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IS SOVEREIGNTY DIVIDED STILL SOVEREIGNTY? KANT AND *THE FEDERALIST*

Paul Guyer*

I. IS SOVEREIGNTY STILL A USABLE CONCEPT?

This Article is a written response to Panel 2 of the Sovereignty, Humanity, and Law Symposium. The description of the program for *Panel 2: Sovereign and the Individual in the Law*, states that “[a]ttention will be given to the role of the sovereign in the twenty-first century.”¹ However, does the concept of the sovereign, or of sovereignty, make sense in the present day when applied to republican governments divided into separate, supposedly co-equal branches? Did it make sense even in the eighteenth century, when the basic structure of federal government for the United States was designed? I will approach both questions by comparing the views of the *Federalist* papers, focusing primarily on James Madison but with a glance or two at Alexander Hamilton and Immanuel Kant on sovereignty in republican government. Although Madison was twenty-seven years younger than Kant, I will not suggest any influence of Kant on Madison. In fact, since Madison’s expression of his views about government, in his *Federalist* papers and in the U.S. Constitution itself, preceded Kant’s expressions of his political views by a decade, above all in the “Doctrine of Right” of the *Metaphysics of Morals*, if there had been any influence, it could have run in the opposite direction.² But I have no more evidence that Madison influenced Kant rather than that Kant influenced Madison, although there were clearly common sources for both (and for Hamilton too), namely *The Spirit of Laws* by Charles-Louis

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¹ Conference Program, University of Pittsburgh Law Symposium: Sovereignty, Humanity, and Law (2021), https://www.law.pitt.edu/sites/default/files/cile/Program_Sovereignty_Humanity_and_the_Law.pdf [<https://perma.cc/6EHW-C2F3>].

² See generally THE FEDERALIST (The Library of America 2001); IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

de Secondat, Baron de Montesquieu.³ My aim is just to compare their views—regardless of any possible common sources or influences they may have had on each other.

I suggest that although both Kant and “Publius,” the fictional voice of *The Federalist* that represented the views of Madison, Hamilton and John Jay, argued for a government divided into three branches—namely the legislative, executive, and judiciary branches—and promoted the idea that those branches are co-equal, thereby putting into question the idea of undivided sovereignty *de jure* within a territorial government, as understood for example by Jean Bodin and Thomas Hobbes,⁴ both Kant and Madison ended up assigning supremacy and therefore it might be claimed, sovereignty *de facto*, to one branch over the others. That may not be entirely surprising, for perhaps the supremacy of one branch over the others, at least on specified issues, is the only alternative to anarchy. And Kant, as well as Publius, were determined to design a form of government suitable for free and equal citizens that would avoid tyranny on the one hand but anarchy on the other, or “faction,” as the authors of *The Federalist* typically call it.⁵

What might be surprising, however, is that it is not Kant, but Madison (along with the other authors of the U.S. Constitution), who ends up giving *de facto* supremacy and, therefore, *de facto* sovereignty to the *legislature*, while Kant, in spite of affirming both that the ultimate source of sovereignty is the “people” and that the legislature is the most direct expression of that sovereignty, ends up granting *de facto* supremacy in certain vital regards to the *executive*. Then again, perhaps this is not entirely surprising, since Madison was arguing for a new federal constitution to an audience of separate states that already accepted the idea of a common legislature while they remained fearful of a strong central executive, while Kant was a civil servant in an autocratic monarchy who could publicly push his ideas about republican government only so far, and perhaps himself could only think them through to a limited extent. But Kant’s concession to the executive power of a monarch should not be dismissed as a mere historical curiosity; it also reflects an inherent liability in any system of divided government no matter what its rhetoric—a determined executive with his hands on the levers of coercion may be able to

³ See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., Batoche Books 2001) (1748).

⁴ Anna Stilz refers to “the notion—associated with early modern absolutists like Bodin and Hobbes—that sovereignty is located in a unitary ruler whose will cannot be bound by laws.” ANNA STILZ, *TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION* 13 (2019).

⁵ For a reading of the *Federalist* papers that stresses the urgency of avoiding faction in the eyes of the authors, see MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 55–85 (1987).

arrogate *de facto* sovereignty to himself regardless of the protests of the legislature (all the more easily, of course, in the case of a supine legislature). That is one lesson to be drawn from my comparison.

A second lesson that both Kant and Madison drew, and that remains as relevant as ever, is that no system of government, whatever the formal division of powers within it might be, can guarantee justice through its laws and structure alone. Even if the subjects of a government can be coerced to conform their behavior to the law by the juridical and penal mechanisms of the state, the people in the positions of powers, although they are, in Kant's famous image, made of the same "crooked timber" as the rest of us,⁶ have to act in conformity with morality out of their own free will. As if we needed more proof of how difficult that can be, recent events have certainly provided it.

Kant himself thought that philosophical analysis should end in definitions but let me begin with a few. First of all, I will understand sovereignty to mean, or at least to include, "the idea that there is a final and absolute authority in the political community,"⁷ or an authority that answers to no other within the relevant community although it may be held answerable to the general authority of morality, historically understood as the authority of God and/or the law of nature. As put by Bodin, the definition of a sovereign is one who recognizes no power greater than himself other than God;⁸ in terms of the author from whom I cite Bodin, "Whoever is sovereign decides in the final instance" or has the last word.⁹ Second, although this is the definition of sovereignty, the concept can be applied in several ways. As F.H. Hinsley put it, it is typical to distinguish sovereignty "within the community" and in the "relations between states,"¹⁰ or between "*internal sovereignty* . . . a political community's right that its legal order be supreme within its territory," and "*external sovereignty* . . . a community's right to immunity from interference by outside

⁶ Paul Guyer, *The Crooked Timber of Mankind*, in *KANT'S IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN AIM: A CRITICAL GUIDE* 129, 129 (Amélie Oksenberg Rorty & James Schmidt eds., 2009).

⁷ F.H. HINSLEY, *SOVEREIGNTY* 1 (2d ed. 1989).

⁸ See JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* (1576) (author's own translation).

⁹ H. Quaritsch, *Souveränität*, in *9 HISTORISCHES WÖRTERBUCH DER PHILOSOPHIE [HISTORICAL DICTIONARY OF PHILOSOPHY]* 1103–10 (Joachim Ritter, Karlfried Gründer & Rudolf Eisler eds., 1995) (author's own translation).

¹⁰ HINSLEY, *supra* note 7, at 126, 158.

powers”;¹¹ we might call this a distinction between domestic and international sovereignty. Hobbes assumed that a unitary sovereign, “[o]ne Person . . . [who] . . . may use the strength and means of [] all, as he shall think expedient, for their [p]eace and [c]ommon [d]efence,” is necessary to ensure both external and internal peace, to prevent war abroad and civil war at home, but that would be an assumption of fact, not a matter of definition.¹² A third application of sovereignty might be to the case of individual rights; for instance, I have recently seen the right of individuals to control the data that they generate in the cybersphere referred to as their sovereignty over their data. I will discuss only the first of these applications of the concept of sovereignty, domestic or internal sovereignty, and ask whether that idea survives *de facto* in the face of the *de jure* division of sovereignty—almost a contradiction in terms—in the eighteenth and twenty-first century conception of republican government.

My first question is whether the idea of a single supreme authority within a republican form of government even makes sense. The essence of republican government according to both Kant and Madison, and to Montesquieu before them, and to John Locke in turn before him, is the distribution of the indispensable *powers* of government to make and enforce laws to the legislature, executive, and judiciary as separate *persons* or *bodies of persons*. So, the question becomes how is the division of government into three separate and, in some sense, co-equal branches (or as Madison calls them “departments”)¹³ even compatible with the idea that there is some authority within a political community that is answerable to no other authority within it, although perhaps it is answerable to morality in the form of God and/or the natural law outside of the community? That is, how is the idea of a separation of powers compatible with the idea of a supreme authority?

