



Revista de  
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# Índice

## Artículos

- 1 Law and Liberty. Immanuel Kant and James Madison on the Modern Polity  
*Günter Zöller*  
DOI 10.7203/REK.3.1.12157
- 14 El ingreso y la asimilación de la filosofía kantiana en México  
*Dulce María Granja Castro*  
DOI 10.7203/REK.3.1.12156
- 46 Unidad del espacio, mereología y geometría desde la Estética Trascendental  
*Efraín Lazos*  
DOI 10.7203/REK.3.1.10708
- 69 The current status of research on Kant's Transcendental Deduction  
*Dennis Schulting*  
DOI 10.7203/REK.3.1.10706

## El autor y sus críticos

- 89 Kant on Human Rights, Peace and Progress: a debate with Luigi Caranti  
*Joel Thiago Klein*  
DOI 10.7203/REK.3.1.12307
- 97 Reflexiones en torno a la cuestión de si es posible encontrar un fundamento moral del derecho en Kant que posibilite una teoría de los derechos humanos en la actualidad  
*María Guadalupe Martínez Fisher*  
DOI 10.7203/REK.3.1.12331
- 103 Kant en el debate contemporáneo acerca de los derechos humanos, el cosmopolitismo y la paz  
*Ileana Beade*

DOI 10.7203/REK.3.1.12308

- 110 Reply to my critics  
*Luigi Caranti*  
DOI 10.7203/REK.3.1.12335

#### **Recensiones**

- 117 Juan Cruz Cruz: *Conciencia y representación. Una introducción a Reinhold*, Pamplona, EUNSA. Ediciones Universidad de Navarra, 2017, 253 pp. ISBN: 978-84-617-5062-7.  
*David Hereza Modrego*  
DOI 10.7203/REK.3.1.10791
- 119 Dennis Schulting: *Kant's Radical Subjectivism: Perspectives on the Transcendental Deduction*. Londres, Palgrave Macmillan, 2017, 460 pp. ISBN 978-3-319-43877-1.  
*Tim Jankowiak*  
DOI 10.7203/REK.3.1.12266
- 123 Daniela Alegría y Paula Órdenes (coords.): *Kant y los retos práctico-morales de la actualidad*, Madrid, Tecnos, 2017, 261 pp. ISBN: 978-84-309-7151-0.  
*David Rojas Lizama*  
DOI 10.7203/REK.3.1.11323

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- 127 Call for Papers: The 13<sup>th</sup> International Kant Congress: The Court of Reason (Oslo, 2019)  
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# Artículos

# Law and Liberty. Immanuel Kant and James Madison on the Modern Polity

GÜNTER ZÖLLER<sup>1</sup>

## Abstract

The paper relates Kant to the American Revolution by connecting his republicanism with the ingenious balancing of national and federal features in the constitution of the American Republic, as envisioned and enacted by James Madison. Section 1 sets the stage by profiling Kant and Madison in historical and systematic terms. Section 2 traces the development of republicanism from its ancient origins to its modern variety. Section 3 reconstructs Kant's legalist republicanism in the twofold context of his philosophy of history and his philosophy of law. Section 4 portrays Madison as the leading theoretician of the modern federal republic.

**Keywords:** Immanuel Kant, James Madison, republicanism, federalism, polity.

## Ley y libertad. Immanuel Kant y James Madison sobre la política moderna

## Resumen

Este artículo pone en relación a Kant con la Revolución Americana al conectar su republicanismo con el ingenioso equilibrio de las características nacionales y federales de la constitución de la República Americana, tal y como lo concibió y promulgó James Madison. La sección 1 establece el escenario en el que se presenta a Kant y a Madison en términos históricos y sistemáticos. La sección 2 rastrea el desarrollo del republicanismo desde sus primeros orígenes hasta su variedad moderna. La sección 3 reconstruye el republicanismo legalista de Kant en el doble contexto de su filosofía de la historia y su filosofía del derecho. La sección 4 describe a Madison como el principal teórico de la república federal moderna.

**Palabras clave:** Immanuel Kant, James Madison, republicanismo, federalismo, política.

“If men were angels, no government would be necessary”  
(Fed. 39, Hamilton, Madison and Jay 2003: 319)

The article aims to link Kant with a political revolution akin to, but also different from, the French Revolution, about which Kant the political philosopher thought long and hard. Historically, the article seeks to place Kant in the context of the American Revolution in general and the debate about the ratification of the U.S. Constitution in particular. Systematically, this work intends to connect Kant's political philosophy, in general, and his republicanism, in particular, with the ingenious balancing of

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national and federal features in the constitution of the American Republic, as envisioned and enacted by James Madison.<sup>2</sup>

This paper proceeds in four sections. Section 1 sets the stage for the ensuing comparison of Kant's and Madison's republicanism by profiling each author in historical and systematic terms. Section 2 traces the development of republicanism from its ancient origins to its modern variety. Section 3 reconstructs Kant's legalist republicanism in the twofold context of his philosophy of history and his philosophy of law. Section 4 portrays Madison as the theoretician of the modern federal republic.

