

# The Lockean Constitution: Separation of Powers and the Limits of Prerogative

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[See table of contents](#)

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## Article abstract

In the post-9/11 era, many legal scholars have advanced theories of constitutional law that make allowance for unreviewable discretionary decision making by the executive branch, particularly in the context of the “war on terror”. Drawing on Lockean constitutional theory for normative support, the author develops an alternative constitutional model that addresses the problem of discretionary executive power. Locke’s constitution divides political power between the executive and the legislature, with the latter checking and balancing the former. Both the executive and the legislature have a fiduciary trust to act for the public good. Locke closely links the public good and the constitution such that any breach of the constitution is per se a breach of the public good. Therefore, unreviewable decision making by the executive always violates its trust because it is a breach of the constitution. After setting out Locke’s theory of separation of powers, the author presents a modified model that makes the judiciary, in addition to the legislature, responsible for the accountability of executive decision makers. Although the executive retains its prerogative power, it must always remain accountable to the legislature and the courts, even in emergencies.

## THE LOCKEAN CONSTITUTION: SEPARATION OF POWERS AND THE LIMITS OF PREROGATIVE

*David Jenkins\**

In the post-9/11 era, many legal scholars have advanced theories of constitutional law that make allowance for unreviewable discretionary decision making by the executive branch, particularly in the context of the “war on terror”. Drawing on Lockean constitutional theory for normative support, the author develops an alternative constitutional model that addresses the problem of discretionary executive power. Locke’s constitution divides political power between the executive and the legislature, with the latter checking and balancing the former. Both the executive and the legislature have a fiduciary trust to act for the public good. Locke closely links the public good and the constitution such that any breach of the constitution is per se a breach of the public good. Therefore, unreviewable decision making by the executive always violates its trust because it is a breach of the constitution. After setting out Locke’s theory of separation of powers, the author presents a modified model that makes the judiciary, in addition to the legislature, responsible for the accountability of executive decision makers. Although the executive retains its prerogative power, it must always remain accountable to the legislature and the courts, even in emergencies.

Depuis le 11 septembre, de nombreux juristes ont avancé des théories de droit constitutionnel qui permettent à l’exécutif un pouvoir discrétionnaire incontrôlable, particulièrement dans le contexte de la «guerre contre le terrorisme». S’appuyant sur le soutien normatif de la théorie constitutionnelle de Locke, l’auteur développe un modèle constitutionnel alternatif qui aborde le problème du pouvoir exécutif discrétionnaire. La constitution de Locke répartit le pouvoir politique entre l’exécutif et le législatif, avec le pouvoir législatif contrôlant le pouvoir exécutif. Les deux branches ont un obligation fiduciaire d’agir pour le bien public. Locke lie le bien public et la constitution d’une manière étroite, faisant en sorte que toute violation de la constitution représente en soi une violation du bien public. Toute décision incontrôlable prise par l’exécutif viole donc toujours son obligation fiduciaire en portant atteinte à la constitution. Après avoir exposé la théorie de Locke sur la séparation des pouvoirs, l’auteur présente un modèle modifié qui rend l’appareil judiciaire, en plus de la législature, responsable de la responsabilisation de l’exécutif. Bien que l’exécutif conserve sa prérogative, il doit toujours rester responsable devant le parlement et les tribunaux, même en cas d’urgence.

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<b>Introduction</b>	545
<b>I. The Lockean Constitution</b>	546
<i>A. A Constitution of Structure</i>	546
<i>B. The Problem of Prerogative</i>	554
<i>C. The Legislative Check</i>	563
<b>II. Judicial Power</b>	570
<i>A. A Constitution of Law</i>	570
<i>B. Modifying Locke</i>	573
<i>C. Popular Sovereignty and the Judicial Trust</i>	580
<b>Conclusion</b>	586

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## Introduction

Executive power is the predicament of our times. Although the common law nations have long sought to prevent unchecked executive authority, this problem has re-emerged at the forefront of legal controversies in the long decade since “9/11”. During these years, there have been more frequent and powerful suggestions that the executive branch must be free to make decisions beyond the scrutiny of the legislature or the courts. These suggestions have been made in response to a number of perceived social problems (such as crime and illegal immigration), but they have been most vociferously made in the context of the “war on terror”. There, some scholars have expressed constitutional theories that sit in tension (or perhaps outright conflict) with liberal values.

This article particularly targets and roundly rejects those constitutional theories that support sweeping and institutionally unaccountable executive powers in times of crisis. It is true that exceptional executive decisions in the absence of or even contrary to law might be necessary on extraordinary occasions. Such decisions, however, must remain accountable in some way to the legislature or the courts; there is no room in a liberal constitution for exclusive, unilateral spheres of executive power, where the will of the one must always prevail. In making this argument, this article turns to the ideas of John Locke for a constitutional model in which executive power must always remain accountable to the legislature and courts, even in emergencies.

The Lockean constitution, broadly conceived, is a sophisticated system for the separation of powers. Locke divided political power between an executive and legislature, each having independent fiduciary trusts to act for the public good. Because the public good is politically contestable, Locke closely linked it to a structural system for its rational realization. The substantive goals or requirements of the resulting trust, which resides in those wielding political power, are likewise circumstantially dependent and open for debate. However, that trust always requires fidelity to constitutional checks and balances that allow institutional struggles over the meaning of the public good and restrain power, especially unitary executive power. In Locke’s dualistic model, which is the forerunner to modern separation of powers theories, the legislature is the sole or primary institutional check on executive power. An attempt by the executive to undermine the legislature’s independence or oversight, or otherwise to slip the restraints it puts upon him, is tantamount to an attempt to wield absolute power. Absolute power per se violates the public good and thereby the executive’s trust, because it runs too high of a risk of miscalculation or arbitrariness. Although Locke argued that the executive has a prerogative power to make exceptional decisions in emergencies, decisions without any institutional accountability whatsoever are not

prerogative ones at all, as properly understood. To the contrary, this sort of executive overreaching manifests an illegitimate exercise of power, which in extreme circumstances threatens tyranny and invites legislative or popular resistance. Furthermore, even in those common law countries where parliamentary sovereignty prevails, the legislature is no longer the only check. There are the courts. A practical theory of the Lockean constitution must somehow account for the judiciary's historical development into an independent, third branch of government. This article therefore expands on Locke's original structural model by including them in the constitutional architecture. It argues that the Lockean constitution not only easily accommodates the judiciary, but normatively justifies its review of executive decisions—even prerogative ones.

Before continuing, a disclaimer is in order. Some readers will criticize this article as assuming too much and saying too little, because it neither delves into the full complexities and intellectual history of Locke's philosophy nor considers the different legal systems and political cultures of the common law countries. These are, of course, important areas worth further attention, in the context of putting the Lockean constitution to work. However, this article is not strictly a piece on political philosophy or national law, but a normative argument for a particular liberal constitutional model. It addresses the problem of executive power in those jurisdictions sharing the common law heritage, and selectively draws upon the Lockean strands within that heritage. It prioritizes the Lockean influence over other ones, such as Hobbesian or classical republicanism. For these same reasons, this article's methodology relies heavily upon the work of political scientists and especially historians, who have studied Locke's philosophy and its influences on the constitutional development of the common law nations. As a law article, then, this piece seeks to do more than understand Locke's original meanings and their historical place; it interprets his ideas and modifies them to construct a workable constitutional model that better controls executive power in times of emergency. Just how the Lockean constitution adapts to local conditions obviously requires further work. That, however, is beyond the scope of this article.

## I. The Lockean Constitution

### A. *A Constitution of Structure*

Part I argues that Locke, in his *Second Treatise on Government*,<sup>1</sup> sets out a constitutional model, in which executive power is always politically

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<sup>1</sup> John Locke, *Two Treatises of Government* (London: Black Swan, 1690) book II at para 4 [Locke, *Second Treatise*].

accountable to the legislature—even in times of emergency. This reading of Locke therefore rejects alternative interpretations of prerogative power (as noted below), which would not only allow the executive to act against the letter of the law, but outside of the constitution itself. The Lockean constitution, which always constrains the executive, is a structural division of political power between the executive and legislature (and, as explained in Part II, the judiciary), resembling the modern separation of powers doctrine. This constitution of structure, therefore, contrasts with other forms of government that would, for example, rely on substantive restrictions on princely power or lodge sovereignty in a single republican legislature. While this article examines Locke's constitutional model in detail and expounds upon it, it is first helpful to explain briefly why Locke embraced this structural solution to the problem of executive power. Its origins lie in his theory of the state of nature and natural law.

Locke's *Second Treatise* begins with the pre-political state of nature, in which all men enjoy perfect freedom and equality, subject only to natural law.<sup>2</sup> He equates that law with reason, which “teaches all Mankind, who will but consult it; That being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”<sup>3</sup> The law of nature permits such harm only when individuals defend themselves, seek reparations for injuries to person or property, or restrain and punish the transgressions of others.<sup>4</sup> Therefore, natural law gives everyone a right to self-preservation, just as it imposes a duty to respect the rights of others; an individual can neither slavishly submit to another, nor exercise arbitrary or destructive dominion over others.<sup>5</sup> Rather, one person's “attemp[t] to get an other Man into his Absolute Power” is to enter into a “State of War” with the other.<sup>6</sup> Like Hobbes, Locke acknowledges the great insecurity of this natural state where, in the absence of higher authority, every person has rights to ascertain, judge, and execute natural law. Being inclined to “ill Nature, Passion and Revenge,” as well as self-interest and imperfect reason, individuals will misuse these rights and attempt to impose their wills upon others.<sup>7</sup>

Consequently, entrance into a “*Civil Government* is the proper Remedy for the Inconveniences of the State of Nature.”<sup>8</sup> This act establishes a

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<sup>2</sup> *Ibid* at paras 4, 22.

<sup>3</sup> *Ibid* at para 6.

<sup>4</sup> See *ibid* at paras 7-12.

<sup>5</sup> *Ibid*. See also *ibid* at paras 23-24.

<sup>6</sup> *Ibid* at para 17.

<sup>7</sup> *Ibid* at para 13. See also *ibid* at paras 124-26.

<sup>8</sup> *Ibid* at para 13 [emphasis added].

supreme, communal authority that will decide controversies and so avoid dangerous states of war between individuals. Political society therefore exists for the purpose of better realizing natural law and protecting natural rights to life, liberty, and property.<sup>9</sup> With this explanation for the origins of civil government, Locke thereby introduces the rights-security contradiction that has long vexed liberalism's supporters and provoked its critics. This contradiction, however, is central to Locke's political thought. As will be explained below, his structural constitution is built around and productively channels the tensions between rights and security. A careful constitutional architecture preserves natural rights insofar as they are compatible with mutual security, at the same time as it accommodates strong but limited executive power.

Locke arrives at his structural solution, and so deals with the rights-security contradiction, in two basic steps. First, in a move similar to that of Hobbes, Locke disembodies the individual's rights to ascertain, judge, and execute natural law by placing them in the hands of government. Man thereby leaves behind his perfect natural liberty for liberty in a society formed with his consent.<sup>10</sup> In making this transition from a state of nature to civil society, Locke also reconceptualizes natural law itself. The individual no longer pursues and defends his natural rights through the short-sightedness of his own self-interest. Instead, government officials must impartially ascertain, judge, and execute natural law for the benefit of the whole. In this civil society, the maxim "*Salus Populi Suprema Lex*"<sup>11</sup> underlies the exercise of all political power. Such power, as Locke describes it, is

*a Right* of making Laws with Penalties of death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of the such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Public Good.<sup>12</sup>

All political actions must be reasonably related to achieve these ends. Otherwise, actions that are not directed towards the public good cease to be exercises of political power (properly so called), but are instead despotic.<sup>13</sup> However, what does or does not advance the above goals becomes a complex political calculation, where the separate interests of the indi-

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<sup>9</sup> See *ibid* at paras 87-89, 127-31.

<sup>10</sup> *Ibid* at para 22.

<sup>11</sup> *Ibid* at para 158.

<sup>12</sup> See *ibid* at para 3.

<sup>13</sup> Ruth W Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987) at 82; John T Scott, "The Sovereignless State and Locke's Language of Obligation" (2000) 94:3 *Amer Pol Sci Rev* 547 at 558-59.

vidual and the community (and thus the balance between rights and security) are no longer clear. How natural law is to be realized in civil society is therefore a difficult question of what serves the public good.

Because the public good is normatively thin as an animating principle of government, Locke only proposes it as an abstracted moral imperative and justificatory basis for political power.<sup>14</sup> It is simply too difficult to say in advance what the public good dictates in different, perhaps unforeseen circumstances.<sup>15</sup> Just as individuals do in the state of nature, officials and political factions might dispute its meaning, necessitating an appeal to the opinions of majorities.<sup>16</sup> Therefore, although he justifies civil government as a cure for the ills of the state of nature, Locke is skeptical about the possibility of preordaining the requirements of the public good. At the same time, he distrusts the abilities and motives of those officials exercising political power. Notwithstanding the basic principle that government should protect life, liberty, and property while ensuring security, natural law is a weak constraining force on government. So long as officials appear to serve these ends, the ambiguity and complexity of the public good means that they will have considerable political discretion and will attract popular deference to their decisions. Consequently, despite the merits of the hypothetical philosopher king, benevolent prince, or assembly of virtuous men, the concentration of political power in any one person, group, or institution runs too great a risk of error, arbitrariness, or abuse in ei-

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<sup>14</sup> Although John Dunn writes that the Lockean community's goals focus upon man's relationship with God and the "accomplishment of religious duty", the substantive moral purposes of society certainly could be other than promotion of religion (*The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government"* (Cambridge: Cambridge University Press, 1969) at 123). Without a substantive moral framework to guide individual and even collective moral judgment, then, as Dunn states, rational human action would fall back upon the "confusing abstractness of the utilitarian calculus" (*ibid* at 266). In *A Letter Concerning Toleration*, Locke suggests that the duties of even a religiously based society are compatible with individual moral choice, within certain parameters (London: Black Swan for Awnsham Churchill, 1689). What is more important is that different moral frameworks for society still mandate substantive ends to both individual actions and a government authority wielded for the public good. These frameworks therefore posit an ethic of individual or communitarian fulfillment going beyond Hobbesian order and security, and mere preservation of the polity. Indeed, some substantive political ethic of liberty or freedom itself "is to be valued as a 'fence' to preservation." Grant, *supra* note 13 at 90; See also Richard H Cox, *Locke on War and Peace* (Oxford: Clarendon Press, 1960) at 107.