Many in the eighteenth century were aware of this conceptual issue, and Richard Tuck has convincingly argued that in the early United States, but also elsewhere, many attempted to resolve it, or perhaps we should say avoid it, by assigning undivided sovereignty to the “people”—that is, some form of electorate as a whole, although of course it always excluded many people, such as women and slaves, and still excludes some, such as minors and non-naturalized immigrants, would be exercised in what is essentially the single act of authorizing a form of government and method of elections to offices within the government, which could

¹¹ STILZ, *supra* note 4.

¹² THOMAS HOBBS, *LEVIATHAN* 161 (Noel Malcolm ed., Oxford Clarendon Press 2018) (1651).

¹³ *See, e.g.*, THE FEDERALIST NO. 38 (James Madison) (The Library of America 1999).

consist of separate and co-equal branches with no definitive sovereignty of one part over another without threat to the undivided sovereignty of the people.¹⁴ As Tuck describes it, the sovereignty of the people would not have been exercised in an original compact lost in the mists of history, nor would it be merely a myth or an abstract idea of a social contract (as it is for Kant). It would be exercised in a real constitutional convention, the results of which later generations could either continue to accept or instead amend, although there might be long periods of “sleep” between an original convention and later acts of amendment (hence his title, *The Sleeping Sovereign*).¹⁵ Tuck argues that the power to amend a constitution constitutes a continuing possibility for consent or not, depending on whether it is exercised or not; he shows how an early U.S. author such as St. George Tucker clarified John Locke’s obscure idea of “tacit consent” as the decision not to amend when the decision to amend could be made.¹⁶ Kant, as I suggested, considered the idea of a social contract an entirely abstract idea of reason, a criterion by which the justice of legislation can be tested: if a law *could have been agreed to in a hypothetical contract*, that is, could *freely and rationally* have been agreed to by all affected or governed by it, then it counts as just—no matter how it was actually arrived at. But I am not going to get further into this issue of whether the fundamental social construct is only ever an idea of reason or is historically realized in a constitutional convention plus the continuing possibility of amendment. Granting for the sake of discussion that a republican government can be an expression of popular sovereignty, the ultimate authority of “the people,” my question is whether the idea of sovereignty can usefully be applied to the form of government itself with its defining separation of powers. Does it make sense to talk of sovereignty *within* the government if the government is divided into three co-equal branches?

II. KANT

Kant presented his political philosophy under the name “Doctrine of Right” (*Rechtslehre*; *Recht* has also been translated as “justice”).¹⁷ The Doctrine of Right is part of Kant’s *Metaphysics of Morals*, published in 1797 and one of his last three published works. By “metaphysics of morals,” Kant means, at least in this work, the system of duties for human beings that arises from applying the fundamental, *a priori*

¹⁴ See RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 181–248* (2016).

¹⁵ See *id.* at 211–12.

¹⁶ See *id.* at 217–24.

¹⁷ KANT, *supra* note 2, at 23.

principle of morality, valid for all rational beings, to certain empirically known but fundamental and indubitable facts about the human condition, such as that we are embodied creatures who need to consume other physical objects in order to live and who live on the finite surface of a sphere any point on which can be reached from any other and who therefore cannot avoid all contact and interaction with others.¹⁸

In his preliminary work, the *Groundwork for the Metaphysics of Morals* (1785), Kant notoriously formulated the fundamental principle of morality in at least three different ways—as the requirement that it is permissible to act only on “maxims” or policies that we could also will to be universal laws; as the requirement that we must always treat human beings, as rational beings, as ends, never merely as means; and as the requirement that all our maxims must tend toward the establishment of a realm of ends, a “systematic union” of all human beings as ends in themselves and of the particular ends that they may set for themselves, so far as the latter are compatible among themselves and with the status of all persons as ends in themselves.¹⁹ Kant treats these three formulations of the fundamental principle of morality as intentionally different but extensionally equivalent; that is, as involving different concepts with different meanings but always yielding the same results; the third can also be considered the description of the proper outcome of the first two.²⁰ He uses both of the first two formulations throughout the *Metaphysics of Morals* without mentioning the third.²¹ Turning to right, that consists of the subset of our moral duties that may, indeed, must be able to be coercively enforced properly within a state with a codified legal system.²² Kant justifies the coercive enforcement of duties of right

¹⁸ See *id.* at 10.

¹⁹ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785), reprinted in *PRACTICAL PHILOSOPHY* 73–85 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996).

²⁰ See KANT, *supra* note 2.

²¹ See *id.*

²² I have argued in a number of places for the position that for Kant, right is the coercively enforceable subset of the moral duties of human beings. See Paul Guyer, *Kant's Deductions of the Principles of Right*, in *KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS* (Mark Timmons ed., 2002); Paul Guyer, *The Twofold Morality of Kantian Recht: Once More into the Breach*, 107 *KANT-STUDIEN* 34–63 (2016). Several authors have argued that Kant intends right to be independent of morality, including Thomas Pogge, *Force and Freedom: Kant's Legal and Political Philosophy*, in *KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS*, *supra* note 2, at 133–58; Marcus Willaschek, *Which Imperatives for Right? On the Non-Prescriptive Character of Judicial Laws in Kant's Metaphysics of Morals*, in *KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS*, *supra* note 2, at 65–88; Allen W. Wood, *The Final Form of Kant's Practical Philosophy*, in *KANT'S METAPHYSICS OF MORALS: INTERPRETATIVE ESSAYS*, *supra* note 2, at 1–22; Allen W. Wood, *Rights and Ethics: A Critical Tribute to Paul Guyer*, in *KANT ON FREEDOM AND SPONTANEITY* 233–49 (Kate A. Moran ed., 2018). Willaschek's version of the

by means of a short argument from the premise that morality requires that each person be able to act as freely as possible and compatibly with the equal freedom of all others, a premise that can be derived from his definition of humanity, which must always be treated as an end and never merely as a means, as the ability of human beings to set their own ends,²³ and the further assumption that a hindrance to such freedom—that is, the use of the threat of coercion to prevent crime and the use of actual coercion, punishment, as a deterrent to further crime, either by an original perpetrator or by others who are thereby put on warning—can be used to preserve such freedom, and must be so used in the face of the imperfect motivation of human beings by respect for morality alone. Kant then divides the domain of right into *innate* rights, freedoms that everyone ought to have regardless of any particular prior acts or agreements, such as equality before the law and freedom of expression, because of the inherent *obligation* of all to respect such rights;²⁴ private or acquired rights, or rights to property, contracts, and services or long-term relationships such as marriage, which depend upon particular agreements or understandings, although the *right to acquire rights* is innate; and public right, or the system of duties and rights within the kind of state or institution that is necessary to make the first two kinds of rights determinate and secure.²⁵ Indeed, for Kant, the fundamental role of the state is to make innate and acquired rights determinate and secure; as I like to put it, the two most fundamental organs of the state are the recorder of deeds and the sheriff.²⁶ Those kinds of rights are what Kant calls merely “provisional” until the establishment of a state makes them “conclusive” (*peremptorisch*) by making them determinate enough to be enforceable and enforcing them.²⁷ The question before us now is what is the structure by means of which Kant thinks this should be done, and does it make sense to understand this structure in terms of the conception of sovereignty as the supreme authority within a polity, answerable to no power other than morality itself?

“independence thesis” has in turn been controverted by Nance. Michael Nance, *Kantian Right and the Categorical Imperative: Response to Willaschek*, 20 INT’L J. PHIL. STUD. 541 (2012).

²³ See KANT, *supra* note 2, at 150–51.

²⁴ *Id.* at 29.

²⁵ *Id.* at 37, 49, 57, 61, 89.

²⁶ See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 159–76 (2009); SHARON B. BYRD & JOACHIM HRUSCHKA, KANT’S DOCTRINE OF RIGHT: A COMMENTARY 138–42 (2010); PAUL GUYER, KANT 314–17 (2d ed. 2014).

²⁷ KANT, *supra* note 2, at 45.

