38

Prerogative

Thomas Poole[*]

'That's your prerogative'. Used in an everyday setting, the word prerogative conveys a reluctant acceptance of someone's entitlement to do something as of right, without someone else's say-so or approval. That is also its essence when used to describe the general or inherent executive capacities of government. But when we try to say more about prerogative in this sense, things go rapidly downhill. One obstacle is that, while prerogative is important within certain systems of law and government, it is not a feature of others, or at least not obviously so. An inquiry into the general nature of prerogative has to contest with the fact that it is a far from universal concept. Another difficulty relates to its elusive qualities. Prerogative often seems to inhabit the margins around and gaps within constitutional order. Its content and scope – the powers, perquisites and immunities that might at any one time be summoned in its name, so far as these can indeed be ascertained – change substantially over time. As a result, the concept is often approached obliquely, with correspondingly disappointing results. Descriptive accounts get mired in the historical and local, adding thinly sketched functional material for ballast. Big-picture accounts tend to reach for the mystical. From Blackstone's 'mysteries of the Bona Dea' through Schmitt's 'miracle' to Loughlin's 'sublation', no other constitutional term provokes so much quasi-religious cliché (Loughlin 2010).

Much of this chapter chases prerogative down the rabbit hole. Taking its cue from Locke's remark that, at the beginning of political organisation, 'the government was almost all prerogative', it starts from the proposition that prerogative reflects a basic form of rulership. It represents, that is, a rudimentary expression of the command function (or imperium), a function bound up with de facto control over a territory and population. More precisely, I take the term 'prerogative' to signify what remains of that command function once institutions of law and government instantiate themselves around that basic core and in so doing transform it. The primary constitutional meaning of prerogative relates, then, to the capacities that

[*] London School of Economics & Political Science

remain once the command function is subsumed and reshaped by the stabilisation, institutionalisation and juridification of power that we associate with the constitutionalising process.

Constitutional theory often distills the complex character of the self-reflexive administrative capacity that emerges from these social operations down to an order of rules (and rules about rules). Framed in juristic terms, the relevant question becomes how best to express the idea of prerogative as residual command function within the order of rules that the constitution provides. Much of the literature on that question tends to share the same characteristic and ultimately the same fault. Most older texts, and some newer ones, rely on the claim that prerogative in the sense that I have described retains its original or authentic political quality. While paying due attention to their subtleties and nuances, I read these texts primarily with a view to identifying this shared characteristic, what animates it and where it can lead. I argue that in general the authors of these texts presuppose the existence of a 'sovereign prerogative', that is, an authority inherent to government that is distinct from, prior to, and in some sense superior to law. They suggest, in other words, that the 'original' command function stays more or less intact throughout the constitutionalisation process, capable when need arises of emerging from beneath the constitution's normative institutional crust.

I argue that the model of sovereign prerogative fails on two counts. Analytically, the claim that prerogative is an original power attempts to ascribe to the concept of something that it cannot possibly possess. Whatever the historical trajectory of a constitution, there is no such thing as a natural or original constitutional power (save possibly for the constituent power that may be said to undergird it). As a result, what is presented as a natural or quasi-natural power is in reality a disguised claim about how power ought to be allocated. Normatively, the claim that prerogative is outside and in some sense above the law introduces instability into our conception of constitutional order by postulating two distinct sources of authority. It also, in so doing, opens a path to bypassing or dismantling institutional structures designed to reinforce the idea of government subject to law, threatening the promise of free and equal citizenship that constitutional order seeks to elaborate.

It is for these reasons that modern constitutional orders have by and large abandoned sovereign prerogative in favour of the idea of 'constitutional prerogative'. That model begins by rethinking the residual nature of prerogative. One can hardly expect the rudimentary expression of the state's command function to emerge unscathed from successive waves of constitutionalisation. Even if we imagine the modern prerogative or its functional equivalent as specifying some of the same functions as its 'original' ancestor, these are now encoded within vastly different institutional and ideational structures. Their constitutional meaning is to be recalibrated accordingly. Prerogative power is now either authorised by a constitution or assumed to have been so. This means that, whatever the precise form of the constitution in which it appears, constitutional prerogative is understood to be general executive power

that is derived, enumerated and limited, an arrangement which brings potentially conflicting sources of normative authority into conceptual alignment. (It might also be said to do the same for the constitution's past and present.) To the extent that sovereign prerogative was animated by the search for the Statesman capable of navigating the ship of state by means of the prudent exercise of superior intelligence, constitutional prerogative anticipates an order of statespersons, insisting on collective responsibility for the common good even on matters of statecraft.

Lest this sounds too neat a reconciliation, the chapter concludes with a sting in the tail. There are good reasons why we might want to reserve certain important functions to the central executive and to grant in respect of the exercise of some of these functions a wider degree of latitude. It follows that even if we empty the category of prerogative of any special significance, it is not clear that we have done much more than to shift the terrain on which executive power-grabs and other expressions of constitutional 'backsliding' may occur. Constitutionalising prerogative may foreclose more obvious routes to over-centralising power. (I do not altogether discount the counterintuitive proposition, which may be what Locke believed, that maintaining a distinct category of prerogative makes constitutional corruption, in fact, less likely.) But it is not clear that the same holds for less obvious routes. If that is indeed the case, constitutional interest shifts from first-order questions circling around the disruptive potential of prerogative to second-order matters relating to the exploitation of 'pseudo prerogatives' derived from open-textured grants of statutory or constitutional authority, or from obsequious judicial interpretation. It is one thing formally to curtail the prerogative; quite another to curb the 'prerogative disposition'.

I PRELIMINARY OBSERVATIONS

If prerogative has a certain ragbag quality to it, that may be because its content varies considerably across time and place. Some constitutional traditions, indeed, seem to find no obvious room for prerogative power. But it is still possible to think of prerogative as typically containing powers relating to foreign relations, war, national security, public order, emergencies, citizenship, border control, office-holding and pardon. We can provisionally classify these powers as relating to the somewhat indeterminate category 'matters of state', a somewhat indeterminate category but one that reflects the assumed origins of prerogative in the command functions of rudimentary political order. Likewise, the prerogative used also to play an important role in conquest and empire, now considerably less in relevant topics. Constitutions sometimes also contain prerogative powers to summon, prorogue and dissolve the legislature. Prerogative powers do not usually give exclusive jurisdiction to the executive over the fields to which they relate, nor do they necessarily give it a free hand. Constitutions often make provisions for power-sharing in the domains over which prerogative once held sway.

