is primarily a ministerial and subordinate function, although subordinate to the "Original Constitution" rather than the legislature. If, however, the timing for new assemblies and elections is not set by the constitution or positive law, then the choice is typically left to the discretion or "Prudence" of the executive (II: 154). Despite Locke's perhaps overly earnest assurances that it is not his "business here to inquire" whether it is better to convene the legislature at "settled periods" or by a "Liberty left to the Prince," he does not demur from offering the opinion that executive discretion is the "best remedy" to the necessary defect in foreknowledge of the "First Framers of the Government," who could not presumably have predicted with prophetic wisdom all the correct or necessary times for new assemblies and elections (II: 156).[9] With this discussion Locke subtly suggests not only that the executive can play a key role in the operation of legislative powers but, more importantly, that control over elections and convoking the assembly may be a constitutionally protected power placed beyond the purview of ordinary legislation. While Locke's theory only permits rather than requires that the people constitutionally entrench the executive's power, he offers an implicit endorsement of the principle of enlightened constitutional design asserted by "First Framers," who are far-sighted enough to recognize the limits of their own foresight and to delegate to the executive constitutional authority to exercise discretion with regard to the mechanics of convening and electing assemblies.[10] The obvious corollary of this argument for executive discretion as a product of constitutional design is Locke's clear implication that this kind of power is not inherent in the executive function, but must be understood as governed by an overriding constitutional authority. In this instance Lockean executive discretion has a most deliberative origin.

The second, and in the constitutional sense more important, example of prerogative Locke supplies relates to the vexing issue of apportionment. Locke argues that one of the major problems facing constitutional government is the oligarchic tendency for the system of representation to become inequitable over time. While "things of this world are in so constant a Flux, that nothing remains in the same State," Locke complains that the "gross absurdities" of custom (not to mention the narrow self-interest of legislators) typically ensure that representation in the legislature "becomes very unequal and disproportionate to reason as it was first establish'd" (II: 157). In contrast to hereditary elements of the government, time is the peculiar enemy of rational popular representation. Showing, in the seventeenth century, remarkable anticipation of the nineteenth-century reform movement, Locke attacks the phenomenon of the "rotten borough," wherein a district with "scarce so much Housing as a Sheep-coat; or more Inhabitants than a Shepherd is to be found sends as many Representatives to the Grand Assembly of Law-makers, as a whole County

numerous in People and powerful in riches" (II: 157). Locke claims that all sensible people agree that this problem "needs a remedy," but it has proven "hard to find one" due to the assumption that "the Constitution of the Legislative" is the original act of society antecedent to positive law, and thus "no inferior power can alter it" without dissolving the entire system of government (II: 157). By this logic, the doctrine of legislative supremacy is, perhaps paradoxically, the single greatest obstacle to electoral reform.

The inability of his contemporaries to conceive of a constitutional means to redress malapportionment is indicative of the mind-set Locke believes needs to be overcome, if they are to grasp correctly the relation between constitution and law. In apparent contradiction to the doctrine of legislative supremacy, Locke argues that an executive "who has the power of Convoking the Legislative" may exercise prerogative to regulate "not by old custom, but true reason, the number of Members, in all places, that have a right to be distinctly represented" (II: 158). He insists, however, that the erection of a "fair and equal Representative" does not give the executive any superiority over the legislature or mean that the legislature has been altered from the original condition "depending wholly on the People" (II: 157). Locke argues that prerogative in this case does not signify executive supremacy, because it is a discretionary power authorized by the people in the "Original Frame of Government" (II: 158), which initially entrusted the power of convoking the legislature to the executive.

The discussion of reapportionment confirms the underlying complexity in Locke's theory of consent, inasmuch as the executive's authority to act contrary to the will of the people, expressed through their representatives, reflects a form of consent to constitutional government that is more fundamental than the authority of legislative institutions (Josephson, 2002: 233). The implicit populism in Locke's treatment of prerogative and apportionment, by which the executive is authorized to reform representation on the basis of changes in a district's population and economic contribution "to the publick" (II: 158), suggests the democratic foundation of civil executive power, which supplies a measure of legitimacy that overrides conventional legal usage.