### 1. From Paris to Philadelphia

Work on Kant's relation to Anglo-Saxon thinking typically focuses either on the influence exercised by earlier and contemporary English and Scottish philosophers on Kant's intellectual development or on the influence exerted by Kant on Anglo-Saxon thought. Locke's rejection of innate ideas, Berkeley's immaterialism and Hume's psychological analysis of causal relations are examples of the former kind. Strawson's descriptive metaphysics, Rawls' moral constructivism and McDowell's global conceptualism are instances of the latter kind. Yet in addition to influence, effect and reception, all of which involve real relations between the philosophers concerned, there are also the ideal relations of affinity, similarity, comparison and contrast that might hold – or rather, could be established – between philosophers otherwise not, or not known to be, related through actual historical relations established by the transmission of ideas and insights.

Such an ideal relation is the object of the following contrastive comparison between Kant and a roughly contemporaneous thinker not known to have stood under Kant's influence or to have had an influence on Kant. But not only is it unlikely that Kant ever even as much as heard of James Madison (1751-1836), who assumed the office of the U.S. Secretary of State under Jefferson's Presidency only during Kant's declining years and became the fourth President of the United States of America only after Kant's death. Subsequent scholarship on Kant also has hardly ever related the two in a comparative study of their work in political thought. Too large loomed the difference and distance between the academically entrenched, university-based philosopher and the philosophically versed but politically oriented founding figure and significant statesman.

The point of comparing – and contrasting – two thinkers as diverse in professional profile as Kant and Madison is not simply the correction of an earlier oversight of their philosophical affinities. Rather the combined consideration of Kant and Madison as political thinkers can serve to supplement the strictly theoretical orientation of the one with the primarily practical perspective of the other. Moreover, the two thinkers to be compared are more closely related in their philosophical projects than might appear when considering only their different contexts of influence and effectiveness. In particular, Kant and Madison share a common ground that both justifies and motivates their closer comparison.

The *tertium comparationis* between Kant and Madison is the political philosophy of republicanism – the fundamental belief or assumption that the civil society that is the state is a public matter [*res publica*] instituted, arranged and maintained in the interest of the common good, rather than an instrument of empowerment and enrichment on the part of private individuals or particular groups that assume public power and office. On the republican political outlook, the government of the state is to be self-government, at the exclusion of domestic and foreign forces driven by purely private and particular interest (see Zöller 2016).

<sup>2</sup> An earlier French version of this essay appeared under the title, “«Garantir le bien public et les droits privés ... » Emmanuel Kant et James Madison sur l'état républicain fédéral moderne” (Zöller 2017a).

Moreover, Kant and Madison share the view that republicanism in political theory and practice is not simply a continuation of a historical tradition, with roots in classical antiquity and revivals in medieval and early modern city republics. Both Madison and Kant are in search of the grounds and bounds, the forms and norms of republican government under the specific conditions of modern times, marked by large territorial states with sovereign political power, a thriving commercial society and increasing international relations under the twin shape of warfare and trade. Finally, Madison and Kant agree with regard to the linkage they both seek to establish, in theory and in practice, respectively, between a republican form of government and a federal constitution involving a plurality of republican member states. For both Kant and Madison republicanism entails federalism, even if the republican federalism and federal republicanism they each envision or advance is different in character and extension.

To be sure, Kant and Madison develop their politico-philosophical positions within different theoretical and practical contexts. Kant's political thinking takes place as part of the combined theoretical traditions of the social contract and of natural law and against the background both of pre-revolutionary Europe and revolutionary France, with no consideration given to the contemporaneous political events in North America that should prove to be equally important and at least as momentous. Like virtually all Continental Europeans of his time, Kant turns to Paris rather than to Philadelphia when it comes to eyeing the future with that curious mix of apprehension and expectation to be found on the side of the sympathetic observer. It was not until almost half a century later that Tocqueville would look to the developing democracy of the United States to ascertain Europe's own social, civic and political future. Madison, on the other hand, while steeped in classical and modern political thinkers (from Aristotle, Cicero and Polybius through Locke and Montesquieu), was exclusively concerned with the founding and shaping of an emerging republic – the first ever of large size in modern times. Yet although he showed no interest in theory for its own sake or in abstract issues devoid of immediate application, Madison is widely viewed and rightly regarded as the premier political theorist of his country – certainly in his own time and in many regards through today.