The most obvious feature of these powers concerns how they are exercised. They are executive powers which do not need authorising legislation or prior legislative approval to have lawful effect, powers under which government acts 'as of right' and so discretionary in a strong sense. The informality of prerogative powers relative to how governmental power normally operates through a framework of public laws provides a clue to their material essence. The powers that fall within this category tend to correspond to areas where the custodial responsibility of government is to the fore, its duty to protect the state. It is generally thought that distinct qualities are required for these governmental functions to operate effectively – 'decision, activity, secrecy, and dispatch' in the formulation of *Federalist* No.70 (riffing on Blackstone 1979, p. 242). The juridical structure in which prerogative powers operate tends to give expression to this apparent imperative. We need to be careful for several reasons, not least since these sources of power become increasingly entwined in modern governmental structures, an important factor later in my argument (Tilly 1990). But it may not be entirely improper to identify law and prerogative as two species of command emanating from two distinct sources of power. If law is the product of the state understood as normative institutional order or *potestas*, then prerogative, or directive authority, seems to be tied with the material (especially military) force of the state or *imperium*. (Blackstone 1979, p. 254).

II IN SEARCH OF THE STATESMAN

While our interest lies in the particular concatenation of powers and duties that characterises the modern constitution in at least one of its forms, I start with a general argument concerning law and discretionary power which animates this tradition of inquiry. The argument for prerogative – or, more generally, sovereign directive authority – is not a claim about the general capabilities of a system of government in its entirety, its accumulated and aggregated institutional capacities, but one concerning the capacity of a single institution to act apart from its general institutional normative environment. At its sharpest, the prerogative claim is that an individual site of intelligence, whether individual human or select group, that forms part of an institutional normative order but is also capable of independent action, should be able to determine a different course of action from that which would otherwise be determined by that order.

Plato's dialogue *Statesman* offers something like an Urtext for this claim, not just for its defence of directive power but also in the qualifications it makes to it. True statesmanship, Plato argues, is the practice of the art of ruling. Like a doctor whose treatment must fit the needs of individual patients, if rulers truly possess the art of government we must let them do the job according to what their superior skill determines. From the ruler's perspective, laws are like heuristics, to be dispensed with if that is what he considers for the best. Since general laws cannot prescribe with accuracy what is best and just for each member of the community at any one time, it follows that 'the best thing of all is not full authority for laws but rather full authority

for a man who understands the art of kingship and has wisdom'. Like the weaver, the art of governing is to blend warp and weft, different personality types that otherwise might conflict, into harmonious unity. Understood as an activity of continuous creation, the true Statesman's power, conceived as an activity of continuous creation, is the closest realisation in our fallen state to natural conditions of divine ordering. As it partakes in the divine, it ought to be considered absolute. Within this constitution, for Plato the one true constitution (all others being more or less imperfect copies), 'what matters is that with or without persuasion, rich and poor, according to a written code or against it, the ruler does what is really beneficial', even if it involves compulsion (Plato 1992, 294a, 297a).

The Statesman as doctor; the Statesman as weaver. These images evoke the idea of ruling as a directive enterprise in which the leader, primary locus of intelligence and will, acts upon or disciplines the populace. Plato explores the idea that the governing relationship is like that between a shepherd and his flock earlier in the dialogue, only to reject the comparison. He elaborates a myth, more science fiction than speculative anthropology, which imagines how life was for our distant ancestors. That first epoch, the 'age of Kronos', coincided with a universe geared to happiness in which everything from the movement of the planets to the care of earthly life was managed by gods. Our ancestors, a simple species of humans who sprang like flora directly from the earth, were cared for by demi-gods. These proto-humans, in any case simpler beings, perceived those charged with their care as natural superiors, and the governing relationship that ensued, simple and unquestioning, could indeed be said to take the form of a pastorate.

But this epoch ended once the empyrean polarities were reversed, sending the solar system spinning in the opposite direction. The proto-humans were wiped out in the resulting cataclysm, replaced by our direct ancestors, who had previously lain dead in the earth but are now formed in the womb. Things in this, our own 'age of Zeus' are disordered, chaotic, and destined for ultimate destruction. Gods have withdrawn from the active management of human affairs, leaving us without natural superiors. But with chaos comes complexity. Our new imbrication within family structures into which we are born gives rise to memory and, with it, politics. Faced with a disorienting and deteriorating world, the best we can do to hold calamity at bay is to find leaders who possess the science of ruling. But such leaders as emerge are no longer like shepherds since they too are human, and so lack something that marks them out beyond peradventure marks rulers as special. Into the resulting legitimacy vacuum step various 'rivals of the king', doctors, priests, generals, sophists and so on, each claiming some special pastoral role. The ruler's task is now both more specific and more difficult. They must attempt to replicate, so far as possible under conditions of disenchantment, the natural order that existed under divine order, by seeking to join together contrasting lives into a unity of concord and fellowship.

But it is not just the more complicated situation rulers face in stabilising the legitimacy of their rule that complicates what might appear a highly directive form of

government. Plato also adds an important qualification to the Statesman's plenary power. It is only the true statesman, one 'willing and able to rule with moral and intellectual insight and to render every man what is his due according to divine and human law with strict fairness' (Plato 1992, 301d), who has the right to claim absolute authority over those under their care. But Plato acknowledges that, even with the right sort of education and training, such a character is vanishingly rare – certainly, he sees no-one in his own time as exhibiting the right qualities. Plato accepts the consequences of this for constitutional design. The ideal constitution cannot function without a true Statesman. In fact such a constitution is positively dangerous absent the true Statesman since it gives godlike power to mediocre men, 'party leaders … supreme imitators and tricksters'. When the false Statesman attempts to copy the true Statesman it is tyranny (Plato 1992, 303c, 301c). Under non-ideal conditions, which in effect are the conditions we almost always inhabit, the right course of action is to ensure that laws are strictly adhered to and rulers prevented from claiming any extra-legal power.

III CONSTITUTING THE PRINCE

Plato's text indicates how the idea of superior discretionary authority is pervasive within political thought. It also outlines an important space in which discussion over prerogative takes place: the search for natural leaders in the absence of natural leadership. As an exercise in constitutional theory, though, our interest is more specifically geared toward understanding the concept of prerogative within the modern constitution. But to do that we must first go backwards in order to chart how a medieval category, with roots in Roman juristic thought, was later adapted to modern conditions of statecraft. Though not wishing to obscure the considerable variation thrown up during this process of development, I suggest that two main models of prerogative can be discerned. The *princely* model accords the executive authority a sovereign prerogative: a discretionary power, or reservoir of authority, assumed to correspond to an original command function, which is capable of operating at its own determination outside the law and if necessary against it. The *republican* model describes a constitutional form of prerogative in which general executive capacities are dispersed into enumerated, though still often quite general, separate discretionary functions. These prerogatives are taken to be vested by the constitution in an executive authority and subject to (often second-best) constitutional constraints. For much of the relevant period, it was the princely form that dominated, in various guises. Only recently has the republican model taken hold of the field.

