

**The London School of Economics and Political Science**

*Judging Politically: Kant's Public Right revisited*

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## **Declaration**

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## **Abstract**

This thesis offers a novel reading of Kant's *Doctrine of Right*. It argues that *The Doctrine of Right* is plausibly read as a sustained exercise in practical political judgment. In the text, Kant reflexively formulates principles of political judgment – including the formal principle of political judgment – the idea of the general united will. According to this principle, to judge politically is to judge as a citizen. The thesis offers this interpretation in contrast to the mainstream of current scholarship on *The Doctrine of Right*, which is here termed 'Kantian legalism'. This thesis argues that *The Doctrine of Right* is a fundamentally political text in which judgment is a key concept. Part One of this thesis begins by tracing the formulation of the idea of the general united will in the first part of *The Doctrine of Right* 'Private Right'. The thesis then turns to 'Public Right' to argue that Kant's account of political judgment based on the idea of the general united will stands in contrast to an ideal-theoretic account, the attribution of which to Kant Kantian legalism makes plausible. Part Two substantiates this account through three separate chapters which aim to show the consequences of this reading for interpreting public right in each of its three divisions: right of state, right of nations and cosmopolitan right. By revisiting Public Right, this thesis argues that *The Doctrine of Right* embraces the contingency of politics from the finite, human perspective that is characteristic of Kant's philosophy.

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## Abbreviations of Kant's texts

All citations refer to volume and page numbers of the Prussian Academy Edition of *Kant's gesammelte Schriften* (Berlin: Walter de Gruyter and predecessors, 1900—), with the standard A/B form for the first/second editions of the *Critique of Pure Reason*. Most translations are from the Cambridge Editions of Kant's works, published by Cambridge University Press under the general editorship of Paul Guyer and Allen Wood. Divergences from the Cambridge Editions are noted. Discussion of some of the more significant changes can be found in footnotes 167 and 174.

I use the following abbreviations:

Critique of Pure Reason (A:1781/B:1787) – *CPR*.

Critique of Practical Reason (1788) – *CPrR*.

Critique of the Power of Judgment (1790) – *CPJ*.

The Metaphysics of Morals (1797) – *MM*.

An answer to the question: What is enlightenment? (1784) – *WE*.

Groundwork of the Metaphysics of Morals (1785) – *G*.

What does it mean to orient oneself in thinking? (1786) – *WOT*.

On the common saying: That may be correct in theory, but it is of no use in practice (1793) – *TP*.

Toward Perpetual Peace (1795) – *PP*.

On a supposed right to lie from philanthropy (1797) – *OSR*.

On turning out books (1798) – *OTB*.

The Conflict of the Faculties (1798) – *CF*.

Anthropology from a pragmatic point of view (1798) – *A*.

Reflections – *R*.

Drafts for On the common saying: That may be correct in theory, but it is of no use in practice – *dTP*.

Drafts for Toward Perpetual Peace – *dPP*.

Drafts for The Metaphysics of Morals – *dMM*.

Natural right course lectures notes by Feyerabend (1784) – *F*.

## **Introduction – Why Political Judgment?**

Immanuel Kant is amongst the most – if not *the* most – significant philosopher of judgment in the history of Western philosophy. Kant’s philosophy takes up a first-person, finite, and human standpoint.<sup>1</sup> This alone suggests that judgment is central. There is no possibility, for Kant, of an all-seeing, god-like standpoint from which to think and act. The possibility of judgment is central to what it means to be human. Kant’s philosophy aims to orientate the subject in the world through *critique* of our capacity to judge. That is, the attempt to account for and delimit the kinds of judgments that are possible for beings like us, who are both rational and empirical. That this is the centre of Kant’s philosophical project is most obvious in his third critique: *The Critique of The Power of Judgment*. It is, however, increasingly widely accepted – though not universally so – that both Kant’s theoretical philosophy, and his moral philosophy are concerned, respectively, with theoretical and moral judgments;<sup>2</sup> with judgments about what we can know, and judgments about what we ought to do.<sup>3</sup>

It is, then, surprising that leading English language interpretations of Kant’s political philosophy should give the concept of *political judgment* a marginal place. This scholarship tends to focus instead on the concept of law or of an ideal legal system. To be clear, law is a concept of vital importance to Kant’s philosophy, but it is the argument of this thesis that Kant’s political philosophy can plausibly be read as having political judgment at its philosophical core. This is so even in Kant’s most austere, academic, and seemingly least ‘political’ work of political philosophy – *The Doctrine of Right* – the interpretation of which is the core content of this thesis.<sup>4</sup>

In this task, there is little help to be found in the wide literature on political judgment itself. Though Kant’s work on aesthetic judgment in the third *Critique* is a major source for this literature, Kant’s own political work is largely dismissed for its apparent rigidity and a

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<sup>1</sup> On the importance of this first-person standpoint see the work of Karl Ameriks, especially in his *Kant and the Fate of Autonomy* (Cambridge: Cambridge University Press, 2000).

<sup>2</sup> See Béatrice Longuenesse, *Kant and the Capacity to Judge* (Princeton: Princeton University Press, 1998); Karl Ameriks, *Kant and the Fate of Autonomy* (Cambridge: Cambridge University Press, 2000); Barbara Herman, *The Practice of Moral Judgment* (Cambridge, MA: Harvard University Press, 1993).

<sup>3</sup> *CPR*, A805/B833.

<sup>4</sup> In comparison to other works of political philosophy such as *TP* and *PP*. These works are less academic, though no less philosophical for that, but were explicitly written for the wider reading public and hence might be thought to be more ‘political’ in their aims.

priority.<sup>5</sup> I will not engage thoroughly with this particular literature; the aim of my thesis is scholarly. My argument can nonetheless be read as a gentle imploring to political philosophers interested in political judgment to look again at Kant; not because he is necessarily right, but because he does have more to offer when it comes to our own considerations on political judgment.

The thesis is, then, a work of scholarship, not an attempt to make a case for Kant's account of political judgment except in so far as I will argue that it has a certain coherence and philosophical power. The main concern is the philosophical centrality of political judgment to *The Doctrine of Right* such that the work can be plausibly read as establishing certain principles of political judgment. Moreover, Kant's anti-foundational, reflective, and recursive philosophical method implies that such principles can only be found through reflection by the subject engaged in practical political judgment itself. The text of *The Doctrine of Right* is itself an exercise in practical political judgment. My reason for focusing on Public Right is to show that Kant never leaves practical political judgment behind but is rather engaged with it throughout the text.

The central principle of *The Doctrine of Right* which expresses the form of political judgment is the idea of the general united will. The boldest and most systematically significant claim of this thesis is that the general united will is an extension and development of the categorical imperative. The general united will is distinct from the categorical imperative but plays an analogous role for political judgment to the role of the categorical imperative in ethical judgment.

In arguing for this central role for the general united will, I am also arguing that Kant's account of political judgment is importantly distinct from an ideal-theoretic account under which a non-specialist might be tempted to subsume it. This temptation is aided by the currently leading interpretation of Kant's political philosophy in English which I dub 'Kantian legalism' for its preponderant focus on the concept of law. Kantian legalism is, in my view, the most sophisticated and developed account of Kant's political philosophy to date, certainly in English. It is not my purpose to suggest that it is wrong. It is rather the theoretical background context of this thesis, and if I offer a criticism, it is only that it leaves Kant open to being read as having an ideal-theoretic account of political judgment. To a certain degree, this criticism involves a caricature of both the ideal-theoretic account of

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<sup>5</sup> *CPJ* 20:211 and see works cited in fn. 14.



political judgment, and of Kantian legalism. The purpose of this is to present a foil against which the thesis highlights what is distinctive about Kant's account of political judgment.

The remainder of this introduction is concerned with the following tasks. First, to give a brief account of what 'political judgment' is or could be. Second, to suggest there is good reason to think that there is a need for an account of political judgment in *The Doctrine of Right* which is distinct from Kant's account of moral judgment. Third, to trace the reception of Kant's political philosophy in English to the emergence of Kantian legalism. Fourthly, and finally, to offer an overview of the argument to come.

### Section One – What is Political Judgment?

Political judgment is a difficult but important concept for philosophers. Nearly all would agree that at least some degree of good political judgment is necessary for politics to go well, yet the concept itself remains elusive. Political judgment asks the question 'what should be done?' It is a form of practical judgment, but it is political and so asks this question in a collective context. Beyond these minimal statements, what political judgment involves and what it means to have 'good' political judgment remain subjects of discussion amongst political philosophers.

Political judgment is a concept that contains much promise, and yet remains somewhat mysterious. It sits at the intersection of political theory and practice, and it is often invoked to bridge the gap.<sup>6</sup> The philosophical literature on political judgment is thus large, diverse and draws on a huge range of sources and influences.<sup>7</sup> One influential source is Aristotle and his account of practical wisdom or *phronesis*. However, considering my focus on Kant, the central figure here must be Hannah Arendt. Kant is a significant presence in contemporary philosophical discussions of political judgment through her defining influence. Arendt devised a new political philosophy centred on the concept of political judgment, taking

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<sup>6</sup> See Richard Bourke, "Theory and practice: the revolution in political judgement", in *Political Judgement: Essays for John Dunn*, ed. by Richard Bourke and Raymond Geuss (Cambridge: Cambridge University Press, 2009), pp. 73-110.

<sup>7</sup> Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge: Cambridge University Press, 2006).

inspiration from Kant's work on aesthetic judgment. Arendt, however, was dismissive of Kant's politics even claiming that he never wrote a political philosophy.<sup>8</sup>

Arendt's influence on discussions of political judgment stems from her *Lectures on Kant's Political Philosophy*, the intended basis for the third part of her unfinished *The Life of the Mind*.<sup>9</sup> The ideas in this text and others have been carried forward through scholars such as Ronald Beiner in his *Political Judgement*.<sup>10</sup> A quite different line of her influence (and of criticism) can also be traced through the work of Jacques Rancière.<sup>11</sup> Arendt rejects Kant's political philosophy in favour of developing a new one centred on judgment. She adapts Kant's work on aesthetic judgment and the notion that such judgments are grounded in a *sensus communis* (roughly, 'common sense') to develop a new political philosophy.<sup>12</sup> This Arendtian approach, often also drawing on Aristotle, has gone on to influence accounts of political judgment into the 21<sup>st</sup> Century.<sup>13</sup>

The Arendtian account has largely defined the reception of Kant in the philosophical literature on political judgment. With Arendt, most of this literature rejects Kant's political philosophy as a basis for thinking about political judgment.<sup>14</sup> Kant's philosophy is deemed too be deterministic, relying on the application of a priori principles in judgment. By contrast, politics is said to be more suited to the form of 'reflecting' judgment found in Kant's

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<sup>8</sup> Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. with an interpretative essay by Ronald Beiner (Brighton: The Harvester Press, 1982), p. 7.

<sup>9</sup> Hannah Arendt, *The Life of the Mind*, ed. Mary McCarthy (San Diego, CA: Harvest, 1981)

<sup>10</sup> Ronald Beiner, *Political Judgement* (Cambridge: Cambridge University Press, 1983); see also Hannah Arendt, *Responsibility and Judgment*, ed. By Jerome Kone (New York, NY: Schocken Books, 2003).

<sup>11</sup> Jacques Rancière, *Dis-agreement: Politics and Philosophy*, trans. by Julie Rose (Minneapolis, MN: University of Minnesota Press, 1999) and Jacques Rancière, *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (London: Bloomsbury Academic, 2015), especially chapters 2 & 3.

<sup>12</sup> Not to be conflated with a 'Humean common sense'. Both for Kant and Arendt, *sensus communis* has a priori connotations.

<sup>13</sup> Alessandro Ferrara, *Justice and Judgment* (London: SAGE, 1999); Alessandro Ferrara, *The Force of Example* (New York, NY: Columbia University Press, 2008); and Linda Zerilli, *A Democratic Theory of Judgment* (Chicago, IL: University of Chicago Press, 2016).

<sup>14</sup> See discussion in *Judgment, Imagination and Politics*, ed. by Ronald Beiner and Jennifer Nedelsky, (Landam, MD: Rowan & Littlefield, 2001); Peter Steinberger, *The Concept of Political Judgment* (Chicago, IL: University of Chicago Press, 1993), especially ch. 2; and Friedrich Kratochwil, "Judgement: A Conceptual Sketch" in *The Oxford Handbook of International Political Theory*, ed. by Chris Brown and Robyn Eckersley (Oxford: Oxford Handbooks, 2018).

aesthetics, in which there is no prior principle that is simply applied in judgment.<sup>15</sup> This is supposedly due to the complexity and contextualist quality of political judgment. There are, of course, non-Arendtian approaches to political judgment available. There is, for example, a kind of political realist account of political judgment.<sup>16</sup> Interestingly, despite the differences between this and the Arendtian and Aristotelian accounts, Kant's politics is rejected for much the same reasons in both.

The Arendtian account does not propose itself as scholarship on Kant's political philosophy, and so this thesis is in some sense tangential – if hopefully of interest – to the contemporary literature on political judgment. It does, however, raise the question of why I do not focus on the third *Critique* in this thesis. It seems that a full account of political judgment in Kant would require drawing on material from Kant's *Critique of the Power of Judgment*, as well as from other of Kant's political, anthological, or historical writings,<sup>17</sup> and yet I propose to focus almost solely on *The Doctrine of Right*. Whilst there is merit to this question, the aim of my project is somewhat different and more limited. My aim is to interpret *The Doctrine of Right* itself as an exercise in practical political judgment that reflexively establishes its principles. I cannot, therefore, share the focus on reflecting judgment that characterises the Arendtian account.

To elaborate on this point, in the *Critique of the Power of Judgment*, Kant distinguishes between two kinds of judgment. Along with 'reflecting' judgment, there is also 'determining' judgment. In the latter the judgment takes the form of the application of a prior universal to a particular, such as the application of a moral law. In the former, the universal is found in the particular, and this characterises aesthetic and teleological judgment. Whilst an account of

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<sup>15</sup> Both Kant's importance to and his dismissal by this literature can be fairly traced to his distinction between determining and reflecting judgment. That is the power of judgment is either for "determining an underlying concept through a given empirical representation" or for "reflecting on a given representation, in accordance with a certain principle, for the sake of a concept that is thereby made possible" or, put another way, in determining judgment the principle the particular is to be subsumed under is formed prior to judgment and in reflecting judgment the principle is formed through judgment itself. The concept of reflecting judgment is central to the literature of political judgment, but Kant's political philosophy is rejected as he places it under moral philosophy as involving determining judgment. See *CPJ* 20:211 and fn. 17.

<sup>16</sup> *Political Judgement*, ed. by Richard Bourke and Raymond Geuss (Cambridge: Cambridge University Press, 2009); John Dunn, *The Cunning of Unreason* (London: HarperCollins, 2000).

<sup>17</sup> A very good example of this is Miguel Vatter, 'The People Shall Be Judge: Reflective Judgment and Constituent Power in Kant's Philosophy of Law', *Political Theory* 39 (6) (2011), 749-776.

reflecting judgment, especially as it concerns teleology, would be necessary for a full account of political judgment in Kant, in the context of the practical, and hence, moral reasoning of *The Doctrine of Right* specifically, it is determining judgment, the kind which characterises moral judgment, that is crucial.<sup>18</sup>

Political judgment, then, in the context of Kant's *Doctrine of Right* is a kind of moral, determining judgment. It concerns collective decision making or in Kantian terminology "external legislation", as we shall see in the next section.<sup>19</sup> It concerns matters of state, of law and the relations between individuals, and between individuals and states. Fundamentally, it concerns the exercise of power and authority over others. This understanding is admittedly still vague but given that this thesis aims to arrive at an understanding of the nature of political judgment in *The Doctrine of Right*, this is necessarily so at this point.