If the executive alters or disables the legislature in a fundamental way, then this is a classic example of tyranny and the necessary consequence is the dissolution of government (II: 214–8). However, Locke contends that reapportionment does not alter the legislature so much as restore "the old and true one" on the basis of the "True Foundations" prescribed by the original consent of the community (II: 158; Grant 1987: 144–5).[11] It is by reference to this original consent, rather than a legislature based on distorted representation, that Locke predicts the executive who modernizes apportionment is an "Establisher of the Government ... [and]

cannot miss the Consent and Approbation of the community" (II: 158). In this instance, prerogative is a considerable extra-legal power extending far beyond the strict purview of legislative oversight (contra Weaver, 1997: 431). However, Locke also determines that this executive discretion presupposes the existence of constitutional structures and norms more fundamental than the law produced by the legislative body the executive is reforming.

Locke's idea of prerogative is a capacious concept ranging from *ex tempore* emergency powers to fundamental electoral and institutional reform. It is neither simply a narrowly construed ministerial function, nor a potentially limitless extra-constitutional power. The treatment of prerogative illuminates Locke's understanding of the proper limits of normal legislative power, but it also demonstrates his concern to formulate this important executive power as an authority intrinsically contextualized within a constitutional order that limits and defines its legitimate exercise. By defining prerogative within a range of legitimate government action framed by constitutional authority, Locke indicates that not every public act assumes the general character of law (Zuckert, 2002: 305; Seliger, 1968: 364–7). However, he also retains an important element of the principle of legislative supremacy when he reserves some authoritative public acts, such as taxation, solely to the representative assembly, effectively excluding them from executive discretion (II: 140). The public good, according to Locke, must inform "just" prerogative, but civil executive power must also never be completely detached from the underlying mediation of constitutional authority.

Locke's attitude towards prerogative, then, is complex. On the one hand, it is a vital element of good government that should be provided for in the original act of constitutional framing. Wise rulers, he claims, "cannot have too much prerogative" (II: 164). Moreover, the opportunity to exercise this power will be frequent, given that the people will demand extra-legal action in dire situations or at least are "very seldom, or never scrupulous" about transgressions of the law if the action is not manifestly against the public good (II: 161, 164; Arnhart, 1979: 122–4; Fatovic, 2004: 288–90). On the other hand, Locke also identifies serious dangers in prerogative, most notably the tendency for precedents established by good rulers to be exploited by bad or self-serving ones (II: 166). His core concern is that the overturning of laws and overly expansive interpretations of delegated powers can create the impression that prerogative is inherent in the executive function, rather than a constitutionally authorized power. An example of the potentially pernicious effect of exalted executive power is the traditional English "sacred person" doctrine, by which "the Person of the Prince by the Law is Sacred," and thus is "free from all Question or Violence" (II: 205). Although Locke sees some value in a measure of executive immunity from legislative harassment in the

proper exercise of his or her duty, he is adamant that sovereign immunity must be interpreted very narrowly. It is more a legal fiction than a theological fact that must never extend to ministers of the Crown and only pertains to the sovereign's performance of constitutionally authorized actions (II: 206). Even a supreme executive who exceeds constitutional authority "ceases in that to be a Magistrate, and may be opposed, as any other Man" (II: 202). Locke maintains that the extension of prerogative beyond constitutionally delegated limits may be checked by "express laws" or even active resistance (II: 162–3, 202).

Thus, in some respects Locke's constitutionalism retains clear sympathy with the traditional English parliamentary argument for legislative control over the executive. The effect of the frequent use and abuse of prerogative on the political psychology of a people may, Locke fears, be to inure the citizens and leaders to the importance of law and thus risk a gradual reversion to the trusting passivity and political primitivism of pre-civil society. As such, it is perhaps no coincidence that Locke first introduces his theory of the right of revolution in the context of his treatment of prerogative. The final arbiter in disputes over prerogative is the community who will "Easily decide" the question on the basis of whether the people "feel" the palpable design of oppression (II: 161, 225). The logical and moral corollary of the extra-legal prerogative power of the executive is Locke's vision of a highly strung political culture grounded on popular vigilance, and more "scrupulous" about legality than has been the custom traditionally. In the dissolution of government resulting from abuse of power, the separation of executive power and prerogative that marked the creation of civil society to some extent collapses with the reversion of natural executive power to the individuals in society. By Locke's defense of the logic of anticipatory resistance, the people have a natural right not only to resist tyranny, but also "to prevent it" from arising (II: 220). While Locke maintains that the supreme power of the community must remain largely dormant until the legislature and government are dissolved (II: 149), he also insists that the people will decide when the government is dissolved (II: 224–8). The final, and only truly extra-constitutional, prerogative in Locke's theory lies in the revolutionary judgment of the community.