If, as some suggest, Western philosophy is just a set of footnotes to Plato, it is tempting to say the same about juristic thought and Rome, though the lineage is often convoluted. The ideas that shape constitutional discourse, including the core notion of power generated by and subject to law, derive from a body of jurisprudence, itself sourced in Roman law, which medieval canon lawyers developed to

explicate the juristic character of the papacy as an imperial structure (Blumenthal 1988). Prerogative became an important part of that story as the juristic framework began to be deployed in respect of the power of the secular prince. We might say that it offered in that context an especially acute 'hard case', the elaboration of which helped to redefine the character and characteristics of lordship, the defining topic of the age (Bisson 2009). Conceptualised as a special power that the prince possessed in contradistinction to non-sovereign lords, prerogative helped cement the difference between the two and was, as such, bound up with the consolidation of power around the Crown (Post 1964). But thinking juridically about public power also helped to foster a different way of conceptualising public power, one which we might call doctrinal on account of its tendency to recast princely power in terms of specific sovereign rights and capacities. This new way of thinking in turn prompted new questions about sovereign capacity, specifically whether the prince's field of action was circumscribed by the legal nature of his power. Answers varied considerably, but the juristic pack could certainly be shuffled to more constitutionalist ends. We see in this period the English jurist Bracton adamantly reject the notion that the prince's will could be superior to law, interpreting the maxim 'what pleases the Prince has the power of Law' to give a conciliar, almost impersonal or supra-personal, account of kingly rule (Pennington 1993, p. 92).

The modern prerogative only comes into view with the rise of government as a more serious proposition from sixteenth century onward, a development we assess presently. The medieval debate interests us mostly in so far as it shaped much of the basic grammar, the ideas-stock and word-hoard, through which modern conceptions were rendered. Two distinctions played a particularly important role in that later process, the first relating to the space in which medieval administration took place, the second rather more conceptual in nature. The first distinction – between *gubernaculum* and *jurisdictio*, government and law – expressed the idea that while there might be limits on his legal powers, the king enjoyed largely uncontrolled discretion in respect of his administration. Prerogative, as the public authority of the ruler, lay within the sphere of his government (McIlwain 2008). The second distinction divided ordinary and absolute kingly power – *potestas absoluta et ordinata* (Pennington 1993). The former operated within the interstices of the laws, though it was not strictly bound by it; the latter described an anterior and superior capacity to act outside the laws – though jurists would continue to disagree about whether this equated to a capacity to act wilfully or arbitrarily for as long as monarchy remained an active proposition (Burgess 1993).

IV BIRTH OF GOVERNMENT

One might assume that the search for the statesman, elusive enough in Plato's day, became less viable as societies became more complex. In the long run that assumption may be said to have held good. But not so in the medium term. The cult of

the Statesman reached something of an apogee in early-modern Europe, just when the apparatus of government assumed greater sophistication. Despite the impetus toward political concentration and constitutional formation after the Reformation, and the development of the idea of a sovereign entity housed within an abstract and impersonal state, far from freeing themselves from the figure of the prince, most states in the period embraced forms of 'absolutism'. The dominant tendency, that is, was to centralise and streamline authority around the executive, the King and his ministers, dismantling the consensual apparatus that had emerged in the Middle Ages and eliminating articulated constitutional checks on the royal prerogative (Thornhill 2011, pp. 112, 117). Why this was so is a difficult question. Most likely it was a response, in a period of quite staggering dislocation, to the sense of things falling apart. But perhaps the Machiavellian turn toward the politics of 'reason of state' also reflected how new currents of scientific reason impacted the sphere of politics. One can easily imagine in such an environment how recent conceptual and technological developments in government might well have produced a clearer sense of the state's own instrumentality, of how institutional power could be effectively harnessed in the furtherance of particular interests.

To connect these developments to prerogative, I examine two early-modern thinkers, Gabriel Naudé and John Locke, one now vastly more celebrated but both equally representative for our purposes. While their accounts are perhaps closer than one might expect, the differences between them are important since they reflect, I argue, the two dominant modern conceptions of prerogative in embryo form. Naudé's unqualified embrace of the new science of statecraft, sequestered within an invigorated and professionalised office of the executive, offers a blueprint for modern sovereign prerogative. A characteristic mix of old and new, Locke's account of prerogative keeps the basic medieval template but re-equips it to match the demands of dynamic modern statecraft. Locke anticipates a significant role for independent prudential action on the part of the executive, particularly in crisis management. But unlike Naudé he embeds prerogative (though not always neatly) within an evolving body of law law and custom. In what remains an idiosyncratic attempt to reconcile decisive government with a liberty-sustaining institutional ecosystem, we catch in Locke a glimpse of the constitutional prerogative. But only a glimpse. His retention of the notion of prerogative as an original (and in certain respects superior) power prevents the integration of princely power within the interstices of constitutional order.

V MASTER-STROKES OF STATE

Gabriel Naudé spent most of his career in service to a papal diplomat. His *Considérations politiques sur les coups d'état* (1639) advocated extraordinary and secret executive action, so-called 'master-strokes of State' (*coups d'état*), the 'Bold and extraordinary Actions, which Princes are contrain'd to execute when their

Affairs are difficult and almost to be despair'd of, contrary to the common Right, without observing any Order or Form of Justice, but hazarding particular Interest for the good of the Publick'. The book became the most famous manual of statecraft representative of the Machiavellian type in the seventeenth century. The identification of the executive as a superior source of both intelligence and agency generates the claim for that office constituting a superior sovereign agency beyond law. The power to command is presented as a true and authentic source of power, with law (in as much as it is discussed at all) seen as an artificial, and hence much less protean, source of power. There is no trace here of the equivocation and compromises of the medieval jurists. Naudé's clear and logical presentation drives the conclusion that prerogative must trump law whenever the executive sees fit:

> This law which is so common, and ought to be the principal Guide of all the Actions of Princes, *Salus Populi suprema Lex esto*, Let the Safety of the People be the Supreme Law, absolves them from abundance of the little Circumstances and Formalities to which Justice would oblige them, so they are Masters of the Laws to extend or mitigate, or confirm or abolish them, not as may seem good to themselves, but as Reason and the Publick Safety require[.]