## Section Two – The Need for an Account of Political Judgment

Judgment as such is relatively sparsely addressed in the leading contemporary 'Kantian legalist' interpretations of *The Doctrine of Right*. Unsurprisingly this means these scholars do not explicitly formulate an account of political judgment in Kant. As I discuss in Chapter One, there is a place for legal judgment within these accounts, and I make an argument to favour a political rather than legal account of judgment in *The Doctrine of Right* in Chapter Four. For now, however, there is a need to address why one should think there is such an account of political judgment to be found in *The Doctrine of Right*.

In the first instance, simply by virtue of the status of *The Doctrine of Right* and the wider political philosophy as *practical* philosophy, some account of political judgment is at the very least assumed. If the principles elaborated in *The Doctrine of Right* were not supposed to relate to practical judgment in some way, then Kant's political philosophy would not have practical content. To say that Kant's political philosophy would have no practical content is to say that it is not moral in Kantian terms. This is not a sustainable interpretation.

Merely architectonically, we could point out that *The Doctrine of Right* forms the first half of *The Metaphysics of Morals*. In a more specific, yet also elaborated fashion, we could point to the passages of *Toward Perpetual Peace* in which Kant argues that "politics must bend its

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<sup>18</sup> *CPJ*, 20:221-6.

<sup>19</sup> *MM* 6:218-21.

knee before right”.<sup>20</sup> These passages indicate that not only is it implausible to suggest that Kant intended his political philosophy to have no practical content, but further that it is one of the claims he finds most important to defend. Indeed, one could read the entire argument of the Private Right section of *The Doctrine of Right* as aiming principally to show how it is possible that external objects could be apt for moral claims of right.

So, it seems that there must be some form of political judgment expressed in Kant’s political philosophy precisely because Kant’s political philosophy is part of his moral philosophy. Indeed, one might be tempted to suggest that Kant’s account of political judgment is simply his account of moral judgment. If politics is part of morality, then political judgment is moral judgment. Yet, the matter is not straightforward, and this is due to Kant’s distinction between right and virtue. This divides morality into right and virtue; juridical and ethical duties. This is a division found in the doctrinal part of his moral philosophy, and exactly how we should understand this division in relation to the critical portion is a matter of debate among Kant scholars.<sup>21</sup> What is clear, however, is that it introduces a problem in thinking about political judgment.

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<sup>20</sup> *PP*, 8:380.

<sup>21</sup> Much of this debate concerns how Kant’s Universal Principle of Right relates to The Moral Law as expressed through the idea of The Categorical Imperative. The debate is between those who view *The Doctrine of Right* as grounded on Kant’s fundamental moral principle “act on a maxim which can also hold as a universal law” (6:226) such as Jürgen Habermas and Paul Guyer; those who view it as independent of it such as Allen Wood and Marcus Willaschek; and those who hold positions in between these poles such as Arthur Ripstein, which we might call ‘complex dependency’ views. In reality the substance of these positions constitutes a spectrum, rather than clearly delineated camps. For example, one might reasonably disagree with my classification of Guyer under the dependency rather than complex dependency view. In this debate, I find the complex dependency position most convincing, and though I won’t engage in the debate any further, my arguments in this thesis can be read in light of that. A full argument for this position is well beyond the scope of the present thesis. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: Polity Press, 1996), pp. 104-106; Paul Guyer, “Kant’s Deductions of Principles of Right” in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 23-64; Allen Wood, “The Final Form of Kant’s Practical Philosophy” in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 1-22; Marcus Willaschek, “Which Imperatives for Right?”, in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 65-88; Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 355-88. See also pp. 168-9 in the Conclusion of this thesis.

When discussed in the literature, moral judgment in Kant primarily refers to ethical judgment – that is judgments that concern virtue. As determining judgment, the idea is that moral judgment involves the agent subsuming a particular under a universal moral principle. This involves the subject determining their will by a principle – called a maxim (a principle of proposed action). There are many debates about how exactly this process works in ethical judgment, including, for example, whether The Moral Law, in its guise as the categorical imperative, is a principle of moral judgment or a higher order principle of moral deliberation.<sup>22</sup>

In any case, the idea is that in ethical judgment the subject’s will is determined by a moral principle. This is where the problem for political judgment lies. The nature of the distinction between right and virtue concerns exactly this question. The distinction involves whether or not other “incentives” besides duty are involved in the determining of the agent’s will in fulfilling juridical or ethical duties.<sup>23</sup> In the latter case they aren’t, in the former they are. In matters of right, and hence of politics, it doesn’t seem to matter if the subject’s will is determined by the moral principle itself. Since Kant requires that there be a will that is determined by a principle of practical reason for practical/moral judgment to be possible, the right/virtue distinction raises a problem for political judgment. This strongly suggests that a simple ‘read across’ for the form of moral or ethical judgment to political judgment is not possible.

### Section Three – Kantian Legalism

In Chapter One, I will give a more detailed account of my suspicions as to why current scholarly interpretations of *The Doctrine of Right* do not address the concept of political judgment. In this section, I want to set out the theoretical background for these suspicions and the thesis as a whole by tracing the emergence of the leading English language approach to interpreting *The Doctrine of Right* which I call Kantian legalism.

Kant’s political philosophy was until recently relatively overlooked by English readers of Kant. There are some exceptions to this, and works by Mary Gregor, Howard Williams, Hans

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<sup>22</sup> Cf. discussion in Herman, *The Practice of Moral Judgment*, 1993.

<sup>23</sup> *MM*, 6:219.

Saner and a few others received some attention in English language political theory.<sup>24</sup> A separate line of influence concerns international relations theory, and specifically IR Liberalism or Neo-liberalism.<sup>25</sup> Michael Doyle draws on *Toward Perpetual Peace* as he attempts to scope out a liberal tradition for international relations theory, for example.<sup>26</sup> In turn, international political theory would pick up on this influence, drawing on Kant's supposed rejection of international power politics and on his supposed support for an early form of democratic peace theory.<sup>27</sup> For the most part, however, English language scholarship on Kant's political philosophy begins to increase dramatically in the late 20<sup>th</sup> and early 21<sup>st</sup> Centuries, with works by Katrin Flikschuh and Elisabeth Ellis especially notable.<sup>28</sup>

These works attempted to push back on what to that point had been the most significant impact Kant had had in political philosophy, namely his influence on the ideal theory of John Rawls.<sup>29</sup> Rawls' adaption of Kant's moral philosophy, especially the categorical imperative recast as a decision procedure, brought Kant into the centre of political philosophical debate. Whether or not one finds Rawls' adaption of Kant's ethics for politics either plausible or even in the spirit of Kant's own political philosophy, the influence of this kind of Kantian constructivism is without doubt.<sup>30</sup> Rawls inspired a huge literature in political philosophy, but

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<sup>24</sup> Mary Gregor, *Laws of Freedom* (New York, NY: Barnes & Noble, 1963); Howard Williams, *Kant's Political Philosophy* (New York, NY: St. Martin's Press, 1983); Hans Saner, *Kant's Political Thought: Its origins and development*, trans. by E. B. Ashton (Chicago, IL: The University of Chicago Press, 1973).

<sup>25</sup> As advanced in Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984).

<sup>26</sup> Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs" *Philosophy & Public Affairs*, 12 (3) (1983), 205–35; Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 2" *Philosophy & Public Affairs*, 12 (4) (1983), 323–53; Michael Doyle, *Ways of War and Peace* (New York, NY: W. W. Norton & Company, 1997), pp. 251-300.

<sup>27</sup> Jürgen Habermas, "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight" in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. by James Bohman and Matthias Lutz-Bachmann (Cambridge, MA: MIT Press, 1997), pp. 113-154, (p. 116); John Rawls, *The Law of Peoples*, (Cambridge, MA: Harvard University Press, 1999), pp. 44-5. I return to these issues in Chapter Five.

<sup>28</sup> Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000); Elisabeth Ellis, *Kant's Politics: Provisional Theory for an Uncertain World* (New Haven, CT: Yale University Press, 2005).

<sup>29</sup> John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1999); John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993).

<sup>30</sup> John Rawls, "Kantian Constructivism in Moral Theory", in *Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999).

also in Kant scholarship primarily among those who would approach Kant from a systematic rather than historical perspective.<sup>31</sup> Amongst the important developments of the more ‘Kantian’ of these Kantian constructivists, such as Christine Korsgaard and Onora O’Neill, was a renewed focus on Kant’s first-personal perspective that Rawls had eschewed.<sup>32</sup> Despite this, these works remained primarily orientated by Kant’s moral and ethical philosophy, and the *Groundwork of the Metaphysics of Morals* above all. The works of Flikschuh and Ellis (especially Flikschuh) represent a turn away from Kant’s moral and ethical philosophy, towards the political philosophy, and *The Doctrine of Right* above all.

The arrival of Kantian legalism at the forefront of scholarship on Kant’s political philosophy is signalled by the publication of Arthur Ripstein’s *Force and Freedom* and B. Sharon Byrd and Joachim Hruschka’s *Kant’s Doctrine of Right: a Commentary* in 2009 and 2010 respectively.<sup>33</sup> Kantian legalism marked the definitive turn in English language scholarship towards *The Doctrine of Right* as Kant’s most important political text.<sup>34</sup> This focus, as well as its well-merited leading status as scholarship of Kant’s politics is the reason that Kantian legalism forms the intellectual context in which the scholarship of this thesis is situated. My aim is not to demonstrate that Kantian legalism is wrong, though I will differ on many points

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<sup>31</sup> See for example: David Brink, “Rawlsian Constructivism in Moral Theory”, *Canadian Journal of Philosophy*, 17 (1987), 71–90; Thomas E. Hill Jr. “Kantian Constructivism in Ethics”, *Ethics*, 99 (1989), 752–770; Ronald Milo, “Contractarian Constructivism”, *Journal of Philosophy*, 92 (1995), 181–204; Stephen Darwall, “Contractualism, Root and Branch: A Review Essay”, *Philosophy and Public Affairs*, 34 (2006), 193–214; *Constructivism in Practical Philosophy*, ed. by James Lenman and Yonathan Shemmer (Oxford: Oxford University Press, 2013).

<sup>32</sup> Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996); Christine Korsgaard, *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Cambridge: Cambridge University Press, 2008); Onora O’Neill, *Constructions of Reason: Explorations in Kant’s Practical Philosophy* (Cambridge: Cambridge University Press, 1989); Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reason*, (Cambridge: Cambridge University Press, 1996). See also Onora O’Neill, “Constructivism in Rawls and Kant”, in *The Cambridge Companion to Rawls*, ed. by Samuel Freeman (Cambridge: Cambridge University Press, 2003) pp. 347–367.

<sup>33</sup> This is despite other important works appearing around the same time, e.g. Oliver Eberl und Peter Niesen, *Immanuel Kant: Zum ewigen Frieden/Auszüge aus der Rechtslehre: Kommentar* (Berlin: Suhrkamp Studienbibliothek, 2011); Ripstein, *Force and Freedom*; B. Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010).

<sup>34</sup> On taking *The Doctrine of Right* as the key text for Kant’s political and legal philosophy, see Byrd and Hruschka, *Commentary*, pp. 13-5.



of interpretation. My aim is rather to use Kantian legalism's vulnerability to being read as attributing to Kant an ideal-theoretic account of political judgment to highlight what is distinctive in Kant's account of political judgment as I interpret it in this thesis. I will say more about Kantian legalism and the ideal-theoretic model of political judgment in Chapter One. For now, let me say more about Kantian legalism.

The term "Kantian legalism" is novel, and I introduce it here to capture an approach to interpreting Kant's political philosophy epitomised by *Force and Freedom* and *Commentary*. It is primarily an English language approach and, in this thesis, it is treated as such. It must, however, be noted that a focus on law is common in German language interpretations as well, as the inclusion of Byrd and Hruschka suggests. There, Kant is interpreted in the natural law tradition, with a focus on Achenwall whose text Kant used for his lectures on right.<sup>35</sup> There is also a degree of convergence on this point, as the increasing volume of English language analysis of Kant's lectures and on Achenwall demonstrates.<sup>36</sup>

Kantian legalism is marked by a decisive answer to the question of the relationship of law and politics in *The Doctrine of Right*: Law subordinates politics. Indeed, I take this subordination to be the paradigmatic characteristic of legalism as an approach to political philosophy.<sup>37</sup> Political judgment is constrained within the law and only rightfully exercised through law. In Kant scholarship, this is now the leading approach. It is not only a scholarly project, however. It is increasingly proposed as a liberal and/or republican approach in contemporary political philosophy.<sup>38</sup> Ripstein is himself engaged in contemporary legal philosophy in which he is influenced by, among other things, insights he takes from his work on *The Doctrine of Right*.<sup>39</sup> In addition, a wide range of scholars have taken a fundamentally

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<sup>35</sup> Notes taken of Kant's lectures are published as *F*.

<sup>36</sup> See some of the contributions to *Kants Naturrecht Feyerabend: Analysen und Perspektiven*, ed. by Margit Ruffing, Annika Schlitte, and Gianluca Sadun Bordoni (Berlin: De Gruyter, 2020); as well as the recent translation Gottfried Achenwall, *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy*, ed. by Pauline Kleingeld, trans. by Corinna Vermeulen, with an introduction by Paul Guyer (London: Bloomsbury, 2020).

<sup>37</sup> Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1986).

<sup>38</sup> Japa Pallikkathayil, "Neither Perfectionism nor Political Liberalism", *Philosophy and Public Affairs*, 44 (3) (2016), 171-196; Louis-Philippe Hodgson, "Kant on the Right to Freedom: A Defense", *Ethics*, 120 (4) (2010), 791-819.

<sup>39</sup> Arthur Ripstein, *Private Wrongs* (Cambridge (MA): Harvard University Press, 2016).

Kantian legalist interpretation and applied it to contemporary questions in political philosophy.<sup>40</sup>

Kantian legalism thus refers to numerous interpreters and naturally there are differences between them, but there are commonalities that define the approach. For Kantian legalists, Kant argues in *The Doctrine of Right* that the equal freedom of all individuals could possibly be realised only through law and the legal state: The *Rechtsstaat*. This is impossible in the state of nature because in the state of nature relations between individuals are in some way problematically unilateral. This is made clear in rights claims, such as those to property and contract. If individuals are equal in status and free with regard to each other, then it becomes problematic to explain how any individual can unilaterally place others under obligations, as they do through rights claims. For example, in asserting a rights claim to an object as property, the individual unilaterally places all others under an obligation to refrain from interfering with that object. The trouble is that this violates the equal freedom of others.

The solution Kant finds, according to Kantian legalists, is law and the legal state grounded in the omnilateral or general united will. The general united will is read as an idea that requires institutionalisation such that the sovereign of the legal state represents that will whilst law making. If it does, then that law is not unilateral and can provide the conditions for rights claims. The legal state thus underwrites the rights claims of individual citizens which would otherwise be problematically unilateral. The state, especially considered in accordance with the state in idea – Kant’s ideal of the state – is structured to achieve this end.<sup>41</sup> As Thomas Sinclair puts the point: “The most important means by which this is achieved is that there exist legislative, judicial, and executive roles in the Kantian state that are defined by obligations to create and sustain through law a rightful condition.”<sup>42</sup> As Kantian legalists read *The Doctrine of Right*, it is law, legal process and the legal system that secure the freedom

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<sup>40</sup> For example, attempts to ground welfare systems on Kant’s political philosophy. See Luke Davies, “Kant on Welfare: Five Unsuccessful Defences”, *Kantian Review*, 25 (1) (2018), 1-25 for discussion and criticism.

Further, see Japa Pallikkathayil on issues related to bodily autonomy such as the right to sell or donate organs, “Persons and Bodies”, in *Freedom and Force: Essays on Kant's Legal Philosophy*, ed. by Sara Kisilevsky and Martin J. Stone (Oxford: Hart Publishing, 2017), pp. 35-54.

<sup>41</sup> The state in idea is the subject of Chapter Two of this thesis.

<sup>42</sup> Thomas Sinclair, “The Power of Public Positions: Official Roles in Kantian Legitimacy” in *Oxford Studies in Political Philosophy, Volume 4*, ed. by David Sobel, Peter Vallentyne and Steven Wall (Oxford: Oxford University Press, 2018), pp. 28-51, (p. 34).

and equality of citizens. This is what I mean by the subordination of politics to law in Kantian legalism.