## 2. Republics Ancient and Modern

The ancient precedent for the modern theory and practice of republican rule is Rome's long lasting political set-up between the expulsion of its last king and the advent of imperial rule in the wake of the assassination of C. Julius Caesar through a conspiracy of committed republicans and the constitutional reforms of his nephew, adopted son and political heir, Octavian 'Augustus'. Already in ancient times the Roman Republic had become the object of political history writing (Polybius, Livy, Tacitus) and political philosophy (Cicero). An important factor in the later reception and revival of Roman republicanism had been the antecedent development of democratic rule in fifth-century BC Athens, similarly explored and assessed by political historians (Herodotus, Thucydides) and political philosophers (Plato, Aristotle), but also by political tragedians (Aeschylus, Sophocles, Euripides).

The key features of the Greek democratic legacy that were to reemerge in Roman and neo-Roman republican thought were the freedom from foreign rule [*eleutheria*], legal equality [*isonomia*], and open political deliberation [*parrhesia*] among the full fledged members of the citizenry [*polites*], along with the idea of the city-state [*polis*] being ruled by a civic populace that took turns in governing and being governed through popular self-rule [*democratia, politeia*]. Most importantly, though, the translation of Greek political philosophy and practice into Roman republican thought and deed turned on the philosophical as well as political integration of democratic rule into a comprehensive account of the specifically different types of political rule and the correlated typology of a state's structural set-up or constitution.

In particular, classical Greek political philosophy had distinguished states – city states [*poleis*], to be precise – in terms of the numerical size of the ruling body, whether a single person [*monarchia*], an elite group [*aristocratia*] or a multitude [*democractia*]. In addition, the Greek political thought had correlated each of the three constitutional types with a specific defective, degenerate variant: the rule of a despot in the case of monarchy [*tyrannis*], the partisan rule of a few in the case of aristocracy [*oligarchia*] and the rule of the rabble in the case of democracy [*ochlocratia*].

The classical account of constitutional change, as introduced by Plato and Aristotle and codified by Polybius in his Greek-style history of the rise of the Roman Republic, had allowed for political change to occur at two levels, in two modes and in two stages. First, there was the typically gradual deterioration of each of the three ideal types into its degenerate twin. Second, there followed the typically sudden switch from the degenerate version of one constitutional type to the pristine version of another constitutional type, in a sequence that ran from monarchy (eventually turning into tyranny) through aristocracy (eventually resulting in oligarchy) to democracy (eventually issuing in ochlocracy). Third, the classical constitutional course was believed to run in cycles, with degenerated democracy *qua* ochlocracy eventually leading to the reestablishment of monarchy [*anakyklosis politieion*].

Generally speaking, the twofold three-tiered typology of constitutions, with its intricate combination of change – degeneration from true to false type, development from one type to another and recycling of the generate and degenerate typology – proved a lasting legacy of Greek political thought to Roman as well as modern political philosophy. However, two circumstances mitigated the continued immediate relevance of the classical constitutional typology to modern political theory and practice, with the first mitigating circumstance being specific to modern political developments and the second one already prepared and present in the classical Roman political theory and practice – and with both circumstances perceptively portrayed by that great comparatist of ancient and modern politics, Montesquieu.

The first mitigating circumstance concerns the changed status of monarchical rule in modern times. With the advent of the modern territorial state, characterized by supreme princely power (sovereignty) and centrally administered rule, as detected and described by Bodin, a type of monarchical state came onto the political scene that had been unknown to ancient European civilizations and even to the medieval feudal socio-political order. While absolute in its claim on the citizens' obedience to royal rule, modern monarchical power typically was circumscribed by the legitimating devices of praeter-positive legal rules (natural law) and of implicit, presupposed citizen consent (social contract). In the eyes of Montesquieu, the generally binding legal framework of the post-medieval polity ('state') made modern monarchy less prone to degeneration into its defective double, despotism.

The second mitigating circumstance concerns the enlargement of the three basic constitutional types through the introduction of republican rule as a prudently developed combination of all three elementary types of constitution (mixed constitution). In particular, Polybius had credited the mixed constitution with an exceptional degree of stability and a considerable amount of resistance to the gradual degeneration and sudden overturn typically experienced by each of the unmixed, pure constitutional types. For Polybius it was the careful mixing of monarchical, aristocratic and democratic features – under the guise of the consuls, the senate and the tribunes, respectively – that accounted for the relative stability and overall success of the Roman Republic. The modern reception and transformation of Polybius' analysis, again undertaken chiefly by Montesquieu, led to the effective replacement of the classical tripartite constitutional typology by the modern duality of monarchical and republican rule. In the process, monarchy came to be reconceived as rule-governed, constitutional monarchy, at the exclusion of arbitrary, tyrannical rule, and republican rule as either

aristocratic (aristocratic republic) or democratic (democratic republic). In addition, all three defective derivatives of the formerly distinguished pure types (tyranny, oligarchy and ochlocracy) could now be grouped together as despotic and thus severed from the set of true types to which they previously had been linked. This left monarchy narrowly construed and republican rule broadly construed as the only genuine kinds of rule worthy of theoretical consideration and political emulation.