Ignore for a moment the parallels between this passage and Locke's familiar definition of prerogative. There is another side to Naudé's text besides its more headline-grabbing elements that deserves attention. The last chapter of *Considérations politiques* concerns the desired characteristics of the Minister in effective charge of government policy. An idealised portrait of Richelieu, with whom Naudé associated, these passages emphasise softer and quieter attributes of statecraft. Secrecy is still pervasive, as in the discussion of master-strokes, but Naudé now suggests that the Minister's role is generally best accomplished not by confrontational gestures but the delicate application of almost imperceptible nudges. An almost otherworldly detachment on the Minister's part is called for: he 'should live in the World as if he were out of it, and beneath the Skies as if he were above them'. Successful government is based on information gathering, Naudé concludes, requiring a calculating coldness in applying the new science of politics to predict the future and contain risks of disorder.

Combining the layers in Naudé's text reveals a conception of the modern executive in which the blending of magisterial and ministerial capacities produces a dense concentration of reason and energy. While some aspects are specific to Naudé, the general picture is characteristic of its time and place. Plato's influence is still palpable, though largely subterranean, notably in the invocation of the godlike capacity to rain a 'Thunderbolt' on unsuspecting adversaries 'before the Noise of it is heard in the Skies', and in the superhuman omniscience demanded of the Minister. But now the stabilising intellect at the centre of the vortex of politics is invested with the properties of a machine or automaton, a theme destined to have a considerable future. In this way, the medieval juristic framework, crafted for the world of lordship and

landholding, is adjusted to the new politics of statecraft. The notion of a space operating at least partially outside the sphere of ordinary law and justice is retained, and a sharper edge given to the idea of the executive as repository of legitimate violence.

But Naudé's text reveals another change. While medieval commentators emphasised stability as the chief attribute of rulership, early-modern thinkers began to see the executive as dynamic, decisive and calculating, liberating it from the bonds of convention in two rationalising moves. First, the disassociation of office from the person of the ruler. Though centralised more effectively around the figure of the king, effective public power was increasingly being held by Ministers, who retain office by virtue of their professional abilities. Government takes on classic attributes of bureaucracy: the functionary (Minister) accepts a specific duty of loyalty to the job and is at the service, not as before to a person (King), but of an objective and impersonal goal built into the organisation to which he is linked (State).

The second move works on the language of ordinary and absolute royal authority, realigning it to produce a dichotomy of prerogative and exception. Squarely aligning the power to command with new strategic imperatives, the move borrows heavily from the foreign policy field, itself recently reconfigured. Prerogative, in this new formulation, becomes the domestic analogue of diplomacy, its primary function being to coordinate inter-institutional dynamics through the application of prudence and persuasion. State power grows as the network of office holders increases, and the task of the executive, the nerve cell of this expanding operation, becomes more demanding and more important as a result. This understanding of prerogative as a category of directive communication, capable of ad hoc formulation as well as being expressed as rules, is exemplified in the quieter side of Naudé's exposition. But the portrayal is also consistent with the way prerogative would be discussed in Enlightenment thought. Blackstone, the most important eighteenth century legal analyst of prerogative, also highlighted prerogative's mediating capacity. (The same is true of Necker.) When 'balanced and bridled', Blackstone wrote, prerogative 'invigorates the whole machine and enables every part to answer the end of its construction'. Note the recurrence of the image of the machine. (Blackstone 1979, p. 233)

Blackstone's account deliberately excludes the exception (Blackstone 1979, p. 243). If the modern prerogative shadows diplomacy, the exception mirrors war and its potentially future-shaping logic. In recognising the capacity of decisive governmental action to effect potentially rupture-inducing moments, it reflects a distinctly modern understanding of the transformative possibilities of politics. The refashioning of prerogative helps inaugurate a new conceptual space, defined by the capacity consciously to make and remake constitutions, and which also become a feature Enlightenment thought. Take Rousseau as an example. His republicanism has no place for the kingly paraphernalia of Blackstone's *Commentaries*, including princely prerogatives. But his theory does advance a number of exceptional institutions: not only the dictator, who wields command authority in times of crisis, but

also the enigmatic Legislator, who assumes a pre-eminent role in establishing a new constitution for the republic. Classical echoes are unmistakable. Yet the institution is nonetheless defiantly modern. Where the Statesman aims to knit together a preformed or natural political community, the Legislator must devise and inaugurate a new constitutional order by translating principles of political right into the conditions of that particular society. The Legislator's two main tasks thus resemble the two dimensions of Ministerial power in the *Considérations politiques*. To succeed in their respective roles, the Legislator and the Minister must possess singular political skills, combining the flamboyant, decisive and uncompromising on one hand, with the softer, more subtle and flexible on the other – both éclat and élan.

VI CONSTITUTIONALISING THE KING

Taking his cue from Naudé, whom we know Locke read, and the civil law writers on regal power and prerogative, Locke defined prerogative as a reserve power to command that operates outside and against the laws. 'This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative' (Locke 1988, §160). Though there are certainly affinities between Naudé and Locke's work on prerogative, these should not be overemphasised. Naudé gives the impression of the executive as uncontrolled controller, rightful possessor of a monopoly of both political wisdom and violence, whereas in Locke's considerably subtler portrayal executive power is both weak and strong, subordinate and not subordinate. But perhaps the chief difference between the two is that Locke seeks to integrate a prudential account of executive power within a wider constitutionalist vision. Prerogative properly so called – that is executive discretionary power as opposed to arbitrary lordship – operates for Locke within an evolving band of law and custom which exerts non-trivial constraints on its exercise.

Locke generally refers to the active arm of government as the executive: the body, constitutionally subordinate to the legislative, that executes the laws. But he refers to the same institution when exercising prerogative power as 'the Prince' (or simply 'the King'). The choice indicates that Locke understands prerogative as a distinct mode of public power that implicates a different structure of authority from action under rules. The Prince, whether monarch or republican leadership, holds this special power in reserve for use at its discretion where the laws are not enough, either because the laws are silent or because what they prescribe is seen as obstructive to the public good. (The point works the other way: the Prince is identifiable as Prince because these powers are at its disposal.). But the terminological choice also shows how prerogative provided Locke with an entry point for exploring the situated or de facto nature of executive power and, beyond that, the progression from more or less arbitrary lordship to for the more structured and contained governmental discretion that characterises free association.