As one would expect, Kantian legalism includes substantive commitments, such as a strong commitment to the rule of law in *The Doctrine of Right*. Perhaps less obviously, there is also something distinct in the philosophical approach Kantian legalism takes to *The Doctrine of Right*. Kantian legalism takes Kant's philosophical project in *The Doctrine of Right* to be the elaboration of a set of principles that make a legal system necessary, define its ideal form, and that ought to be enacted through the legal state. That is to say that the principles Kant derives in *The Doctrine of Right* are not simply realised through law, but rather *are* legal principles and the principles of the ideal legal system. Politics is then said to be the task of applying these principles in the world, and in doing so the equal freedom of citizens is secured. Crucially, rightful politics becomes a matter of specifying what are abstract and general a priori principles through making law under empirical conditions. All further political action is then constrained by principles of law as specified. Rightful politics is thus a fundamentally legal matter.

As argued in Chapter One, although Kantian legalism does not address the question of political judgment explicitly, it nonetheless lends itself to an ideal-theoretic model, and it is this that the thesis challenges. Kantian legalism thus forms the immediate intellectual context for the thesis, and the thesis is not oppositional to it. I do differ from Kantian legalists in certain respects and offer challenges to it, but I don't set out to show that Kantian legalism is incorrect. It is rather that the openness of Kantian legalism to an ideal-theoretic model of political judgment makes it useful as contrast to Kant's distinctive account of political judgment. Kant's account of political judgment, not Kantian legalism as such is my real focus.<sup>43</sup>

#### Section Four – The Argument to Come

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<sup>43</sup> How far my reading of Kant's account of political judgment in *The Doctrine of Right* could be adopted by Kantian legalists would be something for them to judge. However, as discussed in Chapter Four, my understanding of political judgment in Kant does lead me to a very different interpretation of Kant's politics on some crucial points.

The argument of this thesis is that *The Doctrine of Right* is itself an exercise in practical political judgment. In reflective and reflexive first-personal practical reasoning, Kant derives a series of principles of political judgment, including the principle that expresses the form of political judgment – the idea of the general united will. The thesis is focused on public right, i.e. right in the context of the existence of at least one state.<sup>44</sup> Kant is engaged in practical political judgment throughout the text, and it is in the context of public right that the central role played by practical political judgment becomes especially clear. It is my contention that Kantian legalism (and scholarship on Kant’s political philosophy in general) places much less of the argumentative and philosophical heft of *The Doctrine of Right* in its second part on Public Right. This is, I suspect, one reason political judgment is not and has not been central to interpretations of Kant’s political philosophy. It is also why I suggest that Public Right needs to be revisited.

The argument is in six chapters divided into two parts. Part One – System and Ideals – argues that the ideal-theoretic model of political judgment is not the correct reading of Kant’s account of political judgment in *The Doctrine of Right*. Chapter One – Recovering Political Judgment – sets up much of the rest of the thesis by introducing some of the key concepts and ideas that are in play. First, it introduces the ideal-theoretic model of political judgment and argues that Kantian legalism is plausibly read as compatible with it. It then introduces an alternative model, based on the idea of the general united will. That argument is made through an analysis of Private Right in the first Part of *The Doctrine of Right*, and the chapter concludes by motivating the shift to Public Right, which is the focus of the rest of the thesis.

Chapters Two and Three make the case against the ideal-theoretic model. Chapter Two – A Practical Ideal – argues that the one ideal in *The Doctrine of Right*, namely the ‘state in idea’ or the ideal of a rightful association, does not function as ideal in the way the ideal-theoretic model of political judgment would require it to. Instead, it is a practical ideal that is conditioned by and posited through practical political judgment. Chapter Three – Perpetual Peace is not an Ideal – argues, simply, that perpetual peace, the highest political good in *The Doctrine of Right*, which might be plausibly read as an ideal, is in fact no such thing. The case against reading *The Doctrine of Right* as compatible with the ideal-theoretic model of political judgment is thus concluded as it is shown there is no such theoretic-ideal in Kant’s political philosophy.

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<sup>44</sup> ‘At least one state’ as public right also covers the right of nations and cosmopolitan right.

Part Two – Judgment and Application – offers three separate but related examples of the role of judgment in Public Right. The examples do not systematically build on each other, but each serves as an argument for the central role of political judgment in *The Doctrine of Right*. Chapter Four – Ambiguous Sovereignty – argues that a key ambiguity in Kant’s conception of sovereignty can be accounted for if we understand that sovereignty is a political and not a legal concept in *The Doctrine of Right*. The key interpretative move to enable this is to see the ambiguity not as a mistake, but as result of the need for sovereign political judgment in politics.

Chapter Five – Kant and the International Balance of Power – moves from The Right of State to The Right of Nations and argues for the place of a balance of power in Kant’s conception of perpetual peace in *The Doctrine of Right*. This is done by tracing and linking the development of Kant’s views on the balance of power and the institutional form of perpetual peace through the 1790s. Finally, concerning Cosmopolitan Right, Chapter Six – Kant and the Settler Contract – argues that the limits of the idea of the general united will as the form of political judgment enable us to make sense of Kant’s struggles to account for rightful interaction between European settlers and non-state, non-European peoples.

**Part One – System and Ideals**

## Chapter One – Recovering Political Judgment

In the preface to the first part of *The Metaphysics of Morals*, which contains the general introduction and *The Doctrine of Right*, Kant makes the following statement regarding Public Right:

*Toward the end of the book I have worked less thoroughly over certain sections than might be expected in comparison to the earlier ones, partly because it seems to me that they can be easily inferred from the earlier ones and partly, too, because the later sections (dealing with public right) are currently subject to so much discussion, and still so important, that they can well justify postponing a decisive judgment for some time.*<sup>45</sup>

Kant here refers to the conceptual distinction between public right, or civil right given the existence of at least one state, and private right, or natural right in the state of nature.<sup>46</sup> Since the question of drafting is at issue, he also refers to the division in the text of *The Doctrine of Right* between the first section on Private Right and the second on Public Right. Aligning these distinctions, as we must assume is Kant's intention despite the fraught history of the manuscript of *The Doctrine of Right*, he makes two claims which give the appearance of being, at the least, in tension.<sup>47</sup> First, Kant claims that he works over Public Right less thoroughly because it can be "easily inferred" from what has come earlier in Private Right. Second, he claims that public right remains subject to "so much discussion" and hence "decisive judgment" must be postponed for some time. The first claim suggests Kant already has in hand what he needs to deliver judgments on public right; the second that there remains work to be done in light of on-going discussion.

Both are claims are plausible despite the apparent tension. The first claim reflects Kant's comparative rush to complete *The Metaphysics of Morals*, which he had promised for so long

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<sup>45</sup> *MM* 6:209.

<sup>46</sup> *MM* 6:242.

<sup>47</sup> On the fraught publication history of *The Doctrine of Right*, see the introduction to Mary Gregor's translation of *The Metaphysics of Morals* in the Cambridge Edition of Kant's *Practical Philosophy*; Bernd Ludwig, "'The Right of a State'" in Immanuel Kant's Doctrine of Right", *Journal of the History of Philosophy*, 28 (3) (1990), 403-415; Thomas Mautner, "Kant's Metaphysics of Morals: A Note on the Text." *Kant Studien*, 72 (3) (1981), pp. 356-359. Such are the issues with the published version of the text that Ludwig has published a revised edition, and such is the controversy about these extensive changes that only some are incorporated into the Gregor translation, see Bernd Ludwig, *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre*, (Hamburg: Felix Meiner Verlag, 1986).

and not yet delivered.<sup>48</sup> The second reflects the wild turmoil of European political thought in the wake of The French Revolution, in which Kant was an active participant and during which his views appear to have changed in response to criticism, particularly on issues concerning public right.<sup>49</sup> They might, of course, both be true. It might be true that one has all one needs concerning the matter of private right on the basis of what Kant writes in the Private Right section to infer conclusions concerning the matter of public right that Kant goes on to write about in the Public Right section, but that this inference is complicated (though easy enough if one is Kant) and perhaps requires additional premises, many of which remain, at that moment in 1797, under discussion.

It seems to me that Kantian legalism, as the leading English language approach to interpreting *The Doctrine of Right* favours an emphasis on the first claim – that public right is easily inferred from private right. For Kantian legalism, the key to understanding Public Right is Private Right. Judgments about private right determine judgments about public right. It thus comes as no surprise that the core texts of Kantian legalism reflect this. B. Sharon Byrd and Joachim Hruschka's *Commentary to The Doctrine of Right* begins with the transition from private to public right, before retreating back through the text to issues from the Introduction to *The Doctrine of Right* and Private Right, encompassing the innate right to freedom, the permissive law, external mine and thine, property and so on.<sup>50</sup> The issues of Private Right are taken to explain why the transition happens and then from this transition they can be used to infer conclusions about issues in Public Right, such as, to use Byrd and Hruschka's distinction, 'the state in idea' and 'the state in reality'. Similarly, Arthur Ripstein

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<sup>48</sup> Manfred Kuehn, "Kant's *Metaphysics of Morals*: The History and Significance of its Deferral" in *Kant's Metaphysics of Morals: A Critical Guide*, ed. by Lara Denis (Cambridge: Cambridge University Press, 2011), pp. 9-27. Less specific but interesting discussion can also be found in Manfred Kuehn, *Kant: A Biography* (Cambridge: Cambridge University Press, 2001).

<sup>49</sup> Comprehensive discussion of Kant's political context can be found in Reidar Maliks, *Kant's Politics in Context* (Oxford: Oxford University Press, 2014). For an example of Kant's changing views see Pauline Kleingeld, "Kant's Second Thoughts of Race", *The Philosophical Quarterly*, 57 (2007), 573-92. Rebuttal in Robert Bernasconi, "Kant's Third Thoughts on Race" in *Reading Kant's Geography*, ed. by Stuart Elden and Eduardo Mendieta (New York, NY: State University of New York Press, 2011), pp. 291-318. I discuss one other such change of view in detail in Chapter 5.

<sup>50</sup> B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010). Admittedly, this textual ordering of the chapters somewhat breaks down after this but, for illustrative purposes, the subjects of the first six chapters establish the point.



argues that fundamental matters of public right – such as the structure of the state in a separation of powers – are determined by issues in private right – in this case, his analysis of three problems in the state of nature.<sup>51</sup> Ripstein is quite explicit about this. Consider, for example, his claim that the constitution of the ideal legal state is directly derived from three normative problems of the state of nature:

*The three arguments [concerning the three problems of the state of nature] generate three independent but coordinate branches of government: the legislature must authorize all acts that change, enforce or demarcate rights; the executive must enforce rights in accordance with law, and the judiciary must decide disputes and authorize remedies, again in accordance with law.*<sup>52</sup>

Ripstein is also explicit about the relationship of Private Right/private right and Public Right/public right. He quotes the earlier passage from the Preface to *The Metaphysics of Morals* and states that he will rely on his analysis of private right in his development of Kant's position on public right.<sup>53</sup> Ripstein thus adopts the position I have imputed to Kantian legalism explicitly, and that is no surprise as he is a, if not *the*, key proponent of that interpretative school. For Ripstein, and so for Kantian legalists, Kant's first claim holds precedence in interpreting Public Right.

The second claim is not entirely neglected. However, when it comes to Kant's phrase "subject of so much discussion and still so important" Ripstein takes this to licence his incorporation of "recent discussions of the same issues".<sup>54</sup> There is, of course, nothing questionable about making use of resources developed in later political philosophy, but it is curious that he neglects to refer to Kant's claim that he has postponed "decisive judgment".<sup>55</sup> This is no more than symbolic, but in this moment the crux of the project I undertake in the context of the Kantian legalist literature is highlighted.

Political judgment needs to be recovered in *The Doctrine of Right*. Firstly, political judgment in Public Right needs to be recovered from under the preponderant philosophical focus on

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<sup>51</sup> Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 145-81.

<sup>52</sup> Ripstein, *Force and Freedom*, p. 173.

<sup>53</sup> Ripstein, *Force and Freedom*, p. 183.

<sup>54</sup> *MM* 6:209; Ripstein, *Force and Freedom*, p. 183-4.

<sup>55</sup> *MM* 6:209, my emphasis.

Private Right. In claiming that judgment on public right is postponed, Kant indicates that there is much practical reasoning that remains to be done at a philosophical level even after that on private right is concluded. This practical reasoning is to be informed by private right but cannot be reduced to it. This practical reasoning, I shall argue, is best understood by way of Kant's account of the form of political judgment. Second, political judgment needs to be recovered from the ideal-theoretic model of political judgment. Though not explicitly theorised as such, because Kantian legalism interprets *The Doctrine of Right* as centrally concerned with the principles of law and the ideal legal system, it leaves the text open to being read through the ideal-theoretic model. This at once excludes explicit discussion of, but inevitably is orientated by the necessity of, political judgment for any practical political philosophy. In this second sense, recovering political judgment involves addressing the distinct form of political judgment in *The Doctrine of Right* directly.

This chapter sets out the groundwork for this recovery. In the first Section, I explain in more detail what the ideal-theoretic model of political judgment is, and why Kantian legalism can plausibly be read as endorsing it. It is in contrast to this reading that I present my own interpretation of political judgment in *The Doctrine of Right*. In the second Section, I begin to develop my alternative reading of political judgment in *The Doctrine of Right*. In Section Three, I explain why the idea of the general united will motivates the transition to public right in what I call Kant's 'first political judgment'. In the final section, I discuss how the considerations of the previous two sections motivate me to read political judgment in Public Right, and how this differs from the ideal-theoretic account sketched in Section One. The central claim is that Kant's political philosophy in *The Doctrine of Right* should itself be read as a sustained exercise in practical political judgment. The rest of the thesis aims to supply such a reading.

### Section One – Kantian Legalism and the Ideal-Theoretic Model of Political Judgment

Political judgment is not much discussed in Kantian legalism. Judgment is present, however, albeit in a limited way. It is not 'political' as such, but rather 'legal'. This suggests that there is at least something distinctive about judgment in Kant's politics, and it is this thought that I want to pursue. Though not actively theorised, Kantian legalism does accede to an interpretation of political judgment in *The Doctrine of Right* and in so far as *The Doctrine of Right* is read as practical philosophy, this is inevitable. In this section, I argue that Kantian

legalism can plausibly be read as open to the ideal-theoretic model about political judgment. I say ‘open’ because it is not obvious to me that Kantian legalists would, on reflection, accept this characterisation. However, as long a political judgment is not actively theorised another way, they remain open to this reading and here I aim to show why. My aim is not to argue that Kantian legalism is wrong, though I will present challenges to it. Still less is my argument that an ideal-theoretic approach to political judgment is wrong. Rather, my aim here is to establish a foil against which I can highlight what is distinctive in Kant’s account of political judgment. There is inevitably something of a caricature involved in this approach, but it is enough for my purposes.

To begin, let us remind ourselves of the key features of Kantian legalism. As discussed in the Introduction, Kantian legalism denotes a significant theoretical overlap between different interpretations of *The Doctrine of Right*. For Kantian legalism the freedom and equality of all citizens is realised through law and through the ideal legal state. Legalists argue that, for Kant, without law any assertion of rights claims (e.g. to property) unilaterally places obligations on others (e.g. to refrain from interfering with said property). Law, grounded in the general united, i.e. universal or omnilateral will, gives legal backing to make judgments that would otherwise be problematically unilateral. So far as citizens and officials do not violate these laws, freedom and equality is secured. The legal state is thus conceived as solving problems in the state of nature in order to realise individual rights to freedom and equality.<sup>56</sup>

On legalist interpretations, then, freedom and equality are guaranteed only by the rigorous application of law. As well as this substantive conclusion, legalist interpretations also take a view about the purpose of Kant’s political philosophy. They hold that Kant’s political principles *are* the philosophical principles that comprise the ideal legal system that would fully realise freedom and equality. Kantian legalism thus takes the view that the principles Kant elaborates in his political philosophy are principles of institutions or of law. Ripstein, for example, argues that political freedom can be cashed out as “each person’s entitlements to be his or her own master” and is only possible if “public legal institutions are in place.”<sup>57</sup> In more recent work on the right of nations in Kant, this analysis is extended to the international realm. He claims, for example, that “the international legal order will inevitably be defective

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<sup>56</sup> Cf. Ripstein, *Force and Freedom*, pp. 145-81.