Prior to publishing the “Doctrine of Right” in the *Metaphysics of Morals*, Kant lectured on what he (and his contemporaries) called “natural right,” a dozen times, according to the catalogues of the *Albertina* University of Königsberg.²⁸ A student transcription of his lectures from one of those courses has survived, named after that student the *Naturrecht Feyerabend*. These notes are from 1784, the same time in which Kant was writing the *Groundwork for the Metaphysics of Morals*, thus formulating his mature moral philosophy.²⁹ The *Feyerabend* lectures help us interpret that work.³⁰ Kant’s textbook for these lectures was the *Ius Natura* of Gottfried Achenwall.³¹ Achenwall clearly recognized the distinction between legislative, executive, and judiciary *powers* or *functions* of government, but he did not argue that these should or must be divided among three different *persons* in a government, whether “natural,” i.e., individual, or “artificial,” i.e., groups or bodies of persons.³² Achenwall assigned distinct powers to a single actor, the “civil overlord,” although he recognized that some of the work would have to be delegated to and carried out by multiple “officials” serving this overlord.³³ Achenwall thus employed a traditional conception of undivided sovereignty in an absolutist, rather than republican, model of government; even though he used the term “republic,” he meant it only to refer to any polity, regardless of the form of its government.³⁴ He wrote:

Because the civil overlord is obliged to further public welfare by means of his reign, as much as possible, *he has the right to everything without which the goal of the republic cannot be attained, and hence the right to establish everything at*

²⁸ Paul Guyer, *Stellenindex and Konkordanz zum Naturrecht Feyerabend, Teilband I: Einleitung des Naturrechts Feyerabend*, 25 *RATIO JURIS* 110, 111 (2012).

²⁹ *Id.*

³⁰ See MARGIT RUFFING ET AL., *KANT’S NATURRECHT FEYERABEND: ANALYSEN UND PERSPEKTIVEN* (2020).

³¹ Guyer, *supra* note 28.

³² GOTTFRIED ACHENWALL, *NATURAL LAW: A TRANSLATION OF THE TEXTBOOK FOR KANT’S LECTURES ON LEGAL AND POLITICAL PHILOSOPHY* (Pauline Kleingeld ed. & Corinna Vermeulen trans., Bloomsbury Acad. 2020) (1763).

³³ *Id.*

³⁴ *Id.*

will for that purpose, i.e., everything he deems relevant to the pursuit of the public good.³⁵

For the public welfare to be in fact furthered by the public overlord, it is necessary (1) for him to determine what should be done by the subjects for the sake of the public good, i.e., to tell them what to do, and therefore to *make laws*; (2) for him to make sure that his subjects, in fact, carry out his orders and that they abide by the laws that have been made, and more generally, that his subjects fulfill their obligations; and (3) for him to know everything in the state that may concern public welfare.³⁶

Since the overlord of the state is thus obligated to do these things, he also has a right to them. As a consequence, the following *belong to the sovereign rights*: (1) *the right to give his subjects laws*, LEGISLATIVE POWER (the supreme right to give laws); (2) *the right to effect that the subjects fulfill their obligation*, EXECUTIVE POWER (the right of supreme execution); (3) *the right to effect that he knows everything in the state which may concern public welfare*, OVERSIGHT POWER (the right of supreme oversight).³⁷

Achenwall does not explicitly mention the judicial power, presumably subsuming that into the executive power, while he does explicitly mention a power of oversight, which is not usually mentioned in standard accounts of the tripartite division of powers necessary for a government, and which in our own division of powers might be regarded as shared among all three branches. This detail aside, what is significant about his scheme is that he regards the three powers that he distinguishes as powers of a single sovereign or “civil overlord”—a Hobbesian Leviathan.

Kant surely had Achenwall in mind when he eventually wrote the “Doctrine of Right.” But although much in the organization and detail of the work derives from Achenwall, Kant expressly argues that:

[e]very state contains three *authorities* [*Gewalten*] within it, that is, the general united will consists of a threefold person (*trias politica*): the *sovereign authority* (sovereignty [*Souveränität*]) in the person of the legislator; the *executive authority*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 146.

in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislativa, rectoria et iudiciaria*).³⁸

Kant then continues to say that “[a]ll those three authorities [*Gewalten*] in the state are dignities [*Würden*],”³⁹ which it is natural to read as meaning three *dignitaries*, i.e., different persons, and then says even more explicitly that:

the three authorities in a state are, *first*, coordinate with one another (*potestates coordinate*) as so many moral persons, that is, each complements the others to complete the constitution of a state (*complementum ad sufficientiam*). But, *second*, they are also *subordinate* (*subordinatae*) to one another, so that one of them, in assisting another, cannot usurp its function; instead, each has its own principle, that is, it indeed commands in its capacity as a particular person, but still under the condition of the will of a superior. *Third*, through the union of both each subject is apportioned his rights.⁴⁰

The last sentence of this passage makes clear that the basic function of government, apportioning to each subject his or her rights, that is, making determinate and secure her innate right to freedoms and acquired rights to property, requires the cooperation of the powers of government (although Kant should have said “all three” instead of “both”). The last clause of the penultimate sentence suggests that all three branches of government are supposed to be expressions of a single source of authority, which, Kant says in the previous section, “from the viewpoint of laws of freedom, can be none other than the united people itself”⁴¹—so Kant is trying to reconcile the idea of undivided sovereignty with the necessary division of governmental powers by

³⁸ KANT, *supra* note 2, at 90. I have translated Kant’s words *dreifacher Person* literally as “threefold person;” Mary Gregor, the translator of the Cambridge edition, translated these less literally as “three persons.” My more accurate translation might seem to undermine my point that Kant distributed the three powers of government among three different persons in a way that Achenwall did not, but the remainder of the passage as well as the further quotes I am about to offer make clear that Kant did do what I say. I am also leaving aside here Kant’s not very plausible analogy to the three powers of government to the major and minor premises and conclusion of a practical syllogism. For discussion, see RIPSTEIN, *supra* note 26, at 174–75; BYRD & HRUSCHKA, *supra* note 26, at 157–61; RUFFING ET AL., *supra* note 30, at 201–28.

³⁹ KANT, *supra* note 2, at 100.

⁴⁰ *Id.* at 93.

⁴¹ *Id.* at 100.

supposing that all three powers express popular sovereignty or the sovereignty of the people. My main question can be formulated as whether he can do that without also making one power more than co-ordinate with the others, and thus sovereign within the government. For the moment, however, I want to emphasize only that Kant's division of governmental powers among three different "dignities" or "persons" can be considered a riposte to Achenwall, who assigned three different powers to a single "civil overlord."⁴² Achenwall, as a professor at Göttingen and thus an employee of the Elector of Hanover (and thus also of the Crown of Great Britain during the period of the personal union of these two offices), was an avowed monarchist; Kant's division of powers among three distinct persons as well as his affirmation of popular sovereignty certainly seems anti-monarchical, although in the end it is questionable how firmly Kant maintained that stance.

Kant's insistence on the distribution of governmental powers as opposed to Achenwall's mere distinction among the powers of a single sovereign was hardly original. It was a fundamental point of Montesquieu's *The Spirit of Laws*, a text widely known among educated people in the second part of the eighteenth century, whether German professors or American founding fathers.⁴³ Indeed, although Jean-Jacques Rousseau is often cited as the inspiration for Kant's moral philosophy in general as well as for his political philosophy, and Kant himself sometimes suggested that,⁴⁴ it could well be argued that Montesquieu was a more significant influence on Kant's political philosophy, as he was for the American founders as well.⁴⁵ For Montesquieu argued for two chief points. First, he argued that the goal of the best constitution that he knows (that of England) is liberty, although he also drew a clear distinction between liberty and license: "political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained

⁴² See RUFFING ET AL., *supra* note 30, at 201–28.

⁴³ MONTESQUIEU, *supra* note 3. Kant does not refer to Montesquieu in his lectures on natural right or in the Doctrine of Right, but he does cite him in his lectures on anthropology, indeed as "one of the greatest minds of the French," in a way that implies his own knowledge of *The Spirit of Laws* and presumes such knowledge on the part of his auditors. See IMMANUEL KANT, *Anthropology Mrongovius* (1784–1785), reprinted in LECTURES ON ANTHROPOLOGY 493–94 (Allen W. Wood & Robert B. Loudon eds., Robert R. Clewis trans., 2012).

⁴⁴ See IMMANUEL KANT, NOTES AND FRAGMENTS 7 (Paul Guyer ed., Curtis Bowman, Paul Guyer & Frederick Rauscher trans., 2005) (1765).