Taking first the idea of prerogative as a distinct source of authority, it might seem from Locke's illustrative examples that the power is restricted to public emergency situations. But that is not the case – nor can it be, on Locke's view. Prerogative emerges from the fact that the body in question exercises the functions of a supreme executive agent. It rests on a capacity to command the material resources of the state, or what Locke calls the 'force of Society', in situations where it is necessary to do so to secure the public good, which is a paramount obligation. Whereas the legal side of the office of government engages the executive capacity to implement the laws faithfully and justly, prerogative engages government's capacity as guardian or custodian of the political association. But since it does not source its authority in law, prerogative cannot itself make new laws, though it can generate rule-giving instruments – orders, measures, promulgations or edicts – that are authoritative to their addressees but do not carry the force of law.

More attention tends to be given to the social-contractual aspect of Locke's theory than its more evolutionary aspect. But the more developmental side of his thought, which features an account of how law and government gradually replace violence and arbitrary force, though always present, comes to prominence in the chapter of prerogative. I think there are two reasons for this. One is that Locke sees prerogative as a conventional power, de facto in nature whose effective parameters at any one time are largely determined by the conventions that have grown up around it. The second relates to the idea of trust, a central feature not just of prerogative but of all Locke's politics. What we are presented with on this front appears at first as an elemental, even back-to-basics, account of trust in the prerogative situation. The extra-legal status of prerogative, the way its exercise involves the Prince stepping outside of normal institutional power structures, sets the individual face to face with the Prince. That predicament, as Locke notes in a rather cryptic passage, resembles conditions encountered at a more rudimentary stage of political development:

> It is easy to conceive that in the infancy of governments, when commonwealths differed little from families in number of people, they differed from them too but little in number of laws: and the governors, being as the fathers of them, watching over them for their good, the government was almost all prerogative. A few established laws served the turn, and the discretion and care of the ruler supplied the rest.
>
> (Locke 1988, §162)

Some read this as a claim that we experience in prerogative a reversion from mature government (institutional normative order) to a more basic mode of rulership (interpersonal lordship) (e.g. D. Kelly 2017). But that reading is a poor fit with the rest of the chapter – let alone the rest of the *Second Treatise*. Locke says as much himself. He accepts that, since it can involve the Prince going out on a limb, prerogative may induce instability, but he is at pains to suggest that in practice this very rarely happens. This is not, as it can be read, the triumph of hope over experience. It is a reflection on the embedded nature of prerogative as we experience it. With

the prerogative in its modern constitutional setting – that is, the context mapped by the *Second Treatise* – any 'reversion' to lordly discretion takes place within a conventional setting, one built up over time, that is normatively dense and populated by institutions. Even if those norms and institutions sometimes take a back seat, particularly in acute emergencies, their constitutional status is not disturbed by prerogative. Their presence conditions prerogative. This means that 'prerogative' in the sense used in the passage just quoted to describe rudimentary political forms is quite different from 'prerogative' in the modern sense of the term, understood as a category nested within a *habitus* of constitutional rule. Locke's prerogative (and ours) occupies a distinctive space within a settled deliberative ecosystem largely conditioned by law. Not only must its exercise reflect a good-faith attempt to stabilise the existing constitutional arrangements, as Locke stipulates, but also the effective power that can be claimed in its name is largely pre-determined by the conventions that enfold it.

This reading of Locke centres on the taming of prerogative, while recognising its continued prudential importance in modern statecraft. But it would be wrong to ignore the more unruly elements within his exposition, which can give the impression that Locke focuses on prerogative precisely to explore the never completely tameable nature of power (e.g., Dunn 1969). There is no question that Locke also sees prerogative, or prerogative-induced rupture, as an occasion for rebirth and reinvigoration, a position he interprets in political-theological terms, and that this perspective helps reinforce the idea that the executive's independent source of authority is more basic than the legal power of the state (Bates 2012). Calling prerogative an original power does much to sustain the claim for its supervening capacity over law. But it is at odds with the broader vision offered in the *Second Treatise* of government under law. There is an obvious tension between a civilising narrative which lauds the growth of law and government and the displacement of lordly discretion on the one hand, and an originality narrative which accepts, and sometimes celebrates, the special nature of de facto princely power as compared with institutional normative order on the other. As we shall see, later writers who adopted the same, broadly Lockean, strategy of squeezing and semi-taming prerogative also struggled with this tension.

VII LAW AND LEGISLATION

The writers considered so far wrote when legislation had yet to rise 'to the dignity of a general proposition'. Prerogative occupied more of the terrain on which governmental action took place (e.g., Hale 1976). Law's main task was to put a hedge around the space in which administration took place – directly through setting explicit statutory limits to what government was allowed to do, or indirectly through the allocation to legal subjects of rights and duties that could only be altered by legislation.

That model changed dramatically with the acceptance of legislation in the modern sense and the growth of the state's administrative capacities. Legislation answers the particular needs of modernity for government and self-government, facilitating the organisation of complex social interactions on the basis of a publicly accessible and presumptively coherent grand plan. The 'positivity' of legislation can be understood not just in the basic sense of the *source* of law as an expression of the will of the legislator, but also in a second sense, relating to its *function* – its capacity to place itself at the service of rational projects aimed at altering social reality (Baranger 2018). Authorisation for public action under general rules laid down by the legislator went over time from being an option, to normal practice, to a principle of government. This development, the practical adoption of the model of government authorised and limited by law, amounts to a process of constitutionalisation in the 'small c' sense. With the executive now working predominantly within the institutional structures of representative government, energy and reason, which previously might be seen as the preserve of the executive alone, become associated more closely with law and action under law.

If the widespread acceptance of legislation in its modern sense, grounded in the politics of interest, is the story of the nineteenth century, then a second development, the creation of a dense and complex bureaucracy that was the by-product of the age of reform, is more of a twentieth-century affair. To many, this new administrative state presented an instrument for realising social improvement. But others were unnerved by its machine-like quality, its unknowability and unpredictability, its apparent disdain for established patterns. Two juristic critiques emerged. The first targeted the way the administrative state seemed to dilute constitutional principles, including the rule of law and separation of powers (e.g., Dicey 2007). The second saw it as the triumph of technocracy over politics, and as such a lessening of what it means for a political community to be truly, authentically alive.

We associate the second critique with Carl Schmitt, for whom modern administration – or, rather, the absence of leadership he thought it entailed – was the death of politics and an assault on law properly understood (Schmitt 1991 [1919]). Schmitt is in some ways the natural inheritor of Naudé. Another in search of the Statesman, his work attempts to reconfigure princely prerogative to the radically unstable conditions of twentieth-century Europe. If Locke's tendency is to tame prerogative, Schmitt plans to unleash it. Prerogative represents for him an antidote to the political ills of the age, a means of escape from legal positivism, factional politics and the soulless logic of bureaucratic order into an authentic politics invested with a higher form of 'concrete' reason geared to preserving the political community as a substantive whole.