<sup>15</sup> See e.g. Thomas Poole, "Constitutional Exceptionalism and the Common Law" (2009) 7:2 *International Journal of Constitutional Law* 247 at 258-71, criticizing arguments for substantive, common law values that attempt to limit executive power through advance definition of the public good.

<sup>16</sup> See Locke, *Second Treatise*, *supra* note 1 at paras 96-99.



ther present or in future, less capable hands.<sup>17</sup> The empowering and limiting aspects of the public good accordingly create a “dialectical problem”, which is “critical to Locke’s enterprise.”<sup>18</sup> Locke must therefore find another, pragmatic solution to the problem of controlling and channelling political power for the public good.

At this point, Locke takes his crucial second step in constructing a constitutional model that can both promote natural rights and provide them with the requisite security. When Locke transfers the individual’s rights to ascertain, judge, and execute natural law to government, he conceptually separates these rational functions from one another. While they are unified in the individual existing in the state of nature, or unified in the person of an absolute ruler, in “well order’d Commonwealths, where the good of the whole is so considered,” they must be divided between different officials or institutions.<sup>19</sup> Where these functions are joined in one prince or assembly, only conscience, virtue, or wisdom can ensure that the ruler obeys the dictates of natural law—an abstract and weak constraining force, as just explained. Moreover, rulers are just as irrational as any other individual and can abuse the political power entrusted to them.<sup>20</sup> As with the man who can judge his own cause in the state of nature, such unity of functions in a fallible ruler ensures neither civil society’s rights nor security in the long-run. In contrast, by properly dividing the functions of ascertaining, judging, and executing natural law between government institutions, officials can oppose and dispute one another in an orderly way. Such political disputation ameliorates passions, prejudices, and errors of judgment. Here, then, is the theoretical foundation for erecting a constitutional structure, through which civil society can argue about and articulate the public good.<sup>21</sup> With this important second step, Locke goes on to lay the groundwork for the modern separation of powers doctrine; he first and foremost seeks to control political power by institutionally dividing it between a legislature and executive.

After conferring political power upon civil government, Locke constructs a tense, yet dynamic, constitution where that power is institutionally divided between a strong executive and a powerful legislature. Each

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<sup>17</sup> See *ibid* at paras 13, 90-94.

<sup>18</sup> Dunn, *supra* note 14 at 150. See also Poole, *supra* note 15 at 250-51; Cox, *supra* note 14 at 113-14; John O McGinnis, “The Spontaneous Order of War Powers” (1997) 47:4 Case West Res L Rev 1317 at 1323; Thomas S Langston & Michael E Lind, “John Locke & the Limits of Presidential Prerogative” (1991) 24:1 Polity 49 at 66-68.

<sup>19</sup> Locke, *Second Treatise*, *supra* note 1 at paras 143-44.

<sup>20</sup> See *ibid* at paras 13, 90.

<sup>21</sup> See Benjamin A Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence, Kan: University Press of Kansas, 2009) at 75.

is counterpoised to check and balance the other. Through this constitutional structure, Locke indelibly links political power to the public good in three main ways. First, his constitution prevents a centralization of power (most likely in the executive) that might lead to irrational or arbitrary decision making, and ultimately a descent into tyranny. Second, it further prevents the irrational or arbitrary exercise of power by channelling it through different but coordinate government institutions, each uniquely suited to and responsible for ascertaining, judging, or executing natural law on behalf of the civil society. These natural functions correspond to the legislative, judicial, and executive powers. Third, it results in a dialogical reasoning process between these government institutions. It is through this sometimes cooperative, sometimes confrontational process that civil government determines what, precisely, the public good requires in any particular instance.<sup>22</sup> For Locke, the rational pursuit of the public good—and hence, the legitimate exercise of all political power—cannot be divorced from these constitutional structures and processes. Indeed, the public good and the constitution have such close affinity in Locke’s political universe that it is difficult to tell whether his constitution is merely a means to an end or is partly an end in itself.<sup>23</sup> As pointed out in Part II.B, below, this obfuscation becomes critically important for restraining the executive’s dangerous prerogative claims that he must act outside of the constitution for the greater good.

Just how the Lockean constitution works to control political power (especially executive prerogative), and how it accommodates the courts, is the subject of the remainder of this article. Locke began his examination of government institutions with the legislative power, the representational nature of which built upon his idea that popular consent is the fount of legitimacy for all government authority.<sup>24</sup> However, this article begins with and focuses on executive power for four reasons. First, the danger that arbitrary and abusive executive power might present to the public good highlights the special trust that accompanies all political

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<sup>22</sup> Locke’s constitution facilitates the realization of the public good in positive and negative ways. The positive, rational decision-making aspect of this model is often overshadowed by its negative, defensive purpose of protecting liberty from arbitrary government.

<sup>23</sup> See Harvey C Mansfield, Jr, *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press, 1989) at 186-90. However, Mansfield draws a different conclusion from this ambiguity between political means and ends (*ibid* at 190-93, 199-204, 288, 290). That is, a strong, informal executive lurks behind constitutional forms and retains an extraconstitutional right to act as he sees necessary to preserve civil society. See *infra* note 25.

<sup>24</sup> See Peter Josephson, *The Great Art of Government: Locke’s Use of Consent* (Lawrence, Kan: University Press of Kansas, 2002) at 215. See also Robert Faulkner, “The First Liberal Democrat: Locke’s Popular Government” (2001) 63:1 *The Review of Politics* 5 at 15-17.

power, and thus the necessity of structural checks and balances. Second, despite some claims to the contrary, the unitary nature of the executive (even an elected one) deprives it of the same kind of majoritarian justification that might mask or excuse oppressive laws passed by a representative legislature. Third, the executive's institutional advantages can also be weaknesses. Decisiveness and efficiency can come at the expense of balancing and reconciling various interests of societal factions. Emphasis on group security can also overcome concerns for individual rights. Finally, from a historical perspective, the threat that unrestrained executive power poses to individual rights and the rule of law has long been a preoccupation of Anglo-American constitutional thinking.

The post-9/11 world and the "war on terror" place these concerns in an extraordinary contemporary context and highlight the stresses which crises place on the Lockean constitution. One can only understand the ever-lurking, apparently illiberal contradiction of the prerogative by seeing it within Locke's structural scheme as a whole. Far from a defect in or exception to Locke's constitutional order, prerogative is instead a pragmatic, yet intrinsic, component of it. Locke's executive is indeed formidable, especially where (as explained in the next section) the prerogative allows emergency actions that are, strictly speaking, *contra legem*. Nevertheless, there is one absolute limitation to its legitimate exercise. Executive attempts to rule against or without an independent legislature, capable of holding him accountable, are not prerogative acts at all, but illegitimate assertions of power. Where such actions seriously undermine the constitution's structural mechanisms for pursuing the public good, they lead to tyranny and invite resistance.

The necessity of strong, executive emergency power brings with it risks of misuse, a dilemma that has long been a problem for liberal thinkers. However, this article suggests that it is a problem Locke solved with his constitution of structure. Danger to the public good, of course, reaches its height in times of emergency. During such times, public-safety imperatives threaten to trump individual rights, and executive power begins to overshadow the legislature (or, as will be seen, the courts). The moment of prerogative strips bare the rights-security contradiction in Locke's thought. The executive might act in the absence of or even against established laws, for the greater good of preserving civil society against existential danger. However, this is also where the Lockean constitution operates in its most vital sense. Its structures and processes adapt to prerogative, encourage cautious institutional oversight, and warn of tipping points where the prerogative risks the descent into tyranny. Because Locke strongly links the constitution to the public good, as already noted, the executive cannot easily appeal to the latter as an excuse to violate the former. Rather, the constitution and the public good are so closely entwined that a violation of the constitution is a presumptive violation of the

public good. Therefore, despite what some have suggested,<sup>25</sup> the prerogative power cannot be an extraconstitutional one, in the sense that it is completely unaccountable to the legislature (or also, as this article claims, the courts). While the Lockean constitution is flexible enough to tolerate a decisive executive like Lincoln, it will not countenance the pretensions of an absolutist ruler or a sovereign dictator.

The result of such executive hubris is a constitutional crisis. When the executive gathers together the functions of legislating, judging, and executing the law, he exercises arbitrary power over the whole of civil society. Such an attempt threatens a state of war with other government institutions sharing in political power, or with the people themselves. As for executive efforts to subvert the constitution by stealth or corruption, rather than by open declaration or force—that is, when legislative or judicial deference to the executive becomes so extreme, uncritical, and habitual as to be effectively an abdication of their own power and checking functions—Locke leaves it to the people to decide when the constitution has been betrayed by those to whom it had been entrusted. If the constitution's structures finally fail, then the people have a natural right to revolt and, if necessary, to dissolve and reconstitute civil government altogether.<sup>26</sup> By so prominently advocating a right to revolution, Locke accepts the possibility that his constitution might fail one day, regardless of the quantity

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<sup>25</sup> See Mansfield, *supra* note 23 at 13-16, 203-204. According to him, Locke leaves the legislature (representing law) and the executive (representing extralegal discretion) “in open, unresolved conflict.” He continues:

For in Locke's conception, the constitution goes only so far as law extends. There is no fundamental or constitutional law above ordinary law; hence the prerogative power of the executive can be exercised as much against the constitution when necessary as against the law. Locke's constitution attempts to contain a power that admittedly cannot be contained. The executive is limited only by the end for which it is entrusted by the people, which is the public good as they interpret it (*ibid* at 258).

See also Ross J Corbett, “The Extraconstitutionality of Lockean Prerogative” (2006) 68:3 *The Review of Politics* 428 at 429-30. Corbett joins Mansfield and others in arguing that the prerogative is an extraconstitutional power that cannot be constrained by institutional checks and balances. But see Kleinerman, *supra* note 21 at 48-68, 71-74. He argues for constitutional checks that constrain the prerogative and signal when the executive begins to usurp the legislature's power. Such checks are necessary to counter the people's lack of interest or ability to question the executive's intentions. Poole characterizes the situation where the executive remains subject to legislative or judicial oversight, critical deference, and indemnity as a “lower order of constitutionality” resulting from “a fluid and open-ended constitutional structure”, as opposed to an “extralegal measures” model that would, presumably, give the executive a legitimate prerogative to act against all constitutional checks and boundaries, subject only to popular resistance (*supra* note 15 at 272-73).

<sup>26</sup> Locke, *Second Treatise*, *supra* note 1 at paras 218, 222.

and quality of its fail-safes. No liberal constitution can entirely eliminate the possibility that a bold or scheming executive might wield absolute power, or that a politically apathetic people might surrender their liberties to a stern, authoritarian order. However, the failure of the Lockean constitution marks the state of affairs for what it has become: tyranny and slavery.

### *B. The Problem of Prerogative*

The section above has given an overview of the theoretical origins and purposes of the Lockean constitution. The remainder of Part II unfolds Locke's structural design, and examines its institutions and processes more closely. The following sections show in more detail how Locke divides political power between the executive and legislature, and how that legislature checks and balances the former. These sections specifically address the problem of how this constitutional model controls prerogative power in times of emergency. To understand better what prerogative is, however, it is first necessary to see how Locke conceives of other types of executive power, and how they relate to legislative power (discussed separately in the next section).

Locke characterizes executive power, generally speaking, in two ways. The first (and least constitutionally problematic) is the duty to enforce the laws promulgated by the legislature.<sup>27</sup> Because laws “need a *perpetual Execution*, or an attendance thereunto ... there should be a *Power always in being*” that is separated from the legislative and lodged in different hands.<sup>28</sup> This power of enforcement—Locke's “executive power”, used in a narrow sense—fundamentally characterizes the whole executive office, as indicated by the use of the descriptor. In this role, the executive is clearly subordinate to the legislature, although Locke gives him a veto power to check the legislature and protect the independence of his office. The executive is bound to apply the law as it is, and the legislature can seek to alter the authority delegated to him or otherwise hold him accountable for maladministration.<sup>29</sup> As the “*Supream Executor*” of the law, allegiance to the executive is in fact allegiance to the law itself, rather than to the individual or even the office.<sup>30</sup> Beyond these basic points, Locke spends little more time on executive power, in this narrow sense. The manner in which the executive interprets and executes the standing laws, exercises a veto over their passage, or appoints and directs a myriad of inferior magis-

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<sup>27</sup> See *ibid* at para 144.

<sup>28</sup> *Ibid*. See also *ibid* at para 144 [emphasis added].

<sup>29</sup> See *ibid*.