<sup>57</sup> Ripstein, *Force and Freedom*, p. 9.

in relation to its own ideal principle”, which reinforces this fundamental orientation.<sup>58</sup> Along similar lines, Byrd and Hruschka argue that the aim of Kant’s political philosophy is to secure the rights of individuals in “a state guaranteeing ‘due process of law’”.<sup>59</sup>

Kantian legalism thus claims Kant’s political philosophy concerns the principles of the ideal legal state or system: the *Rechtsstaat*. Politics, on this interpretation, is the task of specifying and applying these a priori principles through law making, with all other political action taking place within the constraints of that law. Rightful politics thus becomes a fundamentally legal matter, and for this reason the term ‘legalist’ is an appropriate one.

Law and the ideal of the legal state are central to Kantian legalism, but judgment is much more marginal. There is a role for judgment – in fact there are three – but all are species of legal judgment, with political judgment remaining under theorised. By saying that they are species of legal judgment I mean that they share a common dependence on the existence of a legal order. The first of these roles for judgment is as verdict. As Kant says, the decision of a court is “a *judgment*”.<sup>60</sup> Verdict is the judgment, “an individual act of public justice”, by which the judge applies positive law in a particular case.<sup>61</sup> Verdict is the resolution of Kant’s political practical syllogism: “These are like the three propositions in a practical syllogism: the major premise, which contains the law of that will; the minor premise, which contains the command to behave in accordance with the law, that is, the principle of subsumption under the law; and the conclusion, which contains the verdict (sentence), what is laid down as right in the case at hand.”<sup>62</sup>

Whilst verdict is the paradigmatic case of legal judgment, there are two other roles for it on Kantian legalist interpretations of *The Doctrine of Right*. The second role for judgment is administrative judgment. Here, state officials are empowered to make judgments that would be problematically unilateral for individuals to make in the absence of public office. The office is legally defined and hence grounded in the omnilateral will. The omnilateral will

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<sup>58</sup> Ripstein, *Kant and The Law of War*, p. 235.

<sup>59</sup> Byrd and Hruschka, *Commentary*, p. 1.

<sup>60</sup> *MM* 6:297.

<sup>61</sup> *MM* 6:317.

<sup>62</sup> *MM* 6:313.

therefore grounds the judgments of public officials in administering the affairs of the state.<sup>63</sup> Finally, the third role for judgment in Kantian legalism is legislative judgment. This is the kind of judgment which is involved in specifying a priori principles into positive legislation under contingent conditions.<sup>64</sup>

Now, each of these roles for judgment is legal in the sense that they are premised on the existence of a legal order. This is simply to say that they are judgments that take place within established institutional and legal constraints. Each form of legal judgment broadly speaking conforms to one of the three authorities of the state.<sup>65</sup> The judge only passes verdict on laws passed by the legislator, state officials only judge within the constraints of their offices as defined in law by the legislator, and the legislature does no more than pass law as one of three state authorities. It is in this sense that the explicit treatment of judgment in *The Doctrine of Right* according to Kantian legalism is legal. Every judgment can be given effect through law because rightful judgment always operates within the legal order of the *Rechtsstaat*.

By contrast, Kantian legalists do not give *political* judgment as such much consideration. Given the constraints of the ideal *Rechtsstaat*, in some ways that makes a good deal of sense. In that context the law which constrains judgment is more important than the judgment itself. And that is enough to make one ask whether they have proven Arendt's notorious claim that Kant never wrote a political philosophy correct.<sup>66</sup> Kant didn't write a political philosophy, but a legal one.

However, Kant's political philosophy is not only legal philosophy. Nor can legal judgment be the entire story of judgment in Kant's politics even on a legalist reading. Indeed, it seems to me that there may be an implicit account of political judgment in Kantian legalism and this is an ideal-theoretic account. To see this, we need to note again that the *Rechtsstaat* is an ideal. An ideal is a technical term for Kant, but for our purposes here, it suffices to say that ideals

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<sup>63</sup> Ripstein, *Force and Freedom*, pp. 190-198; Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy" in *Oxford Studies in Political Philosophy, Volume 4*, ed. by David Sobel, Peter Vallentyne and Steven Wall (Oxford: Oxford University Press, 2018), pp. 28-51.

<sup>64</sup> See, for example, Ripstein, *Force and Freedom*, p.10: "The principles of right that Kant introduces are highly abstract, and require the exercise of judgment to apply them to particulars."

<sup>65</sup> *MM* 6:313.

<sup>66</sup> Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. with an interpretative essay by Ronald Beiner (Brighton: The Harvester Press, 1982), p. 7.

are *noumenal* as opposed to *phenomenal*. That is, they are based in reason and not drawn from experience. They are thus not only not realised but not realisable in the world of experience. They are, nonetheless, regulative on judgment in the sense that they must be strived for. Indeed, the Kantian legalists are clearly correct that Kant conceives of the *Rechtsstaat* this way. Kant concludes the largest part of the ‘Public Right’ section of *The Doctrine of Right* by saying: “By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.”<sup>67</sup> The ideal of the *Rechtsstaat*, then, is regulative. It serves to provide an end to which political action is directed. It is here that the ideal-theoretic model of political judgment comes into view. This form of judgment strives to approximate the ideal the *Rechtsstaat* as closely as possible, by, for example, institutionalising the separation of powers.

This model of political judgment will be familiar to many political theorists, especially in Anglophone academia. I detect in it an implicit influence of John Rawls. His own discussion of the role of political judgment is suggestive of this approach.<sup>68</sup> But more importantly, Rawls’ drawing of a distinction between ideal and non-ideal theory, which has become ubiquitous, has led to a certain dominance of the ideal-theoretic model of political judgment.<sup>69</sup> Though Kantian legalism continues to trend away from Rawlsian Kantianism and towards an understanding of Kant’s politics more closely engaged with *The Doctrine of Right*, as discussed in the Introduction, it remains open to the same ideal-theoretic model of political judgment.

On the ideal-theoretic account, political judgment is a practical activity in a non-Kantian sense, and one which takes place after political theorising both conceptually and, plausibly, temporally too. On the ideal-theoretic model, political philosophy is tasked with the formation and justification of a third-personal ideal, in Rawls’ case it is an ideal of the ‘basic structure’.<sup>70</sup> This ideal is most commonly conceived as being composed of certain principles,

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<sup>67</sup> *MM* 6:318. I return to Kant’s conception of the ideal state in the next chapter, here I only want to highlight how it would be understood on an ideal-theoretic Kantian legalist reading of *The Doctrine of Right*.

<sup>68</sup> See John Rawls’ discussion of political judgment in his *Lectures on the History of Political Philosophy*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 2008), p. 135.

<sup>69</sup> John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1999), pp. 215-6.

<sup>70</sup> Rawls, *A Theory of Justice*, pp. 6-10.

and in Rawls' case these are the liberty and difference principles.<sup>71</sup> These principles can thus be said to constitute principles *of* the basic structure. Political judgment is then engaged in bringing about this ideal, and this orientation guides political judgment. There is much more to the ideal-theoretic model, but there are two points I want to highlight here. First, the positing of the ideal is third-personal, that is, the ideal is theorised as a moral ideal that applies generally. Second, and in consequence, philosophy and practical political judgment are separated. One might engage in political judgment by striving to bring about an ideal another has formulated.

Applied in the context of Kantian legalism, there is good reason to favour an ideal-theoretic model of political judgment. In contrast to the Rawlsian account, the ideal in question is the ideal of the legal state. The principles Kant formulates in *The Doctrine of Right* are principles *of* this ideal legal state. One can conceive of the ideal-theoretic model as using the ideal of the legal state to mediate between the individual political principles. Unlike in ethical judgment, the moral principles are not involved directly in determining the subject's will, but the subject orientates their judgment to the ideal. Consider the way Ripstein claims "Public officials must figure out how to maintain and perfect a rightful condition" because "the state has no other purpose but to be a rightful condition".<sup>72</sup> Here, political judgment consists in the pursuit of the ideal of the *Rechtsstaat* as the rightful end of politics. In this way, the ideal-theoretic model of political judgment provides one kind of solution to the problem of political judgment created by Kant's introduction of the right/virtue distinction.

The argumentative weight of my thesis is not carried by the claim that the ideal-theoretic model is inherently incompatible with Kant's political philosophy, instead the work of the rest of the thesis is to show that, at the least, another plausible account is possible.

Nonetheless, it would do well to be able to suggest some reasons why we might be sceptical of the ideal-theoretic reading of *The Doctrine of Right* and motivate the search for an alternative. One such reason is that although the ideal of the *Rechtsstaat* is clearly based on a priori practical reason, it threatens to render political judgment itself prudential or even teleological in an unacceptable manner. On the ideal-theoretic model, the practical principles of Kant's politics pertain to the ideal, but when the subject has to judge what to do this leaves an immensely wide scope. One issue with this is that Kant has no clear notion of the

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<sup>71</sup> Rawls, *A Theory of Justice*, pp. 52-6.

<sup>72</sup> Ripstein, *Force and Freedom*, p. 203 fn. 35.

sufficient realisation of ideals, which he thinks are unrealisable in full, nor would this serve as a good ground for judgment for Kant. A second issue is that the ideal-theoretic approach to political judgment has a backwards structure from a Kantian perspective. It describes an ideal and sets this as an end, rather than deriving an end from duty and moral judgment.<sup>73</sup> It approximates a teleological or consequentialist form and as such is unlikely to be what Kant had in mind.

This is not to say that Kant eliminates prudence from politics – in fact, quite the opposite, as we shall see in Chapters 4 and 5. However, in conceiving of political judgment as no more than the prudent pursuit of the ideal *Rechtsstaat*, the ideal-theoretic model gets the grounds for prudence wrong. Kant conceives of politics as the problem of arranging and organising society in accordance with freedom and equality.<sup>74</sup> In Kant's terms, politics is a "moral" rather than a "technical" problem.<sup>75</sup> In so far as Kantian legalism can be read as open to the ideal-theoretic model of political judgment, it threatens to render politics technical because it instrumentalises the state to solve the problems of the state of nature. This is also quite consistent with Kantian legalism's preponderant focus on private right. The principles of the ideal legal state are established in private right as problems of the state of nature. The task of public right is then more political and less philosophical. The ideal of the *Rechtsstaat* is postulated to solve these problems and the state as such, the one which one is subjected to and which one must obey, has no moral significance in and of itself.

To conclude this section, I would re-emphasize two points. First, I do not commit to this being the account of political judgment that Kantian legalists would endorse on reflection. I merely argue that, in so far as Kantian legalism reads the principles Kant formulates in *The Doctrine of Right* as principles of the ideal legal state, it is open to the ideal-theoretic model of political judgment. Second, the ultimate moral justification of Kantian legalism, or of the ideal-theoretic model of political judgment more broadly, is not my concern in this chapter or thesis.

By briefly raising these issues, I do not take myself to have decisively refuted Kantian legalism. Indeed, Kantian legalism represents the most sophisticated attempt to grapple with

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<sup>73</sup> The latter is Kant's usual way of proceeding. One can see this clearly with regard to his discussion of the highest good, see *CPrR* 5:110-9. See also the final section of this chapter for further discussion.

<sup>74</sup> *OSR* 8:429.

<sup>75</sup> *PP* 8:372.



Kant's obscure and sometimes confounding political philosophy. What I take myself to have done is to have given more detail about the immediate intellectual context of the thesis, and to have established a position, admittedly somewhat of a caricature, against which to highlight the distinctiveness of Kant's account to political judgment. It is the task of the rest of the thesis to argue that *The Doctrine of Right* can be read differently; read such that practical political judgment is central to what Kant is arguing for. Rather than being principles of an ideal *Rechtsstaat*, the principles derived and elaborated in *The Doctrine of Right* are themselves principles of practical political judgment.

## Section Two – The Idea of the General United Will as the Form of Political Judgment

I read *The Doctrine of Right* not as constitutional theory, or legal philosophy but as practical political philosophy. In the text, Kant is engaged in practical political judgment. He reflectively and reflexively formulates principles of political judgment as he does so. Kant is concerned with how rightful political judgment is possible. This is a problem for him because, unlike in his ethical philosophy, political philosophy concerns the relationship of more than one will, rather than the relationship of the subject's will to itself. The difficulty is how any political judgment can be conceived of as compatible with the freedom and equality of these different wills. In a sentence, my argument is that rightful political judgment is possible in so far as it is possible for judgment to conform to the idea of the general united will.

In Kantian legalism, the general united will is an idea that requires institutionalising through the *Rechtsstaat*. Clearly, this is part of the picture, Kant explicitly does give sovereign authority – which is associated with legislative authority – to the general united will.<sup>76</sup> I discuss this extensively in the next chapter. However, I don't think this is the entirety or even the most significant role for the idea of the general united will. On my alternative reading, the idea of the general united will is the form of political judgment. All rightful political judgments will have this form, though the matter of judgment is open. This includes the political judgments Kant's practical reasoning leads him to make in *The Doctrine of Right* itself. It is the idea of the general united will as the form of political judgment that conditions Kant's judgments in *The Doctrine of Right*. My task in this section is to lay some of the

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<sup>76</sup> *MM* 6:313.

groundwork for my account of this claim in the following chapters. As this thesis is primarily concerned with the ‘Public Right’ section of *The Doctrine of Right*, in the rest of this chapter, I set out my understanding of how the idea of the general united will emerges in ‘Private Right’ and how this leads to Kant’s ‘first political judgment’ – the duty to form and submit to a civil union.

Understanding the role of the general united, or omnilateral, will for political judgment requires an understanding of how much Kant has ‘in hand’ before it makes an appearance. Given the systematicity of his thinking, we have to acknowledge that even before he begins *The Metaphysics of Morals* he has the three *Critiques* and the *Groundwork of The Metaphysical of Morals* already. The most important consequence of this for our purposes, is that he already has “The supreme principle of the doctrine of morals” at hand, namely, “act on a maxim which can also hold as a universal law”.<sup>77</sup> Though one might ask whether there are differences with the principle expressed here and how it is expressed in the *Critique of Practical Reason*, and still more the three formulations of the *Groundwork*, it seems clear that Kant considered himself to have established the objective validity of this principle for us, that is, he understood himself to have shown why this principle expresses the possible form of moral judgment for human beings.<sup>78</sup>

Following his statement of the supreme principle of morality, Kant goes on to immediately to draw a distinction, saying that “Laws proceed from the will, maxims from choice”.<sup>79</sup> Moral judgment, as we have previously understood it in the Introduction, is the alignment of the subject’s maxim with the universal moral law. So, we can see that the formulation of key moral concepts in *The Metaphysics of Morals* does nothing to complicate that understanding of moral judgment. In short order, however, Kant does introduce a complication through the division of right from virtue, or external from internal law giving. This division, as Kant says, pertains not to “different duties” but to “the difference in their law giving, which connects one incentive or the other with the law.”<sup>80</sup> This distinction is analytic, and it stands still to be

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<sup>77</sup> *MM* 6:226.

<sup>78</sup> *CPrR* 5:30; *G* 4:421-40.

<sup>79</sup> *MM* 6:226.

<sup>80</sup> *MM* 6:220.

validated synthetically.<sup>81</sup> Kant tells us as much. In a footnote to this section, he says “A deduction of the division of a system ... is one of the most difficult conditions which the architect of a system has to *fulfil*.”<sup>82</sup> Although the larger concept of morality has been shown to be valid for human beings, whether the same is true of external law giving has yet to be shown. That there are laws for which external law giving is possible has not yet been shown and will only be shown after the turn to synthetic argument in Private Right.