Schmitt's systematic realignment of the framework of prerogative and the exception gives him a route back to 'the political', to a politics that is substantive rather than procedural, decisive not deliberative, existential rather than concerned with muddling through. The centrepiece of this framework is to be found in Schmitt's

characterisation of politics in terms of the friend/enemy distinction, which postulates that a group self-identifies as a political unit through its decision as to who counts as enemy. Schmitt identifies the designation of enemy with a preparedness to fight (Schmitt 1996 [1932]). It is the freighted quality of this designation, he suggests, which creates the peculiar density characteristic of political association. The political decision is the mechanism through which a multitude becomes a unity. Its essence inheres in a double movement: establishing an external boundary between 'us' and 'them' instigates an internal boundary between the law that binds 'us' and the condition of non-law that relates to, or concerning our relations with, 'them'.

Schmitt understood the dynamics that resulted from the enemy designation as a cascade, shaping the quality of the laws and decision-making within the shadow of those laws at the general level as well as the particular, and on a daily basis as well as in constitutional 'moments'. The political decision should be allowed to radiate, he argued, in as unmediated a way as possible throughout the constitutional order. Public law is ideally subject to and structured by the political, its content formed by iterative determinations on the enemy made most naturally in the constitution's outward-facing dimensions. The dominant theme of the treatise *Constitutional Theory* (1928) is precisely this prioritisation of the 'positive' concept of the constitution, 'the constitution of the complete decision over the type and form of the political unity', over the constitution in the negative or normative sense, referred to as the bourgeois Rechtsstaat. 'The political decision, *which essentially means the constitution*, cannot have a reciprocal effect on its subject and eliminate its political existence. *This political will remains alongside and above the constitution*' (Schmitt 2008 [1928], pp. 125–126).

Schmitt used the idea of 'the exception' to make sense of the internal ramifications of the political decision. The exception denotes a general category of constitutional theory and not merely a construct applied in emergency situations (though it is that too). It nonetheless remains opaque, since it is applicable to a range of phenomena, and is in certain respects misnamed, since Schmitt insists that the 'exception' should also be infused within the 'normal'. For the sake of clarity, I reserve the term 'exception' for a constitutional moment or similar event in which the constitutional order undergoes radical change, especially as a result of extra-constitutional action. I use the word 'prerogative' to describe the phenomenon Schmitt describes as operating at the everyday and particular level, that is, largely within the interstices (and around the margins) of the legal. My use of the term prerogative to describe one part of the operation of the political, though it is not an especially common term in his works, does have some textual support. Discussing the association between legal and theological concepts in *Political Theology*, Schmitt suggests that prerogative is 'analogous to the miracle in theology' (Schmitt 1985 [1922], p. 36). Just as the miracle transcends the laws of the natural world, so does prerogative exceed the bounds of the 'normal' legal system. Both share the structure of a capacity for extraordinary intervention invoked by a powerful figure.

On Schmitt's reading, the prerogative becomes the internal, intra-systemic analogue of the political ('exceptional') decision over who constitutes the enemy. Political decision and prerogative are *constitutive* of sovereignty: 'Sovereign is he who decides the exception.' (Schmitt 1985 [1922], p. 5) Note how the prerogative agent is here as elsewhere assumed by Schmitt as an individual man – the decisive leader, whose decisions express the will of the people, channeling his 'principally unlimited authority' (Schmitt 1985 [1922], p. 12) above or against the existing legal framework to the extent that he thinks necessary (Schmitt 2004 [1932], p. 69). Schmitt's theory foregrounds constitutional moments, situations of crisis, emergency or upheaval, but it does so in order to describe the constitutional normal. He sees these limit cases as showing us the way things really are. They uncover the pulsating life that we tend otherwise to stuff behind a juridical veneer. These elemental political moves animate the constitutional state through the radiating effect of prerogative. It is the means by which the exception becomes quotidian.

VIII THE PREROGATIVE STATE

Schmitt's argument for the supervening capacity of prerogative over law, based on the decisive character of the executive agent, is broadly familiar. So too are the oppositions that animate it: the authentic vs. the artificial, original vs. derived power, life vs. death (trapped in the machine). All are standard features of the general theory of princely prerogative. We have given space to Schmitt because of his bravura handling of those themes and because his work represents certainly, as specifically *constitutional* thought, a culmination of that theory. We also have a fairly good idea of what Schmitt's ideas looked like in practice. Though not the particular brand of (rightist authoritarian) concrete order he wanted, the Nazi regime, which Schmitt soon vociferously supported, contained many elements consistent with his theory. In his seminal work on the legal origins of the Nazi dictatorship, *The Dual State* (1941), Ernst Fraenkel identified Schmitt as the main theoretician of the National-Socialist state, turning to the term 'prerogative' to describe its basic juridical orientation. The system was a 'dual state', he argued, in the sense that 'the prerogative state', representing a special, floating, open-ended, politically-driven jurisdiction, hovered over 'the normative state' or institutional normative order.

Fraenkel's direct engagement with the Nazi legal system – though Jewish, as a great war veteran he was allowed to practice law until 1938, often representing dissidents (Morris 2020) – enabled him to distinguish the prerogative from the normative uses of law and to recognise the different ways *both* were made to serve the transition to dictatorship (Meierhenrich 2018). But the main driver of that process was unquestionably the semi-cannibalisation of the normal by the exception. Prerogative within the Nazi order took on the character of a general reservation – a supervening power that enabled 'the political', the content of which was the sole province of the regime, to float above the legal, intervening whenever so desired to

divert, subvert or otherwise trump the operation of law: 'the presumption of jurisdiction rests with the Normative State. The jurisdiction over jurisdiction rests with the Prerogative State' (Fraenkel 2017 [1941], p. 57). The inversion of law and prerogative was consistent with what were in effect the martial law foundations of the Third Reich and in turn fed 'the cynical contempt for law which prevails among the power-intoxicated clique now dominating Germany' (Fraenkel 2017 [1941], p. 27). It is for *law* now to be tamed, and for prerogative to do the taming. In all its myriad forms – directions, commands, memos, suggestions, asides, even suppositions – prerogative is little more than a juridical veil for the wellspring of violence which fuels the regime.