### 3. Kant's Inner Republicanism

Kant's contribution to the development of a specifically modern republican political philosophy involves a further reconceptualization of the difference between monarchical and republican rule as the sole legitimate types of government recognized since Montesquieu. In particular, Kant aims at including also monarchical rule under the heading of republican governance, thereby allowing to subsume all three types of legitimate rule distinguished and recognized since classical antiquity under the label 'republican', provided they are properly constituted. To that end, Kant redefines political republicanism by drawing on the modern distinction, going back to Bodin, between a state's outward constitutional form [*Staatsform*] and its inner mode of government [*Regierungsart*] (MS RL, AA 06: 338-340). According to Kant, a state's republican identity is not a matter of its manifest constitutional form or 'letter' but of its inner mode of operation or 'spirit'. Accordingly, a monarchical state can be governed in a republican manner, provided it issues and executes «intrinsically popular laws» [*«innere Volksgesetze»*] (KU, AA 05: 352). On Kant's account, which follows classical and early modern precedent, a state's republican identity rests on the rule of law and, moreover, on the legislation and execution of laws that reflect the general popular interest (see Zöller 2015; 2018ab).

Kant's internalized, pneumatic republicanism gathers the prime features of republican government previously promoted by Montesquieu and Rousseau. Kant follows Montesquieu in making the personal and institutional separation of the legislative and the executive power a defining trait of manifestly republican as well as republicanly inspired rule. From Rousseau, Kant takes over the connected conceptions of popular sovereignty and the general will that make government rest on the civically concerned will of the people. Moreover, Kant has the supreme political power lie with «the general unified popular will» [*«der allgemein vereinigte Volkswille»*] (MS RL, AA 06: 314), from which all legislation is to issue. In order to become practical, i.e., empirically effective, the ideal popular legislation has to be delegated to an instituted government ('represented'). Depending on the particular form of the state, the representation of the general legislative will occurs through a single individual, as in monarchies, through a select group of people or a non-natural ('moral') person, as in aristocracies, or through a larger part of the people, as in democracies.

Throughout Kant favors monarchical rule and rejects democratic rule, the basic normative origin of all rightful government in the civically defined and refined popular will ('general will') notwithstanding. To be sure, the monarchical rule preferred by Kant is not absolute and authoritarian but republicanly restricted, in the manner of the 'Enlightened absolutism' of his own time, as allegedly practiced by Frederick II of Prussia. In particular, Kant rejects political paternalism and has the proto-liberal as well as crypto-republican model state of his political imagination concern itself primarily with the rule of law, at the exclusion of patronizing provisions for the achievement of its citizens' happiness. Unlike in classical republicanism, the highest good of Kant's specifically modern republican politics is not happiness – however defined in extensional and intensional terms, whether individually or collectively understood, whether viewed in terms of private pleasures or of civic virtues. Instead in Kant the highest good in politics is juridically defined, chiefly involves the rule of law and essentially consists of a permanently peaceful civic life on the basis of «public justice» [*«öffentliche Gerechtigkeit»*] (MS RL, AA 06: 306).

Kant closely ties the general goal of politics to generate and guarantee a civic social order, which had been maintained as the very purpose of political institutions and their politics since Hobbes ('security'), to the establishment of a republican-type government. From the viewpoint of the philosophy of history, Kant considers the introduction of civil society by means of a social contract the end and goal of a naturally induced historical progress designed to enable and sustain the optimal development of all human abilities. While not the highest good in a complete, unqualified sense, which, for Kant, resides in moral perfection and morally merited happiness, the political *summum bonum* of civic peace is to provide the socio-civic basis and the juridico-political framework for extra-political, generally cultural, and specifically ethical pursuits on the part of individuals as well as communities.

But for Kant the entrance into the civil state with its political pacification program of a lawful public order is not only a preordained product of universal history, advanced and assured by the natural twin facts of human selfishness and human neediness («unsocial sociability») (IaG, AA 08: 20). To leave the state of nature is also an unconditional moral obligation («categorical imperative») (MS RL, AA 06: 318) that places politics under praeternatural prescripts. To be sure, the moral character of the command to enter into a civic union is not a specifically ethical duty that would involve proper motivation and the adoption of suitable subjective principles of action ('maxims'). Rather the surpranatural-*cum*-unconditional ('moral') imperative of civic association is jural in nature and involves the rationally required and freely chosen mutual restriction of the natural, «wild freedom» (MS RL, AA 06: 316) of everyone in their outward actions to the conditions of its civic coexistence with the freedom of everyone else.

The constitutive condition of peace linked by Kant with the civil state in general and the republican mode of government in particular is again articulated in the twofold perspective of history and of (juridical) law. From an essentially prudential natural-historical perspective, war is, on the whole, inimical to the flourishing of socialized, civilized and cultured human beings, whose abilities and accomplishments tend to be threatened or annihilated by the destruction and disorder of war. From a jural point of view, war invariably violates legal entitlements ('rights'), including the primary, 'innate' right to (external) freedom (MS RL, AA 06: 237).

