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The Lockean Prerogative, Natural Law, and Political Power

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Abstract:

In this paper, I argue that Lockean prerogative power is political and not natural. I do this by pointing out that two interrelated distinctions present in Locke have not been properly taken into account in the literature. First, I claim that Locke's conception of executive power is not unitary; rather, he distinguishes between natural and political executive power. Second, I show that Locke also distinguishes between two types of public good; the general public good of all of mankind and the specific public good of a political community. Drawing on these two distinctions, I aim to demonstrate how views that aim to situate prerogative in the natural realm fail and how those that argue for it to be a political power succeed. In (1), I introduce Locke's concept of prerogative and situate it briefly in his political thought and the contemporary literature. In (2), I explore the view that prerogative might be a natural power. In (3), I introduce two distinctions between different types of executive power and public good that have been neglected in the literature. Then in (4), I draw together these findings and give an account of what a political prerogative would look like. In (5), I offer concluding thoughts.

Keywords: prerogative, natural law, natural power, political power

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1. Locke's Political Thought and Prerogative

Since the attacks of September 11, 2001 as well as the “war on terror,” warrantless mass surveillance, and the numerous military arrests that followed, many scholars have revisited the topic of prerogative, and especially its portrayal by Locke. Prerogative, Locke tells us in *Two Treatises of Government*,¹ is a discretionary power employed “for the publick good, without the prescription of the Law, and sometimes even against it” (II.160, 375). How this Lockean prerogative relates to his commitment to a broad legalism, largely embodied in modern liberal democracies nowadays, is a question of theoretical as well as of practical importance;² how can a legalistic framework allow for an extra-legal power of such an extent, and what does this mean for the legitimacy of potentially illegal actions in cases such as arising during the “war on terror”? The aim of this paper, however, is a much narrower one. Instead of exploring the relationship of prerogative to Locke's underlying legalism³ or its directly practical consequences, I will attempt to answer the question whether prerogative is a natural or a political power. If it is political, it would be a community sanctioned power. If it natural, it would be a natural power taking center stage in the political realm. This question is motivated by the fact that a majority of interpreters either fail to address this question directly or assume a natural prerogative without much explicit argument. If what I lay out below is correct, then some portion of Locke's political thought may have to be rethought, yielding not just theoretical, but also practical results that can inform understanding of contemporary prerogatives.⁴

1 John Locke, *Two Treatises of Government*, ed. Peter Laslett, Student Edition (Cambridge: Cambridge University Press, 1988). All parenthetical citations to the *Two Treatises of Government* will be understood to be referring to this edition in the treatise-section-page format. For example, “II.48, 301” will refer to the Second Treatise, section 48, page 301 in the edition cited above.

2 See e.g., Assaf Sharon, “Locke, Liberty, and Law: Legalism and Extra-Legal Powers in the Second Treatise,” *European Journal of Political Theory*, (September 2019): 1–23; Leonard Feldman, “Lockean Prerogative: Productive Tensions,” in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, eds. Clamont Fatovic and Benjamin Kleinerman (Oxford: Oxford University Press, 2013), 75–93.

3 See Benjamin Kleinerman, “Can the Prince Really be Tamed?” *American Political Science Review* 101, no. 2 (May 2007): 212–16.

4 Feldman argues that Locke's approach to prerogative has “directly shaped U.S. political institutions and culture.” Leonard Feldman, “Judging Necessity: Democracy and Extra-Legalism,” *Political Theory* 36, no. 4 (May 2008): 55. This is making plausible the claim that a deep understanding of prerogative can have direct practical implications not only on understand the history of political thought, but also in conceptualizing justified use of prerogative power going forward. For an overview of the impact of Lockean executive and prerogative on the framers, see Alex Tuckness, “Discourses of Resistance in the American Revolution,” *Journal of the History of Ideas* 64, no. 4 (October 2003): 547–63. For accounts of how Locke's thought has shaped the political thought in the past and influences it in the present, see Edward Samuel Corwin, *The President: Office and Powers* (New York: New York University Press, 1957); Cronin, Genovese, and Bose, *The Paradoxes of the American Presidency* (Oxford: Oxford University Press, 1998); Clement Fatovic, “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives,” *American Journal of Political Science* 48, no. 2 (January 2004): 429–44; David Weaver, “Leadership, Locke, and the Federalist,” *American Journal of Political Science*, 41, no. 2 (April 1997): 426. Moreover, in the United Kingdom, ministers are still appointed by prerogative, see Quentin Skinner, “On Trusting the Judgement of our Rulers,” in *Political Judgment*, eds. Richard Bourke and Raymond Guess (Cambridge: Cambridge University Press, 2009), 129–30.

Before moving on to setting up the central distinction and situating it in the literature, let us first lay the groundwork by presenting the Lockean picture of prerogative. For Locke, civil government consists of three distinct functions: the legislative, the executive, and the federative. The legislative has the “Power of making Laws” (II.143, 364), the executive the power to “execute them” (II.143, 364), and the federative the power over matters concerning “Persons and Communities without the Commonwealth” (II.146, 365). Following Locke, who takes the executive and the federative to be “almost always united” (II.147, 365), I will understand “executive” to include both the executive and the federative functions unless explicitly stated otherwise.⁵ Following this clarification, the remainder of the paper will take government to consist of the legislative and the executive organs. The focus of this paper will be on the executive, and on prerogative specifically.

Locke defines “prerogative” in his often ignored chapter 14 of the Second Treatise as that “power to act according to discretion, for the publick good, without the prescription of the Law and sometimes even against it” (II.160, 375), specifying that it is in the hands of “Princes” (II.165, 377)—namely, executives. This highlights the two most important aspects of prerogative: (i) its focus on the public good and (ii) its extralegal status, with the latter distinguishing prerogative from adjacent powers and the former restricting it. Most broadly, prerogative is the power of the executive to act outside or against the law for as long as these actions are conducive to the public good.