IX THE REPUBLICAN PREROGATIVE

The year 1945 saw the end of the Nazi regime. It also marked the end of the primacy of prerogative in princely form, i.e. an original power to command with the capacity to supervene over law, a step which England had taken, despite what Locke might say, in 1689. The twentieth century had thrown up more than enough examples to skewer the fallacy of assuming that the proposition 'the true Statesman is one who breaks the laws' entails the conclusion that 'one who breaks the laws is a true Statesman'. Enough people now seemed to realise that there is no Statesman, at least of this sort, worth waiting for. Earlier, we encountered a wave of 'small c' constitutionalism, bound up with the rise of legislation, which instituted the principle that government should seek authority for its actions through enacted law. This principle, rolled back in many places under conditions of authoritarianism, re-emerged after the War as a tenet of liberal democracy. But this post-war consensus accommodated more substantive constitutional principles. The part of that development that interests us is how prerogative is closed around more tightly by law and a supporting culture of legality – the squeezing strategy we saw in Locke – but also and more deeply how the conceptual space occupied by prerogative is itself reconfigured so that its claim to act legitimately outside or above law are severely curtailed.

This development, which I call the constitutional prerogative, contains three central elements. While standard features of the post-war boom in constitution-making, parallel developments occurred in other forms of constitution. First, the rejection of the idea of prerogative as an original or authentic power of government. Like any other species of executive power, prerogative is now understood as a derived power authorised by a superior source, namely the constitution. It is as such subordinate to law, which represents the determination of the common good that is supreme within the constituted order. Second, the rejection of the idea of open-textured prerogative. The constitutional prerogative is enumerated: constitutions allocate to government particular prerogative functions (general executive powers) rather than acknowledge a pre-existing reservoir of discretionary prerogative authority. Third, the rejection of the idea of prerogative as inhabiting a space

outside law and justice. The modern constitution makes sustained attempts to ensure control of prerogative powers consistent with their discretionary character. This may involve the specification of various 'second-best' design elements, such as ex-post legislative oversight and judicial review, that bring supervision of prerogative closer to the constitutional norm.

Though in many ways a distinctly modern phenomenon, the constitutional prerogative also has rather a long history. In *The Dual State*, Fraenkel continually juxtaposes the authoritarian regime he is describing with the English normative tradition, even describing the twentieth-century movement culminating in Fascism as 'a reaction against the heritage of the English revolutionary movements of the seventeenth century' (Fraenkel 2017 [1941], p. 48). The core of that tradition lay, he believed, in a hostility towards unconstrained prerogative allied to a scepticism of 'fancied emergencies'. The intuition seems to be that the constitutional subordination of prerogative, institutionally embodied in Parliament and the courts, is what really fuels the rule of law tradition, British constitutionalism's most important contribution to general constitutional theory. The same intuition animates Bagehot's well-known comment about the British constitution being a Republic that has insinuated itself beneath the folds of a Monarchy (Bagehot 2001).

If Fraenkel is right, there ought to be a seventeenth-century revolutionary root to these political sentiments. Though Locke fits broadly within this tradition, as we have seen, tensions remain in his work as a result of the retention of something resembling sovereign prerogative in an otherwise strongly constitutionalist account. We find a clearer statement of the thesis, which denies the prince any special original capacity and insists that the people hold all sovereign power some of which they may choose to vest in an executive agent, articulated by English revolutionary republicans (Poole 2015). Harrington's *The Commonwealth of Oceana* (1656), the most philosophically rewarding republican text, is an account of the founding of a republican constitution for England. Convinced that to secure political change you must change not just the system of government but the ideational framework in which it operates, Harrington insists that ultimate sovereignty within the constitution of Oceana always rests in the people: 'this free-born nation liveth not upon the dole or bounty of one man but, distributing her annual magistracies and honours with her own hand, is herself King People' (Harrington 1992 [1656], p. 98). This rhetorical crowning of the people has material implications. The term 'prerogative', previously associated with lords and kings, is now the property of the people. The people themselves are named the 'prerogative tribe', and wield the legislative power and the power of judicature. The executive or magistracy, a dedicated office of government, is placed firmly under the law, its officers publicly accountable for their actions.

This radical account of prerogative would have been inconceivable without various precursors – not just Machiavelli (of the *Dialogue*) whose influence loomed large over the English republicans but also the new political philosophy

of Reformed Protestantism, notably Althusius's *Politica* (1603). The latter in particular, a theory of the self-governing polity established by citizens on the basis of consent expressed through binding covenants, contains an account of constitutionally derived and legally constrained magistracy at least as uncompromising as the one presented in *Oceana*. But one of the distinctive features of Harrington's inquiry relates to what we call, and he very nearly did, public reason. His theory manages to incorporate the politics of interest, then a cutting-edge category for understanding political action embracing prudential calculation, strategic thinking and reason of state. Harrington's objection is not to reason of state itself, which is a function of every state, but reason of state understood in terms of the private interest of particular rulers or ruling elites. To ensure against the latter, the existing political structure must be changed so that public reason prevails. The constitution should contain, then, various devices to guard against private-interest capture, including election, rotation, accountability and the agrarian law (a 'perpetual law' limiting wealth and property-holding).

X THE CONSTITUTIONAL PREROGATIVE

This may seem a little removed from the constitutional mainstream. But support for Fraenkel's position can also be found in A. V. Dicey, for whom prerogative and the rule of law were constant preoccupations. In terms of the narrative being advanced here, he is best understood as a liminal figure. In *The Law of the Constitution*, his chief work, prerogative is discussed in two ways. The first interpretation appears when writing directly on the subject. Dicey defines prerogative as 'the remaining portion of the Crown's original authority' and is as such 'the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers' (Dicey 2013, p. 189). On this interpretation, prerogative is what the modern constitution retains from medieval kingship. Though the angle of inquiry is different, the substance of this position is not far removed from Locke. Both think of prerogative as subject to a long-term process of reduction, squeezed by tightening bands of law and sentiment. Both also assume that throughout this prerogative retains its character as a pre-existing, authentic and sovereign capacity – as 'the Crown's original authority' in Dicey's phrase. The same tension we found in Locke is to be found in (this version of) Dicey. On the one hand, we are told that the modern prerogative recognises a basic shift in the character of lordship. On the other, we are asked to assume the existence of an older and (in some sense) truer type of lordship that still animates prerogative in the present. The declining role of the monarch by Dicey's time makes the tension between those positions, if anything, more acute.