Considered more closely, the warlike condition proscribed by Kant on prudential grounds (in his philosophy of history) as well as on strictly moral grounds (in his philosophy of law or right) concerns the state of nature at two intersecting levels. To begin with, the civil state puts an end to the warlike condition of the state of nature. According to Kant, the latter is by no means lawless and even includes an entire set of laws regulating social relations between private persons, as contained in the private law part of natural law [*ius privatum*]. But those laws, while valid, are not secured by a praeter-private, «public» authority, entitled and enabled to adjudicate cases of dispute and contestation in private legal matters. With the advent of the civil state, natural private law is secured and sanctioned by the institutions of public law [*ius publicum*], essentially the political state (MS RL, AA 06: 312f).

But even after the establishment of civil society under the guise of the political state, warlike, proto- and prewar conditions continue to obtain between the plural instances of civil society established among different populations ('people'), each socially contracted into a particular state ('nation'). Kant resorts to the early modern tradition of international law («law of the peoples», *ius gentium*) to subject the continued state of nature between coexisting states to a functional equivalent of the civic legislation already effectuated in the ideal contractual self-constitution of a particular state (MS RL, AA 06: 343-351). Again, the argument for lawful relations, this time at the supranational level and between states rather than between natural persons, is twofold – with the argument from world historical development taking recourse to the infringement on human flourishing ('culture')

that international warfare entails and the argument from the philosophy of law appealing to the validity of the supreme principles of right (natural law).

Kant also argues, at the legal, constitutional level, for the functional importance of a republican mode of government in order to achieve and preserve lasting peaceful relation both within states and between states («enduring peace», «perpetual peace») (MS RL, AA 06: 343, 350). In particular, he refers to the opposition that most modern warfare, typically initiated by royal rulers and their power interests, would face from a suitably conveyed popular, civic and general will under the guise of a legislative body functioning on republican principles (MS RL, AA 063: 44-346). As the part of the population to be most affected by the circumstances and consequences of war in terms of taxation, recruitment and damage or loss of life and property, the citizenry, if politically represented, could not possibly give its consent to the extreme extension of politics into war. Moreover, Kant predicts the eventual, if not obsolescence, then increasingly inopportune character of warfare between all those states that maintain close economic relation («commercial spirit», «monetary power») (ZeF, AA 08: 368).

In a further republican argument for an international order of peace and prosperity, Kant makes the actual achievements of the civil state – the rule of law and the provision of public order – dependent on the republican governmental mode in other states and on the peaceful lawfully regulated relations among such republicanly constituted states. In the absence of worldwide universal republicanism, any republicanly organized state, no matter how inwardly civilized and pacified, would suffer the threat of unlawful action on the part of non-republican states with their constitutive affinity to war and aggression (ZeF, AA 08: 354f).

To be sure, the universal republicanism advocated by Kant does not entail the political goal of a «world republic» (MS RL, AA 06: 34) that would fuse plural republicanly governed states into a single central super state. On the contrary, based on classical republican apprehensions about a state so extended and encompassing in size and power that it would be unopposed by any other significant political entity within and without («universal monarchy»), Kant advocates federalism as the system for international coordination and cooperation («permanent congress of states») (MS RL, AA 06: 350). Under federal republicanism (and republican federalism), as envisioned and advocated by Kant, states retain their individual supreme political power (sovereignty), while forming a confederation with other such states in the interest of peaceful conditions for the flourishing of culture, the latter including both ethical self-improvement (moral culture) and material flourishing (commercial culture).

Accordingly, the cosmopolitanism eyed by Kant both in the philosophy of history and in the philosophy of law does not, as had been the case with its ancient antecedent, viz., Stoicism, involve citizenship in an imaginary – or rather, intelligible – world state, but the legally regulated status that the citizen of one state has toward another state with regard to visit and sojourn, chiefly for private purposes of trade and commerce. Pneumatically refined and legally defined as Kant's specifically modern republicanism is, the modern republic Kant envisions is as much a commercial republic, actually run by its citizen-burgers, as it is a state of right, virtually governed by its burger-citizens.

#### 4. Madison's Federal Republicanism

While roughly contemporaneous events of momentous consequence each, the American and the French Revolution differ from each other in kind and character. In France a politically marginalized but economically and intellectually ascending *bourgeoisie*, upon finding itself civically empowered in the fiscal crisis of an absolute monarchy [*États généraux*], seized the historical moment by reconstituting the former Third Estate as the core of a politically (re-)created nation, first abolishing

the privileges of nobility and clergy and eventually ending hereditary monarchy altogether. In North America, a number of overseas colonies of the United Kingdom, originally settled by religious dissenters and soon populated with a microcosm of the British middle and lower classes, united to break loose from colonial rule by a distant King and Parliament that subjected them to taxation without granting them political representation.