⁴⁵ See WHITE, *supra* note 5, at 29, 139, 155–56.

to do what we ought not to will.”⁴⁶ But second, he argues that in order to preserve liberty, the liberty of the subjects of a government, the three powers, legislative, executive, and judiciary, need to be distributed among different persons.

In every government there are three sorts of powers: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.⁴⁷

This presumes the distinction between domestic and international or internal and external sovereignty with which we began and does not seem to mention the judiciary. But Montesquieu refers to that as he continues:

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.⁴⁸

Here Montesquieu clearly recognizes the judiciary power, and its division into criminal and civil. However, he seems to be assigning all three governmental powers to a single, sovereign person, the “prince” or “magistrate.” But then he qualifies that:

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite that the government be so constituted as one man need not be afraid of the other.⁴⁹

Here it sounds as if Montesquieu is still channeling Hobbes, assigning the task of ensuring the safety of subjects to an undivided sovereign, although he is also

⁴⁶ See MONTESQUIEU, *supra* note 3, at 180.

⁴⁷ *Id.* at 173.

⁴⁸ *Id.*

⁴⁹ *Id.*

updating Hobbes by making the goal the safety or preservation of the *liberty* of the subjects of government. But now comes the clincher:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.⁵⁰

Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. 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 violence and oppression.⁵¹

Montesquieu is arguing that the only way to control the natural tendency of human beings to try always to augment their own power—the basic assumption of Hobbesian psychology—is to divide the powers of government, so that those who are to determine what is in accordance with the law, the judiciary, and those who are to enforce the law, the executive, do not get to make the laws themselves, *a fortiori* do not get to make the laws in their own interests, but are themselves required to act within the law, and so not, or not merely, in their own interest. Of course, it is typically in the interest of *subjects* to act in accordance with the law, and self-interest is typically a sufficient motivation to so act; the issue is how to make those who *govern* act in accordance with the law even if their self-interest would not require it. Only through such a distribution rather than mere distinction of powers can the liberty of the subjects be secured.

Here Montesquieu was clearly following Locke, who had written in the second *Treatise of Government* that

it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience

⁵⁰ *Id.*

⁵¹ *Id.*

to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage,⁵²

and for this reason argued for the separation of the executive from the legislature (and also for the reason that a legislature could not always be in session)—although of course the same premise implies the necessity of separating the executive from the law-making power.

Kant clearly accepted this argument and, indeed perhaps did not need to state it explicitly in his own highly compressed work precisely because he could assume that his readers would be familiar with Montesquieu's and Locke's books and these central passages from both. The question now is, did Kant succeed in retaining this conception of three separate "coordinate" powers and in reconciling it with the conception of the unitary sovereignty of the people, or did he in fact relapse into at least a *de facto* acceptance of the supreme authority of the executive power?

Kant begins by asserting the fundamental sovereignty of the people, the citizens of a state (he takes the division of the world into separate territorial states for granted, as one of the empirical but indisputable conditions of human existence), and argues that this sovereignty is expressed through the legislative branch of government—as he states in his 1793 essay, *On the common saying: That may be correct in theory, but it is of no use in practice*, "the people" acting directly rather than through a legislature representing them in accordance with the idea of a social contract would not be acting "*as a commonwealth* but only as a mob."⁵³ Anarchy can be avoided only through government, and then in the "Doctrine of Right," he argues the positive side of the case, beginning with the claim that "[t]he legislative authority can belong only to the united will of the people."⁵⁴ Here he gives an argument in the spirit of Rousseau rather than Montesquieu—perhaps we should consider Kant's political philosophy the attempt to synthesize these two, as his philosophy in general is so often the attempt to synthesize what seem like opposed positions:

For since all right is to proceed from it [the united will of the people], it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*,

⁵² JOHN LOCKE, TWO TREATISES OF GOVERNMENT 382 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

⁵³ IMMANUEL KANT, ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY, BUT IT IS OF NO USE IN PRACTICE 12 (1793), *reprinted in* PRACTICAL PHILOSOPHY, *supra* note 19, at 300.

⁵⁴ KANT, *supra* note 2, at 71.

it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.⁵⁵

Kant does not make explicit what eighteenth century political theorists closer to the ground (such as James Madison) argued in detail, namely that in any modern state, in contrast to an ancient city-state, the legislature must be a representative rather than an assembly of all the citizens, and that it must make its decisions by majority rule rather than by unanimous consent, with the consent of all being required only for the legitimacy of the system and not for particular decisions made within it and according to its agreed procedures. We can assume that Kant assumed these principles. What he does explicitly assert is that in spite of the equally “coordinate” but equally “subordinate” relation of the three branches of government to each other, “from the viewpoint of laws of freedom,” only the “united people itself,” and thus the *legislature*, can be considered a “superior over all,” the “commander [*Gebietenden*] (*imperans*) to those who obey (*subditus*).”⁵⁶ Continuing, Kant maintains that the *executive* must be the *agent* of the legislature, and only through serving the united will of the people as represented by the legislature does it have a *de jure* claim to any share of sovereignty.⁵⁷ “The ruler [*Regent*] of a state (*rex, princeps*) is that (moral or natural person to whom the executive authority (*potestas executoria*) belongs. He is the *agent* of the state.”⁵⁸ The person, natural or moral, in that position, has a variety of important tasks, but these all have the form of implementing the laws determined by the legislature: he “appoints the magistrates and prescribes to the people rules in accordance with which each of them can acquire something or preserve what is his in conformity with the law (through subsumption of a case under it)—law which the executive himself does not legislate, in accordance with the principle of Montesquieu and Locke.⁵⁹ (Again, by the expression “what is his in conformity with the law,” Kant can be understood to mean that making both the innate right to freedom and the acquired rights to property,

⁵⁵ *Id.*

⁵⁶ *Id.* at 92.

⁵⁷ *Id.* at 93.

⁵⁸ *Id.*

⁵⁹ *Id.*

contracts, and relationships determinate and secure is the primary and essential function of the state). This statement has the ring of Friederich II's description of himself as the first servant of the state, but by the tail-end of the reign of Friedrich Wilhelm II, who was no less autocratic in his practice than his uncle but all the more so in his rhetoric,⁶⁰ it would have been highly inflammatory; and it certainly would not have been literally true, since there was no legislature in eighteenth century Prussia for the executive to be the agent of. Perhaps because his ideal was so radical in its context, in many other places Kant uses terms for the executive, such as "supreme commander" (*Oberbefehlshaber*), which are more flattering than mere "agent" (Kant's German word is the same as the English word), and which might have been meant to throw some dust into the eyes of the royal executive that he was indeed the sole sovereign. Be that as it may, Kant's position seems to be that the superiority and thus the sovereignty of the people as a whole (actually, only the "active" citizens who are qualified by their non-dependence on others, thus excluding not only children, but also all women and those who have only their labor to alienate and no goods or products to sell if they choose)⁶¹ is expressed in the supremacy and thus sovereignty of the legislature, and that the executive, as well as the judiciary which he supposes to be appointed by the executive (the "magistrates"), should be regarded as mere agents of the legislature, with the task of implementing the laws that the legislature alone can legislate.

But Kant immediately makes a more than merely terminological concession to the power of the executive, a concession that may undercut his assignment of sovereignty to the legislature in a way that renders the *executive* the *de facto* sovereign as having the last word on any issue on which it cares to say the last word. In Kant's view, laws have to be enforced through the threat of coercion and through carrying through on that threat when necessary, that it is through punishment.⁶² But in a well-ordered state there must be a monopoly on the use of coercion for the administration of punishment, otherwise anarchy results and we are back to a mere mob rather than a commonwealth, that is, back to the state of nature.⁶³ The executive must thus have a monopoly on the use of coercion. And this means that there can be

⁶⁰ See the haughty language of his well-known order to Kant to desist from further publication on the topic of religion after Kant had published *Religion Within the Boundaries of Mere Reason*, although of course the order was drafted for the king by a minister. Letter from Friedrich Wilhelm II to Immanuel Kant (Oct. 1, 1794), in CORRESPONDENCE 485 (Arnulf Zweig ed. & trans., Cambridge Univ. Press 1999).