Prerogative’s extralegality can be divided further—namely, into its prelegal and antilegal components.⁶ The case for the prelegal prerogative draws its intuitive appeal from the claim that in cases in which “the municipal Law has given no direction” (II.159, 374) on any specific matter, the executive is bound to act regardless for the public good. This is because a paralyzed executive’s inability to respond to emergencies leaves the polity at risk for genuine emergencies.⁷ This is based on Locke’s historically motivated understanding of the legislative’s interrupted presence (II.143, 364) that is contrasted with the executive’s “Power always in being” (II.144, 365).⁸ In such a circumstance, the executive must be able to act without the specific directive of the law until the legislative is assembled and can address the topic in question with proper and

⁵ Given that Locke holds that the executive and the federative to be “almost always united” (II.147, 365), an interesting question remains as to the relationship between the federative organ and prerogative: Is prerogative also a power of the federative? Feldman suggest that, substantively, prerogative might be an “adjunct power of the internally focused executive power.” Yet, structurally, it seems much more akin to the federative power. This, Feldman believes, is due to its “source.” Feldman, “Extra-Legal Power and Legitimacy,” 77. However, the literature is still undecided on the issue, with some arguing that, because the federative power is fully unconstrained by all laws, it has “no need of emergency powers.” Ian Roth Zuckerman, “The Politics of Emergencies: War, Security and the Boundaries of the Exception in Modern Emergency Powers” (PhD diss., University of Chicago, 2012), 190. Others see prerogative as partly wielded by the executive and partly wielded by the federative, with the main difference being the domain of application. For example, Neocleous argues that the “federative power [that is] to govern external relations is easily transposed onto the executive power.” Mark Neocleous, *Critique of Security* (Edinburgh: Edinburgh University Press, 2008), 16–17.

⁶ See Thomas Langston and Michael Lind, “John Locke & the Limits of Presidential Prerogative,” *Polity* 24, no. 1 (Autmun 1991), 49–68.

⁷ Douglas Casson, “Emergency Judgment: Carl Schmitt, John Locke, and the Paradox of Prerogative,” *Politics & Policy* 36, no. 6 (November 2008): 944–71.

⁸ Much of this discussion is set against the historical background in which Parliament was dissolved periodically whereas the king, i.e., the executive, was in power uninterruptedly.

fitting laws. The executive hence wields the power to act on matters on which the “Law [is] silent” (II.164, 377). This includes especially cases in which there exists a “vacuum of explicit legislation”⁹ that must be filled by the executive, such as instances in which no law has yet been made to deal with a novel scenario.

Antilegal prerogative, on the other hand, posits the ability of the executive to act explicitly against the law. This *prima facie* surprising claim, that the law must “in some Cases give way” (II.159, 375) to the executive power, is arguably at the center of contemporary interest in the concept. The antilegal reading of the prerogative seems to be primarily concerned with the “inflexible” nature of laws and the impossibility to “foresee” specific eventualities that might lead to the law being uncondusive to the commonwealth’s good (II.160, 375).¹⁰ Importantly though, both the prelegal and the antilegal components of prerogative are constrained by the public good.

As such, prerogative is not an unconstrained power. Locke explicitly restricts it by his notion of the public good of the commonwealth. A prerogative is “*undoubted*” (II.161, 375)—namely accepted, tolerated, and, most importantly, justified, Locke tells us, if it is used to that end. If it is used to other ends—for example, to the personal ends of the executive—it becomes tyrannical (II.199, 389–99; II.202, 499–501) and thus unjustified. Accordingly, Locke distinguishes the rightful king from the unjust tyrant first and foremost by claiming that while the former makes “the Good of the Publick the end of his Government; the other makes all give way to his own Will and Appetite” (II.200, 400). As such, the actions of the executive are restrained and justified by its consequences regarding the public good.¹¹ To many, the scope and nature of this prerogative are surprising. How can Locke, a defender of “legislative supremacy,”¹² sanction a power that can act directly against it and that the right executive “cannot have too much [of]” (II.164, 377)?

As a partial answer to the question of what we should think about Locke’s account of prerogative, I want to state the motivating question of this paper: What type of power is prerogative? Is it a natural or a political power? Before proceeding with the lengthy analysis of this question, we must define the following terms to make sense of the question whether prerogative is a natural or a political power. Four terms warrant proper definition here: “power,” “right,” “natural power,” and “political power.” The definitions that I am working with here are found directly in the text itself.

First, what is Locke’s understanding of power and rights? We best locate them directly in Locke. He claims that “*Political Power . . . I take to be a Right of making Laws . . . and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury*” (II.3, 268). In following Locke here, a power is simply understood as the possession of certain rights with the type of right possessed characterising the type of power. In other words, to have a specific power, is to possess a right characteristic of that power. As such, these

9 Langston and Lind, “Limits of Presidential Prerogative,” 60.

10 I will use “commonwealth” (II.89, 325), “polity” (II.175, 384), and “civil society” (II.95, 331) interchangeably.

11 See Thomas Pangle, “Executive Energy and Popular Spirit in Lockean Constitutionalism,” *Presidential Studies Quarterly* 17, no. 2 (Spring 1987): 253–65.

12 Robert Faulkner, “The First Liberal Democrat: Locke’s Popular Government,” *The Review of Politics* 63, no. 1 (Winter 2001): 30.

two concepts are inherently intertwined and help set up the remaining two terminological definitions clearly.

As such, a political power is defined as having the right to make political decisions. These political decisions include the “total”¹³ right of “making Laws” and executing them (II.3, 268; II.89, 325).¹⁴ In this sense used here, a power is stereotypically political if it grants the right to make political decisions. In Lockean thought, political powers are almost exclusively justified by a consent-based mechanism, being the basis for any political community and, as Halldenius points out, can “by definition not be absolute.”¹⁵

Analogously, natural power is defined as having the right to make natural law decisions. For example, these include the right to punish aggressors and to appropriate property (under certain provisos) (II.6, 270–71; II.7, 271–72; II.33, 291),¹⁶ and exercising as well as protecting rights more generally. Natural powers, in this understanding, are entirely justified by the law of nature.¹⁷

The question whether prerogative is a political or a natural power has been relatively neglected in the literature. Even though scholars have researched related matters such as, for example, the limits of prerogative,¹⁸ the question of direct interest to this paper has not been fully explored as “most interpreters [still] pass over [the chapter] in silence.”¹⁹ However, I do not wish to speculate as to the reason for this neglect. In the remainder of this chapter, I will instead sketch the literature that has, more or less directly, dealt with this topic.

Corbett, in providing one of the few pieces of work directly addressing this question, argues that prerogative must be a natural power. He claims that prerogative can only be a natural power because “only a countervailing natural force can restrain”²⁰ it, thinking here about the Lockean appeal to heaven (II.168, 379–80; II.21, 282). He claims that “we can take this even further: prerogative has the same juridical character as individual resistance, both being nothing more than an individual’s

13 John Dunn, *John Locke: A Very Short Introduction* (Oxford: Oxford University Press, 2003), 41.

14 John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969), 132; John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 2014), 60.