With this analytic division in hand, Kant then proceeds from the general Introduction to The Metaphysics of Morals to The Introduction to The Doctrine of Right itself. “The sum of those laws for which external law giving is possible is called the *Doctrine of Right*”, and thus, if external law giving is possible, then it is in *The Doctrine of Right* that Kant will need to show this.<sup>83</sup> Kant again proceeds analytically and primarily elaborates claims about the concept of right. He defines right as “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom”.<sup>84</sup> This yields the universal principle of right: “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law”.<sup>85</sup> In turn, this yields the universal law of right “act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law”.<sup>86</sup> Because this law is external, Kant specifies that “it does not expect, far less demand, that I *myself should* limit my freedom”.<sup>87</sup> Kant develops an account of external freedom as law governed; a freedom that “*is limited*”.<sup>88</sup> Kant then concludes the introduction with his famous argument that a right is a right to coerce.<sup>89</sup> As with what has come before, this argument is analytic and an elaboration of the concept of right as Kant understands it.

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<sup>81</sup> I follow accounts from which *The Metaphysics of Morals* is analytic until Private Right, in which the transition to synthetic argument occurs, cf. Katrin Flikschuh, “Innate right in Kant—A critical reading”, *European Journal of Philosophy*, 30 (2) (2022), 823– 839.

<sup>82</sup> *MM* 6:218 fn. emphasis added.

<sup>83</sup> *MM* 6:229. Cf *R* 7309 19:308.

<sup>84</sup> *MM* 6:230.

<sup>85</sup> *MM* 6:230.

<sup>86</sup> *MM* 6:231.

<sup>87</sup> *MM* 6:231.

<sup>88</sup> *MM* 6:231.

<sup>89</sup> *MM* 6:231-4.

Following The Introduction to The Doctrine of Right, comes The Division of The Doctrine of Right. This section distinguishes three duties of right (be a rightful person, do not wrong anyone, and the duty to form and submit to a civil union);<sup>90</sup> two divisions of rights into natural and positive, and innate and acquired;<sup>91</sup> and finally the one innate right: “Freedom (independence from being constrained by another’s necessitating choice), insofar as it can coexist with the freedom of every other in accordance with a universal law”.<sup>92</sup> The innate right is subject to a great deal of controversy both over its meaning and its importance. I will not engage extensively in these debates, but merely state my position. I take the view that the innate right follows from the duty to be a rightful person and amounts to the right to be a rightful person, that is, to be a legal person capable of being imputed for their actions.<sup>93</sup> Needless to say, I reject accounts according to which the innate right is a right to bodily integrity, to purposiveness, or a right to liberal negative freedom.<sup>94</sup> It is rather a corollary of the universal principle of right. If, and Kant has yet to show this, the universal principle of right applies, that is, if there are persons who fall under its scope, then it would follow that each would have the innate right to freedom. However, thus far, Kant has neither shown that the universal principle of right nor the innate right are valid. He continues to proceed analytically.

The turn to synthetic argument comes in Private Right. Of particular importance here is the deduction of the concept of intellectual possession.<sup>95</sup> This argument is now widely accepted to be central to Kant’s project in *The Doctrine of Right*, and it is subject to a great deal of controversy. As such a full analysis of the argument and the different interpretations that have

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<sup>90</sup> *MM* 6:623-6. I characterise the duty to enter society with those who you cannot help but associate with as the duty to form and submit to a civil union because, in discussion of the latter, Kant refers to the creation of the civil union as making a society, see *MM* 6:307.

<sup>91</sup> Two divisions which it is tempting to run together, but which should be kept separate.

<sup>92</sup> *MM* 6:237.

<sup>93</sup> Cf. “A *person* is a subject whose actions can be *imputed* to him” *MM* 6:223; cf. Flikschuh, “Innate Right”.

<sup>94</sup> For example, Japa Pallikkathayil, “Neither Perfectionism nor Political Liberalism”, *Philosophy and Public Affairs*, 44 (3) (2016), 171-196; Louis-Philippe Hodgson, “Kant on the Right to Freedom: A Defense”, *Ethics*, 120 (4) (2010), 791-819; Kyla Ebels-Duggan, “Kant’s political philosophy”, *Philosophy Compass*, 7 (2012), 896– 909.

<sup>95</sup> *MM* 6:245-57.

been offered of it is not possible.<sup>96</sup> Instead, I only wish to indicate how the idea of the general united will – or the “collective general (common) and powerful will” – emerges as the condition for the possibility of intellectual possession, and with it right and external (political) freedom.<sup>97</sup>

For right, and hence external law giving, to be possible, it must be possible to possess an external object. Kant argues that this possibility is a “*Postulate of practical reason with regard to rights*”.<sup>98</sup> This states that it is possible to have possession of an external object, and thus a rights claim to it. As a postulate this possibility is not *known* theoretically, rather practical reason “wills” that this principle holds.<sup>99</sup> As Kant says: “No one need be surprised that *theoretical* principles about external objects that are mine or yours get lost in the intelligible and represent no extension of cognition, since no theoretical deduction can be given for the possibility of the concept of freedom on which they are based.”<sup>100</sup> The postulate leaves us with the question of what conditions are required for its possibility even if it cannot be shown that there are any theoretical grounds for it.

At stake in the argument is the possibility of the equal external freedom of all, and the possibility of morally valid external law giving. The universal principle of right states that right consists in the equal external freedom of all, and for any external law giving to be valid, this principle cannot be violated. The problem is that when it comes to possession, i.e. rights claims to external objects, the individual subject obligates all others to refrain from interfering with the object through their very claim to that object. They thereby elevate their unilateral will as though it could be a source of external law giving to the other, yet this violates freedom and equality as required by the universal principle of right.<sup>101</sup> Note, this is not to say that freedom and equality are foundational values, but rather that the possibility of external law giving consists in realising freedom and equality. Kant here reaches an impasse.

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<sup>96</sup> The centrality of the arguments of acquired right in *The Doctrine of Right* has long been acknowledged. See for example, Reinhard Brandt, “Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre” in *Rechtsphilosophien der Aufklärung*, ed. by Reinhard Brandt (Berlin: de Gruyter, 1982), pp. 233– 275.

<sup>97</sup> *MM* 6:256.

<sup>98</sup> *MM* 6:250. I leave out the first several sections of the chapter which concern the definition of concepts which it is not necessary to delve into deeply for the purposes of my argument here.

<sup>99</sup> *MM* 6:247; *MM* 6:251-2.

<sup>100</sup> *MM* 6:252.

<sup>101</sup> *MM* 6:252-5.

The source of external law giving would be the will of another, but it does not seem possible for this external law giving to realise freedom and equality.

The solution is that such law giving must be the law giving of the general united will which is not unilateral. Only through this will is external law giving, hence also right, hence also equal external freedom, possible. Only in accordance with the idea of the general united will are judgments concerning rights and external objects practically possible. The chain of practical reasoning I have traced through the pages of *The Doctrine of Right* is one in which Kant begins with the form of moral judgment in hand, and then, judging in accordance with this form, finds it impossible to justify the possibility of external law giving. It is only through extending moral judgment by the idea of the general united will that he can reach this possibility. The possibility of making moral judgments about external objects and external law giving, thus rests on the transition to a new form of moral judgment – which I call political judgment.

On my reading, a political judgment in *The Doctrine of Right* is a judgment in accordance with the idea of the general united will. Just as the moral law or the categorical imperative, or the supreme principle of morality expresses what it is that we do when we judge morally, the general united will expresses what it is we do when we judge politically. To judge politically is to judge in accordance with the idea of the will of a collective unity. I have thus far traced the argument by which the form of political judgment emerges in *The Doctrine of Right*.<sup>102</sup> One question immediately arises: What is this collective unity and why should the idea of its will condition and mandate a form on the political judgment of the individual? I now turn to this question, before returning with an answer in hand to explicate the idea of the general united will as the form of political judgment further at the end of the chapter.

### Section Three – Kant’s ‘First Political Judgment’

Kant’s statement of the idea of the general united will is followed immediately by a corollary:

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<sup>102</sup> In contrast with Kantian legalism, what I here propose to derive from private right with relevance to public right is only the necessity of public right. I derive the formal condition of the idea of the general united will as the form of political judgment, but do not intend to explain the inherent structure of public right in terms of private right.

*“Corollary: If it must be possible, in terms of rights, to have an external object as one’s own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another’s to enter along with him into a civil constitution.”*<sup>103</sup>

Compare this to “the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition”.<sup>104</sup> When we further specify that this duty also involves the right and even the duty to “to use coercion” against others in case they do not by their own will leave the state of nature, we can see that the content of both judgments is the same.<sup>105</sup> It is an imperative to form and submit to a civil union with others. This judgment is often referred to amongst scholars as ‘the duty of state entrance’.<sup>106</sup> It is the first political judgment in that it is the first judgment that is conditioned by the idea of the general united will as the form of political judgment. This represents a transition from moral judgment in general, to political judgment in particular.

There are 50 pages between the two statements of the duty to form and submit to a civil union, a fact that is not without significance. These pages comprise the bulk of Private Right, including Kant’s account of property, contract, and status rights as well as an important chapter on the judgments of courts in the state of nature. The rights discussed in these sections are provisional and the fact that the two statements of the duty of state entrance are separated by 50 pages of discussion of provisional rights is not a coincidence. What makes these rights provisional is precisely that submission to the civil union is a corollary of the idea of the general united will. Because the first political judgment is a direct inference from but not identical to the form of political judgment, there is a conceptual space between the general united will and the civil union in which rights in the state of nature can be discussed. However, because the civil union is a corollary and so follows immediately from the form of political judgment, these rights are discussed in permanent view of it. The judgment that each individual subject has a duty to form and submit to the civil union does not rely on these

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<sup>103</sup> *MM* 6:256.

<sup>104</sup> *MM* 6:307.

<sup>105</sup> *MM* 6:307; cf. *PP* 8:354.

<sup>106</sup> I use the term ‘civil union’ in this context because Kant only introduces his concept of the state after the postulate of public right, and also to emphasise the distinction with Kant’s ideal for the state, the state in idea, which is discussed in the next chapter.

arguments of private right, rather these arguments are dependent on the civil union, that is, on the possibility of public right. The purpose of this section is first to explain the corollary as Kant's first political judgment and why it follows from the form of political judgment. Second, I give a brief explanation of how provisional judgments about private right are made possible through the form of political judgment.

(i) The first political judgment

The duty to form and submit to a civil union follows as a corollary (*Folgesatz*) from the general united will. This indicates two things. First, it follows from what has come before, but second, it is a separate judgment. That it is a separate judgment is clear. It is one thing to say that matters of rightful external freedom and so on must be judged in accordance with the idea of the general united will, it is another to say that this means one must submit to a sovereign in a civil union. Why then, should the idea of the general united will require that the individual subject submit to the sovereign? Kant tells us that “the condition of being under a general external (i.e., public) law giving accompanied by power is the civil condition.”<sup>107</sup> This indicates a very close link between the idea of the general united will and the duty to submit to the sovereign, but it does not tell us why. It is possible to judge in accordance with the general united will without submitting to the state. One would simply judge based on what the people “could”, “would” or “ought to” will, depending on which of Kant's formulations one prefers.<sup>108</sup> This is what is going on in the majority of Private Right, as argued in the next sub-section.

In the context of his second statement of the duty to form and submit to a civil union, Kant argues that “The ground of this postulate can be explicated analytically from the concept of *right* in external relations”.<sup>109</sup> Even if the ground can be explicated analytically, it is clear that the judgment is synthetic given that it involves a moral ought. The ground only highlights the analytical distinction between a rightful and a non-rightful condition. The source of the moral ought is the idea of the general united will.<sup>110</sup> The conclusion of Kant's possession argument is that right and external freedom are only possible through the general united will; only in accordance with the idea of the general united will is rightful political judgment possible. As

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<sup>107</sup> *MM* 6:256.

<sup>108</sup> *MM* 6:340; *MM* 6:328; *OTB* 8:434.

<sup>109</sup> *MM* 6:307.

<sup>110</sup> Cf. *R* 7665 19:482 “These grounds of right are, however, the common will”.



highlighted above, for Kant “Laws proceed from the will, *maxims* from choice.”<sup>111</sup> What Kant has argued thus far is that this holds for external law giving because it is the idea of the general united will that is law giving.

The general united will is different from the will of an individual subject. It is a “collective”, “general” and “common” will.<sup>112</sup> It is the will of a whole, of a unity. It thus has different conditions for its possibility, namely that a collective exists for the general united will to be the will of. This is not to suggest that the idea of the general united will is empirical, but rather that for it to be coherent to act in accordance with a collective will, there must be a collective which the subject acts as part of. This collective *is* empirical and contingent. The duty to form and submit to a civil union is a practical political judgment of a practically reasoning individual agent. In order for practical political judgment to be possible, the agent must commit themselves to the conditions that make the idea of the general united will possible. The individual’s political judgment is an expression of the general united will, and through the individual the general united will enacts the conditions of its possibility. The civil union, formed by the submission of the subject to the sovereign, “*is not so much a society but rather makes one*” in practical terms.<sup>113</sup>

This is a significant political judgment, as it contains not only the duty to submit, but the right *and duty* to coerce others to submit to a contingent and empirical civil union. No individual subject has the right to make themselves an exception to this principle. To do so would be violation of the supreme principle of morality and to “do wrong in the highest degree”.<sup>114</sup> To do so would destroy the possibility of rightful external law giving and violate the idea of the general united will. In this sense, to judge other than that one has a duty to form and submit to a contingent and empirical civil union is to fail to truly judge politically.

It is, therefore, no surprise that Kant is emphatic in his judgment that “there is a categorical imperative, *Obey the authority who has power over you*”.<sup>115</sup> It is this first political judgment that conditions all others, which bears the burden of Kant’s opposition to revolution. In refusing to submit to the sovereign, the subject judges not in accordance with the idea of the

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<sup>111</sup> *MM* 6:226.

<sup>112</sup> *MM* 6:256.

<sup>113</sup> *MM* 6:307. Cf *R* 6667 19:128.

<sup>114</sup> *MM* 6:308.

<sup>115</sup> *MM* 6:371.

general united will, but rather as an individual subject “in its own suit”.<sup>116</sup> For “a people must be regarded as already united under a general legislative will in order to judge with rightful force”, and thus a people can give a judgment only by means of the sovereign that represents them in a civil union.<sup>117</sup>

The first political judgment is of crucial importance for Kant’s practical political judgment on matters of public right, and not only that concerning revolution. In Chapter Two, we will see how the contingent civil union is the practical context from within which Kant posits his ideal of the state, namely, the state in idea. Here, however, we will remain in Private Right, and discuss how the idea of the general united will makes possible provisional judgments of private right in the state of nature.

(ii) Provisional judgments of private right

Following Chapter One of Private Right, Kant moves from the idea of possession to the idea of acquisition, covered in two chapters. This marks his departure from considerations of protective justice to a chapter each on justice in acquiring from one another and distributive justice.<sup>118</sup> Each of these chapters is dependent on the concept of possession and dependent on the idea of the general united will as the form of judgment. In each case, judgments concerning matters of right require one to judge as a member of the collective people in a civil union. The distinction between the chapters and between what we can call commutative and distributive justice is the perspective from which the judgment is made.<sup>119</sup> Whilst both concern “right that can be cognized a priori by everyone’s reason”, the former is “how every human being has to judge about it on his own” and the later concerns what is right “before a court”.<sup>120</sup>

Chapter Two addresses three forms of acquisition: Of a thing (property), of another’s choice (contract), and of a person akin to a thing (status).<sup>121</sup> In each case, the form of acquisition is dependent on the idea of the general united will. The possibility of the intelligible possession

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<sup>116</sup> *MM* 6:320.

<sup>117</sup> *MM* 6:317-8.

<sup>118</sup> *MM* 6:306.

<sup>119</sup> *MM* 6:306

<sup>120</sup> *MM* 6:297.