<sup>30</sup> *Ibid* at para 151 [emphasis added].

trates are all related issues of obvious, day-to-day importance in Locke's constitution.<sup>31</sup> Nevertheless, this narrow executive power does not really seem to trouble Locke. This article suggests three related reasons for this. First, while there will of course be frequent, quotidian political disputes between the executive and legislature, the exercise of executive power (in this sense) should not usually occasion serious constitutional conflicts between them. Second, whatever statutory discretion the executive enjoys in enforcing the law will itself be narrow, legally circumscribed, and likely subject to close legislative (as well as judicial) oversight. Third, neither aspect of this narrow executive power tends to stress unduly or amplify suddenly the security-rights contradiction within the constitution. Locke's real worry, revealed in his subsequent discussion on executive power in a much broader sense, is the executive's *non-statutory* discretion to deal with the uncertainties of political events and protect civil society in times of unexpected crisis. In addition to executive power narrowly conceived Locke identifies and works to control two other, more constitutionally problematic forms of executive power: the federative and the prerogative.

The executive regularly exercises "Federative Power" over matters such as making war, concluding peace, and conducting foreign affairs.<sup>32</sup> Locke describes it as the power over "War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."<sup>33</sup> Federative power engages the public as "one Body in the State of Nature."<sup>34</sup> Thus, it is distinct from the executive power (in Locke's narrow sense) in terms of its subject matter and personal application, and the allowable degree of discretion.<sup>35</sup> With federative power, the executive tends to exercise political power outwardly from the civil society and to act upon foreign persons. Furthermore, in contrast to the factional debates and institutional dialogue prevalent in domestic politics, the potentially hostile international scene requires that civil society act expeditiously as a unified force. This unity aggregates claims to the public good, intensifies its demands, and faces-up to the dangerous and unpredictable state of nature between nations.<sup>36</sup> Consequently, federative power "is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for

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<sup>31</sup> See *ibid* at paras 151-52.

<sup>32</sup> *Ibid* at paras 145-48.

<sup>33</sup> *Ibid* at para 146.

<sup>34</sup> *Ibid* at para 145.

<sup>35</sup> See *ibid* at paras 147-48.

<sup>36</sup> See Cox, *supra* note 14 at 122-23.

the publick good.”<sup>37</sup> In contrast to the slow deliberations of the legislature, the executive possesses institutional virtues of speed, efficiency, and decisiveness that are better suited to deal with rapidly-changing international events. Federative power therefore shifts decision-making initiative to the executive; for Locke, unitary action rather than protracted political deliberation better serves the public good in external affairs of state.

Despite its necessity for security in a dangerous world, federative power presents its own risks to the civil society it preserves. The executive might manipulate foreign affairs, war, or national security concerns in order to increase his prestige, influence, and share of political power. Thus, for instance, “war making is a public good where the optimal assignment of power for the most effective delivery also leads to a great risk that it will be produced for private ends.”<sup>38</sup> Moreover, the executive might redirect the federative power inward to manage affairs within the civil society and act upon its members. Where the boundaries between external and internal security become blurred, there is a greater risk that the executive might abuse federative power; with it, the executive might come to exercise domestic political power without legislative restraint.<sup>39</sup> It is only in spite of such concerns, not because of their absence, that the executive wields federative power in order to safeguard civil society from outside threats and enemies. With federative power, the rights-security contradiction becomes more apparent and constitutional checks and balances become strained.

Executive initiative, however, does mean executive unilateralism. Federative power is therefore not an extraconstitutional power. Rather,

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<sup>37</sup> Locke, *Second Treatise*, *supra* note 1 at para 147 [emphasis added]; Cox, *supra* note 14 at 127. In *The Federalist* No 74, Alexander Hamilton similarly pointed to the need for executive leadership, especially in war:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority. (“No 74” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) 447 at 447).

Hamilton justified presidential power under the proposed US Constitution in Lockean terms. In the British context, Blackstone did the same for the Crown’s war prerogative: William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979) vol 1 at 249-50.

<sup>38</sup> McGinnis, *supra* note 18 at 1322.

<sup>39</sup> See e.g. *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 72 S Ct 863 (1952) [*Youngstown Sheet*] (denying US President Truman a unilateral power to nationalize the steel industry, without congressional authorization, in order to prevent widespread strike action and work stoppage during the Korean War). See also *infra* note 43.

the “executive-federative power” together comprises “in truth a single power viewed from different aspects,”<sup>40</sup> legitimized and limited by the executive’s obligation to serve the public good. For this reason, it would also be “impracticable” to place them in different persons.<sup>41</sup> Locke’s distinction between them is not one of kind, but mainly of their direction of exercise and the degrees to which the executive has discretion vis-à-vis legislative deference. That is, there is a distinction in executive “umpirage” between the individuals *within* the society, and ... the proper organization and direction of the force of the political society with respect to threats which emanate from *without*.<sup>42</sup> Thus, just as with the executive’s power to enforce the standing laws, the public good simultaneously justifies and limits federative power. Because of the public good’s close connection to constitutional structure, however, it accommodates federative power only within some sort of institutional checks and balances that bring it under political control. Accordingly, although the legislature’s deliberative processes make it ill-suited for directing the federative power, they do enable cautious oversight of it.

Of course, the nature of international affairs makes it difficult for the legislature either to determine in advance or to judge retrospectively what the public good requires of the executive’s federative power in specific circumstances. Therefore, the same institutional justifications for placing the federative power in executive rather than legislative hands also affect the way that the legislature will conduct its oversight. As explained in the next section, Locke’s legislature remains empowered to pass any law it likes, and so can try to limit or censure the executive in his use of federative power. Notwithstanding this strong formal power, the legislature’s institutional limitations in this field mean that it will likely (and rightly) defer to executive discretion. Furthermore, the effectiveness of any laws it passes will be contingent to some extent on unforeseen future events. The function of laws also shifts from primarily enabling executive authority in domestic affairs to checking it in foreign ones. Legislative deference, a paucity of applicable laws, and the vicissitudes of the international state of nature all give the executive a presumptive freedom in his exercise of the federative power; he may act externally in ways that would be unacceptable in a domestic context. In regard to this power, then, Locke’s legislative check on the executive appears to weaken. Importantly, however, it does not disappear. The legislature will flex its power once again if the executive redirects federative power inward to tamper with domestic affairs. Furthermore, the legislature can still try to constrain the federative

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<sup>40</sup> Cox, *supra* note 14 at 127.

<sup>41</sup> Locke, *Second Treatise*, *supra* note 1 at para 148.

<sup>42</sup> Cox, *supra* note 14 at 107, 124-25 [emphasis added].



power directly, in the unusual event that the risk of executive malfeasance overcomes the legislature's natural deference.<sup>43</sup> In Locke's constitutional model, federative power is best understood as not formally delimited, but residing in the executive and resisting—but not foreclosing—legislative interference only due to its particular nature.

It is against Locke's (narrow) executive and federative powers—as much as against legislative power, as will be seen—that one must conceptualize the prerogative. This power is “nothing, but a Power in the hands of the Prince to provide for the publick good.”<sup>44</sup> This executive discretion is necessary, as

the Law-making Power is not always in being, and is usually too numerous, and so too slow for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by Laws to provide for all Accidents and Necessities that may concern the publick.<sup>45</sup>

The prerogative is therefore defined not only by the substantive requirement that it serve the public good, but also by the presence of a political exigency where the legislature is unable to act in time. As Locke describes it, “*Prerogative is nothing but the Power of doing publick good, without a Rule.*”<sup>46</sup> However, he also finds that the prerogative might dictate action “*against the direct Letter of the Law*” when the public good demands.<sup>47</sup> Thus, in extreme cases (such as when foreign invasion or attack might be imminent) it might even be that the executive must act *contra legem* to preserve civil society.<sup>48</sup> Locke's idea of prerogative presents a problem “to

<sup>43</sup> See *ibid* at 129 (suggesting that the external operation of the federative power typically will not occasion internal constitutional crises). While the public might broadly defer to executive judgment in foreign affairs and war, however, the executive's inward redirection of the federative power—for purposes of managing domestic affairs usually left to the legislature—would then abrogate the grounds for such deference.

<sup>44</sup> Locke, *Second Treatise*, *supra* note 1 at para 158.

<sup>45</sup> *Ibid* at para 160.

<sup>46</sup> *Ibid* at para 166 [emphasis in original].

<sup>47</sup> *Ibid* at para 164 [emphasis added].

<sup>48</sup> See *ibid* at paras 159-60. See also Grant, *supra* note 13 at 84-85; Jules Lobel, “Emergency Power and the Decline of Liberalism” (1989) 98:7 Yale L J 1385; Clement Fatovic, “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives” (2004) 48:3 Am J Pol Sc 429. Grant and Fatovic emphasize this aspect of prerogative to advocate that emergency powers be exercised exceptionally in open contravention of standing laws and subjected to political scrutiny, rather than dangerously legalized through broad legislative grants of power. Locke's conception of prerogative is perhaps best illustrated by President Lincoln's unilateral suspension of the writ of habeas corpus, without Congress' prior approval, during the American succession crisis of spring 1861. Congress was out of session at the time. Responding to criticisms of his habeas suspension without congressional approval, Lincoln asked: “Are all the laws *but*

understand how the executive may be constitutionally and legally constrained, and yet also retain the latitude to act outside or against the law for the public good.”<sup>49</sup>

Some might characterize the prerogative as a unique emergency power, conceptually different from the executive and federative powers. This argument would make the prerogative extraconstitutional and illimitable by the legislature (or the courts).<sup>50</sup> Yet, there are some fundamental similarities between the prerogative and federative powers; both emphasize the uncertainty of events and the need for a swift, energetic response in order to preserve civil society. Indeed, from this perspective, the distinctions between federative and prerogative power also become ones of application and degree, but not of kind. While the federative power externally acts upon subjects outside of the civil society, the prerogative will tend to be inwardly directed; it is in domestic, not foreign, affairs where there is less likely to be a legislative vacuum and more likely to be legal restraints upon executive power.<sup>51</sup> The fact that Locke’s constitutional model already tolerates greater executive discretion in federative matters means that the executive will probably only need to act under prerogative when exceptional domestic circumstances require an unusually swift and unanticipated executive response. Federative power admittedly does not contemplate executive violation of the laws (where they do exist and apply), although a foreign crisis might precipitate recourse to the prerogative at home or abroad. Moreover, one can also conceive of the prerogative *contra legem* as responding to circumstances so unique that any relevant laws arguably no longer apply, opening up a crack in the legal framework that must be immediately filled by executive action. In either case, under both the federative and prerogative powers, the executive exercises wide discretion to deal with unpredictable security threats that are not amenable to regulation by standing legislation.

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*one to go unexecuted, and the Government itself go to pieces lest that one be violated?”* Abraham Lincoln, Presidential Address (Message delivered at Congress in Special Session, 4 July 1861), reprinted as “Special Session Message” in James D Richardson, ed, *A Compilation of the Messages and Papers of the Presidents*, vol 7 (New York: Bureau of National Literature, 1897) 3221 at 3226. Congress retrospectively approved Lincoln’s actions.

<sup>49</sup> Josephson, *supra* note 24 at 233.

<sup>50</sup> See e.g. Corbett, *supra* note 25 at 445-46. He denies that executive, prerogative, and federative powers can be characterized as different forms of a single discretionary power. He instead suggests that prerogative pre-exists executive power (and is therefore extraconstitutional), by characterizing the latter as one based upon and derived solely from enabling legislation.

<sup>51</sup> See Locke, *Second Treatise*, *supra* note 1 at paras 145, 147.

Seen in this way, the prerogative, federative, and executive powers are indeed various forms of a unified discretionary power in the executive; prerogative is not on a different conceptual plain. Accordingly, “ordinary” executive discretion under the laws and exceptional discretion under the prerogative stand at different end points on a scale of discretion to be used for the public good. When the whole of Locke’s executive power and the varied circumstances justifying executive discretion are placed on this scale, there is no longer room for extraconstitutional concepts of emergency power or states of emergency. Instead, there are only degrees of executive discretion, legislative deference, and exception from usual legal norms, all of which correspond to the degree of ever-present risks to the security of the civil society.<sup>52</sup> Like any other type of executive discretion, then, the prerogative rests upon a duty to serve the public good, as well as upon institutional advantages for taking quick, decisive action. However, more than any other type of power, the prerogative strips bare the security-rights contradiction and threatens to centralize political power in the executive. Significantly, Locke alludes to this dilemma in his introduction on prerogative, writing that “[w]here the Legislative and Executive Power are in distinct hands,” the public good justifies executive discretion when the legislature is unable to act.<sup>53</sup> The prerogative, just like executive power generally, is limited by the constitution’s structural division of political power (as explained in the first section). Even where executive discretion is at its broadest and most necessary, it comes to an end where the executive attempts to make binding rules, alter or abolish the laws, or does so constructively by dispensing with them and ruling through arbitrary decree. Should the executive attempt any of these actions under a claim of prerogative, the legislature has its own constitutional duty (explained in the next section) to cease its deference to executive discretion

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<sup>52</sup> As Nomi Lazar argues:

Now, if order and liberal rights entail one another, it follows that existential ethics are a constant and not exceptional feature of liberal democratic life. What I have called existential ethics obviously manifest as emergency powers in times of crisis. But the enforcement and preservation of order, however more urgent in times of emergency, is a central function of everyday government and one that *always* involves the derogation of rights. If this is true, then emergency powers need no special justification at all. Instead, they are an extension of everyday practice and everyday values. The difference is of degree and not of kind (Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009) at 99-100).

See also *ibid* at 19-21, 50-51, 71-80, 103-04, 108-12.