15 Lena Halldenius, “Locke and the Non-Arbitrary,” *European Journal of Political Theory* 2, no.3 (July 2003): 272.

16 Simmons, *Edge of Anarchy*, 5.

17 This distinction is importantly different from the claim that each power is constrained to its context, i.e., all powers in the political context are political powers and all powers in the natural context are natural. This definitional start would make all further results, especially that of finding prerogative to be political, uninteresting. As such, this paper operates under the assumptions that the above view is wrong and that one can have, in principle, both political and natural rights in a political context.

18 See David Dyzenhaus, “The Compulsion of Legality,” in *Emergencies and the Limits of Legality*, edited by Victor Ramraj (Cambridge: Cambridge University Press, 2008), 33–60; Langston and Lind, “Limits of Presidential Prerogative,” 49–68.

19 Pasquale Pasquino, “Locke on King’s Prerogative,” *Political Theory* 26, no. 2 (April 1998), 199.

20 Ross Corbet, “The Extraconstitutionality of Lockean Prerogative,” *The Review of Politics* 68, no. 3 (June 2006), 447.

execution of the law of nature. They are exercises of private judgment what the law requires.”²¹ Fatovic arrives at a similar conclusion, coming to understand prerogative as a substantive principle “derived from the law of nature.”²² Further, Mattie takes prerogative to be ultimately “justified by . . . the law of nature”²³ precisely because it is a power to deal with “confusion, disorder, and violence,”²⁴ akin to conditions (potentially) faced in the state of nature. A large number of additional authors²⁵ simply take prerogative’s naturalness for granted. All those authors understand prerogative as a type of remnant power from the state of nature, transferred into the political realm for one or another reason.

Literature on the explicit portrayal of prerogative as a political power is even more scarce. For Weaver, for example, prerogative’s extralegality is being pre-authorized by the law, representing a legal antilegality if you will, that would be political according to the definitions above. This is because Weaver reads Locke as requiring a ratification of prerogative,²⁶ which is clearly political. On this view, the polity would consent to the law-surpassing prerogative that would intentionally be placed in the hands of the executive. More recently, Sharon has argued that these two lines of argument are actually compatible, suggesting that if the legalism of Locke is reinterpreted as based on the “rationale of collective self-rule,”²⁷ prerogative can be both natural and political, a proposition he admits might only “push back the inconsistency”²⁸ without resolving the issue.²⁹ It seems that at this point, a clear answer to the question of whether prerogative is a political or natural power is missing. This is exactly what I aim to achieve in the remainder of the paper.

2. In Favour of the Naturalness of Prerogative Power

In this section of the essay, I present the case for prerogative power being a natural power. I do this by advancing two distinct, but interrelated, arguments couched within the literature: The *Argument from Source* and the *Argument from Grant*. Both

21 Corbet, “Extraconstitutionality,” 447.

22 Clement Fatovic, “Constitutionalism and Contingency: Locke’s Theory of Prerogative,” *History of Political Thought* 25, no. 2 (January 2004), 279.

23 Sean Mattie, “Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,” *The Review of Politics* 67, no. 1 (Winter 2005), 86.

24 Mattie, “Prerogative,” 86.

25 Dunn, *Political Thought*; Simmons, *Edge of Anarchy*; George Thomas, “As far as Republican Principles will Admit: Presidential Prerogative and Constitutional Government,” *Presidential Studies Quarterly* 30, no. 3 (February 2004), 534–52.

26 David Weaver, “Leadership, Locke, and the Federalist,” 426; David Weaver “Liberalism and Leadership: Lockean Roots,” *The Leadership Quarterly* 2, no. 3 (1991), 170.

27 Sharon, “Locke, Liberty, and Law,” 16.

28 Sharon, “Locke, Liberty, and Law,” 16.

29 Though Sharon thinks that ultimate coherence ought not be the goal of any exegesis, and that, properly understood, his account does not necessarily lead to this conclusion, Sharon, “Locke, Liberty, and Law,” 16–17.

arguments give evidence for the claim that prerogative is a natural power and represent the type of position one would expect from most scholars if the distinction between natural and political powers were presupposed.

I take there to be two strategies in arguing for the naturalness of prerogative. First, one might inquire whether prerogative is natural or political by asking where the power in question originates from. Remember that according to the definition used here, a power is possessing a right of one type or another. Inquiring into the origin of the right might, as such, give one insight into what type of power prerogative is. If the source of a power is, say, a natural right, then one would be able to show that the power itself is natural too. For example, the right to punish in the state of nature is supplied by the law of nature (II.6, 270–71; II.7 271–72). As such, the right to punish is a natural power, as Ward points out correctly.³⁰ Analogously, labour would be a natural power too,³¹ stemming from the same source. Call this type of argument an *Argument from Source*.

In order to pin down the source of a power, one might ask: Where does this power come from (and who gets to wield it)? As an illustrative example, remember that, for Locke, there is no divine right of kings that bestows prerogative power on specific individuals—for example, descendants from Adam—and prohibits others from ever wielding said power in principle, such as would be the case in a preordainment theory like Filmer's,³² Locke's main interlocutor in the First Treatise. On this picture of divine sanction of absolute monarchy, there would be no way in which a common person could ever get to wield such power. In this case, the power of monarchs would be divine power due to the divine right of kings.³³ Clearly, such a restrictionist understanding is not Locke's view. For Locke and other natural rights theorists, the set of people who could wield prerogative is theoretically non-restrictive, but the illustrative point still stands.

The *Argument from Source* is perhaps best exemplified by Corbett.³⁴ He suggests that because Locke's law of nature is, by its non-restrictive definition, equally applicable to all, prerogative cannot be restricted to a few special individuals (such as via divine right). Corbett goes on to point out that "the source of the [prerogative's] right suggests that everyone ought to possess it: Anyone with the power in their hands could exercise prerogative."³⁵ This, Corbett tells us, is because "the law of nature does not, after all, grant superior rights to the merely conventionally superior."³⁶ Drawing

30 Lee Ward, "Locke on Executive Power and Liberal Constitutionalism," *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 39, no. 3 (September 2005), 723.

31 Dunn, *John Locke*, 51.

32 Robert Filmer, *Patriarcha*, in *Patriarcha and Other Writings*, ed. Johann P. Sommerville (Cambridge: Cambridge University Press, 2008).

33 See e.g. William Blackstone, *Commentaries on the Law of England* (Portland, ME: Thomas B. Wait, 1807).

34 Corbett, "Extraconstitutionality," 428–48.

35 Corbett, "Extraconstitutionality," 446.

36 Corbett, "Extraconstitutionality," 446.

on Locke directly (II.21, 282), he concludes that because the law of nature is “common, i.e., [it] applies to all equally,”³⁷ the source of prerogative must be natural.