⁶¹ See KANT, *supra* note 2, at 31–32.

⁶² *Id.* at 38.

⁶³ *Id.*

no lawful coercion of the executive himself. The executive is subject to law but not to punishment.

So, a people's sovereign (legislator) cannot also be its *ruler*, since the ruler is subject to the law and so is put under obligation through the law by *another*, namely the sovereign. The sovereign can also take the ruler's authority away from him, depose him, or reform his administration.

So far, so good: that is how the relation between a principal and his agent ought to be.

But, it cannot *punish* him (and the saying, common in England, that the king, i.e., the supreme executive authority, can do no wrong, means no more than this); for punishment is, again, an act of the executive authority, which has the supreme capacity to *exercise coercion* in conformity with the law, and it would be self-contradictory for him to be subject to coercion.⁶⁴

Thus, while the legislature is sovereign, as the voice of the sovereign people, and is the supreme authority over the making of law, the executive, even though it is supposed to be only the agent of the legislature, is supreme in the sense of holding the only authority to enforce the law by coercion. The legislature cannot exercise coercion against the executive, and in that sense the executive is supreme. So, either there are two distinct sovereigns in a republic constructed according to Kantian lines, or there is none, and the idea of sovereignty proves to be useless for understanding not only Kant but also any modern political system constructed along his lines. Or there is one, after all, but it is the executive, not the legislature, as advertised. As we will see, Kant's conception of the relation between legislature and executive is thus very different from that foreseen in the U.S. Constitution, which in the view of Alexander Hamilton gave the Congress a well-defined power to impeach the chief executive *and* the courts the power to punish him for crimes like anyone else.⁶⁵

A lot rests on Kant's contrast between deposing a wayward executive and punishing him and whether the legislature's power to depose without punishing has any teeth. Kant was not in the concrete business of writing a constitution, so he made no attempt to specify what the power to depose might amount to. That was a task left

⁶⁴ *Id.* at 32.

⁶⁵ THE FEDERALIST NO. 69, at 366–67 (Alexander Hamilton) (The Library of America 1999).

to the drafters of actual constitutions, such as the U.S. Constitution. We will come back to that. But first it should be noted that Kant was by no means unaware of the problem his *de facto* assignment of real sovereignty to the executive rather than the legislature created. His answer to the problem is that only the good will, or moral motivation, of those in the real positions of power in a political system can substitute for the coercion that no one else is in a position to exercise upon them.⁶⁶ He makes this fundamental point in two places. First, in his 1784 essay, *The Idea of a Universal History from a Cosmopolitan Point of View*, he introduces his famous metaphor that human beings are made out of “crooked timber” (*krummes Holz*).⁶⁷ He argues that like trees in a forest that are made to grow straight by the close presence of other trees also reaching upwards for sunlight, human beings can be made to behave as *subjects* of a system of coercively enforced laws; but the *rulers* who must both design and operate such a system, while they are made of the same crooked timber as the rest of humanity, cannot themselves be coerced by the laws they are to design and enforce, and so are like a tree growing in an open plane, which can send its branches out in any old way.⁶⁸ There is no mechanical solution to this problem; rather, the just design and administration of a just system of laws “requires correct concepts of the nature of a possible constitution, great experience practiced through many courses of life, and beyond this, a good will that is prepared to accept” the correct concepts of the nature of a possible constitution.⁶⁹ Where their moral motivation fails them, ordinary subjects of a state can be coerced into following the law by the threat of punishment, and thus may do the right thing although they do not earn the special credit of moral esteem for doing so out of fear of punishment. But those who run the system and are not themselves liable to coercion must be motivated by their respect for morality itself if they are to do the right thing—which for Kant is one reason why right or justice is inconceivable except as part of morality. To put the point another way, in the United States, people are fond of saying that we are a nation of laws, not of men; but laws must be made and enforced by mere human beings, and are of no avail without what Kant calls good will, that is, motivation by respect for the moral law, and virtue, that is, the resolve or strength of will to act in accord with that motivation. This is true no matter what the design of a political and legal system; as

⁶⁶ Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Aim*, in ANTHROPOLOGY, HISTORY, AND EDUCATION 113–14 (Günter Zöllner & Robert B. Loudon eds., Mary Gregor & Allen R. Wood trans., 2007).

⁶⁷ *Id.* at 113.

⁶⁸ *Id.*

⁶⁹ *Id.* at 114.

long as there are anywhere in it people, few or many, who do not answer to anyone else, they had better be moved by morality itself to do the right thing.

A second place where Kant touches upon the necessity of moral motivation for political justice is in his 1795 pamphlet *Toward Perpetual Peace*.⁷⁰ This piece is in a different genre than Kant's *Metaphysics of Morals*: it is not an academic treatise aimed at students and other professors, but is a droll yet serious pamphlet, a parody of a proposed treaty complete with preliminary and definitive articles and appendices, which uses this comedic form to tell the autocratic rulers of Europe to their faces that they will never achieve peace among their nations unless those nations are transformed into republics with the people as the real sovereigns. Kant's argument is that although kings are all too easily tempted into war by the prospect of personal and dynastic advantage when the costs in blood and treasure are to be borne by their subjects, not themselves, if the people who would have to bear those costs also got to decide between war and peace, they would always decide for peace. This argument has been subject to much debate,⁷¹ in fact, Hamilton rejected it *avant la lettre*, arguing that "republics have been [no] less addicted to war than monarchies," just because "the former are administered by *men*" with all their irrational passions and impulses "as well as the latter."⁷² My point is just that Kant assumes that autocratic states can only be transformed into republics without passage through impermissible anarchy by reforms from above, by their current rulers themselves, functioning as what he calls "moral politicians" rather than mere "political moralists." Political moralists "frame a morals to suit the statesman's advantage."⁷³ In other words, their morality is a sham, but moral politicians take "the principles of political prudence in such a way that they can coexist with morals," and make it their "principle that, once defects that could not have been prevented are found within the constitution of a state or in the relations of states, it is a duty, especially for [supreme] heads of states [*Staatsoberhäupter*], to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model in the idea of reason, even at the cost of sacrifices to their self-seeking."⁷⁴ For Kant, there are only two alternatives: motivation by self-interest and

⁷⁰ See generally IMMANUEL KANT, *TOWARD PERPETUAL PEACE*, reprinted in *PRACTICAL PHILOSOPHY*, *supra* note 19, at 311 (1795).

⁷¹ The modern debate goes back to Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFFS.* 205, 230 (1983). For my own position, see Paul Guyer, *The Possibility of Perpetual Peace*, in *KANT'S PERPETUAL PEACE: NEW INTERPRETATIVE ESSAYS* (Luigi Caranti ed., 2006).

⁷² THE FEDERALIST NO. 6, at 179 (Alexander Hamilton) (The Library of America 1999).

⁷³ KANT, *TOWARD PERPETUAL PEACE*, reprinted in *PRACTICAL PHILOSOPHY*, *supra* note 19, at 340.

⁷⁴ *Id.*

motivation by morality. And even though, as I said, both motivations might usually suggest the same actions for subjects, they cannot be counted to do so for rulers or “politicians.” So the only way in which a politician can be motivated not by self-interest, including the desire for self-enrichment and self-aggrandizement but also the desire to avoid coercion, the form of motivation by self-interest to which he is not exposed, is to be motivated by morality itself—what Kant calls the good will. In the immediate context of this statement, what he has in mind is that the executive himself should reform his laws and his administration of the laws, but this should ultimately take the form of granting a legislature supreme authority to make the laws and reducing his own role to that of an agent for their proper administration, and if he cannot take that last step, then stepping aside in favor of a natural or moral person who can. In this way, presumably, the problem of the non-punishability of the executive would be obviated, and sovereignty within the government would be restored to where it belongs, to the legislature, and through that, in turn to the people itself. But until the executive is willing to reduce himself to a mere agent, he is, in fact, the *de facto* even if not *de jure* sovereign in the Kantian model of government.