<sup>53</sup> Locke, *Second Treatise*, *supra* note 1 at para 159. Locke also notes that the scope of prerogative (and thus legislative deference) expands and contracts, according to how well a particular executive tends to use his discretion for the public good (*ibid* at paras 162-66).

and challenge the encroachment upon its own political power. As argued in Part II, similar executive attempts to usurp the judicial power to adjudicate legal rights and obligations would likewise invite resistance.<sup>54</sup>

For these reasons, the prerogative is not an extraconstitutional power in the sense that it is outside of all control by the legislature (or even the courts). This exceptional prerogative power remains subject to constitutional checks and balances for the same reason that it exists—that is, to serve the public good. As explained in the first section, the public good and the constitution are so closely related as to be nearly one and the same. While they together allow broad executive discretion—even so far as to tolerate emergency actions *contra legem*—they do not countenance institutionally unaccountable executive rule. Prerogative actions that seek to avoid or undermine institutional oversight, then, violate both the public good and the constitution, and so are not, by definition, prerogative ones at all. Rather, such actions are illegitimate and unconstitutional, presenting a new risk of tyranny to the civil society, even as the executive claims to save it from other threats.<sup>55</sup>

At this point, this article argues that there is a further representational aspect to the public good that links it, and consequently the prerogative, to Locke's constitution of structure. As Locke writes, the prerogative must combine "activism" with discretion and self-restraint;<sup>56</sup> its exercise is subject to a "Fiduciary Trust ... for the safety of the People."<sup>57</sup> His reference to public safety is best understood broadly against the rights-security contradiction at the centre of his constitutional model. Security is to be ensured against both external threats and tyranny, which results from the concentration of political power in any one person or institution. Indeed, with the line above, Locke specifically refers to the executive's duty not only to take necessary action when the legislature is not in session or is unable to act, but actually to convene the legislature at regular intervals. He makes clear that "though the Executive Power may have the Prerogative of *Convoking* and *dissolving* such *Conventions of the Legislative* ... it is not thereby superiour to it."<sup>58</sup> The executive's trust is therefore not only to act where the legislature cannot, but also to ensure (and then submit to) a continuous legislative power. In being willingly accountable to that power, the executive also recognizes the legislature's

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<sup>54</sup> See *ibid* at para 141. See *Case of Proclamations* (1611), 12 Co Rep 74, 77 ER 1352, (KB); *Prohibitions del Roy* (1607), 12 Co Rep 63, 77 ER 1342 (KB).

<sup>55</sup> See Lazar, *supra* note 52 at 69.

<sup>56</sup> See Grant, *supra* note 12 at 72-73, 141-42.

<sup>57</sup> Locke, *Second Treatise*, *supra* note 1 at paras 141, 156.

<sup>58</sup> *Ibid* at para 156 [emphasis added].

own claim to represent the people (as will be seen in the next section), who have consensually formed the constitution, chosen the legislature, and entrusted to it an independent share of political power.<sup>59</sup>

Prerogative, as the executive's share of political power in trust, precludes divine right or any other authoritarian theories of unrestrained executive rule. Rather, "any political society which derives its legitimacy formally from a set of rights of its sovereign which are not derivatives of the wills of his subjects violates the logical preconditions for a legitimate political society."<sup>60</sup> Thus, the executive shares political power with the legislature not just to prevent the centralization of that power and to promote institutional dialogue conducive to reasonable decision making but also to share power with a representative assembly for the republican purpose of furthering consensual government. The executive has neither a personal right to rule, nor a claim to superior wisdom as to what is or is not in the best interests of the people—even during emergencies. In a civil society arising from popular consent, therefore, the public good (and the constitution) seeks to resolve the security-rights contradiction and give voice to the people whose life, liberty, and property are at stake. The resulting trust creates a representational relationship between the executive and the people (as well as between the legislature and the people), who have consensually delegated political power to, and divided it between, government institutions. For example, the people owe allegiance to the executive only so long as he abides by the law and the constitution, whereas the executive "degrades himself" in their violation.<sup>61</sup> As Locke writes, the executive is only "the Image, Phantom, or Representative of the Commonwealth, acted by the will of the Society, declared in its Laws; and thus he has no Will, no Power, but that of the Law."<sup>62</sup> Accordingly, although the executive might assert a unitary representational mandate for the whole of the people when exercising the prerogative during an emergency (perhaps even *contra legem*), his trust nonetheless requires two things: First, he must recognize the representational limits of his own institutional role. Second, he must respect the representational nature of an elected legislature that reconciles competing claims to the public good by rival political factions. The executive's trust only legitimizes prerogative power, then, while it remains locked within the constitutional framework.<sup>63</sup>

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<sup>59</sup> See Lazar, *supra* note 52 at 69.

<sup>60</sup> Dunn, *supra* note 14 at 124.

<sup>61</sup> Locke, *Second Treatise*, *supra* note 1 at para 151.

<sup>62</sup> *Ibid.*

<sup>63</sup> See Lazar, *supra* note 52 at 108-11.

The trust that directs the prerogative is thus different from a contractarian theory of executive authority establishing an agreement between a single ruler and the people. Such agreement might imply not just that the executive possessed certain rights to power, but that he alone was obligated to do what, in his sole judgment, he paternalistically might think best for them.<sup>64</sup> So, while the trust does place a duty on the executive to exercise the prerogative as he judges necessary for the good of the people he represents, it likewise requires that the executive respect and remain accountable to the elected legislature. Locke's executive, understood in this way, is republican. The trust gives him a representational justification for the prerogative at the same time that it denies the executive the final political judgment as to whether it actually serves the public good. That responsibility, in Locke's constitutional model, lies with the legislature.

### C. *The Legislative Check*

Notwithstanding the importance of, and interpretive controversies over, the nature of executive power, Locke's constitutional model focuses primarily on the legislative power. Indeed, his conception of executive power is defined against it, because the model hinges on the extent to which the executive has a discretion to act in the absence of (or exceptionally against) standing legislation. Governing through stable rules, reconciling factional interests, and being composed of elected members makes the legislature—not the executive—the central institution of civil government. As Locke writes:

The great end of Mens entering into Society, being the enjoyment of their Properties in Peace and Safety, and the great instrument and means of that being the Laws establish'd in that Society: The *first and fundamental positive Law* of all Commonwealths, is the *establishing of the Legislative Power*; as the *first and fundamental natural Law*, which is to govern even the Legislative: It self, is the *preservation of the Society*, and (as far as will consist with the publick good) of every person in it.<sup>65</sup>

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<sup>64</sup> Even though Locke famously advocated the notion of a social contract, that contract is one between the individuals forming civil society, not between rulers and the ruled. It only grants political power in trust, rather than contracting it away. Ross Harrison suggests, for example, that this political trust arises from a “double contractual operation,” in which individuals fictionally contract to form a political society, then subsequently create a civil government as a corporate entity (i.e., a “corporation”) empowered to act on its behalf (*Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (Cambridge: Cambridge University Press, 2003) at 212). See Grant, *supra* note 13 at 104.

<sup>65</sup> Locke, *Second Treatise*, *supra* note 1 at para 134 [emphasis added].

Therefore, “the *Legislative* must needs be the *Supream*, and all other Powers in any Members or parts of the Society, derived from and subordinate to it.”<sup>66</sup> Its institutional location will therefore determine the form of the commonwealth.<sup>67</sup> Influenced by the seventeenth century’s civil wars and the developments leading to the Glorious Revolution, Locke’s emphasis on legislative power presaged the formal doctrine of parliamentary sovereignty, by which Parliament could check the Crown’s authority, guard against its misconduct, and even strip it of its ancient prerogatives.<sup>68</sup> For example, the legislature would normally have to authorize executive encroachments upon the liberties of the subject.<sup>69</sup> It might, on the other hand, grant limited rule-making authority to the executive, with guidelines as to its allowable exercise.<sup>70</sup> More radically, the legislature could expressly limit or abolish specific powers historically left solely to executive discretion, as Parliament did with the *1689 Bill of Rights*.<sup>71</sup> Legislative limitations such as these establish boundaries, beyond which the executive cannot act unless he is prepared to do so *contra legem* under the prerogative.

Legislation, then, prospectively controls executive power (and might seek to correct specific executive abuses), while expressing the legislature’s own assessment of what the public good requires. As previously explained, these legislative checks and balances are Locke’s structural solution to the dialectical problem of simultaneously enabling and restraining executive power. They are at their strongest in domestic matters, which are most amenable to regulation through slow deliberation and standing rules. Furthermore, as already explained, these checks formally apply just as much to control the executive’s slippery federative power in international affairs, as to his exceptional prerogative in times of crisis. However, any legislative response will have less of a proactive, prospective focus and more of a reactive, retrospective one—especially where the legislature must judge whether the executive was justified in acting *contra legem*. Although normally deferential to executive discretion in federative and pre-

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<sup>66</sup> *Ibid* at para 150.

<sup>67</sup> *Ibid* at paras 132, 134.

<sup>68</sup> “The theorist of the Revolution is Locke; and it was his conscious effort to justify the innovations of 1688”: Harold J Laski, *Political Thought in England: Locke to Bentham* (London: Oxford University Press, 1961) at 23.

<sup>69</sup> See *Entick v Carrington* (1765), 2 Wils KB 275, 95 ER 807 (requiring legal authority for executive officers to issue a search warrant and seize private property).

<sup>70</sup> See AW Bradley & KD Ewing, *Constitutional and Administrative Law*, 14th ed (Harlow, UK: Pearson Education, 2007) at 674-75.

<sup>71</sup> *An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*, 1689 (UK), 1 Will & Mary, c 2 [*1689 Bill of Rights*].

rogative matters, the legislature must nevertheless consider how the executive has used his wide discretion in specific instances, as well as over a protracted period of time. The legislature's cautious, deferential oversight—combined with its latent, strong power—thus characterizes its checking function over executive power.

Far from being inconsistent with the notion of prerogative, legislative review and approval or disapproval of prerogative decisions is intrinsic to it. Once prerogative is recognized as merely an extreme degree of executive discretion in the absence of applicable law, rather than a conceptually distinct emergency power, there is no basis for theoretically exempting it from legislative control.<sup>72</sup> Instead, there are only circumstantial arguments for more or less legislative deference to the executive, based on their relative abilities and disabilities for taking swift and decisive action. From this perspective, it also becomes conceptually impossible that “the People have *incroach'd upon the Prerogative*, when they have got any part of it to be defined by positive Laws.”<sup>73</sup> There can be no encroachment, as such, because the executive neither possesses an exclusive, absolute sphere of prerogative authority, nor a freestanding right to govern without or against other institutional oversight.

Despite its great authority, the legislature (like the executive) has no more than a “Fiduciary Power to act for certain ends,” thus holding its political power in trust for the good of the people.<sup>74</sup> The legislature's trust has a special representational quality, given that Locke provides for its election. Although Locke did not expound upon an electoral system, he nonetheless alluded to public choice in the legislature's composition:

If the *Legislative*, or any part of it be [made up] of Representatives, chosen for that time [of assembly] by the People, which afterwards return into the ordinary state of Subjects, and have no share in the Legislature but upon a new choice, this power of chusing must also be exercised by the People, either at certain appointed Seasons, or else when they are summon'd to it.<sup>75</sup>

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<sup>72</sup> See Lazar, *supra* note 52.

<sup>73</sup> Locke, *Second Treatise*, *supra* note 1 at para 163 [emphasis added].

<sup>74</sup> *Ibid* at para 149.

<sup>75</sup> *Ibid* at para 154. It is important to remember that while Locke's legislature may theoretically represent the public as a whole, it must not necessarily be popularly elected. Indeed, this corresponds with the theory of virtual representation under which members of Parliament legislate on behalf of both the disfranchised populace at home and peoples living throughout the Empire. Locke's legislature is fundamentally republican, not democratic. Historical restrictions on suffrage for those without sufficient wealth, women, racial minorities, and other groups illustrate the gaps that have existed between the make-up of the voting electorate and the legislature's responsibility to act on behalf of the public as a whole. Indeed, property qualifications echoed Locke's own idea



Being in some way chosen by the people, individual legislators maintain links to various societal interests that keep them more directly accountable than the executive. The electoral process therefore democratically legitimizes legislative power to check the executive, while that process, in turn, holds individual legislators publicly accountable for their failures in office.<sup>76</sup> As an elected assembly, then, the legislature's trust embodies an especially strong representational relationship between it, the people, and the constitution they have consensually formed.

The elected legislature's fiduciary trust is critical for solving Locke's problem of controlling prerogative power, especially when the executive claims a mandate to act for the whole of the people; the question is not whether the executive can do wrong, but who will judge his actions and hold him accountable if he does. Some scholars of Locke maintain that only the people themselves, through popular resistance (discussed below), have the right to challenge the executive's extraconstitutional use of prerogative.<sup>77</sup> This paper argues the contrary. Locke constitutionalizes republican values in an important way: the legislature and the executive share a representational mandate, just as they share political power. When exercising the prerogative, the executive acts on behalf of the people in order to preserve them from danger, but shows restraint to avoid tyranny. When judging that prerogative (with likely deference), the legislature similarly acts for the people in order to guard them from tyranny, while still allowing the executive the discretionary latitude that exigencies demand. Both represent the people from the different perspectives of security and rights, and their mutual trusts mean that one (like security and rights) cannot do without the other.