In order for this argument to work, one would need to show that it is indeed that case that anyone could possess prerogative. In other words, one must establish that the set of people who could wield prerogative is all-encompassing.³⁸ As quoted before, Corbett, drawing on King,³⁹ claims that “anyone with the power in their hands could [theoretically] exercise prerogative,”⁴⁰ presupposing such an all-encompassing reading. In order for this to go through, one must primarily draw on the restriction of prerogative by the public good and claim that it is the only thing restricting prerogative. If this was right, then all individuals would be equally restricted—that is, the concept extends to everyone. We can now state the above argument more clearly as the *Argument from Source*:

Natural law grants all rational individuals natural powers, i.e. it extends to everyone. Prerogative power is a power that can be theoretically possessed by anyone, i.e. it is non-restrictive. As there is no further power except natural power that extends to everyone, prerogative power must be a natural power.

The only missing step that has not been argued for is the claim that natural power is the only power that extends to everyone. On Locke’s view, it is clear that natural law has this property—it is defined as extending to everyone (II.11, 273–74)⁴¹—though by showing that it extends to everyone, one has not shown that it is the only power that extends to everyone.

Locke only ever explicitly restricts political powers in scope (II.88, 324–25). For example, Locke clearly restricts political power to the borders of its commonwealth that instituted it, by stating that any political sanctions, as actions of political power, could not “reach a Stranger” outside of its borders and that they “hath no Power over him” (II.9, 273). Moreover, only a certain subset of citizens of any one commonwealth can execute the laws—namely, the executive. With political powers being restricted, and natural powers being unrestricted, one only has to show how there is no third type of power in order to arrive at the above argument. Textually, Locke does not introduce any such third power, such that the claim that natural law is the only power to extend to everyone is, at least, largely plausible. If that is correct, then the *Argument from Source* shows successfully that prerogative is natural. If there is a third type of power to be found in Locke, then this argument loses much of its strength.

Another, related, argument might also be advanced for the naturalness of prerogative. It is based on an analysis of who grants powers. This line of thought

37 Corbett, “Extraconstitutionality,” 446.

38 Following Locke, I will, here and elsewhere, understand terms like ‘all’ and ‘everyone’ to refer to all rational human beings.

39 William King, *The State of the Protestants of Ireland under the Late King James’s Government*, 3rd ed. (London, 1692).

40 Cf. Corbett, “Extraconstitutionality,” 446; Langston and Lind, “Limits of Presidential Prerogative,” 59–60, 66.

41 Cf. Alex Tuckness, “Locke’s Political Philosophy,” Stanford Encyclopedia of Philosophy, published November 9, 2005; substantive revision January 11, 2016, <https://plato.stanford.edu/archives/sum2018/entries/locke-political/>.

expands upon the *Argument from Source* and attempts to specify how it is that one is granted the power in question, asking: How does one get to wield prerogative? Take a standard political power like the legislative's power to make laws for their respective polity. It is granted by the consent of the people in the formation of government (II.122, 349). Because it is granted by people in a political community, it must be political, so the line of argument goes. Natural powers, like the aforementioned power to punish, are not granted by anyone specifically. For Locke, it seems, it is simply not the case that any community of individuals could bestow upon each other the right to property appropriation or self-defence. Rather, they are, as argued for above, possessed by everyone by natural law (that is itself given by God and is discoverable through reason⁴²).

An application of this argument on the case of prerogative is, at least in part, found in Mattie. He argues that prerogative is not and indeed cannot be granted by the people. This is because prerogative justifies actions that cannot be justified by human agents, such as actions enacted by the antilegal prerogative. For Mattie, prerogative must ultimately be "justified by . . . the law of nature" as it is a power to deal with "confusion, disorder, and violence,"⁴³ akin to conditions (potentially) faced in the state of nature. Because of this, it cannot be political, for no political power could achieve that; only unconstrained by the legalistic framework can the executive achieve such a feat. Fatovic understands prerogative similarly, calling it a substantive principle "derived from the law of nature"⁴⁴ that is directly "bound"⁴⁵ by it. For him, prerogative is possessed by everyone, cannot be granted by anyone and functions to deal with the insufficiencies of legal political life analogously to the state of nature.

One more explicit reason to think prerogative is derived from the law of nature found in Fatovic is best shown by the following *reductio ad absurdum* type argument: Imagine prerogative was a political power and could be granted by people. If that was indeed the case, then the people would be able to bestow upon one (or several) of them the powers to act without and against the law. However, Fatovic claims, there can be no "prior approval"⁴⁶ to such a move in Lockean thought. Locke seems to agree, claiming that one "cannot give another Man such a[n Arbitrary] Power" (II.172, 382), which would exactly be such "prior approval"⁴⁷ to prerogative. Additionally, in the *Essay on Toleration*, Locke specifically says that "no man can give another man power over that over which he has no power himself."⁴⁸ If that argument from self-effacement is right, prerogative cannot be political. Following this line of reasoning, we can formulate the *Argument from Grant* more clearly:

42 In what follows, I will continue to state that natural law is not given by anybody. By "anybody," I mean "any created being." Clearly, Locke held that the natural law was given by God.

43 Mattie, "Prerogative and the Rule of Law," 86.

44 Fatovic, "Constitutionalism and Contingency," 279.

45 Fatovic, "Constitutionalism and Contingency, 290.

46 Fatovic, "Constitutionalism and Contingency, 296.

47 Fatovic, "Constitutionalism and Contingency, 296.

48 John Locke, *An Essay on Toleration*, in *Locke: Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press), 137.

Political powers are granted by people. Natural powers are granted by nobody. Prerogative cannot be granted by people. Hence, it must be a natural power.

The Argument from Grant is similar, yet distinct from the *Argument from Source*. The latter drew its plausibility from the fact that the source of prerogative is given by nature, whereas the former more pronouncedly argues that prerogative is non-political—that is, it cannot be granted by other individuals. Both suggest that prerogative is a natural power extended into the political realm. In this section, I have hoped to provide two strong formulations for those arguing that prerogative is a natural power. In the remainder of the essay, I will explore why one might instead think that prerogative is political and what that would mean for Locke's political thought.

3. Two Overlooked Distinctions

In this section, I prepare the argument that prerogative might be a political power after all. The thrust of my argument rests on two distinctions that, I claim, have been unduly neglected so far. I claim that neither executive power nor public good are unitary concepts. Once properly understood as multiple concepts, I hope to show that much of the arguments presented above fail to capture these conceptual distinctions in Locke's political thought adequately and that prerogative might thus be political and not natural.