A. *The Federalist*

The U.S. Constitution is commonly spoken of as instituting a system of “checks and balances” among three branches of government that would, in Kant’s terms, be both coordinate with and yet subordinate to each other. It would thereby seem to leave little room for the idea of sovereignty in the form of the superiority of any one branch over the others, although no doubt it was intended to leave room for, indeed, to celebrate and secure, the idea of the sovereignty of the system as a whole in “the people.” Much of the rhetoric around the Constitution, especially James Madison’s arguments for its ratification in his contributions to *The Federalist* papers, is certainly that of checks and balances. But the design of the Constitution actually makes one branch, namely the legislature, superior to the others, that is, gives it the last word on many of the most important matters of state, thereby at least in principle making room for something close to undivided sovereignty *de jure*. In this way, the U.S. Constitution conforms more closely to Kant’s idea of the supremacy of the legislature than does Kant’s own treatment of the relation between legislature and executive. However, the U.S. Constitution does make it extremely difficult although not impossible for the legislature to exercise its *de jure* sovereignty over the other branches. And, as recent events have reminded us, it is impossible for the legislature to exercise its sovereignty without moral politicians, or a large enough body of politicians moved by morality rather than mere self-interest. This is one of the things that has made it possible over time for the U.S. executive to gain more *de facto* sovereignty than the Constitution seems to have intended (which is *not* to say that the executive branch has had a bigger share of moral politicians than the legislature!).

Throughout his *Federalist* papers, Madison talks of checks and balances, describing in these terms not only the internal structure of the proposed federal government, but also, for the benefit of those states reluctant to join a more powerful central government than the one that had gotten them through the Revolution, the relation between the federal and state governments.⁷⁵ Of course, to talk of checks and balances, one first has to divide government into multiple powers exercised by multiple parties.⁷⁶ Obviously, Madison does that. He shares the general Enlightenment principle that in a republic all “powers” of government must derive “directly or indirectly from the great body of the people,” although such power must be exercised by particular persons, “holding their offices,” however, “during pleasure, for a limited period, or during good behaviour.”⁷⁷ By “the great body of the people” he does not mean any abstraction, such as Rousseau’s “general will” or Kant’s “united will,” but an actual electorate, which is of course not going to include every person living within the relevant territory, but which also must comprise a not “inconsiderable proportion” of the actual population, thus it must not be, for example, “a handful of tyrannical nobles.” Madison also makes the standard assumption that the powers that devolve from the great body of the people to their officers are trifold, that is, legislative, executive, and judiciary, and further follows Locke and Montesquieu as well as anticipating Kant in asserting that these three powers must be distributed among three different persons or bodies of persons, that is, a legislature, an executive, and a judiciary comprised of distinct, non-overlapping persons. In explaining what is wrong with the Articles of Confederation left over from the Revolution, he asks, rhetorically, “[i]s it improper and unsafe to intermix the different powers of government in the same body of men?”⁷⁸ To continue to have as “the sole depository of all the federal powers” all together in the hands of a single “Congress, a single body of men?”⁷⁹ For example, “[i]s it particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands?”⁸⁰ The answer to these questions is self-evidently “yes;” as they were not in the previous federation of states, the power of the federal government must be divided, especially the power of the purse and the command over armed forces, the first of which must

⁷⁵ See, e.g., THE FEDERALIST NO. 39, at 213 (James Madison) (The Library of America 1999).

⁷⁶ *Id.*

⁷⁷ *Id.* at 211–12.

⁷⁸ THE FEDERALIST NO. 39, at 208 (James Madison) (The Library of America 1999).

⁷⁹ *Id.*

⁸⁰ *Id.*

be given to a legislature and the second to the executive. The emphasis on the necessary separation of the legislature and executive in particular is also present in Madison's speech in the Constitutional Convention of July 19, 1787:

If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised. There is the same and perhaps greater reason why the Executive should be independent of the Legislature, then why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty.⁸¹

Madison does not pause to explain why the danger of combining the legislature and executive would be more dangerous than that of combining the legislature and judiciary (as many European parliaments had long done).⁸² Perhaps he had in mind the kind of example he gave in *Federalist* 38, that combining the power of the purse with the command of armed forces would make it all too easy to wage war—precisely what Kant thought—or to oppress at home.⁸³ Be that as it may, it is clear that Madison is here following Locke and Montesquieu in holding that the separation and not just distinction of powers is necessary to ensure public liberty.

In fact, Madison's conception for the separation of powers goes beyond the usual tripartite division of legislature, executive, and judiciary, and describes such divided sovereignty that this concept might well seem useless. I say "conception" rather than "scheme," or use descriptive rather than prescriptive language, because in some part Madison was advocating for ratification of the proposed constitution in the face of existing realities rather than inventing an ideal model for government. One existing reality, of course, was the existence of thirteen former colonies with significantly different interests, each of which considered itself a sovereign state, and

⁸¹ James Madison, Speech in the Federal Constitution on Electing the Executive (July 19, 1787), in *THE WRITINGS 1*, 127–28 (The Library of America 1999) [hereinafter James Madison 1787 Speech].

⁸² Hamilton recognized the danger of combining legislative and judiciary features in a single parliament, although he made an exception in the case of impeachment, on the grounds that the Senate, where impeachments would be tried, was a body of wiser men somewhat insulated from momentary passions by their indirect appointment, but that in any case impeachment is a political process resulting only in removal from office and ban on future office (not a separate issue in Hamilton's presentation), with criminal trial and punishment being left to the ordinary courts, *THE FEDERALIST* NO. 65, at 346 (Alexander Hamilton) (The Library of America 2001).

⁸³ *THE FEDERALIST* NO. 38, *supra* note 13 (James Madison).

which thus had to be persuaded to join a union with significantly greater powers than the current confederation. So, Madison tried to turn a sow's ear into a silk purse by praising what we might call a vertical separation of powers, a division of powers over various matters between the federal government on the one hand and the states on the other, alongside what we might call the horizontal division of powers between the legislature, executive, and judiciary, which would itself be reproduced at both federal and state levels.⁸⁴ *Federalist* 51 emphasizes both the horizontal and vertical division of powers:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same foundation of authority, the people, through channels having no communication whatever with one another.⁸⁵

Here Madison makes the customary reference to the sovereignty of the people, as an undivided whole, as the ultimate source of governmental authority, but also refers to the necessity of exercising that authority through three numerically and not just functionally distinct branches in order, as Montesquieu argued, to preserve the liberty of all. After an important refinement of this doctrine, to which I will return, Madison adds that there are “two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.”⁸⁶ The second consideration is that “[i]t is of great importance in a republic, not only to guard the society against the oppression of its rulers,” which can be done by dividing the powers of government among the three distinct branches, but also “to guard one part of the society against the injustice of the other,” which he thinks will happen in America not by attempting to create “a will in the community independent of the majority, that is, of the society itself,” a fantasy which will inevitably lead to domination by one powerful class, but rather by a division into so many different interest groups that no one can possibly be dominant—“by comprehending in the

⁸⁴ THE FEDERALIST NO. 51, at 294 (James Madison) (The Library of America 1999).

⁸⁵ *Id.*

⁸⁶ *Id.* at 296.

society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable.”⁸⁷ But it is the first consideration to which I particularly want to draw attention to, namely the separation of powers between the federal government and the states:

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into separate and distinct departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.⁸⁸

Here Madison maintains that liberty will be secured not only by the horizontal division of powers within government but by the vertical division of powers between federal and state governments and does so in language very similar to the language of authorities both coordinate to and subordinate to each other that Kant would use ten years later.⁸⁹

A further division of powers that Madison does not mention in this passage is that within the legislature itself—the bicameral legislature with an assembly and a senate that almost all the existing states then had and that the federal government would have. In a speech at the Convention on June 26, 1787, Madison presented the division of the legislature into a more popular, more frequently elected body and “a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose agst. impetuous counsels.”⁹⁰ The members of this body, that is, the Senate, would have longer terms than the members of what became the House—Madison originally thought of nine years—and their service “would not commence

⁸⁷ *Id.* at 297.

⁸⁸ *Id.* at 296–97.