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that one of the primary aims of government and the social contract was to protect property rights, justifying greater political participation for propertied individuals. Accordingly, the legislature is morally bound to act not only for the good of qualified electors, but also for those non-voting individuals for whom the legislature likewise exercises power in trust. Legislators must weigh the good of their local constituencies and favoured political factions with that of the polity as a whole. The disjunction between a legislator's responsibility to particular interest groups and the greater public good therefore belies democratic tensions between the needs of the community and the multiple subgroups having various and conflicting interests. Although Locke would have assumed that the legislature was electorally accountable to only a small proportion of the population, and certainly not to a universal electorate, the legislature nevertheless had a fiduciary obligation to act for the good of the general public. His assumption also is that the security of one individual's life, liberty, and property is the security of everyone's. See JW Gough, *John Locke's Political Philosophy*, 2d ed (Oxford: Clarendon Press, 1973) at 123, 128-29.

<sup>76</sup> See Locke, *Second Treatise*, *supra* note 1 at paras 21, 89.

<sup>77</sup> See e.g. Gough, *supra* note 75 at 45-47, 123.

The legislature—as an elected assembly representing a multitude of political interests—consequently works as an institutional intermediary between the executive and the people. This representational role becomes more pronounced when judging uses of the prerogative in times of emergency. The legislature does this, when in session, by implicitly or expressly acquiescing (or not) to the executive’s decision of the moment. If not in session, it must later consider an act of indemnity for those executive actions against the letter of the law. In turn, the executive (subject to his own trust) is bound to submit to legislative limitations or censure. Executive attempts to thwart the elected legislature through corruption, or outright defiance, show disdain for the legislature’s role as the people’s intermediary, violate the public good, and threaten the constitution. Locke emphasized this point by condemning executive interference with the election of legislators, which might lead to the dissolution of the civil government.<sup>78</sup> The executive also cannot directly and demagogically appeal to the people, in order to get past its elected assembly. Executive subversion of the elected assembly, however attempted or achieved, risks a state of war between the executive and the people.<sup>79</sup> Should that happen, only the people’s right to resist (see below) can save them. It is to prevent such a state that the legislature has its intermediary role. Locke’s constitutional model thus permits “sophisticated institutional representation of the will of the people,” which not only diffuses government power generally, but also channels public resistance against the executive.<sup>80</sup> Consequently, “Legal avenues for redress against tyrannical abuses give effect to the right of resistance without destabilizing the government.”<sup>81</sup> Through this

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<sup>78</sup> See Locke, *Second Treatise*, *supra* note 1 at paras 215-216.

<sup>79</sup> See Harrison, *supra* note 64 at 215-16; Dunn, *supra* note 14 at 178-79. Thomas Jefferson famously put forth such a Lockean argument in the 1776 American *Declaration of Independence* in regard to interference with colonial assemblies and laws. (*The Constitution of the United States of America and the Declaration of Independence* (Garden City, NY: Doubleday & Company, 1948) 11).

<sup>80</sup> Dunn, *supra* note 14 at 182, 181-84.

<sup>81</sup> Grant also suggests that “Locke justifies extralegal resistance only as a last resort” (*supra* note 13 at 163). As examples of constitutional mechanisms for resistance to executive overreaching, Grant writes that “[i]mpeachment, judicial review, a constitutional amendment procedure, and trial by jury could all be seen in this light” (*ibid.*). See also *ibid.* at 202-203. Faulkner suggests that the legislature might perhaps even exercise some political control over subordinate executive magistrates, similar to a system of ministerial responsibility (*supra* note 24 at 34-36). See also Langston & Lind, *supra* note 18 at 50, 61-65. Corbett, however, would characterize prerogative as an extraconstitutional power that cannot be judged by the legislature at all, with the implication that the executive’s judgment as to the public good would be absolute, subject to resistance only by another extraconstitutional power—that of the people, expressing their right of resistance (*supra* note 25 at 446-47). Such an extreme position not only downplays the strong, representational role that Locke gives to legislative power—including

institutional and representational pas de deux or tug-of-war over what the public good requires—and with little normative precommitment—the constitution flexibly controls the prerogative.<sup>82</sup>

Thus, it is only where the legislature is no longer capable of resisting executive abuses—and thus fulfilling its role as intermediary—that the people’s right of resistance actually ripens (although, as Part II argues, the courts now also stand in such an intermediary position that forestalls popular revolution). As already pointed out, the legislature may rightly defer to executive discretion and even indemnify actions that are *contra legem*. However, it cannot uncritically and habitually surrender its judgment to the executive, so that it abdicates for all practical purposes legislative power and its checking function. It must

govern by *promulgated establish’d Laws* ... designed for no other end ultimately but *the good of the People* ... [and] neither must *nor can transfer the Power of making Laws* to any Body else, or place it any where but where the People have.<sup>83</sup>

The legislature cannot exercise its popularly entrusted power arbitrarily, abdicate it by complacency, or delegate it away wholesale to the executive. The people then have a right of resistance not only against executive tyranny, but also against the corrupted legislature that has betrayed its trust.<sup>84</sup> Nevertheless, Locke’s suggestion of periodic elections engages yet

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that of limiting prerogative—but also precludes Locke’s entire constitutional enterprise. It offers no solution to Locke’s dialectical problem other than violent revolution, confuses executive force with legitimate decision, and elevates executive power back to the same place of political dominance that his substantive and structural thinking is intended to prevent: see Sean Mattie, “Prerogative and the Rule of Law in John Locke and the Lincoln Presidency” (2005) 67:1 *Rev of Politics* 77 at 87-88; Pasquale Pasquino, “Locke on King’s Prerogative” (1998) 26:2 *Political Theory* 198 at 205 (rejecting legislative judgment of the prerogative).

<sup>82</sup> See Laski, *supra* note 68 at 44-45; Gough, *supra* note 75 at 108-109.

<sup>83</sup> Locke, *Second Treatise*, *supra* note 1 at para 142.

<sup>84</sup> See *ibid* at paras 135-42, 149, 221-22; Steven M Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, NC: Duke University Press, 1990) at 92. Dworetz illustrates the point: “[T]he theoretical question of the American Revolution was, fundamentally, a *Lockean* question: ‘the extent of the legislative power’” (*ibid*) [emphasis in original, footnotes omitted]. Poole calls attention to another potential problem of excessive and sweeping emergency legislation that only cloaks extraordinary executive powers with the appearance of legality (*supra* note 15 at 252-58). Such a development masks the truly exceptional moment of prerogative decision, when the might of executive power is bared and therefore exposes itself to critical reflection by the people as to its legitimacy and perhaps invites resistance. A slow slide into tyranny, where it is difficult to determine just when the legislature has abdicated its own fiduciary obligations, is an admitted problem that must be judged in degrees by the people. Because the Lockean constitution grants no legitimacy to executive power exercised amidst such structural decay and political decadence, however, it becomes irrele-

another structural backup within his constitutional model, so that the people may correct a legislature that decides poorly or does not adequately check growing or abusive executive power. That is, through elections, the people can oust those legislators failing in their fiduciary obligation, as judged by the electorate. Elections allow the public to “turn the rascals out”, and replace them with legislators more closely attuned to public sentiment. Only where a sitting legislature has become persistently corrupt, or the electoral system is inadequate for correction of the problem, do institutionalized means for resistance (that is, the legislature as intermediary) give way to a popular right of revolution. The people, who initially consented to form a political society and establish a civil government to act on their behalf, then stand once again in a state of nature, face to face with the tyrant (whether executive or legislative).<sup>85</sup> The public has an appeal to Heaven, which is essentially a call to trial by battle, and so possesses moral justification in rebelling.<sup>86</sup>

The legislature, operating properly as a constitutional intermediary for the people, stabilizes both the constitution and civil society against emergencies and the prerogative. First recourse to the legislature as a check on the executive (rather than to the people’s right to resist) enables the constitution to work flexibly and fluidly (if sometimes under strain), without constant, dangerous social upheavals. Locke’s constitutional model is accordingly self-correcting, preventing frequent descents into tumult by institutionally counterbalancing a strong executive with a powerful legislature.<sup>87</sup> Locke’s famous call for revolution is only an extreme and last recourse against persistent and severe executive abuses, when the legislature is unable or unwilling to intercede on the people’s behalf. Such resistance comes with the dissolution of a civil government and a constitution no longer able to correct abuses. Because the legislature has

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vant whether such authority is characterized as “lawful”, a disguised prerogative, or something else. The only consideration is whether the legislature remains institutionally able or willing to hold the executive to account. If the people judge that it is not, then the constitution is corrupted and they may resist the government.

<sup>85</sup> See Harrison, *supra* note 64 at 215-18. This is when “rule-bound legality shatters to reveal the ‘authentic’ political moment, when people and sovereign stand face to face”: Poole, *supra* note 15 at 252. However, Poole does not find such a moment when the constitution’s structural checks have failed; rather, he too quickly identifies it right away “when prerogative power is claimed” or when there is a “bad exercise of the prerogative”, a readiness that allows too much presumptive legitimacy to exceptional executive actions, downplays accountability to the legislature, and, ultimately, gives the executive institutional pre-eminence (*ibid*).

<sup>86</sup> See Locke, *Second Treatise*, *supra* note 1 at paras 155-56, 167-68.

<sup>87</sup> Locke explains that one purpose of political society is to provide for a means of appeal when those in authority attempt to do injury to the public or corrupt the laws to that effect: see *ibid* at paras 20-21, 89.

a special representative mandate for the people and functions as its intermediary, the executive cannot not subvert or bypass it by direct appeals to the people—even pursuant to his own claims to a popular mandate. Should he stubbornly arrogate himself over the legislature, then war might indeed follow between him and the people’s representatives—an institutional struggle for political power like England’s civil wars and the Glorious Revolution, the end of which Locke witnessed. There is, however, one last possible institutional check on the executive (as well as the legislature), which Locke did not describe. This check requires a new institutional addition to his constitutional architecture, but one that still fits with its overall aesthetic of substance and form. That addition is the judiciary, counterpoised against both the executive and legislative branches, and under its own unique fiduciary trust to uphold the rule of law.

## II. Judicial Power

### A. *A Constitution of Law*

Locke’s constitutional model, a forerunner to modern separation of powers theory, rests on a dualistic structure. He divides political power between the executive and legislature, who check and balance one another to prevent the centralization of authority and facilitate dialogical decision making between them. Each of these has its own trust to act for the people, introducing a republican element to his constitution. To the contemporary observer, whether accustomed to the more pronounced American system of separation of powers or the more blurred Westminster variants, an independent judiciary of some sort is notably absent from Locke’s scheme.<sup>88</sup> However, while he gives no specific attention to the role of courts, his constitutional model fundamentally rests on natural rights and the need for a civil government that reasonably judges disputes over them. Adjudication is the essence of politics: “Those who are united into one Body, and have a common establish’d Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, *are in Civil Society* one with another.”<sup>89</sup> Locke asserts the need for appeals against wrongs and judges to settle conflicts, so as to end the destructive state of war between individuals.<sup>90</sup> As suggested in the first section, the surrender of individual rights to ascertain, execute, as well as

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<sup>88</sup> See e.g. Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen’s University Press, 2010) at 56, 61-63, 81-89, 145-52 (on the important, if contested, role of the judiciary in Canada and elsewhere).

<sup>89</sup> Locke, *Second Treatise*, *supra* note 1 at para 87 [emphasis added].

<sup>90</sup> See *ibid* at paras 20-21.

judge natural law roughly corresponds to his institutional division of legislative and executive powers. Thus, while Locke does not establish an independent judiciary to go along with these, he nonetheless infuses his entire constitution with a judicial power. He considers “the main function of the State as essentially judicial,”<sup>91</sup> even though he appears to combine judicial and legislative power in a way that is not entirely clear in meaning. In a commonwealth, the “Judge is the Legislative, or Magistrates appointed by it.”<sup>92</sup> Such a power, it seems, can be either the legislature in its general capacity to govern society through standing laws, or some lesser officials charged with the administration of justice in specific cases.<sup>93</sup> So while Locke does not institutionalize judicial power separate from and alongside the executive and legislature, his constitutional model leaves ample room for its further development.<sup>94</sup>

Accordingly, one can “read-in” an institutional role for courts to administer justice in specific cases, as well as to temper the exercise of political power generally. Locke states quite clearly that the legislature, though supreme, nevertheless, must govern through “*indifferent* and upright *Judges*, who are to decide Controversies by those Laws.”<sup>95</sup> Limited by its trust, the legislature must not only “decide the Rights of the Subject

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<sup>91</sup> MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at 59.

<sup>92</sup> Locke, *Second Treatise*, *supra* note 1 at para 89.

<sup>93</sup> See *ibid* at para 136.

<sup>94</sup> See Gough, *supra* note 75 at 108. In the British system, one might note that, while they are independent, the courts historically originated as forums for the Crown’s royal justice, while under the doctrine of parliamentary sovereignty they remain bound by and subject to legislative will. To further confuse matters, despite the royal connection of the law courts, the House of Lords historically acted both as the upper legislative chamber and the court of final appeal, while the Lord Chancellor was at once a Member of Parliament and a Crown minister. Thus, the British judiciary was an amalgam of executive and legislative authority. Gough (*ibid* at 108-109, 125-26), suggests that judicial power in Locke’s model would fall under the executive power, while Jeffrey Goldsworthy explains that, in Coke’s day, the conceptual line between legislative and judicial power was often indistinct, so that Parliament was conceived as both the supreme legislature and the highest court (*The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at 114-20). The former position is consistent with the historical status of the courts in the British constitution as instruments of royal justice, while the latter accounts for the judicial role of the Appellate Committee of the House of Lords, the upper legislative chamber, and Locke’s explicit reference to the Legislature as judge. Pursuant to the *Constitutional Reform Act 2005* ((UK), c 4), however, the Lords’ Appellate Committee has now been abolished, with the new Supreme Court taking over its judicial role on 1 October 2009: see *Constitutional Reform Act 2005*, SI 2009/11. The functional separation of judicial power, in the British constitution, has at long last been institutionally formalized.