## Conclusion: Locke and Liberal Constitutionalism

This study has argued that Locke's executive power teaching rested on a notion of constitutional government adumbrating the central tenets of liberal constitutionalism. His civil executive is neither the bearer of unstoppable primal force, nor simply the pliant instrument of an omnipotent legislature. Locke's argument for executive power reveals important liberal

constitutionalist elements in his thought, including the notion of fundamental rules establishing the legislature and the idea of non-legislative actors with a constitutionally protected role in the government. In prerogative Locke identifies an important extra-legal power, but it is one manifestly modulated within a context of fundamental constitutional structures and laws. In contrast to the common view, which deems that Locke held constitution and law as co-extensive, we maintain that he not only distinguished *constitution* (societal consent in a constituent process) from *law* (the product of a representative legislative process), but that moreover he sought to ground a theory of legitimate government on this very distinction. While Locke does not explicitly formulate substantive constitutional limits on government action, there is nothing in his argument that in principle contradicts the possibility of written constitutions, charters of fundamental rights, or the establishment of constitutionally authorized executive and judicial power. Indeed, Locke's concept of delegated powers and constituent authority is the theoretical precondition for the enactment of these characteristic elements of liberal constitutionalism.

However, Locke's constitutional theory is in a crucial sense incomplete, even on its own terms. His argument for constituent power is at once a beacon of originality and yet a source of deep opacity. Locke tantalizes us with the awesome spectacle of an entire people assembling to organize their government on the basis of consent (II: 95–99), but he provides no systematic treatment of the mechanics of constitutional formation. While his emphasis on broad societal consent seems to preclude recourse to a Rousseauian semi-mythical sole Legislator, whose primal law stands above normal legislation (Rabkin 1997: 317), we are left to wonder: How precisely does Locke's social contract produce authoritative institutions? Who or what body drafts the constitution delimiting legislative and executive power? Are special constitutional conventions required or will an ordinary legislature suffice? How do people register their assent to a frame of government? Elections? Plebiscites? Is a general franchise required for constitutional ratification and reform, or will a restricted suffrage suffice to bind the nation?[12] Locke's failure to account for the process by which civil government comes into being in all but the most general and abstract terms is arguably, as commentators past and present have observed, "a damaging lacuna" in his constitutional theory.[13]

Locke's neglect to complete his theoretical postulation of constitutionalism as a fundamental law that governs the law-making body with a systematic account of the mechanisms by which such a fundamental law can come into being is in one sense understandable. Both as a matter of theory and practice, there was simply no significant precedent in English or European constitutional history for a comprehensive constitutional proposal ratified by the free expression of broad popular consent.[14] Locke

was venturing into uncharted territory. Perhaps we can only surmise from the context of the *Second Treatise* in Exclusion and Glorious Revolution-era England that Locke initially believed that the historical English Parliament, in a somewhat modified form, could be the proper mechanism for effecting major constitutional revision. There is some evidence in Locke's correspondences of the time that he believed Parliament could serve temporarily as a constituent assembly "to find remedies and set up a constitution that may be lasting for the security of civil rights and the liberty and property of all the subjects of the nation" (Locke in Ashcraft, 1986: 592). If the Convention of 1689, which put William III on the throne, could overcome the short-sighted and partisan "piecemeal" approach he saw as typical of normal legislatures, Locke believed it could produce measures that would at the very least ensure regular elections, provide for an independent judiciary, fix civil control over the military, and guarantee the civil rights of religious dissenters (Ashcraft, 1986: 592).[15] The key, for our purposes, is that Locke wanted the Convention Parliament to provide these measures on the basis of an authority greater than that of normal legislation, to give "laws to kings, yes to the whole parliament, and set bounds to it" by an expression of popular consent so "great, aweful, and august that none may be able to quarrel [with] it."[16] Locke wanted nothing less than to establish a zone of constitutional law and fundamental rights relatively immune from legislative encroachments.