Let us begin with the concept of executive power that, I claim, is not unitary for Locke. Let us first examine the textual evidence for this claim. Broadly speaking, I claim that executive power, for Locke, is divided into natural executive power and political executive power and that this distinction has some relevance when thinking about the topic of prerogative.

Natural executive power, or "executive power of the law of nature" (II.89, 325) is that power possessed by every individual in the state of nature to carry out the law of nature (II.7, 271–72; II.9, 272–73; II.13, 275–76). This includes the right and power to punishing offenders (II.9, 272–73; II.13, 275–76) and the appropriation of property (II.3, 268), both with their respective restrictions. For Locke, "the execution of the law of nature is in that state [of nature] put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation" (II.7, 271). The natural executive power, as Locke remarks, extends to everyone in the state of nature. If a transgression is committed, any one individual may execute the law of nature by prosecuting the transgressor. Put differently, everyone, in the state of nature, is an executive of the law of nature.

This contrasts starkly with political executive power, similarly labelled by Locke. It is that power possessed by the political executive only. This power extends to executing laws, punishing crimes, and repelling foreign invasions, the latter relating to the federative part of executive power (II.9, 272–73). Locke understands this "*Executive Power of Civil Society* [as one] which is to judge by standing Laws how far Offences are to be punished, when committed within the Commonwealth" (II.88, 325). In the case of a transgression against political laws, the executive has the political executive power to punish those offences. Nobody else can simply step in and punish the transgressors rightfully.⁴⁹

⁴⁹ Broadly, natural and political executive power are analogous powers. This is to say that they are both executive powers of their respective domain, that of natural and manmade laws. However, this is

Most of the time, Locke uses the same locution “executive power” to refer to both of these concepts, obscuring the underlying conceptual differences. What I have hoped to have shown above is that Locke actually refers to two concepts at different stages of the text. Above and beyond the textual evidence laid out above, there is further reason to believe these concepts to be meaningfully different. This is because, both textually in Locke and especially in subsequent scholarly work, natural and political powers have been understood as mutually exclusive. Mansfield claims that “no one can have both natural power and political power.”⁵⁰ If it is indeed the case that these two powers are mutually exclusive, and if there is individual evidence for both a natural and a political executive power, then they have to be different concepts.

Mansfield goes on to explain that when individuals step from the state of nature into civil society and then into political society, “natural power is divided, it becomes political, and thereupon no longer exists.”⁵¹ In other words, natural powers turn into political powers (or dissolve or are suppressed until they are reactivated again⁵²). This claim is also corroborated textually in Locke: Political (executive) power, he claims, is “that Power which every Man, having in the state of Nature, has given up into the hands of the Society” (II.171, 381). For Locke, such a political society can only exist if “every one of the Members hath quitted their natural Power, resign’d it up into the hands of the Community” (II.87, 324; see II.88–89, 324–25). As such, there appear to be two mutually exclusive concepts of executive power at work in Locke’s thought; natural executive power and political executive power.

The second distinction, directly interrelated with the first, that has been overlooked follows straight from this finding but is significantly more consequential. Here, I claim that Locke’s concept of public good is similarly bifurcated along conceptually equivalent lines. Much of Locke’s thought on the matter of prerogative power is concerned with the public good. Recall that in the first section, I introduced prerogative as being restrained by the public good, which is a view shared by virtually all Locke scholars and is found very explicitly and repeatedly throughout the Second Treatise (see II.160, 375). This restraint, I suggest, has been misunderstood, especially by those arguing for a natural prerogative.

First, let us examine the textual evidence in favour of the existence of two concepts of public good. Locke tells us that in the state of nature, human beings, by virtue of being God’s property (II.6, 270–71) and being subject to God’s plan, ought to act to preserve “*all Mankind*” (II.7, 271).⁵³ All their actions are restrained by concern for the

not to say that one is derivative from the other. This would be a much more substantive claim that would warrant further argument.

⁵⁰ Harvey Mansfield, *Taming the Prince* (New York: The Free Press, 1989), 199. See also II.130, 353; II.144–48, 364–66, Willmoore Kendall, *John Locke and the Doctrine of Majority-Rule* (Whitefish, MT: Kessinger Publishing, 2000), 62, 103; Simmons, *Edge of Anarchy*, 62, Harvey Mansfield, “The Modern Doctrine of Executive Power,” *Presidential Studies Quarterly* 17, no. 2 (Spring 1987), 237–52.

⁵¹ Mansfield, “Modern Doctrine,” 246. See Richard Ashcraft, *Revolutionary Politics and Locke’s Two Treatises of Government* (Princeton: Princeton University Press, 1986), 577.

⁵² This is the case with the right to revolution. However, Locke explicitly claims that even those powers that lie dormant in political society “will always [only] remain in the community” (II.243, 428) and not the individuals directly.

⁵³ See Mansfield, *Taming*, 195.

public good; if one's actions transgress against the good of all, one's actions transgress against the law of nature. This sense of public good is understood to include all human beings as part of God's creation. For example, one cannot appropriate as much property as one wants, without leaving "enough, and as good left in common for others" (II.27, 288). These "others" are all other humans, and what is playing the constraining function here is the good of all of mankind; if I took all the land available, there would be nothing left for others. In other words, natural powers are restricted by the public good of all of mankind.⁵⁴ Let us call this concept of public good the general public good.

This, I claim, is relevantly different from what we shall call the specific public good. The specific public good is differentiated from the general public good in one important way: it is the public good of one specific community only. The focus shifts from the good of mankind in the former concept to the good of one specific political community in the latter (see II.3, 268; II.159, 374–75; II.161, 375; II.164–66, 377–78). As Locke puts it, the focus is now on the "public good of the society" (II.89, 325). This duty of "collective self-preservation"⁵⁵ restrains political actions by virtue of their impact on the good of the specific community, which differs markedly from the above concept. What is being preserved is not the all-encompassing good all of mankind; rather it is just the collective self-preservation of a given political community.

This distinction between general and specific public good has further strong textual support throughout the entire Second Treatise. That is not to say that Locke uses a distinction along the exact same terms, but rather along the same conceptual lines. When introducing the law of nature early on, Locke repeatedly constrains it by the "*common good*" (II.131, 353) of "*all Mankind*" (II.12, 275). When discussing Adam and the applicability of the law of nature, Locke uses a quite similar locution, specifically calling it "general Good" (II.57, 305). This seems to be the standard interpretation; the law of nature being constrained by the common good of mankind, what I have called the general public good.