<sup>95</sup> Locke, *Second Treatise*, *supra* note 1 at para 131 [emphasis added].

by promulgated standing Laws,” but also by “known Authoris’d Judges.”<sup>96</sup> The legislature can only pass laws that are to be uniformly and equally applied for the public good, can only take property by popular consent, and cannot delegate away its legislative power.<sup>97</sup> From these prohibitions, it is only a short jump to say that *courts* should fairly administer those laws, treat like cases alike, and ensure that government officials only infringe personal liberties pursuant to lawful authority—all hallmarks of adjudication upon which A.V. Dicey later defined the rule of law.<sup>98</sup> Rejecting arbitrary legislation in this way (as well as, by implication, arbitrary executive enforcement of it), Locke lays the groundwork for the institutionally separate administration of justice, based upon natural law principles. Indeed, Locke’s premise can be related to a modern natural law theory like that of Lon Fuller.<sup>99</sup> A full examination of any connections between the two is not attempted here, but a basic comparison is straightforward enough. Expounding on natural justice, Fuller identifies eight desiderata necessary to a true legal system, and which comprise the “internal morality” of the law.<sup>100</sup> If these requirements are substantially lacking, then the political system is not one based upon law, properly so-called. In that case, what passes as “law” is no longer a purposeful, rational enterprise, but is instead only a tool for the imposition of the ruler’s arbitrary will. Fuller’s purpose for the law is admittedly rather modest, being that of “subjecting human conduct to the guidance and control of general rules.”<sup>101</sup> As such, his conception of natural justice lacks Locke’s normative imperative that government only act for the public good (even though that good is contestable), in order to protect natural rights to life, liberty, and property. Nevertheless, Fuller’s argument is consistent with Locke’s assertion that the legislature’s trust requires that it govern through impartial, predictable, and reasonable laws.<sup>102</sup> Of course, in the *Second Treatise*, Locke does not discuss anywhere a judicial power like

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<sup>96</sup> *Ibid* at para 136 [emphasis added].

<sup>97</sup> See *ibid* at paras 142, 135-41.

<sup>98</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Toronto: MacMillan, 1915) at 179ff.

<sup>99</sup> See generally Lon L Fuller, *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1969).

<sup>100</sup> Fuller’s desiderata are (1) a failure to make any rules at all; (2) failure to publicize them; (3) abuse of retroactive legislation; (4) failure to make rules understandable; (5) enactment of contradictory rules; (6) requiring conduct beyond the powers of the parties obliged to obey; (7) introducing frequent changes making orientation of the subject impossible; and (8) failure to ensure a congruence between the rules and their actual administration (*ibid* at 39).

<sup>101</sup> *Ibid* at 146.

<sup>102</sup> See Faulkner, *supra* note 24 at 23.

this. Still, his political theory lays the theoretical justifications for articulating such a power, just as his constitutional model of checks and balances can accommodate a sophisticated court system.

### *B. Modifying Locke*

Even if one accepts this paper's interpretation of Locke's constitutional model, there remain two main objections to including an independent judiciary within it. The first is that Locke himself did not do so; the inclusion would therefore contradict and undermine his legislative-executive dualism, which relies on political instead of legal checks on executive power. That argument is overly rigid, however, and overlooks the fact that Locke's model is general, flexible in light of local circumstances and historical developments. It also ignores the widespread acceptance of the modern separation of powers theory, whereby the judiciary has assumed a constitutional role equal in station to the legislature and executive. On the other hand, once Locke's model is modified to include the courts, it then requires some form of judicial controls even on prerogative power and the elected legislature. The second objection, addressed in the next section, is that unelected judges lack the democratic legitimacy to challenge executive emergency actions intended to preserve the public from harm, let alone somehow limit or control acts of the legislature. Accordingly, control of the prerogative is again a political matter, left to the elected legislature. That position is shortsighted, confusing the judiciary's lack of direct electoral accountability for the absence of a republican trust. Independent and impartial courts exercise their judicial power for the people, so that they have their own representational mandate to preserve the rule of law against executive abuses of power.

The first objection above downplays the fact that Locke's constitution was both prescriptive of an idealized form of government and descriptive of the constitutional changes he witnessed in the turbulent England of the seventeenth century. From its inception, then, Locke's model was attuned to political conditions and historical trends, as much as it had emanated from rational theorizing. Locke imagined a constitution that "is not an abstract doctrine," but that historically "embraces English constitutional practice."<sup>103</sup> His model is adaptable by nature, and "is designed to be applied beyond the circumstances of its conception, if not everywhere."<sup>104</sup> As a practicable model, Locke's constitution invites reinterpretation and application in light of historical experiences and political developments. The same constitutional instability in England that influenced Locke might

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<sup>103</sup> Mansfield, *supra* note 23 at 190.

<sup>104</sup> *Ibid.*



also have warned him that even his constitutional model might evolve over time, either slowly or through more sudden, momentous changes.<sup>105</sup> Furthermore, his own notion of popular consent as the basis of political society necessarily offered a possibility of change, so long as the basic substantive and structural principles of his constitutional model remained. For example, not long after publication of the *Second Treatise*, Parliament passed the *Act of Settlement of 1701*, guaranteeing life tenure for judges, and thereby taking an important step in establishing the independence of the judiciary. Later, the United States Constitution of 1787—emerging from revolution and representing a Lockean moment of the consensual formation of a new political society—clearly elevated the judiciary to its full place within modern separation of powers theory. This development was the culmination of several intellectual influences, but Montesquieu's thinking, common law ideas, and the articulation of popular sovereignty especially guided judicial power to a Lockean end. As a result of these developments with the modern separation of powers doctrine, the judiciary has attained a crucial constitutional role in preserving the rule of law.<sup>106</sup> It holds its own power in trust for the people and sits comfortably within a new, tripartite constitutional structure. In this modified version of Locke's model, the executive is no longer just politically accountable to the legislature for its use of the prerogative, but is legally accountable to the courts as well.

Accordingly, a brief look at the American revolutionary era (broadly ranging from the late colonial period to the adoption of the Constitution in 1787) illustrates the historical contingency of Locke's constitutional model. That is, over time, these events combined with Locke's ideas in a way that would, over a long period of time, influence and enhance the judiciary's constitutional prestige throughout the common law countries. Of course, the court systems in these countries have developed in different ways, as have their precise constitutional roles. Nevertheless, the American example surveyed here is particularly significant because Locke was arguably the pre-eminent theoretical influence on American political thinkers and the US Constitution's innovative system for the separation of powers.<sup>107</sup> His theories of natural rights, the social contract, and constitutional checks and balances potentially combined with radical Whig polemics to fortify the revolutionary rhetoric about fundamental liberties and

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<sup>105</sup> See Gough, *supra* note 75 at 115.

<sup>106</sup> See Faulkner, *supra* note 24 at 36-38.

<sup>107</sup> See Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence, Kan: University Press of Kansas, 1995) at 251. See also Dworetz, *supra* note 84 at 70.

the threat of tyranny.<sup>108</sup> Accordingly, many American thinkers during the period invoked Locke to justify independence, challenge government power, and frame new constitutions at both the state and federal levels.<sup>109</sup> Although polemicists and statesmen took inspiration from many intellectual sources, Locke, Montesquieu, and the English common law remained among the most influential.<sup>110</sup> However, neither the colonial grievances provoking the American Revolution nor the early national troubles leading to the Constitution of 1787 need any explanation here.<sup>111</sup> It is enough

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<sup>108</sup> For a brief description of the Whiggery that arose in the late seventeenth and early eighteenth centuries in opposition to Britain's perceived constitutional corruptions, see WB Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origins to the Adoption of the United States Constitution* (New Orleans: Tulane University, 1965) at 82-83. For Whig thought in the American colonies, see Bernard Bailyn, *The Ideological Origins of the American Revolution*, revised ed (Cambridge, Mass: Belknap Press, 1992) at 28-38; Gordon S Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press for the Institute of Early American History and Culture, 1969) at ch 1 [Wood, *American Republic*]. Laski refers to Locke as "the first Whig" (*supra* note 68 at 40). But see Josephson, *supra* note 24 at 211-12; Faulkner, *supra* note 24 at 26; David Resnick, "Locke and the Rejection of the Ancient Constitution" (1984) 12:1 *Political Theory* 97 at 97. Resnick finds that Locke's ideas broke with the Whigs' tradition-bound exhortations about the "ancient constitution", going further than simply justifying the constitutional settlement of 1689 in order to propose a more radical arrangement of popular government.

<sup>109</sup> See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kan: University Press of Kansas, 1985) at 60-66; Wood, *American Republic*, *supra* note 108 at 151-52.

<sup>110</sup> McDonald, *supra* note 109 at 59-60, 66-67; Wood, *American Republic*, *supra* note 108 at 7-8. Plato and other classical thinkers, along with the cities of Athens and Rome particularly, provided illustrious examples of republican government based upon virtue. As JGA Pocock has shown, classical republicanism would return as a potent political force in Renaissance Italy, with great subsequent influence throughout Western Europe (*The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, 2d ed (Princeton, NJ: Princeton University Press, 2003)). In England, Harrington's *Oceana*, More's *Utopia*, and the great political upheavals of the seventeenth century would carry on this republican tradition (James Harrington, *The Oceana and Other Works* (London: Buchanan's Head for A Miller, 1737; J Churton Collins, ed, *Sir Thomas More's Utopia* (Oxford: Clarendon Press, 1904)). Other sources of natural rights theories included Pufendorf and Grotius, while Hobbes introduced the sovereign Leviathan. With Montesquieu being the greatest of them, Enlightenment writers such as Hume and Rousseau would challenge classical notions of republican virtue, and inspire Madison's reliance upon enlightened self-interest and his fear of self-serving factions.

<sup>111</sup> Changing attitudes towards authority and republican ideals spread throughout the Western world during the Enlightenment, and found particularly fertile ground in the American colonies. For an examination of the long-term, deeper socio-economic factors contributing to the outbreak of the American Revolution, see generally Gordon S Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1991) ch 6-10 [Wood, *Radicalism*]. See also Edward Countryman, *The American Revolution*, revised ed (New York: Hill & Wang, 2003) at 35-49 (a review of the imperial political crises in the decades leading up to the outbreak of war in 1775).

to say that the imperial crises arising in the 1760s began a nation-building process leading to the Constitution of 1787, which established a federal government of limited powers delegated by the people. What is important for this article is that American constitutional thinking embodied an idealized Whig vision of government, formalizing the institutional division between executive, legislative, and judicial power along Lockean lines. Thus, American political theory elevated the judiciary to an independent third branch, capable of, and democratically legitimized in, controlling the other two.

After Locke, Montesquieu was among the greatest intellectual influences on the American development of judicial power; he “made Locke’s separation of powers the keystone of his own more splendid arch.”<sup>112</sup> As Montesquieu wrote:

[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.<sup>113</sup>

Montesquieu’s constitutional division of power was Lockean, in that it diffused authority to prevent the accumulation and arbitrary exercise of power by any one institution. His theory went a step further, however, by institutionally separating the judicial function from both the legislative and executive powers. Montesquieu’s idea of separation was also flexible, so that all three powers checked and balanced one another. Each of the three branches, in different ways, could therefore hold the others to their fiduciary trusts (as explained further below).<sup>114</sup>

Just as Locke’s model reflected the 1689 constitutional settlement, Montesquieu’s inspiration was the early eighteenth-century British constitution. Although that constitution resembled Locke’s legislative-executive dualism (i.e., counterbalancing Parliament and the Crown), Montesquieu took notice of the significant institutional role that the royal courts had assumed in practice. He probably did not imagine judicial power to encompass the nullification of laws, so the judiciary’s power would likely be found only in its impartial adjudication of legal rights and

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<sup>112</sup> Laski, *supra* note 68 at 49. See also McDonald, *supra* note 109 at 80.

<sup>113</sup> Montesquieu, *The Spirit of Laws: A Compendium of the First English Edition*, ed by David Wallace Carrithers (Berkeley: University of California Press, 1977) book XI, ch 6 at para 5.

<sup>114</sup> Vile, *supra* note 91 at 90-91.

obligations, free from legislative or executive interference.<sup>115</sup> Still, he would have noticed the independence of English judges since the *Act of Settlement*, the courts' role in developing the common law, and courts' use of statutory interpretation to temper legislative power and protect individual liberties. The actual constitutional role of English courts only underscored that Montesquieu's own classification of government power into three branches was neither a rigidly formalistic one, nor based on a mixed government between Crown, Lords, and Commons—as Blackstone, discussed below, would describe it. Instead, Montesquieu imagined a constitution where Parliament, Crown, and courts checked and balanced one another through their respective legislative, executive, and adjudicatory functions.<sup>116</sup> Montesquieu's theory thus institutionalized a distinct judicial power by building upon Locke's originally dualistic structure and furthering its purpose of controlling political power generally.