The palpable disappointment Locke felt about the English experience of constitutional reform in 1689 perhaps reflected the deepening of his own understanding of both the populist and institutional implications of his constitutional theory. While he always publicly defended the halting Glorious Revolution settlement against its divine-right monarchist and Tory opponents (Farr and Roberts, 1985), Locke nonetheless castigated the Convention Parliament in private for letting slip an opportunity to mend the "great faults" in England's "frame of government" by acting more like a "parliament" or legislative body than a constitutional assembly (Franklin, 1978: 121). He came to realize that an historical legislature based on narrow suffrage was seriously limited in its capacity to initiate the kind of dramatic reform he advocated or even to make laws exempt from alteration, repeal or amendment solely by its own authority: parliaments do not make constitutions as Locke conceived of them.

Although it would take nearly a century for the acceptance of the principle of general suffrage to transform and in effect operationalize his idea of constituent power, Locke was a harbinger for a version of constitutionalism more liberal and democratic than he was prepared to endorse in an explicit and emphatic way. In the great liberal revolutions of the eighteenth century and the democratic reform movements that followed, the Anglo-American and European political traditions would extend Locke's constitutional principles in radical directions, with ideas

such as special constitutional assemblies and popular ratification with broad franchise as the means to establish fundamental legal instruments unqualifiedly superior to normal legislation. In this distinctly Lockean notion of constitutionalism, we can see the outlines of institutional mechanisms that can in principle guarantee individual rights against undue government interference. Despite the limits in Locke's account of constitutional formation, his innovative ideas about consent and delegated powers adumbrated the modern doctrine of the separation of powers and written constitutions establishing fundamental rights. Locke provided the theoretical materials out of which modern liberals would construct constitutional government as we have come to understand it. In this sense, the genesis of liberal constitutionalism is inconceivable without Locke.

## Notes

1 Obviously Locke's *de facto* account of the historical rise of government through the restraints on prerogative is in some tension with his *de jure* argument for the establishment of civil government in a discrete act of express societal consent. For interpretations of Locke's constitutionalism that give rather more weight to his historical argument than do I, see Josephson, 2002: 183–203; Waldron, 1989: 3–28.

2 As Scheuerman (2001: 56) observes, Locke proposed a "Fundamental Constitution" for colonial Carolina that was not only unalterable by the legislature, but also established a time limit for any piece of legislation (Locke, 1997: 175–6, 181).

3 Thus, Locke would find cabinet government problematic inasmuch as a cabinet dependent on legislative majorities would not satisfy his criteria for supreme executive power (Vile, 1998: 73; but cf. Faulkner, 2001: 6). Faulkner argues that Locke viewed supreme executive power as indicative of "special cases" of mistaken political orders (2001: 26); however, this argument diminishes too much the significance for his general reflections on constitutionalism of Locke's treatment of executive independence regarding the veto, apportionment and convoking the legislature.

4 It is striking the extent to which Locke's discussion of supreme executive power foreshadows the kind of institutional physics underlying Madison's separation of powers theory in the American context, in which "Ambition must be made to counteract ambition" (Madison, 1961: #51, 322). For both Locke and Madison, the crucial element in the separation of powers is not making the branches interdependent, but rather giving them an independent source of authority in the constitution.

5 In contrast to Pasquino (1998: 202), who argues that Locke's executive is stronger than the classical Roman dictator because she or he does not derive authority to act with discretion from a prior legislative grant, I maintain that Locke fundamentally limits civil executive power by insisting that the legislature can never transfer its full authority to another body or actor—a Lockean legislature can never create a dictator with full executive *and* legislative power, because such a grant is incompatible with the fiduciary character of the original delegation of power from society to government. For a very Lockean response to the classical problem of legal dictatorship, see Thomas Jefferson's criticisms of the Virginia legislators during the Revolutionary War (Jefferson, 2002: 165–8).

6 At II: 159, Locke seems to offer a Hobbesian argument for prerogative when he claims that the executive "has by the common Law of Nature, a right to make use of" natural executive power. However, this does not mean that Locke specifically derives

civil prerogative from the natural right to execute the law of nature. Quite the contrary, it demonstrates the mix of natural and legal power in the civil executive, which distinguishes it from the wholly natural power both of individuals in the state of nature and of Hobbes' sovereign.