However, in chapter 14 *Of Prerogative* and also elsewhere, Locke's usage of "public good" and the "good" that constrains the executive is, despite locutionary equivalence, conceptually quite different. He explicitly states that the "end of government [is] the good of the Community" (II.163, 376) and the "good of . . . the People" (II.164, 377). This is a markedly reduced scope from the general public good above (as all political communities, so far, have been a subset of all of humanity). Moreover, Locke sometimes specifically constrains prerogative not simply by the public good (understood in a certain way), but explicitly by the "good of the Nation" (II.167, 378) and "*all [its] Members*" (II.159, 375), making further plausible the claim that what is playing the constraining function here is much more restricted than the good of mankind. More to this point, Locke draws an analogy to the infancy of political rule, stating that those commonwealths differed "little from Families." Right in the next sentence, Locke deictically refers to "their good" as constraining the prerogative of their "Governours" (II.162, 376). At another point, he also explicitly states that "private men's interests ought not be . . . sacrificed to anything but the manifest advantage of

54 Such a position was generally shared by most Whigs, see Ashcraft, *Revolutionary Politics*, 190; James Tyrrell, *Patriarcha non Monarcha* (London, 1681).

55 Fatovic, "Constitutionalism and Presidential Prerogative," 432.

the public,”⁵⁶ further suggesting that this usage of public is similarly restricted as above. All other mentions in chapter 14 fall under either of these categories; never is his mention of “public good” ambiguous enough to allow a different reading.

Just before the chapter on prerogative, Locke also draws on a robust tradition of understanding the limitations of the executive by employing what Goldie calls the “Ciceronian tag”⁵⁷ *salus populi*. In II.158, Locke tells us that “*Salus Populi Suprema Lex*, is certainly so just and fundamental a Rule, that he, who sincerely follows it, cannot dangerously err” (II.158, 373). *Salus populi*, of course, refers to the safety of the people and would be what we have called specific public good here, thus providing strong evidence that, for Locke, the executive’s actions are restricted by just that specific public good.⁵⁸ As Locke writes: “The power . . . placed in the Executive is . . . placed in him for the safety of the People” (II.156, 371). This is a ubiquitous motif. For example, both Hobbes and Spinoza referred to this concept in their political work, establishing a strong tradition of the executive’s relation to the specific public good.⁵⁹ All in all, the textual evidence seems rather clear on this account. Prerogative, for Locke, is restricted by the public good of a community and not by the public good of all of mankind.

If the distinction between the specific and the general public good introduced here is to hold, we must make sense of one peculiarity helpfully pointed out by an anonymous reviewer: Does this picture not require the executive to be able to sacrifice the general public good for the specific public good? If that was so, then this would be in conflict with Locke’s overall picture of natural law, it seems, as trading off the general public good would appear controversially opposed to orthodox interpretations of Locke.

There are a variety of ways to think about this worry. First, one might claim that, given the strong textual basis for the specific public good laid out above, this is a problem for Locke and not a problem for any given interpretation of Locke. It could just be yet another “example of Locke’s infamous inconsistencies.”⁶⁰ Such inconsistencies, not only within concepts but also between chapters, have been pointed out repeatedly by various interpreters and could be at play here too. While I am generally sympathetic to this view in thinking about Locke, I would like to offer a different type of response.

To me, the following picture seems like a more plausible way to understand this. For Locke, the overall existence of political communities might just be consistent with the general public good. If it was not, then Locke would not advocate for political

⁵⁶ John Locke, *John Locke on Money*, ed. Patrick Hyde Kelly (Oxford: Oxford Clarendon Press, 1991), 220.

⁵⁷ Mark Goldie, “Locke and Executive Power” (unpublished manuscript, November 18, 2019), 5.

⁵⁸ Cicero, *On the Republic. On the Laws*, trans. Clinton Keyes, Loeb Classical Library 213, Cicero vol. 16, (Cambridge: Harvard University Press, 1928).

⁵⁹ Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Oxford University Press, 2014); Baruch Spinoza, *Theological-Political Treatise*, eds. Samuel Shirley and Seymour Feldman (Indianapolis: Hackett, 2001).

⁶⁰ Fatovic, “Constitutionalism and Contingency,” 260. See also Halldenius, “Locke and the Non-Arbitrary,” 260; Mwangi wa-Githumo, “Inconsistencies and Contradictions in Some of John Locke’s Economic and Political Theories: A Critique,” *Journal of Eastern African Research & Development* 24 (January 1994): 229–36.

societies to be established, as every political society would leave all of mankind worse off (and that would not be in God's interest and thus be contrary to natural law). However, and I take this to be crucial, within these political societies, the executive may trade off natural law concerns (e.g., the right to property) for political concerns (e.g., the safety of a town when faced with a fire, II.159, 374–75), a point that Mansfield stresses.⁶¹ The executive's decision, as has been established textually, is restricted first and foremost by the specific public good. The sum of all good executive's decisions in a polity may be contributing overall to the general public good, though whether this is so does not impact the question of how individual expressions of prerogative are constrained. In other words, on a micro level (the level of justifiability of the executive's actions), one may trade off the general public good for the specific public good, but only because, on a macro level, this leads to the types of political societies that bring about the good of all of mankind. We find this worry directly in Locke too, when he warns us that in situations in which the executive does have a "separate Interest" (II.163, 376) than that of the public, e.g., when they do trade off other goods for the specific public good on the micro level, they would act irrationally on the macro level too. Those "Rational Creatures [that] entered into a Community for their mutual good" (II.163, 376–77) on terms at which, on the micro level, their specific public good was being violated, are "so void of Reason, and brutish [that] *Prerogative* might indeed be, what some Men would have it, an Arbitrary Power to do things hurtful to the People" (II.163, 377).⁶² However, if the executive's actions on the micro level align with the specific public good, Locke would agree that, on the macro level, entering into these societies is rational, thus dispelling the worry.

However, what would happen if those distinctions were wrongly drawn—that is, if executive power and the public good were simply unitary concepts? In a nutshell, if this was the case, then I would take the arguments presented in section two as *prima facie* plausible—prerogative would be a clear natural power. In the rest of this paper, however, I explore how this picture changes if these distinctions are correct.

4. Locke's Political Prerogative

How do the two distinctions raised above influence how we ought to see prerogative? In this section, I will first come back to the arguments in favour of a natural prerogative and re-examine them in light of the distinctions proposed here. Then, I will offer a positive picture of what this means for Locke's political thought and respond to some objections.