Along with Locke and Montesquieu, the common law also buttressed revolutionary arguments for an independent judicial power. One can argue that the common law itself had earlier influenced Locke, whose own ideas about natural rights and limited government, in turn, became embedded within it. Apparent links between Lockean thought and the common law resurfaced in Blackstone's *Commentaries*—highly influential throughout Britain and its colonies. Blackstone echoed Locke in his discussions on balanced government, natural law, and the consensual basis for political society.<sup>117</sup> He likewise struggled with a similar dialectical problem to Locke; that is, how to justify and limit a sovereign Parliament. To resolve this tension, he elided distinctions between positive and fundamental law: statutes reflected the latter, just as judges “discovered” the common law. This confusion reflected a juristic transition between natural law theories and emerging positivism in English legal thought.<sup>118</sup>

With that confusion, Blackstone inadvertently undermined other constitutional ideas that he was defending. He presented a rationalized, positivistic approach to legal thinking that still maintained strong links with the common law tradition, based upon custom and first principles.<sup>119</sup> Ac-

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<sup>115</sup> Montesquieu, *supra* note 113 at para 32: “Of the three powers above-mentioned the judiciary is in some measure next to nothing. There remain therefore only two.” See Gwyn, *supra* note 108 at 103, 111.

<sup>116</sup> See McDonald, *supra* note 109 at 80-82; Gwyn, *supra* note 108 at 106-13.

<sup>117</sup> Blackstone, *supra* note 37 at 119-23, 149-51, 259-60.

<sup>118</sup> For a criticism of Blackstone's constitutional ideas, see Laski, *supra* note 68 at 117-22.

<sup>119</sup> See Blackstone, *supra* note 37 at 38-43, 47-52, 77-80; Wood, *American Republic*, *supra* note 108 at 10; Vile, *supra* note 91 at 104-05; Michael P Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence, Kan: University Press of Kansas, 2002) at 238-40, 256-57, 259, 262-63.

cordingly, Blackstone described a “balanced constitution” that fit quite well with Locke’s constitutional model; both used constitutional structure to realize natural law and address the rights-security contradiction presented by strong civil government. In Blackstone’s constitution, the institutional division of social estates limited government power, just as natural law guided its exercise. Crown, Lords, and Commons combined and balanced each other in the King-in-Parliament. However, by Blackstone’s day, this understanding of the British constitution was already weakening. Many Whigs at home and abroad saw the growth of responsible government, the party system, and political patronage as undermining an idealized, balanced constitution. According to some accounts, this balance of social forces, as well as the institutional separation of legislative and executive power, would be mostly fiction by the early nineteenth century.<sup>120</sup> In any case, Blackstone’s dated view of a class-bound, balanced constitution was not as important as two other undercurrents in his work. First, he had not found a satisfactory resolution between the limits of natural law and legislative power, thereby inviting a constitutional response of some kind. Second, his constitution hinged on the functional division of political power between legislative, executive, and judicial institutions just as much as it did on the institutional balance between old feudal estates. Thus, both Montesquieu and Locke lurked beneath Blackstone’s orthodox description of the British constitution. Parliament passed statutes, judges “found” the common law, and the Crown—possessing its ancient prerogative powers—enforced the law and provided for security. All three institutions worked together to realize natural law in the most practicable way, serve the public good, and check and balance each other.

Blackstone was highly influential in the American colonies, where he was widely read by generations of lawyers, judges, and statesmen. His dated constitutional account even contributed to revolutionary indignation among his Whiggish readers, as it only highlighted the contemporary “corruption” of the ancient constitution. To colonists in opposition, Crown ministers appeared to undermine legislative independence while Parliament seemed increasingly to abuse its power over unrepresented and largely self-governing colonies. In the second half of the eighteenth century, then, this discrepancy between Blackstone’s constitution as practiced and as Whiggishly idealized contributed to the ideological conflicts leading to war and American independence. Blackstone’s role in these developments was ironic, given that he favoured Parliament’s supremacy over the colonies, despite American appeals to natural law. However, some of his language in the *Commentaries* recalled Chief Justice Coke’s

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<sup>120</sup> See e.g. Walter Bagehot, *The English Constitution*, revised ed (London: Henry S King, 1872) ch 2 at 33ff.

opinion in *Dr. Bonham's Case*, suggesting that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.”<sup>121</sup> Accordingly, Blackstone’s discussions on natural law, the power of the courts, and a balanced constitution imparted special, unintended meanings to those Americans concerned that Parliament had unjustly infringed their liberties (or, later, that even state assemblies had legislated with intemperate revolutionary zeal and without other adequate institutional checks). Blackstone thus became the common law bridge over which American constitutional thinking could cross from the balanced constitution of social estates and parliamentary sovereignty to a government of a functional separation of powers, limited by first principles. Inspired by the *Commentaries* (or, rather, a certain reading of it):

[P]rotesting colonials fused the constitutional rights of Englishmen with the natural rights of man, thereby merging the views of such legal luminaries and former chief justices of England as Coke, Hobart, and Holt, and the natural law views of Pufendorf, Burlamaqui, and Locke.<sup>122</sup>

The fusion of natural law and common law with a Lockean perspective on constitutional structures was another critical step in lifting judicial power to an equal place alongside that of the legislature and executive.

Despite Montesquieu’s own admission that judicial power was weaker than the legislative and executive powers, the above influences would combine to inspire the Constitution of 1787, clearly establishing all three as coordinate branches of government.<sup>123</sup> Article III established “The Judicial Power of the United States,” although it did not explicitly set out how the courts would, in practice, check and balance the Congress and the President. Nevertheless, Locke, Montesquieu, the common law, and popular sovereignty (discussed in the next section) laid foundations for the Supreme Court’s eventual assertion of a power to invalidate unconstitutional acts of Congress.<sup>124</sup> To be clear, the purpose of these American examples

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<sup>121</sup> (1610), 8 Co Rep 113b at 118, 77 ER 646 (KB). See Blackstone, *supra* note 37 at 41, 54, 89, 91.

<sup>122</sup> Huyler, *supra* note 107 at 221.

<sup>123</sup> Montesquieu, *supra* note 113 at para 4. Alexander Hamilton similarly found the judiciary to be the “least dangerous” branch, with power of neither sword nor purse (“No 78” in Rossiter, *supra* note 37). Nevertheless, he argued that limitations on legislative power could only be preserved through “the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing” (*ibid* at 466).

<sup>124</sup> *Marbury v Madison*, 5 US (1 Cranch) 137 (1803). This American approach to judicial review “depended upon the acceptance of the idea of checks and balances as essential

has not been to argue for a written constitution, insist on the judicial nullification of laws, or disregard historical developments in other countries. Rather, the examples here only illustrate an especially important historical process by which Locke's executive-legislative dualism evolved into the modern concept of the separation of powers. Under this general doctrine, an independent judicial branch must check and balance the other two powers, but in an effective way, adapted to local political circumstances. The Lockean constitution, so modified and locally applied, still preserves the political dynamic between the executive and the legislative branches. However, it also legalizes their fiduciary trusts in one manner or another. Moreover, in controlling the other branches, the judiciary upholds its own trust to preserve the rule of law. This trust gives the judiciary a representational mandate all of its own. However, one last American example from the revolutionary era—the articulation of popular sovereignty—gives the final, republican justification for judicial control of even prerogative power.

### *C. Popular Sovereignty and the Judicial Trust*

Due to historical developments like those just described, the modern separation of powers doctrine gives the judiciary a constitutional role equal in importance to the legislature and the executive. As such, it is ensconced within a Lockean constitution of checks and balances. Like the other two branches, the judiciary exercises its power in trust on behalf of the people who have consensually delegated that power to it. Even if judges are not electorally accountable (indeed, perhaps just because they usually are not), the judiciary's trust carries a special, indirect representational mandate to hold impartially both the legislature and the executive to their prescribed powers and to the rule of law. This trust, emanating from the people, therefore has a republican quality. It gives the judiciary an intermediary role between the people and the other two branches, much like the role described earlier for the legislature.<sup>125</sup> Turning once more to the American revolutionary experience for illustration, the doctrine of popular sovereignty shows particularly why judicial power and

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barriers to the improper exercise of power," combined with a written constitution delineating government powers: Vile, *supra* note 91 at 157-58.

<sup>125</sup> As Hamilton noted:

It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority (Rossiter, *supra* note 37 at 467).

review of the prerogative is democratically legitimate. Although elsewhere this doctrine developed differently, perhaps less dramatically, and with distinct legal implications, it also came to underpin constitutional government in other common law countries, such as Canada and the United Kingdom itself.<sup>126</sup>

Rebellious American colonists reacted not only against the King, but also against a Parliament that claimed illimitable, sovereign authority to legislate for the unrepresented colonies in their internal matters. To revolutionaries, absolute parliamentary power could be just as arbitrary and tyrannical as unrestrained royal power, a danger many saw in imperial laws like the so-called “*Intolerable Acts*” of 1774, which (among other things) closed the port of Boston, altered the Massachusetts government, and allowed trials for local crimes in English rather than colonial courts. Such unpopular legislation only proved to many colonists the importance of first principles as restraints upon government power. In much Whigish American thinking, the rule of law—with some kind of judicial checks on legislative and executive authority—became closely bound up with a constitution and the public good.<sup>127</sup> After achieving independence, however, the Americans still had to struggle with how to control the powers of elected government officials who could claim a representational mandate to do the will of the people, as they perceived it. Republican government, and the new relationship between governors and governed, brought its own dialectal problem about how to empower and control civil government, both at the state and national levels.

In America, where older social distinctions based upon class were weak and political participation was for the time relatively open, Whigish ideas had long emphasized the power of elected colonial assemblies responsible to local constituencies. Many Americans kept faith after the Revolution that the establishment of popular legislatures, animated by republican virtue and paired with weak governors, would avoid the heavy-handed manner of government that they had attributed to both Parliament and the Crown. Early constitutional experimentation with state governments, however, unfortunately demonstrated that a majority in a republican legislature, without adequate executive or judicial counterweights, could act just as arbitrarily and unwisely as Parliament or the

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<sup>126</sup> As Dicey writes, “the word ‘sovereignty’ is sometimes employed in a political rather than in a strictly legal sense” (*supra* note 98 at 70). To this he adds, “The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament” (*ibid* at 72). See also Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queen’s University Press, 2007) at xiii, 24-27, 33-36.

<sup>127</sup> See Wood, *American Republic*, *supra* note 108 at 53-54, 344-54.



Crown supposedly had.<sup>128</sup> Thus, by 1787, many Americans increasingly understood that no one branch of government (including an elected legislature) could be endowed with unlimited authority.<sup>129</sup> Post-independence experiences with democracy, as reflected in James Madison's essays numbers 10 and 51 in *The Federalist* quickly turned into political rough-and-tumbles between rival political factions and sometimes less than virtuous public officials.

Republican government, then, could not be securely entrusted to imperfect legislatures tempted to claim democratic infallibility—a notion that smacked far too much of parliamentary supremacy. Instead, there was a need to emphasize the ultimate sovereignty of the people, who had delegated only limited power to their government institutions and officials, none of which could ever entirely be trusted.<sup>130</sup> Popular sovereignty, therefore, not only propped up and explained Locke's notion of the public good in clear republican terms, but it also transformed Locke's checks and balances into a distinctly modern separation of powers theory. As Gordon Wood explains:

The assumption behind this remarkable elaboration and diffusion of the idea of separation of powers was that all governmental power, whether in the hands of governors, judges, senators, or representatives, was essentially indistinguishable; ... Only the great changes taking place in these years in the Americans' understanding of representation and the people's relationship to the government—all culminations of a century and a half of experience in the New World brought to a head by the anomalies inherent in the constitution-making experiments and summed up in the new meaning given to

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<sup>128</sup> See *ibid* at 63-65, 404-13. Concentration of power even in legislative, like executive, hands would also violate Locke's rejection of "*Absolute Dominion*": Josephson, *supra* note 24 at 218-19, citing Locke, *Second Treatise*, *supra* note 1 at paras 174, 201.

<sup>129</sup> Thus, to understand the significance of popular sovereignty, "The missing link here is the people, that is, the people as distinct from their representatives": Barbara Aronstein Black, "An Astonishing Political Innovation: The Origins of Judicial Review" (1988) 49 U Pitt L Rev 691 at 695.

<sup>130</sup> James Madison framed the republican problem:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions ("No 51" in Rossiter, *supra* note 37 at 322).

the idea of the sovereignty of the people—made this assumption possible.<sup>131</sup>

By the time of the constitutional convention in 1787, most or all of the framers would have already conceived of the sovereignty of the people, which both legitimized and limited all forms of government power. This idea clearly built upon Locke's arguments for the consensual nature of political society and for the importance of an elected assembly. It also founded the emerging separation of powers doctrine not upon the institutionalization of a feudal class system, paternalistic notions of government, or classical ideas of republican virtue, but on democratic representation, rational governing processes, and a cautious mistrust of human frailties. As a result, all three branches came to represent the popular sovereign equally, with each independently exercising its limited power on the people's behalf and with an eye on the actions of the other two. Popular sovereignty thus simultaneously empowered and limited government by imbuing three separate branches with their own competing republican trusts. As such, it resonated with Anglo-American Whig polemics, which advocated democratic institutions, while still distrusting government and distressing about its natural penchant for corruption and tyranny.<sup>132</sup>

The enabling and disabling aspects of popular sovereignty had a profound impact on Locke's constitution of structure. Because the legislative, executive, and judicial branches—whether or not popularly elected—each held its political power from the popular sovereign and independently exercised it in trust for the people, each branch had a representational mandate of its own. Equally republican in nature, government institutions were no longer differentiated by either old social orders or even democratically-minded distinctions between elected and unelected officials; rather, the branches were defined solely by functions and personnel.<sup>133</sup> With this new republican, functional separation of powers theory, “modern conceptions of public power replaced older archaic ideas of personal monarchical government.”<sup>134</sup> This theory also got around the problem of

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<sup>131</sup> Wood, *American Republic*, *supra* note 108 at 453. He expanded on the justification of popular sovereignty:

Popular consent now became the exclusive justification for the exercise of authority by all parts of the government—not just the houses of representatives but senates, governors, and even judges. As sovereign expressions of the popular will, these new republican governments acquired an autonomous public power that their monarchical predecessors had never possessed or even claimed (Wood, *Radicalism*, *supra* note 111 at 187).