<sup>121</sup> *MM* 6:260; *MM* 6:271; *MM* 6:276.

of a sensible thing depends on “the *lawgiving* of the will of all thought as united a priori”.<sup>122</sup> The reason is that although property rights appear to concern a thing, they in fact concern “a relation of a person to persons, all of whom are *bound* with regard to the use of the thing, by the *will* of the first person”.<sup>123</sup> It is hence in accordance with the idea of the general united will that possession and acquisition of a thing becomes possible. In the case of contract, the right to another’s choice can “never be acquired originally” and hence depends on a pre-existing possession that itself is dependent on the general united will.<sup>124</sup> Finally, in the case of status rights, acquisition takes place “by law” and as such is dependent is the idea of the general united law giving will.<sup>125</sup> In each case, the idea of the general united will makes possible judgments about rightful acquisition but in each case the judgment can only be provisional, and they anticipate the realisation of the corollary and the state under which these rights are made conclusive.<sup>126</sup>

Chapter Three of *The Doctrine of Right* addresses distributive justice, that is right “as it can be cognized a priori in accordance with the principle of distributive justice how its decision (*sententia*) would have to be reached.”<sup>127</sup> Kant here addresses cases of private right where the judgment of the individual in accordance with the idea of the general united will would differ from that of a court. The court is not actual; not statutory, as we remain here in private right. But given that the duty to form and submit to a civil union already underlies this discussion, Kant is able to look forward to the realisation of a court “in a condition brought about by the united will of all” and so in accordance with the first political judgment.<sup>128</sup> Taking up the position of the court still leaves one with a need to make judgments. This can only be done in accordance with the idea of the general united will. There is no statute on which this a priori judgment can be based, and instead only the formal conditions of law as required by the general united will can be considered.

Judgments concerning provisional private right thus become possible because the idea of the general united will makes possible judging as a collective. However, these judgments remain

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<sup>122</sup> *MM* 6:268.

<sup>123</sup> *MM* 6:268.

<sup>124</sup> *MM* 6:671.

<sup>125</sup> *MM* 6:276.

<sup>126</sup> *MM* 6:257.

<sup>127</sup> *MM* 6:297.

<sup>128</sup> *MM* 6:302.

provisional because it is already known that the idea of the general united will requires entrance into a civil condition and submission to a sovereign in the creation of a civil union for such judgments about right to be conclusive. Only in public right are conclusive judgments concerning private right possible, that is, only through the creation of a civil union can private rights be given practical reality.

#### Section Four – Judging Politically

As we have seen, the idea of the general united will appears between the concept of right and the “*Corollary*” that the possibility of right depends on the duty of each subject to coerce all others into a civil union.<sup>129</sup> The idea of the general united will thus mediates between the two postulates of *The Doctrine of Right*: viz., the postulate of practical reason with regard to rights and the postulate of public right. The idea of the general united will thus emerges prior to the state, and certainly prior to the ideal of the *Rechtsstaat*, which emerges only in Public Right. The idea of the general united will emerges in the key passage in which Kant validates the concept of right and the possibility of external freedom. It is a higher-order principle of Kant’s system of right.<sup>130</sup> It expresses what it is we do when we judge politically: We judge as part of the collective, as a citizen among the people. The idea of the general united will is thus an expression of the form of political judgment and at the same time holds as a deliberative principle with reference to which individual subjects make judgments about politics.

I read the idea of the general united will this way in part because of how I approach *The Doctrine of Right* as a whole. Let us return once more to the preface to *The Doctrine of Right*, where, as we have already seen, Kant discusses how the text is constructed. There is one additional point to note that bears on the question of political judgment. This is his claim that “that right which belongs to the system outlined a priori will go into the text, while rights taken from particular cases of experience will be put into remarks, which will sometimes be extensive; for otherwise it would be hard to distinguish what is metaphysics here from what

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<sup>129</sup> *MM* 6:256.

<sup>130</sup> An early reflection suggests Kant thought about the social contract this way – “The idea of the social contract is only the guideline for judgment about right” (*R* 7737 19:504) – I am suggesting that in *The Doctrine of Right* it is the general united will that is the formal principle of political judgment.

is empirical application of rights.”<sup>131</sup> The distinction between system and application is important for understanding the role of judgment. The determining structure of moral judgment might suggest that judgment has its role in application. The thought might be that it is the principles “derived from reason” which construct the system,<sup>132</sup> whilst the task of judgment is then the application of this system to experience.

The ideal-theoretic model of political judgment, situated within Kantian legalism, could accommodate this account of judgment as application. Kantian legalism implicitly adopts an approach to political judgment in which judgment requires realising as far as possible the ideal of the *Rechtsstaat*. But there is a further question we can ask: What does it mean to say that the system of right can be applied? At the least, it suggests that the system and its principles must be apt for judgment. They must be formed in such a way that application is practically possible. Now, I would not claim that the ideal-theoretic model makes application practically impossible, but as we have seen, the vagueness of the imperative to strive for the *Rechtsstaat* leaves a very wide scope for judgment with very little guidance. An alternative model sees the principles of the system as principles of judgment themselves – rather than the system being applied, as it were, the individual principles are.

Reading *The Doctrine of Right* as practical philosophy attempting to understand how rightful political judgment is possible adopts Kant’s – and all of our – position as a moral subject. In practical philosophy, as Kant argues, theory is always already practical.<sup>133</sup> There is no escaping the position of the human subject, the doctrine of right must be elaborated from the stance of the human, judging subject. One aspect of this is that the division between system and application begins to blur. Each step in elaborating the system of right, each principle of political judgment that is formed, requires judgment. It is itself already practical; it is engaged in practical political judgment. Despite the division between system and application, the two are bound up together in the empirical consciousness of the thinker and both require political judgment. In this way, Kant’s political philosophy, including *The Doctrine of Right* is read as a sustained exercise in practical political judgment. It is this reading of *The Doctrine of Right* that I set in contrast to Kantian legalism.

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<sup>131</sup> *MM* 6:205-6.

<sup>132</sup> *MM* 6:205.

<sup>133</sup> *TP*.

Kant's reflexive formation of the idea of the general united will to give form to his ongoing practical reasoning enables him to judge politically. Until this point he judges unilaterally in accordance with the moral law, but he realises that this conflicts with the possibility of external freedom. By extending the categorical imperative through the idea of the general united will, he is able to establish a form of political judgment that retains the possibility of external freedom. All of his practical reasoning; all of his practical political judgment in the rest of *The Doctrine of Right* is conditioned by this. Political judgment is not distinct from ethical judgment because it doesn't require the determination of the subject's will by practical reason. Rather, it is distinct because it requires the subject to judge as a citizen of a contingent and empirical civil union, not only as a person.

### Section Five – The Ends of Political Judgment

In this chapter, I have discussed Kant's formulation of the idea of the general united will in Private Right. It remains central to Kant's political philosophy in *The Doctrine of Right* through the transition into Public Right as the form of political judgment. Read in light of this understanding of the general united will, our understanding of Public Right is naturally going to change. Over the next five chapters, I offer an interpretation of Public Right which takes the idea of the general united will as the form of political judgment as its central principle in the way that the ethical philosophy takes the categorical imperative as its central principle.<sup>134</sup> Chapters Two and Three engage with one aspect of the parallel between the two principles, which I will discuss to conclude this chapter. This is an elaboration on my understanding of

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<sup>134</sup> I have characterised the general united will as a principle of judgment and liken it to the categorical imperative. There is an alternative to this interpretation which I don't take. One might think of the general united will as being analogous to the individual will, whilst taking the universal principle of right to be analogous to the categorical imperative. On this interpretation, the general united will is (the idea of) a collective will that judges how universal principle of right applies in practical reality. The reason I reject this interpretation is that it draws the scope of political judgment too narrowly. It seems to me that on the proposed interpretation, only the judgment of the state would count as political. That seems to me to be quite close to saying that political judgment presupposes the legal order, a claim which I reject in Chapters Two and Four. If, as I argue in Chapter Two, the state in idea is the idea of a civil union determined by the idea of rightful unilateral external law making, then that does seem to be quite close to saying the general united will is applying the universal principle of right to itself, or to the civil union. However, it would still be wrong to say this amounts to the full scope of political judgment in *The Doctrine of Right*. Political judgment also has to concern the judgment that this is what citizens ought to strive for, and the further judgments involved in that striving.

the idea of the general united will as the formal principle of political judgment and preemptively raises the subjects of the next two chapters.

Kant concludes the first part of the section on ‘Right of State’ in Public Right in *The Doctrine of Right* with the following imperative:<sup>135</sup>

*By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, by a categorical imperative, makes it obligatory for us to strive after.*<sup>136</sup>

The immediate context is Kant’s rejection of Rousseau’s assertion that the well-being of a state consists in the welfare and happiness of its citizens. Leaving aside whether Kant’s reading of Rousseau is the right one, the more significant consequence of this passage is that practical reason here sets as an end for human beings the state in idea. This is Kant’s ideal for the state, that is, for the civil union.

In the conclusion to *The Doctrine of Right*, Kant claims that “establishing universal and lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of mere reason” and his final words identify “the highest political good, perpetual peace.”<sup>137</sup> In this case, as is the case for the state in idea, Kant here argues that practical reason mandates a political end. Considered in the context of Kant’s political philosophy, this is somewhat surprising. Ripstein puts the point well: “By abstracting from the “matter” of choice, the Universal Principle of Right focuses only on whether a particular action uses external means – objects in space and time – in ways consistent with the freedom of others to use their means.”<sup>138</sup> The Universal Principle of Right is formal “in a further sense” than the categorical imperative.<sup>139</sup> Unlike the categorical

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<sup>135</sup> The division of Right of State into two parts is not marked by Kant, and given the corrupted nature of the text, it would be dangerous to read too much into the division merely because it is there. However, there is a thematic shift between Section 49 and Section 50 – leaving out the General Remark, which divides them. Section 49 concludes Kant discussion of the State in Idea and the ideal of the rightful association. Section 50 begins Kant’s discussions of the principles of right that apply to political judgment in light of this ideal. In form, but not on details, this parallels Byrd and Hruschka’s distinction between the State in Idea (Kant’s term) and the State in Reality (Byrd and Hruschka’s term). *MM* 6:313; Byrd and Hruschka, *Commentary*, p. 168.

<sup>136</sup> *MM* 6:318.

<sup>137</sup> *MM* 6:355.

<sup>138</sup> Ripstein, *Force and Freedom*, p. 384.

<sup>139</sup> Ripstein, *Force and Freedom*, p. 383.

imperative which does impose mandatory ends, as we see in *The Doctrine of Virtue*, the universal principle of right cannot. By this logic, there should be no such ends in *The Doctrine of Right*. Yet here we have seen there are two.

As I will argue over the next two chapters, the explanation for this is that it is not the analytic universal principle of right in accordance with which practical reason mandates these ends, rather it is in accordance with the synthetic principle of the idea of the general united will.<sup>140</sup> The state in idea and perpetual peace are mandated by practical reason not to the unilateral will of the individual moral agent as the categorical imperative imposes the ends of “*one’s own perfection and the happiness of others*”, but rather as ends mandated by practical reason to the general united will of a civil union and, hence, to the individual as a citizen of a civil union.<sup>141</sup>

To say that the idea of the general united will is the formal principle of political judgment in a parallel to the categorical imperative is to grant the idea of the general united will a significant status. Just like the categorical imperative, the idea of the general united will can overcome the distinction between form and matter to impose ends. My contention over the next two chapters is that it does so through practical political judgment. I turn first to the state in idea as a practical political ideal, before concluding Part One of this thesis with an analysis of perpetual peace.

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<sup>140</sup> Cf. *dPP* 23:168.

<sup>141</sup> *MM* 6:385. I do not intend to over rely on the symmetry between *The Doctrine of Right* and *The Doctrine of Virtue*, though it is notable that the state in idea involves the perfection of the civil union whilst, as argued in Chapter Three, perpetual peace is an empirical condition much like happiness.



## Chapter Two – A Practical Ideal

The state in idea is the ideal for the civil union or state and is the only ideal in *The Doctrine of Right*. In this chapter, I offer an account of the state in idea and its relationship to political judgment. I argue that the state in idea is an ideal of practical political judgment. It is an ideal that Kant formulates from within practical politics through judgment. It is also not an all-encompassing ideal, but rather serves as only part of Kant's political philosophy as the ideal for the civil union. In both aspects Kant's use of an ideal in his political philosophy is markedly different to a standard ideal-theoretic account. This chapter forms half of a negative argument that there is no end in *The Doctrine of Right* that makes an ideal-theoretic reading of Kant's account of political judgment plausible. In Chapter Three, I argue that the other end – perpetual peace – is not an ideal. Here, I argue that although the state in idea is an ideal, it is a practical ideal of political judgment, not an ideal-theoretic ideal.

The argument of the chapter is structured as follows. In the first section, I draw a distinction between ideas and ideals of practical reason such that ideals are individuated 'things' or 'beings' determined entirely by an idea. In the second section I use this distinction to argue that the state idea should be identified with the 'ideal of a rightful association' in the Conclusion of *The Doctrine of Right*, and that this in turn should be understood as an ideal for the common being formed by the civil union. In Sections Three and Four, I turn to the content of the state in idea to vindicate this reading. In Section Three, I argue that the state in idea as an ideal of practical reason is the common being entirely determined by the idea of omnilateral external law giving and that this results in the state in idea being characterised by a separation of authorities. In Section Four, I argue that the state in idea is also structured by a hierarchy of authority and that this serves to ensure that the common being as the condition for the possibility of the state in idea as a practical ideal is not undermined. I conclude that this practical reading of the state in idea supports a reading of *The Doctrine of Right* in which practical political judgment has priority over the ideal.

### Section One – Ideas and Ideals

The state in idea is *the* ideal of political judgment for Kant. It is the only *ideal* in Kant's political philosophy, though there are many *ideas*. Both ideas and ideals are regulative and serve to orientate the subject for the sake of practical action. Both are practically possible and practically necessary. That is, they serve as norms which we strive to approximate. They are,

however, not fully realisable. This is because both are noumenal, whereas we act as human subjects here in the phenomenal world. However, by dint of our noumenal, rational natures, ideas and ideals can serve as norms. Despite these commonalities, the two are importantly distinct. The first step in arguing that the state in idea is a *practical* ideal is to get clear on this distinction between ideals and ideas of practical reason.

In the *Critique of Pure Reason*, Kant claims that ideas and ideals are objects of pure reason, whether this is practical or theoretical.<sup>142</sup> As we are here concerned with Kant's politics, it is ideas and ideals of practical reason that are relevant. As objects of pure reason, ideas are 'noumenal' as opposed to 'phenomenal'. This means that they are not of the physical, empirical world, are not phenomena, and so cannot be objects of experience. Instead, they inhabit the noumenal moral world beyond experience. Indeed, ideas of reason are very far removed from the world of phenomena or appearances: "**Ideas**, however, are still more remote from objective reality than **categories**; for no appearance can be found in which they may be represented *in concreto*. They contain a certain completeness that no possible empirical cognition can ever achieve".<sup>143</sup> In so far as we can know them, then, ideas are objects of pure reason, in our case, pure practical reason, unsullied by empirical sense data.<sup>144</sup>

As far removed from experience as ideas are, however, "something that seems to be even further removed from objective reality than the idea is what I call the **ideal**, by which I understand the idea not merely *in concreto* but *in individuo*, i.e., as an individual thing which is determinable, or even determined, through the idea alone."<sup>145</sup> Ideals are therefore also noumenal, but Kant suggest even more so than ideas in a certain sense as they are an individual thing entirely determined by an idea. In contrast to an idea, an ideal is a thing. An ideal, we might say, is a "*thought-entity*".<sup>146</sup>

Kant gives us the following example to explain how ideas and ideals are related to each other: "Virtue, and with it human wisdom in its entire purity, are ideas. But the sage (of the Stoics) is an ideal, i.e., a human being who exists merely in thoughts, but who is fully congruent with

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<sup>142</sup> CPR A567/B595.