⁸⁹ Hamilton also emphasized the division of power between federal and state governments, explicitly referring to it as a division of sovereignty, although he was clearly in favor of as strong a central government as circumstances would permit. *See* THE FEDERALIST NO. 9, at 199 & FEDERALIST NO. 32, at 301 (Alexander Hamilton) (“[A]s the plan of the Convention aims only a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States.”).

⁹⁰ James Madison 1787 Speech, *supra* note 81, at 110–11.

till such a period of life, as would render a perpetual disqualification to be re-elected little inconvenient either in a public or private view.”⁹¹ As we know, the terms for service in the Senate ended up being different than Madison originally proposed, with eligibility at age thirty for renewable terms of six years rather than non-renewable terms of nine years, and indirect election through appointment by (elected) state legislatures,⁹² with direct election being established by constitutional amendment only in the Progressive era more than a century later. By now, these divergences from Madison’s original proposal seem to have made senators just as liable to the impetuous counsels of the electorate as the representatives in the lower house, although, in our present political climate it can hardly be imagined that the original method of appointment by state legislatures would be producing a better outcome. Be that as it may, Madison thought of the division of the legislature into two houses with different terms and qualifications for membership as a separation of powers in addition to the more general separation between legislature, executive, and judiciary.

In the *Federalist* papers, Madison certainly spoke of the relation between the two houses of the legislature as well as between the legislature and the other two branches in terms of “checks and balances.”⁹³ Thus, he introduced the characterization of the Senate that I just discussed by stating that:

A people deliberating in a temperate moment, and with the experience of other nations before them, on a plan of Govt. most likely to secure their happiness, would first be aware, that those charged with the public happiness, might betray their trust. An obvious precaution agst. this danger wd. be to divide the trust between different bodies of men, who might watch & check each other. In this they wd. be governed by the same prudence which has prevailed in organizing the subordinate departments of Govt., where all business liable to abuses is made to pass thro’ separate hands, the one being a check on the other.⁹⁴

In other words, the Senate and the House are to function as checks on each other—it is not just the Senate that is supposed to be a check on the House—just as the legislature as a whole and the other two branches are to be a check on each other, at least in the case of all business liable to abuse. I note in passing that this passage refers to the task of the government as that of securing the public happiness, not

⁹¹ *Id.*

⁹² U.S. CONST. art. I § 3, cl. 1, 3.

⁹³ See, e.g., THE FEDERALIST NO. 51, *supra* note 84, at 296 (James Madison).

⁹⁴ James Madison 1787 Speech, *supra* note 81, at 110.

public liberty; but if it is assumed that liberty is either a large part of or a necessary condition for happiness, there is no tension in Madison's Montesquieuan view.

This passage speaks of checks; others speak of balance. In a letter to George Washington dated April 16, 1787, outlining the proposal for a new form of federal government that he would present before the forthcoming convention, Madison described his plan for "a due supremacy of the national authority, [which would] not exclude the local authorities wherever they can be subordinately useful"—here he is not quite as conciliatory to the sovereignty of the separate states as he would be in *Federalist* 51,⁹⁵ or as Hamilton would be in *Federalist* 32.⁹⁶ The division of the legislature into House and Senate, with proportional representation in the form and the equal representation of each state in the latter, would reconcile federal and state power. The executive and the judiciary would have their own areas of supremacy, the former especially when it comes to the defense of all the states and the latter when it comes time to "expound & apply the laws."⁹⁷ The conclusion is that "[a] Government composed of such extensive powers should be well organized and balanced."⁹⁸ *Federalist* 48 (February 1, 1788), appeals to Jefferson's notes on the state of Virginia for support of the proposition that a legislature unchecked by a strong executive and judiciary would itself be a form of "*elective despotism*;" this was "not the government we fought for," Madison continues, rather we fought "for one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."⁹⁹

This last passage speaks of both checks and balances. Many more such passages could be piled up, but the point is clear that Madison used the rhetoric of checks and balances that has remained in constant use to this day (even though his insistence on decision by simple majority in both houses of the legislature has gone by the boards).¹⁰⁰ But what I want to argue now is that not only does this rhetoric *not* appear

⁹⁵ Letter from James Madison to George Washington (Apr. 16, 1787) [hereinafter Letter to George Washington].

⁹⁶ See *supra* note 89 and accompanying text.

⁹⁷ Letter to George Washington, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ THE FEDERALIST NO. 48, at 283–84 (James Madison) (The Library of America 1999).

¹⁰⁰ Letter to George Washington, *supra* note 95; see also THE FEDERALIST NO. 22, at 246–47 (Alexander Hamilton) (The Library of America 1999) (arguing against the power of a minority of states to block

in the actual Constitution, but that the principle of checks and balances is substantively *limited* in that Constitution. In spite of the warning against “elective despotism” in *Federalist* 48,¹⁰¹ the Constitution actually sets up a system in which the *legislature* should have authority over the other two branches in the “final instance” on the most important matters of state, and thus in which the legislature really does have sovereignty over the other two branches and in that way can represent the undivided sovereignty of the electorate itself—although the Constitution also sets a very high bar for the exercise of the sovereignty of the legislature over the other branches, such a high bar that the sovereignty that is granted to the legislature *de jure* may be rendered inoperative *de facto*.

From a literary point of view, the supremacy of the legislature over the other branches may be expressed by its description in Article I of the Constitution, prior to the description of the executive in Article II and the judiciary in Article III. Madison also explicitly asserts the supremacy of the legislature over the other two branches (or departments, as he calls them, referring to the three branches and not the dozen or more departments of the executive branch that have subsequently evolved) in *Federalist* 51.¹⁰² He embeds this assertion in a general argument that the government must defend itself, not so much against foreign enemies as against the tendency of officeholders to bend their official power to serve their own interests rather the public good.¹⁰³ “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.”¹⁰⁴ But humans are neither angels nor governed by angels (the second point being another way of putting Kant’s point that rulers are made of the same crooked timber as their subjects). The general solution to this problem is outlined as follows:

This policy of supplying by opposite and rival interests, the defect of better motives, . . . particularly . . . in all the subordinate distributions of power, where

action by the majority, as in the “Polish Diet,” rather than a minority of individual representatives in Congress). But as both Madison and Hamilton assumed that at least in the House, representatives would vote the perceived interest of their states or regions, there may not be much daylight between the two authors on this issue.

¹⁰¹ THE FEDERALIST NO. 48, at 213 (James Madison) (The Library of America 1999).

¹⁰² THE FEDERALIST NO. 51, *supra* note 84, at 295 (James Madison).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the constant aim, is to divide and arrange the several offices in such a manner as that each may be a check on the other.¹⁰⁵

Next, Madison must be assuming an unstated premise, to the effect that if the three main branches of government were truly equal in their power, that would be a formula for anarchy, because they could be at loggerheads on crucial issues, or undercut each other in various ways. So on various sorts of issues where each branch could exercise power, there must be some means of avoiding conflict or stalemate: one branch must in fact be superior. Madison states that “it is not possible to give to each department an equal power of self-defence” (against the others).¹⁰⁶ And then: “[i]n republican government the legislative authority necessarily predominates,” followed by another statement of his further argument, already mentioned, that to avoid “elective despotism” the legislature itself should be divided into two bodies.¹⁰⁷ In this passage, Madison does not offer a justification that it should be the legislature that has the upper hand when an upper hand is needed. It could be the abstract point that the legislature, in part elected directly by the citizens of the states and in part indirectly elected by those citizens through their directly elected state legislatures, is the most direct expression of the underlying sovereignty of the people itself. Yet it could also be the more pragmatic argument that just because the legislature is itself divided into two bodies and those two bodies are in turn more numerous than the other two main branches of government (or so he supposed), they will themselves be filled with competing voices and interests and thus least able to favor any one selfish interest.