But Dicey offers a second interpretation of prerogative. In his extensive writings on martial law, a major topic of public interest, he accepted the orthodox characterisation of the situation as one involving the use of prerogative in situations of

civil disorder or breakdown. Many contemporary writers understood martial law as an incident of a sovereign prerogative of war and peace, to which many would have given almost unlimited scope, especially in the imperial context. But this approach felt to Dicey too much like the French idea of the 'state of siege', in which constitutional guarantees are suspended, a position he regarded as anathema to British constitutionalism. He presented a very different conceptualisation of martial law, one which saw it as simply a manifestation of the general common law right and duty to suppress breaches of the peace. Though in practice that right might generally be invoked by government, that is just for the sake of convenience: in principle, the right is held by all legal subjects. There is no difference in law between the basic position of officials and ordinary citizens. Both are authorised to employ the force necessary to subdue breaches of the peace, and they are equally accountable in law if they use excessive or unnecessary force (Dicey 2013, pp. 352–366).

Dicey's analysis of martial law, striking in its egalitarian simplicity, mirrors his account of the rule of law (Dyzenhaus 2009b). It asks us not to abandon that idea, and the aspiration to restrain sovereign violence contained within it, even when threatened with serious disorder. The differences between his two treatments of prerogative should not be overstated. They both push in the same direction, an assertion of law and norm against force and exception. But the second interpretation is to be preferred, precisely because it does not assume the continuation in more or less pristine form of a type of power through which embryonic political order was formed. Whether constitutional order did in fact originate in that way does not matter. What matters is the way we think about the proper arrangement of power – who can claim what when – in the now and into the future.

This standpoint matters because it undercuts the assumption underlying the sovereign prerogative in the tradition from Naudé to Schmitt and which continues to exert a baleful influence on discussions involving prerogative to this day. For them, the core idea is that certain matters of state are best decided by a select individual or group, ideally possessing special characteristics. The republican response is that, however special, a select individual or group will tend to confuse the best interest of the state with its own best interest. Sovereign prerogative is private reason. It follows that the whole phenomenon of the Statesman is misconceived, even a little juvenile. The question of personality – whether a ruler is good, bad or ugly – is almost a side-issue. It is not about searching for the Statesman, but creating an order of statespersons. True politics, geared to the identification and realisation of the common good, demands procedural mechanisms that comprise conditions under which public reason can (or should) eventuate. It is a profoundly collective enterprise, a matter of democratic procedure (the common interest should be discussed by all) but also of democratic outcomes (the common interest). This approach must apply at least as much to important matters of state as to other matters of public interest. If there is a functional requirement for secrecy or small-group decision-making, then

these can be put in place. But they must continue to operate within the interstices and under the control of the democratic institutions.

CONCLUDING REFLECTIONS

What I have said about constitutional prerogative might be open to the challenge that it addresses what is ultimately a substantive issue through a largely formal lens. That challenge can be partially deflected by observing that constitutional design is as much conceptual as institutional. Rearranging the way things are done influences how we perceive those things in the first place. It shapes expectations about what power ought to look like and how it ought to be used. But this cannot be a complete answer to the charge. As Marchamont Nedham, another Cromwell-era republican, was quick to realise, it is one thing to the kill a king, quite another to kill 'the king thing'. When it comes to political constitutions, that is to say, the relationship between institutional, conceptual and attitudinal structures is necessarily complex. Law and legality, save perhaps in a purely formal sense, is as much about culture – and habit – as institutions and processes. Especially where the unpurged relic of lordship continues to exert a hold over would-be subjects of aspirant lords, we can and do see the rise of a prerogative disposition among leaders even in cases where the constitution seems to shut off avenues for action under prerogative properly understood (Butler 2004, p. 56). This can take many forms but often includes action technically or ostensibly within the law but whose real effect is to stymie or circumvent its operation. Leaders who make these moves usually exhibit a careless or dismissive attitude to law and stress the primacy of decisive political leadership (Sajó 2021).

Prerogative operates at the hard end of constitutional politics, at the nexus where political violence, order, power and law meet. But it is not just this feature that makes it fascinating. It is also the way it makes us confront the past. I do not mean by this that with prerogative we encounter a long history of discretionary rulership that goes back beyond the age of kings, though this is true. It is more that this is a history that confronts us with its own historicity. The study of prerogative involves sifting through the various stories that have been told about it, stories which themselves have historical dimensions. Some would dismiss, or even celebrate, this as myth-making, something society does in order to make sense of itself politically. And there is no doubt an element to this. But we can also see it as applied conceptual history. One characteristic of that pursuit is to offer an account of how we got to this point by describing how things were at earlier points or at the outset. Though an exercise in rationalisation oriented to the present, it is also a method that incorporates historical data as part of the process of making sense of the concept being accounted for.

This process is not peculiar to prerogative. I think it goes to the heart of constitutional inquiry. Certainly, this is true if one studies constitutions first and foremost in terms of a process of ordering. Seen in long-term historical perspective, constitutions

may be said to produce order of a certain character through the reassembling of base elements, most often fragments of order whether sourced in brute force, charisma, or the scratched surface of well-worn custom. Prerogative is a particularly interesting case of how, in repurposing the bric-à-brac of the past, constitutions also construct, even colonise, history. To the extent that prerogative is preserved in modern constitutions, it owes its continued existence to a process of recognition that is also a subordination and which generates an inclusion that is also partly exclusionary. Constitution implies reconstitution.

RECOMMENDED READING

Blackstone, W. (1979). *Commentaries on the Laws of England*, vol. I. Edited by S. Katz. Chicago: University of Chicago Press.

Butler, J. (2004). *Precarious Life: The Powers of Mourning and Violence*, London: Verso

Dicey, A. V. (2013). *The Law of the Constitution*. Edited by J. W. F. Allison. Oxford: Oxford University Press.

Fatovic, C. (2009). *Outside the Law: Emergency and Executive Power*, Baltimore: John Hopkins University Press.

Fraenkel, E. (2017). *The Dual State: A Contribution to the Theory of Dictatorship*, Oxford: Oxford University Press.

Locke, J. (1988). *Two Treatises of Government*. Edited by P. Laslett. Cambridge: Cambridge University Press.

Mansfield, H. (1989). *Taming the Prince: The Ambivalence of Modern Executive Power*, New York: Free Press; London: Macmillan.

Meinecke, F. (1957). *Machiavellism: The Doctrine of Raison d'État and Its Place in Modern History*. Translated by D. Scott. Introduction by W. Stark. London: Routledge.

Naudé, G. (2020). *Political Considerations upon Refin'd Politicks, and the Master-Strokes of State*. Translated by W. King. Edited by K. Watson. Independently published.

Plato (1992). *Statesman*. Translated by J. B. Skemp. Edited by M. Ostwald. Indianapolis and Cambridge: Hackett Publishing.

Poole, T. (2015). *Reason of State: Law, Prerogative and Empire*, Cambridge: Cambridge University Press.

Schmitt, C. (1985). *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by G Schwab. Cambridge, MA: MIT Press.