But not only were the revolutions attempted and achieved in both countries different in kind and character. They also differed in course and issue. In France the newly created republic, while built on pioneering programmatic acts, chiefly the “Declaration of the Rights of Man and of the Citizen” (1789, even before the establishment of the Republic) and the Constitution of 1791 (also still issued under the old monarchy) soon degenerated, temporarily, into state terrorism and political genocide, and eventually resulted in the neo-Caesarism and European imperialism of Napoleon Bonaparte. In North America, the newly created republic grew into a moderately prosperous, territorially expanding nation – acquiring immense lands in the interior from an overextended Napoleonic regime (Louisiana purchase) – and soon established itself as the first republic under democratic conditions (Tocqueville’s *égalité des conditions*) of the modern era, and as the first such republic on a large territorial scale ever.

A further feature that distinguished revolutionary and post-revolutionary France from its North American counterpart was the continued centralized power system in France that preserved Paris as the nation’s cultural, civic and political capital and stood in stark contrast to the sovereign status of each of the thirteen former North American British colonies turned independent states and joined by a comparatively loose confederation as codified by the first constitution (“Articles of the Confederation”, 1777, ratified by 1781 only) (Rakove 2006: 154-168). Yet while none of the creators (‘founding fathers’) of the American republican federation sought a centralized state on the model of the leading European nations (all monarchies in name and but for England absolute monarchies in practice), the confederate conglomerate of the states so united soon proved insufficient in practical terms and on theoretical grounds. In particular, the confederate authority was too weak in all respects of governmental power and was, moreover, limited to governmental relations with the member states of the confederation, which in turn retained all power over their own citizenry.

Charged with revising the Articles of the Confederation, the Constitutional Convention meeting in Philadelphia in 1787 exceeded its more limited task by passing an entirely new constitution, consisting of seven articles, a preamble and a closing endorsement, to be ratified by each member state through elected representative bodies, which occurred between 1787 and 1790. The Constitution of the United States was the result of a complex set of compromises achieved between the conflicting interests of the different parties and positions involved in a public process of deliberation and decision. At the more theoretical level, the main issues were the mode of popular, parliamentary representation (whether through a bicameral or unicameral system), the institutional division of political power, the guarantees of civil liberties and the respective powers of the federal and state governments.

The ratification process in the individual states proved lengthy and controversial and led to extensive and thorough public debate, chiefly carried out in popular press publications. The outstanding document from the public ratification debate is a series of articles published in New York in 1787-88, which appeared pseudonymously (signed ‘Publius’) and is customarily identified as *The Federalist*, in indication of its chief orientation and purpose, viz., to plead the case of an appropriately empowered as well as checked federal government against the defenders of the opposed, anti-federalist plea for a weak central authority, with the sovereignty of the thirteen states remaining largely intact.

The publication of the pro-federalist article series, *The Federalist papers* as they are also called, was the initiative of Alexander Hamilton (1755-1804), a lawyer, originally from the British West Indies, who had represented the State of New York in the Constitutional Convention and was to serve as the first United States Secretary of the Treasury (1789-1795), becoming the founder of the Federal Bank and the United States Mint, before dramatically dying as the result of a duel with the then Vice President of the United States over mutual political animosities that had turned personal.

Hamilton, who devised the plan and program of the letter series, enlisted the collaboration of James Madison (1751-1836) and John Jay (1745-1829). While the latter, due to illness, contributed only a few letters, Madison wrote 29 of the 85 letters in total, covering central topics and issues that involved distinctly theoretical and outright philosophical – politico-philosophical – concepts and arguments. Madison, a plantation owner from Virginia, whose constitutional draft (“Virginia Plan”) (Rakove 2006: 336-339) had served as the blue print for the U.S. Constitution subsequently developed, was a Princeton-educated gentleman scholar steeped in the classics and with extensive legal knowledge, who was to become the fourth President of the United States (1809-1817).

While *The Federalist papers* in their entirety have long been recognized as the most important document of political theory in the history of the United States, and as such are widely studied, extensively edited and frequently published, some letters stand out in terms of theoretical strength and philosophical scope – most of them authored by Madison. In particular, letters 10, 37, 39, and 51 deserve closer scrutiny in a comparative perspective informed by modern political philosophy in general and by Kant’s political thought on republicanism and federalism in particular.

Federalist 10 presents the republican political set-up in general and republican federalism in particular as suitable systems for controlling the factionalism pervading modern civil society. Madison defines a faction as a group motivated by a shared agenda (‘interest’), no matter how large and regardless of whether it is made up of a minority or a majority of the population. Moreover, he ties the existence and extent of factionalism in modern civil society to the plural preferences, passions and possessions characteristic of an increasingly differentiated – or rather, self-differentiating – society. On Madison’s assessment, the key factor underlying social pluralism in the modern world is the liberty of leading one’s own life, which affords the individual members of society vastly different life forms dependent on their talents, efforts and other socially relevant conditions and accomplishments.