If the above is correct, and Locke does indeed conceptually differentiate between natural and political executive powers and between the general and the specific public good, and if they are interlinked in the way outlined above, do the *Argument from Source* and the *Argument from Grant* still hold up in the way presented above?

First let us revisit the *Argument from Source*: Recall that the gist of it was that because only natural law extends to everyone and because prerogative can theoretically be possessed by anyone, it must be natural. There are reasons to think

⁶¹ Mansfield, "Modern Doctrine," 203, 223.

⁶² For further discussion of this, see Halldenius, "Locke and the Non-Arbitrary," 273.

that this argument might be subject to a reduction type response, for example in the case of legislative power.⁶³

Of more interest to the question of this paper, however, is whether the *Argument from Source* applies to prerogative specifically. Someone like Corbett may claim that prerogative, even in a well-ordered government, remains in the hands of everyone, whereas legislative power, is conferred upon the legislative via consent. Corbett gets close to saying as much, stating that prerogative remains an “exercise . . . of private judgment regarding what the [natural] law requires.”⁶⁴ It just happens to be that the executive, by virtue of possessing more power, is in a privileged position to exercise said prerogative. Because no one else is in a similar position, they are the only one who can exercise it *de facto*. In other words, it is a matter of coincidence that the executive can exercise their prerogative to such an extent simply because of the influence their office enjoys in any specific political society. Other individuals would have *de jure* (*naturae*) access to this power, but simply lack the means of executing it properly. And if someone argues that, for Locke, prerogative is never mentioned as being in the hands of anyone but the executive, this might just reflect a contingent fact of the world but does not exclude anyone from possessing prerogative.

It does seem that Locke never once mentions prerogative in the hands of anyone but the executive (II.159–168, 374–379). Prima facie, it would seem peculiar that Locke would not once extend it to anyone but the executive if it was indeed a natural power and if there was the possibility that others could exercise it as well. Clearly, one would argue, sometimes other non-executives must also be in a position to exercise this prerogative, if it was indeed natural and available to all. It seems unlikely that the executive is necessarily always better positioned to utilise prerogative. If Locke genuinely thought that prerogative was possessed by all, he might have mentioned it at least once.

However, also consider the claim that Locke explicitly allows for prerogative to be wielded by a common man and not just the executive, which might suggest a natural source. If this was right, then prerogative could not be political in the sense defined here.⁶⁵

The supposed textual basis for this claim is found in Locke’s claim that that “the Laws themselves should in some Cases give way to the Executive Power” (II.159, 375) and that “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)” (II.159, 375). One might draw from this passage the conclusion that the prerogative to act against the law is nested in all as, when a nearby house is burning, any one of us may pull it

63 This reductio argument would build off Locke’s understanding of legislative power. Legislative power, like prerogative power, can, in theory, be possessed by anyone. Accordingly, legislative power would also be a natural power. This conclusion appears absurd, for if there is a single power in Locke’s thought that is political, then it would be the legislative power. It seems highly implausible that all powers are, for Locke, natural (cf. John Dunn, *Political Thought*, 127, 149), given that he explicitly holds that, when entering the political society, we “give up all [our] Natural Power[s]” (II.136, 359) so that we can have political ones. This is a sentiment echoed by the vast majority of the literature, see Kendall, *The Doctrine of Majority Rule*; Simmons, *Edge of Anarchy*; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1965). The failure to apply the *Argument from Source* to the legislative power suggests that it may be either internally incoherent (because it does not explain all cases) or must be restricted in scope.

64 Corbett, “Extraconstitutionality,” 446.

65 I thank an anonymous reviewer for this suggestion.

down to stop the fire. Plausibly, this act of pulling down a house is an act to be done by a citizen and not by the executive (as it would restrict the scope of this claim massively, as the prince can only pull down so many houses in time). If this reading is right, then prerogative does not just rest in the hands of the executive, but in the hands of all citizens. If this was indeed the case, then this would complicate the picture presented in this paper.

However, this example is directly followed by the following passage: “Man may come sometimes within the reach of the Law, which makes no distinction of Persons, by an action, that may deserve reward and pardon, ‘tis fit, the Ruler should have a Power, in many Cases, to mitigate the severity of the Law, and pardon some Offenders” (II.159, 375). As Feldman helpfully points out, “the implication is thus that the burning house is an example of a *private person’s* disobedience of positive laws for the sake of the good of the community and that the relevant act of prerogative is the pardoning of the criminal by the executive.”⁶⁶ On this picture, the private person breaking the law to tear down a house to stop the fire from spreading is breaking the law. Yet because the reason why the law is broken is the (specific) public good, the executive can pardon the criminal, thus constituting an act of prerogative that is fully consistent with the picture laid out in this paper. If this is right, then the *Argument from Source* fails in providing a reason to think why it would be that prerogative extends to everyone.

Second, recall the *Argument from Grant*, which roughly held that because prerogative cannot be granted, it cannot be political. Here again, the textually sourced distinction lays bare an inconsistency in Lockean thought. Prerogative is restricted by the specific public good of the political community, and prerogative is part of the political executive power, yet one may still wonder how it can be granted. Those favouring to read it as a natural power will hold that it cannot be granted. Both arguments have some textual support (of varying strength) and are initially plausible. I suggest that, faced with this choice, arguing that prerogative is granted is a better reading of Locke.

On the one hand, prerogative might have to be textually understood as grantable. This is because, as I have argued above, prerogative is a power of the political executive and political power is conferred and legitimised via a consent-based mechanism. The executive is granted their power via consent and does not just happen upon them (nor does the executive have them just because they can use them). If it was not grantable, how come that only the executive ever wields it? Specifically, Locke claims that the prince, whose interests are identical with the “good of the Community . . . was made for it” (II.163, 376)—that is, the prince was given this power. Following this line of thought and drawing on the distinction of natural and political executive power, while locating prerogative in the latter, one could reject the *Argument from Grant*. However, the intuitive cost here has been pointed out before. As Fatovic points out, Locke also claims that one “cannot give another Man such a[n arbitrary] Power” (II.172, 382), which would necessitate a “prior approval”⁶⁷ to extralegal powers that seems so counterintuitive. This represents a textual and interpretative tension, perhaps resolved by denying that prerogative is arbitrary, as it is properly constrained and does have a countervailing force in the right to revolution.

⁶⁶ Feldman, “Judging Necessity,” 558.

⁶⁷ Fatovic, “Constitutionalism and Contingency,” 296.