<sup>132</sup> See McDonald, *supra* note 109 at 76-78.

<sup>133</sup> See Wood, *American Republic*, *supra* note 108 at 151-52, 383-85, 445-49, 603-604.

<sup>134</sup> Wood, *Radicalism*, *supra* note 111 at 187.

how to control the elected legislature and justify public power in less democratically accountable hands. The American articulation of popular sovereignty, then, was the final, crucial step, with which even an unelected judiciary could claim a constitutional responsibility to guard the rule of law and, with it, a power to control (in some way) both the legislative and executive branches.<sup>135</sup>

What all of the above American examples show is that, although Locke originally set out an executive-legislative dualistic structure, the judiciary has historically matured into an independent third branch of government. First, it promotes the constitutional goals of Locke's structural model, as it further diffuses government power and stands as an additional institutional check upon the other branches. Second, the judiciary has a republican fiduciary trust to uphold the rule of law. It therefore has its own representational mandate, holding its power from and exercising it on behalf of the popular sovereign. Third, although not explored further in this article, courts fulfill this process through the common law processes of adjudication. They resolve particular disputes, apply the laws fairly and equally, treat like cases alike, and ensure that all government institutions and officials act within the confines of their delegated powers. In doing so, courts also confront or defer to the other branches as the public good requires, thus allowing for various degrees of executive discretion as circumstances require (as with legislative deference). Of course, particular legal forms, doctrines, procedures, and remedies can vary from jurisdiction to jurisdiction, and can adapt to emergencies that put them under stress.<sup>136</sup> Still, differences notwithstanding, courts cannot abdicate their fiduciary duty to keep the legislative and executive branches under the rule of law, insofar as possible.<sup>137</sup>

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<sup>135</sup> "The department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary": Wood, *American Republic*, *supra* note 108 at 453-54, 159-61. Aronstein Black asserts that popular sovereignty means "*ipso facto*" judicial review (*supra* note 129 at 696). Of course, that review might take different forms in different constitutional systems.

<sup>136</sup> See Lazar, *supra* note 52 at 148-53.

<sup>137</sup> For example, Vile finds that all branches have both "negative" and "positive" constitutional roles under the separation of powers doctrine (*supra* note 91 at 18). He associates the negative aspect with a formalistic view of the doctrine, which prevents one branch from interfering with the specific powers of another. On the one hand institutional division is a brake upon attempts to concentrate political power, at the same time that it keeps any one branch from meddling with or undermining another. The positive aspect of the doctrine, on the other hand, corresponds to a functional view of branch powers, where the branches can have overlapping authority and so can more directly challenge (and control) one another. Different interpretations of the separation of powers doctrine often favour one of these views, with implications for the relative role and powers of the courts. The negative and positive aspects of the judicial role tend to coexist, however,

Once brought within Locke's constitutional model, judicial power is permanently counterpoised against that of the executive. From this position, it can hold the executive legally accountable even for prerogative acts.<sup>138</sup> Of course, the executive might extraordinarily and temporarily act outside of the rule of law or refuse to answer to legal process, in the face of an emergency threatening the existence of the political society.<sup>139</sup> Although unusual circumstances might necessitate such actions, they remain subject to political condemnation or indemnification by the legislature, as well as to legal consequences in the courts.<sup>140</sup> Therefore, the executive can no longer reject or undermine judicial oversight any more than that of the legislature. To do so will break the constitution, violate the public good, and threaten war with the people. Judicial power thus makes it more difficult for the executive to loosen himself from the constitution's overall structural constraints. The judiciary's trust to protect the rule of law ensures more checks and warning signs about the dangerous concentration or institutional unaccountability of executive power—a danger that becomes even greater when the executive wields the prerogative.<sup>141</sup> That trust also justifies its opposition, at times, to a virtuous ex-

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but in different degrees. See also Rebecca L Brown, "Separated Powers and Ordered Liberty" (1991) 139 U Pa L Rev 1513 at 1533, n 81 (citing Gwyn, *supra* note 108 at 127-28).

<sup>138</sup> See e.g. *Council of Civil Service Unions v Minister for the Civil Service* (1984), [1985] AC 374, 3 All ER 935 (HL) (commonly known as the *GCHQ* case). The House of Lords declared for the first time that the Crown's prerogative powers are subject to judicial review, when the subject matter of its exercise is justiciable (thereby recognizing a continuing need for judicial deference in such matters).

<sup>139</sup> See *Ex parte Merryman*, 9 Am Law Reg 524, 17 F Cas 144 (Md Cir Ct 1861) (President Lincoln refused to honour a writ of habeas corpus).

<sup>140</sup> See e.g. *Burmah Oil v Lord Advocate* (1964), [1965] AC 75, [1964] 2 All ER 348 (HL). The House of Lords found that the Crown had a prerogative power to confiscate and destroy the private property of British subjects without prior legal process, in order to prevent it from imminently falling into enemy hands in a combat zone. However, the Crown's exceptional prerogative came with a common law duty to provide fair financial compensation to the owner. For another British example, see *Anisminic Ltd v Foreign Compensation Commission* (1968), [1969] 2 AC 147, 2 WLR 163 (HL) (the House of Lords resisted Parliament's attempts to oust the judicial review of executive administrative decisions).

<sup>141</sup> The importance of judicial power to constitutional checks and balances is well illustrated by President Roosevelt's ignominious "Court-packing plan" of 1937, which was a response to the Supreme Court of the United States' controversial and unpopular invalidation of New Deal legislation. The President submitted a plan to Congress that would have allowed him to appoint several new justices. The enlargement of the Court would have ensured a majority friendly to the Administration's economic policies. Despite Roosevelt's great popularity, and an overwhelming majority of his own Democratic party in the House of Representatives and the Senate, public and congressional reaction to perceived executive manipulation of the judiciary was hostile. For a variety of reasons, in *West Coast Hotel v Parrish* the Supreme Court signalled a new, friendlier

ecutive with good intentions. In the midst of the Korean War, for example, US President Truman unilaterally ordered the seizure of the steel mills, without any statutory authorization, in order to prevent strikes that might have crippled the American war effort. The Supreme Court declared the order unlawful in *Youngstown Sheet*,<sup>142</sup> and President Truman complied with the decision. In his concurring opinion, Justice Jackson summed up the perils of executive emergency powers and the importance of legislative and judicial checks to the preservation of liberty. His sentiments traced a lineage back to the constitutional conflicts that had inspired Locke, and his decision instantiated Locke's political philosophy to reject the president's sweeping prerogative claims. Citing to England's Chief Justice Coke and his defiance of the king, Justice Jackson wrote:

The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance, and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.<sup>143</sup>

## Conclusion

Over the past decade, there has been a renewed interest in Locke's concept of prerogative and whether or not a liberal constitutional order can adequately constrain exceptional executive decisions, taken for the security of the state in times of emergency. Some would answer that such prerogative—a worrisome but necessary executive power—ultimately

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approach to government interventions in the economy, diffusing the controversy (300 US 379 (1937)). The president's plan then died quietly in Congress.

<sup>142</sup> *Supra* note 39.

<sup>143</sup> *Ibid* at 655. Justice Jackson added:

We follow the judicial tradition instituted on a memorable Sunday in 1612 when King James took offense at the independence of his judges and, in rage, declared: 'Then I am to be under the law—which it is treason to affirm.' Chief Justice Coke replied to his King: 'Thus, wrote Bracton, "The King ought not to be under any man, but he is under God and the Law."' 12 Coke 65 (as to its verity, 18 Eng Hist Rev 664-675); 1 Campbell, *Lives of the Chief Justices* (1849), 272 (*ibid*).

cannot be restrained by the constitutional order. As an extralegal power, exercise of the prerogative can only be challenged in turn by another extralegal power. That opposite force is the people, exercising their right to resist tyranny and reconstitute political society. As liberals counter-argue, this security-focused argument presents risks to democratic institutions, the rule of law, and individual rights. It also leaves little constitutional correction to executive abuses, other than a mass swell of popular opposition. Not only is effective opposition unlikely to come except in the most extreme situations of executive maladministration, but it also might prove to be too little, too late. The security-focused argument not only downplays Locke's twin commitment to security *and* rights, but it also introduces a potentially serious constitutional instability, which he carefully seeks to avoid.

This article has clearly supported the liberal position. It has rejected more security-focused arguments as dangerous to liberty and contrary to the Lockean constitution, which so deeply influences the legal and political systems of the common law countries. In that constitutional model, which divides and balances executive, legislative, as well as judicial power for the public good, the executive can never act completely outside of any institutional restraints. To do so risks the concentration of all political power in executive hands, something that Locke does not allow. Furthermore, because every branch of government hold its power in trust, the legislature and judiciary each have republican mandates to act as institutional intermediaries between the popular sovereign and the executive. Any attempt by the executive branch to undermine the other two and avoid their oversight is therefore an attack on the people themselves.

Therefore, notwithstanding urgency and his own claims to a popular mandate, the executive cannot dispense with Locke's constitutional structure. Although extraordinary circumstances might compel the executive to act without legal authority or even *contra legem*, they do not excuse his actions from subsequent political or legal oversight and possible sanctions. To these, he must ultimately submit. Locke so closely links the public good with the constitution that executive defiance of the other two branches violates his own trust. This is so, even where that trust permits swift, decisive action to preserve the civil society. Locke grants the executive an exceptional emergency discretion, but only so long as it remains accountable within the people's constitution.

The Lockean constitution, in this way, does not deny a mighty prerogative. The executive's obligations to the public good mean that, in extreme and unforeseen political situations, he might indeed have to break the law in order to save it—just as Lincoln did. However, Locke denies his executive the sole, ultimate power to judge the wisdom and propriety of his own actions—a principle that underlies the separation of powers doctrine. The executive may of course struggle and contest with the legisla-

ture and the courts, either over his actions or formal branch powers under particular constitutional arrangements. He may also demand and expect fair deference to his decisions under pressure. What the executive cannot do, however, is arrogate his office above the coordinate branches, so as to refuse to consult, inform, or finally submit to them. The executive's prerogative, while great, is after all just a general discretionary power. Executive discretion of all forms, and the security-rights tension it is to resolve, is ever-present in Locke's constitutional design. As such, the prerogative is no more exempt from some kind of constitutional control, than the narrower executive power to enforce the laws. Locke creates a dynamic institutional give-and-take over what the public good requires in all circumstances, from mundane matters of public administration to extraordinary affairs of state. His constitution bends but never breaks, even in great crises. On the other hand, executive hubris invites resistance: if not by the legislature or courts in the first instance, than ultimately by the popular sovereign.

Accordingly, the security-rights contradiction, which so clearly comes to the fore in emergencies, is not a flaw in Locke's constitution. Rather, Locke harnesses it as a powerful and vitalizing force for rational, consensual, and lasting politics. Moreover, for Locke, those politics can only exist within his constitution. He intentionally sets up the conditions for, and encourages, institutional conflict and argument over the public good, as well as its relationship to specific exercises of prerogative and political power generally. His constitutional model is an institutional prophylactic to the abuse of political power of all sorts, and works precisely because it is grounded on a normatively contestable principle of the public good that rejects any official claims to be the absolute judge of its requirements. Arguments about the right balance between rights and security—if indeed, it is even conceptually appropriate to speak of “balance” between Locke's inseparable political imperatives—fundamentally depend upon contingencies and doubts. While the wisest legislature can never statutorily provide for all exigencies with complete certainty, neither can the most virtuous executive be utterly sure that he does not fail the people in a time of trial. The judiciary, of course, must ensure that political power respects basic liberties through the rule of law. However, courts too must be mindful of their own institutional limitations. At the centre of Locke's constitution, the security-rights contradiction is crucial for the same reason that it excites worries in liberal and illiberal commentators alike; it is a politics of doubt. In times of emergency, it is just that doubt—about the need for decision, about the integrity of liberty, about democratic accountability—that allows prerogative power but keeps it within the constitution. At the same time, such doubt encourages reflection, vigilance, and republican virtue among the citizenry.

Locke's constitution of both structure and doubt will avoid most often but not always prevent very bad, or even catastrophic, policy decisions. It is a remarkably strong fence against political apathy, corruption, and anti-democratic forces, but cannot forever ensure virtue against any of them. Thus, it does not entirely foreclose Locke's worst fears: the slow decline into autocracy or the sudden rise of an authoritarian ruler convinced of his infallibility. The Lockean constitution effectively guards against such political decay but, in the end, does not always pretend to be able to prevent the "strongman's" magical seduction of the people, politics of fear, or rule by the gun. However, while a conceited executive might attempt and, God forbid, succeed in slipping his constitutional chains, Locke denies any political legitimacy to such manifestations of power. Not even the combined, supine acquiescence of a weak, frightened, or fawning legislature, judiciary, or public can legitimize such a distorted political state. What Locke's constitution does, in such a case, is deny the executive any legitimacy or pretence of a right to rule. Even if the constitution tragically fails, with its last gasp it decries the new securitized state of order for what it really is—a slavish trade of liberty for tyranny.

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