For Madison, who herein shows his (proto-)liberal leanings, which coexist with his republican commitments, the pluralism of modern society is a given, not to be opposed or oppressed, but to be respected as expressive of modern liberty (Fed. 10, Hamilton, Madison and Jay 2003: 72-74). In particular, Madison maintains a strict distinction between the legal equality granted to everyone in view of everyone’s equal liberty and the socio-economic differences arising from the differential exercise of general liberty. He considers it the theoretical error of a strictly egalitarian social and political philosophy («pure democracy») (Fed. 10, Hamilton, Madison and Jay 2003: 76) to have confused legal and civic with social and economic liberty.

Rather than seeking to eliminate the factions constitutive of modern liberal life, which could only occur at the price of liberty itself, Madison advocates curbing and controlling factionalism through constitutional measures. In particular, Madison advances political representationalism («scheme of representation») (Fed. 10, Hamilton, Madison and Jay 2003: 76) as an institutional limitation on the efficacy of factionalism. In the process, he contrasts and even opposes democracy and republic in terms of the absence or the presence, respectively, of political representation. On Madison’s understanding of the terms, democracy is by definition direct, while the republican regime is by definition representational. This disjunction does not exclude, and even is intended to allow for,



a republican constitution that systematically considers, reflects and respects the interests of the people.

Under conditions of factionalism, as constitutive of modern societal, civic, and political life, the systemic advantages of a representative republic over a direct democracy, so Madison, reside in the filter or channel provided by delegating politics in general and lawgiving in particular to a limited group of individuals able and likely to consider multiple factional interests and, more importantly, the common good beyond factional divisions. Moreover, with the ratio between representatives and represented numerically declining in reverse proportion to the increasing size of the population to be represented, extensive republics – according to Madison’s reasoning – are less prone to succumb to the tyranny of an «overbearing majority» (Fed. 10, Hamilton, Madison and Jay 2003: 72) than smaller sized republics and democracies. A further filter for refining popular preferences shaped by factional interest through the representative system of government consists in a federal constitution of the liberal republic. According to Madison, the distribution of political powers between a local and a federal level allows the differential allocation of interests, with the local level suitable for addressing particular interests, and the federal level suited for handling general interests, especially those concerning the common good.

In Federalist 37 Madison adds to his theoretically based preferential ranking of republics over democracies, of larger republics over smaller ones and of federal republics over ‘simple’ ones a functional argument for the superiority of a stronger union than the one provided by the existing Confederation. He points to the requirement of sufficient resources for the government of the (federally) united (member) states to be able to provide what is expected of any government worthy of that title: reliable conditions for civic life («stability») at the domestic level and sufficient force in dealing with foreign affairs («energy») (Fed. 37, Hamilton, Madison and Jay 2003: 222f). But Madison also and immediately points to the need to assure, by constitutional measures, that the (federal) government so strengthened to control domestic and foreign political matters not infringe upon the very principles of the body politic under review for restructuring, viz., freedom from domination («republican liberty») and popular self-rule («republican form») (Fed. 37, Hamilton, Madison and Jay 2003: 222f). To that effect, he points to the need to carefully balance the requirement that the government instituted by the people be sufficiently strong for purposes of domestic and foreign protection and yet subject to control in the exercise of that power, a control to be exercised by the people themselves.

The precise contributions of the republican and the federal form of the government foreseen by the new constitution are the object of Federalist 39. Madison begins with a definitional determination of the term ‘republic’, as applicable to the U.S. Constitution under review for ratification. Departing from the precedent, set by Montesquieu, of distinguishing between aristocratic and democratic republics, Madison considers neither type by itself a republic in the relevant sense. In particular, he cites Venice (for the aristocratic variety) and the Netherlands (for the democratic type) as republics in name only that do not satisfy the true criteria for a modern, popular republic, viz., the derivation of all governmental power from election, whether direct or indirect, through the great body of the people, together with the elected persons holding governmental offices either for an indefinite amount of time («during pleasure»), for a fixed term («a limited time»), or depending on their performance («during good behavior») (Fed. 39, Hamilton, Madison and Jay 2003: 237f). The point of Madison’s criterial definition of a true republic is to exclude unpopular forms and modes of government and to include governmental practices at variance with direct-democratic notions of popular rule.

With the functional definition of a republic as essentially identical with representative popular self-government in place, Madison can turn to the concern and charge of the anti-federalist critics of a stronger union among the states of the Confederation, viz., that strengthening the union

poses a principal threat to republican liberty. Madison's reply turns on an elucidation of the intricate interplay between republican principles and federal structures in the Constitution, which serves the specific purpose of a mutual enhancement of the «republican form» and the «federal form» provided by the Constitution (Fed. 39, Hamilton, Madison and Jay 2003: 239). In particular, Madison reconceives the customary, federalist as well as antifederalist dual distinction between the (member) state level and the federal level of government by introducing a further mode of governmental action involved in the Constitution to be ratified. According to Madison, a central-governmental action is 'national' if it acts upon the population of all the member states, considered collectively and in their entirety. By contrast, on Madison's account, an action of the central government is 'federal' if it concerns the member states as such.