7 We may also, however, interpret Locke's defence of the pardon power more broadly as an encouragement to the executive to move, however qualifiedly, to protect the basic rights of religious dissenters against legislative encroachment by mitigating "the severity" of discriminatory laws (Ashcraft, 1986: 111; Goldie, 1991: 165).

8 Locke's claim that the "wisest and best Princes" may have had "some Title to Arbitrary Power" (II: 166) has led some to draw the conclusion that he believed prerogative is theoretically at least an arbitrary power illimitable by law (Simmons, 1993: 55; Arnhart, 1979: 125; Josephson, 2002: 231–2). However, in this passage Locke's allusion is to a "Title" more honorific and empirical than normative, and reflects the admittedly dangerous tendency of the people to defer almost implicitly to wide-ranging and even absolute power in the hands of just rulers, who use this power uniformly to do good. Locke's further claim that prerogative involves an "Arbitrary Power in some things left in the Prince's hands to do good" (II: 210) must be qualified in light of his complete rejection of any "Absolute Arbitrary Power, or Governing without settled standing Laws" (II: 137), such that prerogative involves a power directed both by law and by discernible and salutary ends (Grant, 1987: 72–3).

9 Locke is also open to the possibility of a "mixture of both" (II: 159) executive discretion and constitutionally appointed times for convening the legislature in a format not unlike that set out in Article II section 3 of the United States Constitution (cf. Josephson, 2002: 226–7).

10 Locke shows concern both for the danger of executives abusing discretion to extend assemblies inordinately, such as the eighteen-year Cavalier Parliament in Restoration England, and also anticipating the problems of parliaments extending their own tenure by a simple act of legislation, as happened in 1716 with the repeal of the Triennial Act, establishing elections every three years, and its replacement by the Septennial Act, which established seven-year terms. For a good treatment of Locke's understanding of the temporal and especially futural character of legislation, as well as the executive's role in ameliorating the defects in predicting future exigencies, see Scheuerman, 2001: 51–2, 55–6.

11 Faulkner (2001: 32) and Seliger (1968: 343–9) argue that, contrary to Locke's protestations, reapportionment by prerogative does alter the legislature, and thus in effect dissolves the government. However, they base this argument on the premise that Locke does not clearly distinguish legislative and constitutional authority, an argument that I maintain is precisely the mistaken assumption that Locke seeks to correct among his contemporaries.

12 There has been considerable debate about Locke's attitude toward the franchise, with some emphasizing the elitist character of the Lockean idea of representation (MacPherson, 1962: 221–38; Wood, 1992), and others interpreting Locke more as a populist committed to an expanded suffrage (Faulkner, 2001: 13–4; Ashcraft, 1986: 228–85). While my aim is not to weigh the relative merits of these arguments, I do think it is important to recognize the considerable tension between Locke's idea of representative government, which did not include any substantive and systematic argument for universal suffrage, and the greater egalitarianism of contemporary ideas of democratic legitimacy (cf. Scheuerman, 2001: 43, n. 3).

13 See Dunn, 1967: 166 (cf. Ashcraft 1987: 151). For historically influential critiques of the abstract character of Locke's social contract theory, see for example Hume, 1985 [1748]: 469–76 and Blackstone, 1791[1765]: 162, 213.

14 Although the Levellers in civil war-era England proposed something like a written constitution resting on general suffrage, this proposal was never implemented and

the argument for popular consent expressed through a politicized military was neither influential nor congenial to Locke (Franklin, 1978: 125–6). The first constitution in history drafted by a special convention and popularly ratified by broad suffrage independent of royal assent was the product of Locke's American Whig heirs in revolutionary Massachusetts in 1780 (see Ward, 2004: 422–25).

15 Contrary to the suggestion that the English Constitution was Locke's ideal (Gough, 1950: 102; Dunn, 1969: 52–3), I maintain that the radical thrust of his delegated powers argument included a forceful critique of the "Acknowledg'd Faults" and "Original Defects" (II: 223) in the English Constitution, such as malapportionment, ill-defined prerogative, the political role of the bishops, the Crown's role as head of the established church, and the legislative persecution of religious dissenters (II: 158, 162–3, 239; Locke, 1823: 200–12).

16 This quote from Locke's radical Whig colleague John Wildman captures, I believe, the spirit of Locke's expectations for English constitutional reform in early 1689 (Franklin, 1978: 117).

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