The regional interest in slavery and its aftermath have of course sorely tested that optimism since the earliest days of the Republic. That is of course the large issue that looms behind every discussion of the ambitions of American government but is well beyond my purview here. I want to conclude only by enumerating ways in which the original Constitution gives substance to Madison’s claim that the legislature must actually be superior to the other branches of government. The supremacy of the legislature is substantively constituted by the following powers and privileges, not just by the order of the three first Articles of the Constitution.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

First, the legislature has the power of the purse: only “Congress shall have Power to lay and collect Taxes” (Article I, Section 8)¹⁰⁸ and “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” that is, law passed by Congress (Article I, Section 9).¹⁰⁹

Second, only Congress has the power to make war: it is Congress that has the power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy,” and only Congress that has the power to commit these in the form of the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water” (Article I, Section 8),¹¹⁰ while the power of the President as the designated Commander in Chief of the Army and Navy raised and funded by Congress as well as “the Militia of the several states” (now represented by the National Guard) is to obtain only when those forces are “called into the actual Service of the United States” *by the Article I, Section 8 power of Congress*. Hamilton also stresses the point that only Congress has the connected powers to raise taxes and raise armies, and in the latter case only for two years at a time,¹¹¹ and that the President would have the role of Commander in Chief over both the army and navy of the United States and the militias of the several states *only when those were called to service*, i.e. in times of war.¹¹² He explained that this rank “would amount to nothing more than supreme command and direction of the military and naval forces,” while the [P]resident would *not* have the power of the British King extending “to the declaring of war and to the raising and regulating of fleets and armies.”¹¹³ Here the founders clearly had in mind Washington’s role in the Revolution, *delegated to him* by the Continental Congress, and the restriction of the role of Commander in Chief was one of the most important anti-monarchical features of the Constitution, fully endorsed by Washington himself in his role as the first President under the new Constitution. Of course, we know that this restriction on the role or the very idea of “Commander in Chief” has not always fared so well in practice, where now it licenses deference to the President even in the absence of declared war, and ordinary

¹⁰⁸ U.S. CONST. art. I, § 8, cl. 1.

¹⁰⁹ *Id.* art. I, § 9, cl. 7.

¹¹⁰ *Id.* art. I, § 8, cl. 11.

¹¹¹ THE FEDERALIST NO. 24, at 258 (Alexander Hamilton) (The Library of America 1999).

¹¹² *Id.*

¹¹³ THE FEDERALIST NO. 69, at 368 (Alexander Hamilton) (The Library of America 1999); *see also* THE FEDERALIST NO. 29, at 294 (Alexander Hamilton) (The Library of American 1999). Though, the latter applies more clearly to the command of the militias.

citizens can claim that they were just following the orders of their Commander in Chief in storming the Capitol.¹¹⁴

Third, the Congress, through the Senate, has veto power over the appointment of “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for” (Article II, Section 3).¹¹⁵ This power is described as that of “Advice and Consent,” but since there is no provision for the executive to override this power of the legislature (except in the special case of limited recess appointments) the legislature effectively has a veto power over the executive in this regard and thus effective sovereignty in this area.

All of those powers of the legislature over the executive and judiciary are to be exercised in accordance with Madison’s favored rule of simple majority. Further powers of the legislature over the other branches constitutionally require supermajorities (I am not worrying about the non-constitutional supermajority required by the Senate to break filibusters); they thus raise the bar for the exercise of legislative sovereignty to the point of making it extremely difficult in some cases, but in principle the legislature still has the upper hand and last word in all these cases.

A first instance is the senatorial power of advice and consent with regard to treaties, in which case, although not in the case of appointments, “two thirds of the Senators present [must] concur” (Article II, Section 3).¹¹⁶ Another instance of legislative supremacy over the executive is the power to override presidential vetoes of legislation, again requiring the approval of two-thirds of each house rather than a simple majority in each (Article I, Section 7).¹¹⁷ Hamilton stresses the difference between the President, who can return a bill to the legislature for “re-consideration” but that “the bill so returned is to become a law, if upon that re-consideration it be approved by two thirds of both houses,”¹¹⁸ and the “King of Great Britain, [who] on his part, has an absolute negative upon the acts of the two houses of Parliament.”¹¹⁹

¹¹⁴ And apart from their ignorance of the constitutional limitation of that role, they also apparently never heard that the Nuremberg defense does not work.

¹¹⁵ U.S. CONST. art. II, § 2, cl. 2.

¹¹⁶ *Id.*

¹¹⁷ *Id.* art. 1, § 7, cl. 3.

¹¹⁸ THE FEDERALIST NO. 69, *supra* note 113, at 367 (Alexander Hamilton).

¹¹⁹ *Id.*

The power to “propose Amendments to [the] Constitution” also belongs only to the legislature, although it again requires a two-thirds approval in each house rather than a simple majority, and in this case also requires approval by “the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof” (Article V).¹²⁰ Neither at the federal or the state level is there any provision at all for participation by either the executive or the judiciary in the process of constitutional amendment, thus that is a power that exclusively and finally belongs only to the legislative branch of government. Of course, we know from the case of the Equal Rights Amendment that securing approval of three-fourth of the states can sometimes be a very tall order, and that this form of legislative sovereignty can be extremely difficult to exercise.

The same is true of the power to impeach the “President, Vice President, and all Civil Officers of the United States” (Article II, Section 4) as well as federal judges (appointed under Article III, Section 1), who hold their “[o]ffices only during good [b]ehaviour,” *as determined by the legislature in the exercise of its power of impeachment*.¹²¹ Hamilton again stresses that this is a fundamental difference between the President under the Constitution and a genuine sovereign like the King of Great Britain, whose person is “sacred and inviolable” with “no constitutional tribunal to which he is amenable” as well as “no punishment to which he can be subjected without involving the crisis of a national revolution.”¹²² If not being answerable to any other tribunal is the mark of internal sovereignty, then it is clearly the legislature of the United States, not the executive, which was designed to have sovereignty. Again, to be sure, there was intended to be a high bar for the exercise of this legislative power, conviction on a charge of impeachment requiring “the Concurrence of two-thirds of the Members” of the Senate present; and we have just been reminded twice in the space of a year how difficult it is to clear this bar even in the face of the most egregious misconduct; nevertheless, since there is no appeal of conviction in a case of an impeachment, the power of the legislature in this regard is in principle uncontested and conclusive.

Finally, in one place where the power of the executive seems to intrude into the legislature, namely the power of the Vice President to break ties in the Senate (Article I, Section 3), this obviously does not apply in the case of any matter where a two-

¹²⁰ U.S. CONST. art. V.

¹²¹ *Id.* art. II, § 4; *id.* art. III § 1.

¹²² THE FEDERALIST NO. 69, *supra* note 113, at 367 (Alexander Hamilton). Hamilton is of course alluding to the British upheavals of 1649 and 1688.

thirds majority is required, so constitutes no irrevocable power of the executive over the legislature.¹²³

We thus reach an ironic conclusion. Immanuel Kant was a great spokesman for the foundational sovereignty of the people and for the status of the executive as a mere agent of the legislature through which that sovereignty is supposed to be expressed within the structure of republican government, but nevertheless granted the executive a monopoly on the use of coercion that is unconstrainable through anything other than the executive's own good will. He thus ended up granting undivided sovereignty back to the executive. Madison, who in his own voice spoke constantly of checks and balances between three separate and equal branches, was nevertheless the principal author of a constitution that also returns to an idea of undivided sovereignty, although in this case of the legislature over the executive and judiciary. To be sure, in crucial cases he and his colleagues set the bar for the exercise of that sovereignty very high. Because of that, living up to Benjamin Franklin's statement that the founders had created "[a] republic, if you can keep it," is no mean feat. And thus, while Kant stressed that *rulers* had to have good will, Madison emphasizes that "[n]o man can be a competent *legislator*" (emphasis added) who does not add to "a certain degree of knowledge of the subjects on which he is to legislate" "an upright intention and a sound judgment."¹²⁴ Of course, these are often in short supply, and "may all be insufficient to control the caprice and wickedness of men."¹²⁵ No constitution can provide a guarantee of good will whether that is demanded of the executive or the legislature.

¹²³ Madison recognized that the boundaries between the three branches cannot be completely strict. THE FEDERALIST NO. 37, at 197–98 (James Madison) (The Library of America 1999). In this case, the executive power gets to play a role in the legislative; in the other cases I have mentioned, it is the other way around.

¹²⁴ THE FEDERALIST NO. 53, at 306 (James Madison) (The Library of America 1999).

¹²⁵ THE FEDERALIST NO. 57, at 328 (James Madison) (The Library of America 1999).