Recently, Sharon attempted to reconcile this tension. He argued that Locke's legalism might be reformulated as "collective self-rule,"⁶⁸ which means "being governed by one's own will through the collective exercise of political power."⁶⁹ This, Sharon thinks, opens up the "room for extra-legal employment of political power,"⁷⁰ i.e. extra-legal political prerogative. The underlying reason, Sharon agrees, is still the public good, or the specific public good more particularly. Viewed this way, this might prove a way out of the interpretative tensions. However, for the sake of this paper, I would like to leave this specific question, how big exactly the tensions produced by a political community sanctioning prerogative, for further research.

In this last part, I want to give the positive account of what it would mean to have a political prerogative. If what I have argued for above is correct, and the two distinctions underlying a proper understanding of prerogative do indeed represent a textually sourced account of Locke's thought, then I have presented a picture of prerogative that is markedly different than what has been offered before.

The picture I have presented here is rather different than many other interpretations of prerogative and Lockean political thought more broadly. In my view, the chapter on prerogative, far from being an unimportant footnote, represents a central part of his political theory. This is because the role of prerogative is not simply restricted to outwards facing international conflicts or rare internal emergencies occurring due to an overly stale legal system. Rather, prerogative is the power of the political executive, retrospectively consented to by the people, aimed at and justified by their good (and not the good of all of mankind), that takes prime position alongside the legalism that many take to be at the center of Locke's thought. In other words, it is a central element of politics that represents citizens giving the executive wide and sweeping powers.

However, prerogative being political and being restricted by the good of the society does not mean that it is wholly unchecked—that is, it is not arbitrary. In line with standard interpretation of Locke, the natural right to resistance lays dormant in all political societies, though not in the individuals themselves, as Locke reminds us: "*The Power that every individual gave the Society*, when he entered into it, can never revert to the Individuals again, as long as the Society lasts, but will always remain in the Community" (II.243, 427–28). Most broadly, it functions as a check on prerogative by giving the citizens the power to "Appeal to Heaven" (II.168, 380) for there is no "*Judge on Earth*" (II.168, 379)⁷¹ by allowing them to rebel and replace the executive whose prerogatives fail to be guided by the specific public good via this post-hoc mechanism. As such, political prerogative and natural right to resistance stand in a quite peculiar relationship to each other, the former expressing the power of a political community to act rather freely for its own good and the latter ensuring that this expression actually does take the form it purports to do. Prerogative and the right to resistance, in other words, are two fundamental powers, one political, the other natural, their interplay making up the Lockean political theory on my account.

68 Sharon, "Locke, Liberty, and Law," 16.

69 Sharon, "Locke, Liberty, and Law," 14.

70 Sharon, "Locke, Liberty, and Law," 14.

71 Because the citizens cannot "have by the Constitution of that Society any Superior power, to determine and give effective Sentence" (II.168, 379–380). Cf. Weaver, "Liberalism and Leadership," 161.

In this sense, the picture of a political prerogative is not markedly different from one in which the prerogative was natural, both facing the same type of countervailing force in the people and their perception of the consequences of the prerogative and the natural right to revolution restricting it thereby. However, I see the main difference as being the following. Understanding prerogative as political makes it untenable to think of Locke as a defender of a standard picture of legal supremacy in which, through a consent-based mechanism, citizens create all the laws that they are governed by, all the while being under the law of nature. On this view, prerogative would be a natural power that is simply left over from the state of nature, perhaps a necessity but not a design. However, we must now see Locke not as defending a theory of democratic politics, but rather a slightly more utilitarian theory; it is not just the case that the executive executes the laws given to them by the people. Instead, they can also transcend those boundaries at whatever point they see fit to enhance the good of their society, not because the law of nature commands this of them, but because it is their political power to do so. And for as long as the actions of the executive do serve that purpose, they are justified, all the while being instantiated by a political actor. In the words of Arnold, Locke's theory becomes one for which "the exercise of prerogative power deployed for seemingly democratic justification—the security and well-being of the public"⁷² is taken to be fundamental to politics, "even as its implementation is profoundly non-democratic."⁷³ In this space between the executive wielding democratic or political prerogative, and the natural right to revolution reining them in, I claim, Locke envisioned the political life to be.

Applying this finding to more recent pictures of prerogative in liberal democracies, we can understand Locke as endorsing two points. First, that, *prima facie*, much of the powers wielded in the "war on terror" might be justified if they do advance the specific public good of the country wielding them. Second, in response to a reaction decrying it as undemocratic, Locke also reminds us that because there is no judge on earth to oversee the execution of these prerogatives, it falls on us, the public, to do so, thereby putting the responsibility of providing the so often cited checks and balances ourselves. In other words, he reminds us that we, the people, are the checks and balance, because it is our good that is on the line when the executive steps outside the law to act on our behalf. As Feldman and Kleinerman put it, this duty is best done by "public ratification or condemnation after the fact,"⁷⁴ combating our "tendency to accept seemingly well-intentioned, though unconstitutional exercises of prerogative."⁷⁵ In other words, if prerogative is political, then Locke can teach us something about it even in its modern instantiations, namely that it is our duty to check and control it with the same vigilance and effort we put into granting the executive these powers.

⁷² Kathleen Arnold, "Domestic War: Locke's Concept of Prerogative and Implications for US 'Wars' Today," *Polity* 39, no. 1 (January 2007): 16.

⁷³ Arnold, "Domestic War," 16.

⁷⁴ Feldman, "Judging Necessity," 551.

⁷⁵ Benjamin Kleinerman, *The Discretionary President: The Promise of Presidential Prerogative* (Lawrence: University Press of Kansas, 2009), 63.

5. Conclusion

In this paper, I have aimed to offer a picture in which the Lockean prerogative is not a natural, but rather a political power. The main thrust of this argument came from two distinctions that I have introduced and that, I suggested, have been overlooked in the wider literature. First, I claimed that Locke distinguishes natural and political executive power. Second, I argued that the public good that restricts action in Locke's theory is actually conceptually bifurcated. On the one hand, actions in the state of nature are restricted by what I called the general public good—namely, the good of all of mankind. On the other hand, actions in the state of politics are restricted by the specific public good—namely, the good of the community. Drawing on these distinctions, I argued that formerly strong arguments in favour of the naturalness of prerogative appear less persuasive. I then sketched a picture of what a political prerogative would mean for a Lockean political theory, suggesting that politics is best characterized as a strong executive wielding political prerogative that is reined in by the natural power to revolution, producing a constant space of tension in which productive political action can happen.⁷⁶

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