<sup>143</sup> CPR A567/B595-A568/B596.

<sup>144</sup> Another way to put this point is that ideals are not cognised but are posited through pure reason.

<sup>145</sup> CPR A568/B596.

<sup>146</sup> Cf. MM 6:338.

the idea of wisdom.”<sup>147</sup> The idea of wisdom can be represented in part *in concreto* through application to the world of appearances, or the phenomenal world, thus through any wise action, though this is not a full representation for it only “seeks to approach it without ever completely reaching it.”<sup>148</sup> The ideal of the sage can also be represented (albeit only partially) *in concreto*, but is further represented (again, only partially) *in individuo*, that is, as an individual thing that is entirely determined by the idea of wisdom.

Ideals, as with ideas are thus noumenal, and a perfectly wise person is impossible in the phenomenal world. That is, for beings like us, who exist (partly) in the phenomenal world, being a perfectly wise person is impossible, as Kant makes clear: “These ideals, even though one may never concede them objective reality (existence)”.<sup>149</sup> However, we are also, by dint of our reason, (partly) noumenal beings, as such the ideal of the wise person can serve as a norm for us.<sup>150</sup> So, Kant writes “ideals, which do not, to be sure, have a creative power like the **Platonic** idea, but still have **practical** power (as regulative principles) grounding the possibility of the perfection of certain **actions**.”<sup>151</sup> In so far as we ought to be wise, we ought to attempt to realize the ideal of the wise man in our own person so far as possible. As phenomenal but rational beings, we will always come up short, at least in this world, but that doesn’t make the ideal any less valid for us.<sup>152</sup>

## Section Two – An Ideal for the Common Being

The state in idea is an ideal, not an idea. The distinction is subtle, but important. Especially so when one recognises that there is only one ideal in *The Doctrine of Right*. Indeed, the term “ideal” is only used once. This occurs in the conclusion, where Kant mentions although does not discuss extensively “the ideal of a rightful association”.<sup>153</sup> Coming as it does in the brief

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<sup>147</sup> CPR A569/B597. That Kant’s example is the sage as an individual human being indicates that whilst he describes ideals as individual *things*, an ideal can also be a *being*.

<sup>148</sup> CPR A568/B596.

<sup>149</sup> CPR A569/B597.

<sup>150</sup> The partial noumenality and phenomenality of human beings is characteristic of Kant’s conception of humanity, cf. “human being, a being who is partly sensible but partly moral or intellectual.” A 7:277.

<sup>151</sup> CPR A569/B597.

<sup>152</sup> That we, finite beings, struggle with the thought of coming up short is in part Kant’s justification for his assent to the concept of an immortal soul, see CPR 5:122-4.

<sup>153</sup> MM 6:355.

conclusion, the discussion is limited, and it is not immediately clear what he is referring to. There is, however, good reason to think that he refers to the state in idea.

The discussion in the conclusion is about perpetual peace as “the highest political good”.<sup>154</sup> The latter is mandated by practical reason’s “irresistible *veto*: *there is to be no war, neither between you and me in the state nature, nor war between us as states, which, although they are internally in a lawful condition, are still externally (in relation to one another) in a lawless condition*”.<sup>155</sup> I will have much more to say about this in the next chapter, but for now allow me to take Kant’s distinction between war between individuals and between states as indicating that states are not bound by a constitution as individuals are. This is of a piece with the concluding paragraph of *The Right of Nations*: “By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, (not a federation like that of the American states) which is based on a constitution and can therefore not be dissolved.”<sup>156</sup>

That being granted, when Kant refers to “those who are united under a constitution” a quite plausible reading is that he refers to the civil union with which we concluded the last chapter.<sup>157</sup> The civil union is that condition under which the rightful freedom of all is possible (though not necessarily actual); it is a rightful condition of public justice or public right.<sup>158</sup> It is this civil union which is the subject of Kant’s first political judgment, both in its initial form in the corollary and in its subsequent statement as the postulate of public right.<sup>159</sup> Indeed, in the corollary, it is explicitly the “civil constitution” that is at stake.<sup>160</sup> This is something Kant again reiterates when he defines public right in the transitional section: “Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution”.<sup>161</sup> He goes on to link this to another term – the *civil* condition – and this to his definition of the state as “the whole of individuals in a

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<sup>154</sup> *MM* 6:355.

<sup>155</sup> *MM* 6:354.

<sup>156</sup> *MM* 6:351.

<sup>157</sup> *MM* 6:355.

<sup>158</sup> *MM* 6:306.

<sup>159</sup> *MM* 6:256; *MM* 6:307.

<sup>160</sup> *MM* 6:256.

<sup>161</sup> *MM* 6:311.

rightful condition, in relation to its own members”.<sup>162</sup> Finally, as the Gregor translation has it, “Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth*”.<sup>163</sup>

It is important to remember that though Kant judges forming and submitting to the civil union to be a moral imperative on a priori grounds of practical reason, the civil union itself is a contingent and empirical condition. It is this contingent civil union for which the state in idea provides the ideal. Returning to the conclusion and the ideal of rightful association, this ideal serves “as a norm” for “those who are united under a constitution”, that is, as a norm for the civil union.<sup>164</sup> Now, “the rule for this constitution, as a norm for others, cannot be derived from experience”; instead, it is “derived a priori by reason from the ideal of a rightful association of human beings under public laws as such.”<sup>165</sup> As Kant puts it when he introduces the state in idea in Public Right, it “serves as a norm (norma) for every actual union into a commonwealth (hence serves as a norm for its internal constitution)”.<sup>166</sup>

Presumably because of the name, ‘the state in idea’, the Gregor translation of *The Metaphysics of Morals* adds “this idea” to the beginning of that last quotation, but it is significant that Kant does not in fact use the term in that way. It is significant because the state in idea is not an idea, but an ideal: it is the complete determination of an individual thing by that idea. The idea is rightful unilateral external law making, and the individual ‘thing’ is the civil union. The civil union is a union, an association, of a plurality of individuals into a unity and a whole. As the Gregor translation has it, it is a “union into a commonwealth”, but perhaps better is a ‘common being’.<sup>167</sup> The common being of the association, of the civil

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<sup>162</sup> *MM* 6:311.

<sup>163</sup> *MM* 6:311.

<sup>164</sup> *MM* 6:355.

<sup>165</sup> *MM* 6:355.

<sup>166</sup> *MM* 6:313.

<sup>167</sup> “*einem gemeinen Wesen*”, *MM* 6:313. Gregor consistently uses “commonwealth” for “*einem gemeinen Wesen*” and its other forms. An exception is at *MM* 6:337 where the term is left out. In that passage Kant describes fellow citizens as members of the “one and the same common being”. This passage is worth pointing out because it emphasises the key point I wish to stress by using ‘common being’, namely that the civil union is a single, unified entity in and of itself.

union, is what is to be perfected by determining it entirely through the idea of rightful omnilateral external law making.<sup>168</sup>

The state in idea is thus an ideal for every actual common being, for every actual civil union: this is crucial for understanding how this ideal relates to political judgment in *The Doctrine of Right*. On the ideal-theoretic model of political judgment, the political ideal is composed by principles derived in philosophy. The ideal is theoretical, speculative and third personal. Only once the ideal is established is political judgment engaged in the task of bringing the ideal about. Kant's approach to his political ideal is quite different. Kant's positing of the state in idea as an ideal for the civil union is itself a practical political judgment. For Kant, one does not first compose an ideal philosophically and only then turn to practical judgment. For an ideal to be practical – that is, action guiding – the ideal must itself be formed in practical political judgment. Judgment is in this sense prior to ideals in *The Doctrine of Right*.<sup>169</sup>

The judgment that, as a citizen of a civil union, one must “strive” to realise the state in idea within the particular civil union one is subject to is a complex one.<sup>170</sup> In it, the idea of the general united will as the formal principle of political judgment overcomes the distinction between form and matter to mandate an end for political judgment. However, as we have seen, this is not the first political judgment in Kant's practical reasoning in *The Doctrine of Right*. The first judgment is the judgment that it is an imperative to form and submit to the civil union. It is only after this judgment that the state in idea becomes a possible practical ideal. There is no teleological structure or inevitability about the transition from the civil union to the ideal, it requires a separate and new judgment. This judgment relies, in part, on recognising the kind of end that becomes possible after the contingent formation and moral recognition of the civil union.

What becomes possible after the civil union is the idea of a common being which is entirely determined by the idea of rightful omnilateral external law making. This becomes possible because only after the formation of the civil union is there any ‘thing’, or, in this case, a

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<sup>168</sup> Just as in *The Doctrine of Virtue*, each has a duty to perfect their own being, cf. *MM* 6:385.

<sup>169</sup> Though my argument here is limited in scope, this true not only in *The Doctrine of Right*, but in Kant's political and practical philosophy in general.

<sup>170</sup> *MM* 6:318.

‘being’, which can be so determined.<sup>171</sup> This aspect of the state in idea involves the citizen striving to make the idea of the general united will itself the source of external law giving. This is a judgment in accordance with the idea of the general united will, and it is a political judgment that goes beyond the first political judgment because not only does the idea of the general united will now mandate that the condition of its possibility be an imperative, but it also imposes on the civil union a form and structure and sets this as an end for the civil union and each citizen that comprises it. This form and structure is provided by the idea of rightful omnilateral external law making, and it is to the structure of the state in idea that we now turn.

### Section Three – The Separation of Authorities

In *Public Right*, Kant distinguishes three state authorities – sovereign or legislative, executive and judicial – and three persons who each hold one of these authorities – sovereign or legislator, regent and judge. Each authority has different powers in the state. Sovereign authority, or legislative authority, gives general or universal laws for the state.<sup>172</sup> The laws are “the same (...) for all and all for each” meaning that the laws are given by all (united) and to all (general). Sovereign authority thus belongs to the general united will of the people, though it is vested in the person of the legislator.<sup>173</sup> The executive authority provides coercive physical power and other incentives to enforce the laws. It is held by the person of the regent, who is also called the governor, the directorate, or the government.<sup>174</sup> The regent provides directives and decrees, not laws, and governs the state. The regent is the only authority which can exercise coercion and punish, but, as an agent of the state, they are subject to the laws of

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<sup>171</sup> The civil union is an empirical being that citizens can strive to determine by the idea of rightful omnilateral external law making. The state in idea is a noumenal being that is so determined; an ideal.

<sup>172</sup> *MM* 6:313.

<sup>173</sup> *MM* 6:314.

<sup>174</sup> *MM* 6:316. I diverge from Gregor’s standard translation of *The Metaphysics of Morals* consistently throughout this chapter to clearly distinguish sovereign (legislative) and executive authorities. Gregor uses the same term ‘ruler’ to translate terms connected with sovereign (legislative) authority (‘herrscher’ and ‘beherrscher’) and those connected with executive authority (‘regierer’ and ‘Regent’). I amend Gregor’s translation accordingly and use ‘regent’ to refer to the executive authority.

the sovereign.<sup>175</sup> The judicial authority provides verdicts on applications of the law to particular cases. As with the executive authority, the judicial authority is constrained by the laws of the sovereign and may not deviate from them.<sup>176</sup> These three authorities are essential for the establishment of a state and are ‘dignities’, meaning they are “eminent estates without pay” or what we could call political or civil statuses.<sup>177</sup>

Kant’s state in idea concerns the structure of these three authorities. The largest portion of the largest section of Public Right, viz., the section on ‘The Right of State’, is dedicated to his discussion of this ideal. Though he slightly exaggerates in light of the rest of The Right of State, as well as The Right of Nations and Cosmopolitan Right, Kant is not far off in claiming that public right has “to do with the rightful form of their association (constitution)”.<sup>178</sup> This form, or structure, is complex and arranged in accordance with two principles. The first of these principles, is the necessity of the *rightful omnilateral willing of external law* which is reflected in a *separation* of authorities. The second, which is addressed in the next section, concerns the *necessity of maintaining the civil union*.

Kant’s clearest statement of the separation of authorities is in the following passage:

*Accordingly, the three authorities in a state are, first, coordinate with one another (potestates coordinatae) as so many moral persons, that is, each complements the others to complete the constitution of a state (complementum ad sufficientiam). But, secondly, they are also subordinate (subordinatae) to one another, so that one of them, in assisting another, cannot also usurp its function; instead, each has its own principles, 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.*<sup>179</sup>

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<sup>175</sup> *MM* 6:316-7. When referring to authorities by pronoun I use ‘they’ to account for moral personality of authorities (*MM* 6:316) which could involve more than one physical, or natural, person. For example, an executive government, a sovereign aristocratic or democratic assembly, or a court. I note this because it obscures the gendering of Kant’s political philosophy. See Pauline Kleingeld, “The Problematic Status of Gender-Neutral Language in the History of Philosophy: The Case of Kant”, *The Philosophical Forum*, 25 (1993), 134-150.

<sup>176</sup> *MM* 6:317-8.

<sup>177</sup> *MM* 6:328. Cf. *dPP* 23:159; *dMM* 23:258.

<sup>178</sup> *MM* 6:306.

<sup>179</sup> *MM* 6:316.



As argued by Paul Guyer and others, Kant argues both for a separation of functional authorities, and for a separation of the persons vested with those authorities.<sup>180</sup> But Kant goes further than this in the claims that the three authorities are “subordinate to one another” and that none may usurp the function of either of the others. In the capacity or “function” of each dignity, none of the three persons may interfere with either of the other two in the “function” of their dignity. This is a true separation. As Arthur Ripstein rightly points out, it does not take the form of instrumental checks and balances as is common in separation of powers doctrines.<sup>181</sup> Rather, each defines the limits of the others’ authority with regards to apportioning rights. We might say that it is only in virtue of their co-ordinate separation that each and all three together apportion rights. This requires the three authorities to create, apply and maintain a system of laws.

The separation of authorities is justified because it is necessary for the general united will to be the source of external law giving in the civil union. It serves to create the conditions in which rightful law can be established, that is, in which law can be both rightful and effective in the external world.<sup>182</sup> To be rightful the law must be given by the general united or omnilateral will. In this, Kant takes Rousseau’s general will and modifies it for his own philosophical purposes.<sup>183</sup> For his ideal state in idea, Kant rejects Hobbes’ unilaterally willing sovereign and replaces it with this omnilateral will which is given by all and to all.<sup>184</sup> The sovereign authority represents the omnilateral will and it is the sovereign’s will that wills the laws.

However, this alone is not sufficient for establishing rightful omnilateral external law giving. As well as omnilateral willing of laws, particular willing is also required to apply law in

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<sup>180</sup> See Paul Guyer, “Achenwall, Kant, and The Division of Government Power” in *Kants Naturrecht Feyerabend: Analysen und Perspektiven*, ed. by Margit Ruffing, Annika Schlitte, and Gianluca Sadun Bordoni (Berlin: De Gruyter, 2020), pp. 201-228 (p. 202).

<sup>181</sup> Arthur Ripstein makes this point convincingly in *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 174-5.

<sup>182</sup> As opposed to the internal law of the will, which is the subject of *The Doctrine of Virtue* that accompanies *The Doctrine of Right*.

<sup>183</sup> Two useful accounts, which are not necessarily followed in all their details here are Katrin Flikschuh, “Elusive Unity: The General Will in Hobbes and Kant”, *Hobbes Studies*, 25 (2012), 21-42; Macarena Marey, “The Ideal Character of the General Will and Popular Sovereignty in Kant”, *Kant-Studien*, 109 (4) (2018), 558-580.