Since the ratification process under way involves the individual votes of each member state, so Madison's continued line of reasoning in Federalist 39, the ratification process is federal and hence respective of the states' sovereignty. In its distinction from the 'national' dimension of governmental action, which concerns the direct, unmediated power relations between the federal government and the entire population, the 'federal' dimension of government, on Madison's analysis, because it addresses directly only the member states as such, rather than their citizenry as part of the 'nation', systematically satisfies anti-federalist demands for limited federal government (Fed. 39, Hamilton, Madison and Jay 2003: 239f).

Madison goes on to extend his national-*cum*-federal (rather than federal-*versus*-state) reading of the Constitution to each branch of government in view of the republican recruitment of its office holders (Fed. 39, Hamilton, Madison and Jay 2003: 241-243). In particular, he argues that the House of Representatives, due to its election mode of direct popular vote is national rather federal. By contrast, the election of the Senate, in its original form a matter of appointment through the member states, is federal and not national. Finally, the mode of election for the Presidency can be considered both federal and national in its mix of a primary popular vote and a subsequent election procedure through delegates (Electoral College).

The upshot of Madison's analysis is that the government as designed and defined in the Constitution is neither federal nor national only, but a mix of both such that the former confederation receives a superstructure that is national rather than federal (Fed. 39, Hamilton, Madison and Jay 2003: 242f). To be sure, the national government superimposed on the state governments operates under conditions of a federation, which systematically limits its powers over the states to the matters precisely laid out in the Constitution. Moreover, the national government also operates under conditions of republican rule, which systematically limits its powers over the population collectively and individually considered, as stipulated by the Constitution and eventually made explicit in the Bill of Rights (1791-92) and the growing list of constitutional Amendments detailing specific citizens' liberties ('rights') *vis-à-vis* state authority and public power.

The mutual enhancement of republicanism and federalism in the Constitution under review also is the object of Federalist 51 with its famous portrayal of the checks and balances that the «distinct and separate» (Fed. 51, Hamilton, Madison and Jay 2003: 320) powers and branches of government impose on each other, including the constitutionally devised rivalry between the two, differently elected and hence alternatively oriented bodies of the legislature (bicameral system). In addition, Madison here highlights the controls imposed on government, not internally but externally, through the multiple private interests that would register undue preference given to one particular faction over others. Finally, Madison singles out two features of the «federal republic of the United States» (Fed. 51, Hamilton, Madison and Jay 2003: 321) that further protect the body politic from the absolutist control of government through one of its branches, including the executive branch, and from a majority of the people exercising partisan ('unjust') governmental control, respectively.

The first federal measure aiming at the preservation of republican liberty consists in the two-tiered system of power separation provided by the constitution ('compound republic'), in which the differential allocation of power between the member states, on the one hand, and the federal union, on the other hand, results in «two distinct governments» (Fed. 51, Hamilton, Madison and Jay 2003: 320), each of which in turn undergoes further institutional division through the system of checks and balances.

The second federal feature that, according to Madison, functions as an assurance of 'free government' is the territorial size of the United States ('extended republic'), which brings about a vast diversity of concerns, preferences and orientations ('variety of interests') so that none is likely to prevail by forming a politically domineering, absolutist majority (Fed. 51, Hamilton, Madison and Jay 2003: 322). In the eyes of Madison, these features establish the systematic service rendered to the «republican cause» by the «federal principle» in the latter's ingeniously crafted modification through the system of checks and balances and the creative combination with the national principle («modification and mixture of the *federal principle*») (Fed. 51, Hamilton, Madison and Jay 2003: 322).

Compared to Kant's guarded, virtual republicanism and his cautious, futuristic cosmopolitanism, the U.S. Constitution, as co-designed and co-interpreted by Madison, is the founding document of a popular government about to go into effect, with Madison demonstrating its radical modernity in combining all three classical constitutional types through a system of checks and balances that is enhanced further through the mixing of republican, federal and national forms and modes of government. But the unique situation of an entirely new beginning in theory and practice that made the American political experiment possible, remained below the horizon of Kant's thinking as well as that of almost all his contemporaries, whose politico-philosophical imagination was deeply shaped by the Westphalian world – that system of large Continental European states, each maintained externally through a precarious balance of power and internally through an absolute monarchical regime, in force since the treaties of Münster and Osnabrück ending the Thirty Years War (1618-1648). To be sure, Kant experienced, though vicariously, the uprising against the Ancien Régime in France. But he, like so many at the time, missed the other revolution in far away North America that first brought together, in theory and practice, republicanism and federalism, popular government and the representative system, federal and national republicanism, political freedom and civic liberty.

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