<sup>184</sup> *MM* 6:314.

particular cases, both in the giving of verdicts where a case is subsumed under the law, and in the application of coercive or incentivising force to uphold the law. This particular willing is unilateral; it is neither given by all nor to all. Without particular willing, the omnilaterally willed laws could not take effect in the external world. The particular wills necessary for the state are embodied in the executive regent and the judge, and it is only because they are the particular wills of particular persons that they can perform their functions within the state. Only the sovereign represents the idea of the general united will directly, not the regent or the judge.<sup>185</sup>

The omnilateral and particular willing of a system of law is made possible by the separation of authorities. The sovereign represents the omnilateral will and so can only will laws the same for all and for each. The sovereign cannot, for this reason, deal with particular cases.<sup>186</sup> For the sovereign to act in these cases would be to act “beneath its dignity” as the sovereign’s subjects have particular wills and the sovereign is a superior to not an equal of its subjects.<sup>187</sup> One might even say that, in intervening in a particular case, the sovereign would be relinquishing their right of representation of the omnilateral will.<sup>188</sup> Certainly, they would be overstepping the bounds of their authority and threaten the rightfulness of the system of laws. By separating a regent to govern using coercion or other incentives “directed to particular cases” and the judge to give verdicts in particular cases, Kant makes possible the particular willing that makes possible an effective system of law.<sup>189</sup> The laws remain legitimate because both judge and regent are subordinated to the omnilaterally willed law and may not make law themselves. Hence, the regent can will only decrees “given as subject to being changed” and not laws.<sup>190</sup> Moreover, the judge must be a separate person from the regent because both the regent and judge are particular persons with particular wills. This means that the regent cannot judge in their own case, except with the danger of them thereby committing a

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<sup>185</sup> The executive and the judiciary are not ‘public wills’ if that term is understood to mean that they represent the general united will. They are however ‘public’ in the sense of being public or civic dignities.

<sup>186</sup> Cf. Paul Guyer, “Achenwall, Kant, and The Division of Government Power, p. 211; Marie Newhouse, “The Legislative Authority”, *Kantian Review*, 24 (4) (2019), 531-553 (p. 535).

<sup>187</sup> *MM* 6:327. Cf. *F* 27:1384.

<sup>188</sup> *MM* 6:341-2. Something like this relinquishment of sovereign right is what Kant argues happened during the summoning of the estates general.

<sup>189</sup> *MM* 6:317.

<sup>190</sup> *MM* 6:317.

wrong.<sup>191</sup> In so far as the regent is to be held accountable under the laws of the sovereign, they must therefore not judge in their own case.<sup>192</sup>

One might think there is a problem here in that the judge could judge in their own case. This is what Kant describes happening in a case of equity. Perhaps because he is aware of this point the scope of the judge to give verdicts on non-lawful grounds of equity is severely curtailed.<sup>193</sup> However, since inappealability of the highest judge is inherent in the concept of judicial authority, there is in the extreme case no route of appeal and no-one else could have standing to make this judgment.<sup>194</sup>

This crucial link between the separation of authorities as the necessary condition of rightful omnilateral law making is widely accepted in the literature.<sup>195</sup> What is distinctive in my account is that as part of the state in idea, the separation of authorities allows for the idea of rightful omnilateral external law making to entirely determine the individual ‘thing’ or the common being that is the civil union, that is, for the omnilateral or general united will to actually be law making in the civil union. As a practical ideal, the state in idea becomes possible only in the context of the first political judgment of the contingent formation and moral recognition of the civil union.

Now, the first political judgment stands. It is not done away with after the transition to public right which it occasions. For the state in idea to be a practically possible ideal, the imperative to strive for it must not undermine the conditions that make it possible. The state in idea is only practically possible if there is an actual common being to be perfected. For this reason, the structure of the state in idea also gives due to the imperative to form, submit to, and now (in the context of public right) also maintain the civil union. This is reflected in the second principle that defines the structure of the state in idea, to which we now turn.

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<sup>191</sup> Cf. *R* 7752 19:507.

<sup>192</sup> 6:320. Cf. *dPP* 23:164.

<sup>193</sup> 6:234-5.

<sup>194</sup> Cf. B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010), p. 162.

<sup>195</sup> Byrd & Hruschka, *Commentary*, pp. 143-7; Ripstein, *Force and Freedom*, pp. 145-81; Newhouse follows Ripstein in her account of the legislative authority, “The Legislative Authority.”, p. 534.

#### Section Four – The Hierarchy of Authorities

As well as a separation of the three authorities, Kant also establishes a *hierarchy* of the three authorities with the sovereign at the top. Beyond the direct functions of the state authorities with regard to the establishment of law, the sovereign legislature holds powers over the other two authorities which are not matched with symmetrical powers. This creates a hierarchy, not equality, between the three separate authorities. Consider the following passage:

*The sovereign can also take the regent's authority away from him, depose him, or reform his administration. 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 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.*<sup>196</sup>

The first sentence shows that the sovereign has authority over the regent – i.e. the person who holds executive authority – in a right to remove, depose or reform them. The sovereign legislature's authority here does not manifest in a right to exercise executive authority against the regent, but to strip their authority rendering them no more than a private citizen.<sup>197</sup> The sovereign has the authority to decide who can exercise executive authority, and to that extent how they exercise it.

*The Doctrine of Right* also gives the sovereign legislature authority over the judge or judicial authority. First, the sovereign has power of appointment over judges: “neither the head of state nor regent can judge, but can only appoint judges as magistrates”.<sup>198</sup> Second, in certain circumstances or “cases of necessity” the sovereign has the power to “assume the role of judge” and decree a different sentence to that pronounced by the judge.<sup>199</sup> Finally, the sovereign also has the right to grant clemency of which Kant says: “This right is the only one

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<sup>196</sup> *MM* 6:317.

<sup>197</sup> The sovereign's authority to strip dignities is discussed at *MM* 6:328-30. Kant holds that civil offices (including, not incidentally, university professors) cannot be removed by the sovereign except in the case of a crime being committed, whilst dignities can. Even then, unless a crime has been committed, the person will still be left with the dignity of citizenship, hence why the regent is rendered a private citizen. Cf. *dPP* 23:172.

<sup>198</sup> *MM* 6:317.

<sup>199</sup> *MM* 6:334. The circumstances Kant discusses are outlandish, a ‘population-wide murder conspiracy’. I discuss Kant's reasoning behind this bizarre case below.

that deserves to be called the right of majesty.”<sup>200</sup> The right of clemency is limited. Firstly, it is restricted to cases of “wrongs done to himself” i.e., to the sovereign, and never “crimes of *subjects* against one another”.<sup>201</sup> One plausible interpretation of this restriction is that the right of clemency only applies in the case of a crime against the state, not a private person, or crimes of public law, and not private law. Secondly, even then the right of clemency may not be invoked if it “could endanger the people’s security.”<sup>202</sup> Nonetheless, the right of clemency is a second right of the sovereign legislature to annul the verdict of the judge. There are no symmetrical powers for the judge over the sovereign legislature. Nor are there such powers for the regent.

Kant has a principled reason for endorsing this hierarchy of authorities as well as the separation of authorities. This is the necessity of the civil union as the condition for possible rightful omnilateral external law making. As discussed in Chapter One, it is only the first political judgment that it is an imperative to form and submit to a civil union that makes possible rightful omnilateral external law making. The state in idea is a practical ideal, and as such it must be structured in such a way that it does not undermine the conditions for its possibility. This is the reason for the hierarchy of authorities. To see why this is the case, it will be helpful to consider the example of Kant’s ‘population-wide murder conspiracy’, before moving on to the justification in general.<sup>203</sup> It is worth quoting in full:

*Accordingly, every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; this is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded a priori. – If, however, the number of accomplices is so great that the state, in order to have no such criminals in it, could soon find itself without subjects; and if the state still does not want to dissolve, that is, to pass over into a state of nature, which is far worse because there is no external justice at all in it (and if it especially does not want to dull the people’s feeling by the spectacle of a slaughterhouse), then the sovereign must also have it in his power, in this case of necessity (casus*

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<sup>200</sup> *MM* 6:337.

<sup>201</sup> *MM* 6:337. This restriction of clemency to crimes against the sovereign parallels the restriction of judgments of equity in legal cases to crimes against the crown, see *MM* 6:234-5.

<sup>202</sup> *MM* 6:337. Cf. *dMM* 23:348.

<sup>203</sup> This odd case is little discussed in the literature. An exception is Thomas Mertens, “Emergencies and criminal law in Kant’s legal philosophy”, *ethic@ - An international Journal for Moral Philosophy*, 16 (3) (2017), 459-474.

*necessitatis*), to assume the role of judge (to represent him) and pronounce a judgment that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population. This cannot be done in accordance with public law but it can be done by executive decree [Machtspruch] that is, by an act of the right of majesty, which as clemency, can always be exercised only in individual cases.<sup>204</sup>

In this case, the judge is confronted by a murder conspiracy encompassing the whole, or nearly whole, population. By law, the rightful judgment is to execute each of the citizens. The reason for this is that for the crime of murder, no punishment is adequate but that the perpetrator die.<sup>205</sup> Earlier in the section from which this passage is taken, Kant also states that the law of punishment in general is a categorical imperative.<sup>206</sup> So it is not only by positive, or what Kant calls subjective, law that the judge ought to pronounce this verdict, but by objective law, grounded a priori and established by the sovereign legislature.<sup>207</sup> Following this, the executive regent ought to carry out the executions. This course of action would be the three authorities performing their respective functions in accordance with the separation of authorities. The sovereign establishes the lawful punishment for murder in accordance with a priori principles; the judge applies the law through their verdict; and the executive regent carries out the extreme coercive function of executing the entire population. Yet Kant still holds that the sovereign must intervene via a ‘Machtspruch’ to prevent this from happening.

The justification for this is the first political judgment in accordance with the idea of the general united will. Kant’s reasoning is that carrying out the original verdict would lead to the risk that the state would “pass over into the state of nature, which is far worse because there is no external justice at all”. In the unlikely empirical circumstances Kant imagines, the normally desirable fact that the particular willing of the regent and the judge cannot be directed at anything other than applying a general law in a particular case has created a situation in which the civil union, lawfully and rightfully, might rule itself out of existence, thus destroying any possibility of rightful omnilateral external law giving. Without population there cannot be a state and without a state there cannot be rightful laws. The

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<sup>204</sup> *MM* 6:334.

<sup>205</sup> *MM* 6:333.

<sup>206</sup> *MM* 6:331.

<sup>207</sup> Cf. subjective and objective right at *MM* 6:236.

judge's particular will is constrained by rightful omnilateral law to will the destruction of the conditions that make such willing possible: But this is a contradiction in willing. For this reason, the sovereign acts in a particular case whilst still judging in accordance with the omnilateral will because that act secures the conditions for the possibility of the omnilateral willing of rightful external laws. The sovereign assumes the role of the judge, exercises their authority to pronounce a sentence that maintains the population, such as deportation to another province, and carries it out through executive decree. The separation of authorities is violated, but the sovereign does not act from their particular will, and so is rightful and justified in doing so.

I return to this case, and to the role of the sovereign, in Chapter Four. For our purposes here, the important point to take away from the population-wide murder conspiracy example is that when the separation of authorities is violated in accordance with the hierarchy of authorities, this is done to maintain the existence of the civil union. As a practical ideal, the state in idea becomes possible only in the context of the first political judgment of the contingent formation and moral recognition of the civil union, and it must reflect this in its structure. The hierarchy of authorities does just this. The first political judgment remains operative in public right and conditions the structure of the ideal state in idea. The determination of a common being by the idea of rightful omnilateral external law making is only possible if there is such a common being and the state in idea, as a practical ideal, must not undermine this. Practical political judgment thus has priority over the ideal in *The Doctrine of Right*. It conditions the ideal which is itself posited by Kant in practical political judgment from within the contingent context of a civil union. This is a notably different structure from the ideal-theoretic model of political judgment, and this is not the only difference.

Ideal-theoretic political philosophy tends to aim at describing a comprehensive ideal which is then pursued in political judgment. Kant's state in idea does not make this attempt. The state in idea is, in the first instance, only an ideal for the civil union and thus only an ideal for the right of state. The right of nations and cosmopolitan right exist beyond it. Even in the context of right of state, the complexity of the structure of the state in idea also limits its comprehensiveness. Moreover, it sustains the necessity for political judgment. The state in idea allows for both the imperative to strive to ensure that the general united will itself is the source of external law giving, but it also allows for the imperative to maintain the civil union. These imperatives are not inherently contradictory. Nonetheless, given their openness to contingent empirical circumstances, it is quite possible that they become so, as is the case in

the population-wide murder conspiracy. Political judgment, in accordance with the general united will, comes to the fore again in this case.

Imagine another situation, one in which proceeding to reform the civil union to more closely realise the state in idea through, say, separating executive and judicial power provokes a response that threatens the existence of the civil union. Say an angry regent who is about to have half their authority removed mobilises their means of coercion. In such a situation, it would appear that the two imperatives – to realise rightful omnilateral external law making and maintain the civil union – come into tension. Faced with this dilemma, there is nothing a priori that allows for a judgment between the two imperatives. This dilemma is a conflict of duties. Strictly speaking, Kant denies that a true conflict of duties is possible, but in the introduction to *The Metaphysics of Morals* he discusses the potential for conflicts in what he calls the grounds of obligation.<sup>208</sup>

On Jens Timmermann’s analysis, such grounds of obligation are best conceived of as pro tanto duties which can be defeated by other grounds of obligation judged to be stronger.<sup>209</sup> This judgment cannot be determined outside of the empirical and contingent, and yet moral conditions in which the judge finds themselves. Finding the stronger ground requires attention to moral and experiential conditions. The conflict “arises in moral practice” and must be judged from within that practical context too.<sup>210</sup> In the political instance of the conflict of duties that is a stake here, the political judgment must be made in accordance with the idea of the general united will. The judgment must be a possible judgment of the general united will of the common being, the civil union. It would be one thing to delay reform to a more politically astute moment, but it would be another to delay reform because one had accepted a bribe from the regent who faces a loss of their power.

We will return to the questions raised here extensively in Chapter Four. Here, the point is that when I say that the state in idea is not comprehensive, I mean that the state in idea does not provide a definitive orientation for political judgment. It in fact allows for competing imperatives, and the only path forward is through practical political judgment in accordance with the idea of the general united will. To be clear, the idea of the general united will is not

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<sup>208</sup> *MM* 6:224.

<sup>209</sup> Jens Timmermann “Kantian Dilemmas? Moral Conflict in Kant’s Ethical Theory”, *Archiv für Geschichte der Philosophie*, 95 (1) (2013), 36-64.

<sup>210</sup> Timmermann “Kantian Dilemmas?”, p. 58. Cf. *dTP* 23:136; *dPP* 23:163; *dMM* 23:345.



here conceived of as some kind of decision procedure, it is rather a reflective principle, much like the categorical imperative, that gives form to political judgment.

### Section Five – The Priority of Judgment

In this chapter, I have argued that the state in idea is a practical ideal. The ideal state in idea is not formed speculatively or theoretically in philosophical reasoning, separate to practical political judgment. It becomes possible to posit it as an ideal end of political judgment only after the first political judgment to form and submit to a civil union. The formation of the state in idea is itself a practical political judgment in accordance with the idea of the general united will in which it is posited as an ideal for the common being of the civil union; one which determines the civil union entirely through the idea of rightful omnilateral law making. In accordance with the idea of the general united will, the citizen judges that they must strive to make the general united will itself the source of external law giving in the civil union. To do this is to strive to realise the state in idea. However, this imperative must not undermine the conditions that make this striving possible, that is, the common being. The contingent but practical context from which the ideal is posited, conditions the ideal's content such that, as well as a separation of authorities, the state in idea also consists in a hierarchy of authorities. The sovereign is granted the authority to maintain the civil union, even in the face of a threat emanating from the other authorities, through this hierarchy. The state in idea is thus an ideal that is formulated in the context of a categorical commitment to a contingent civil union, and it is this that makes it an ideal of practical political judgment. The state in idea is not an ideal-theoretic ideal, and its relationship to political judgment is not in accordance with the ideal-theoretic model.

One way to put this point is that practical political judgment has priority over ideals in *The Doctrine of Right*. By this I mean that when reading *The Doctrine of Right*, one must conceive of Kant as always already engaged in practical political judgment prior to any suggestion of a political ideal. This is quite different from the ideal-theoretic model of political judgment and in many ways distinctive of Kant's radical first-personal and reflexive approach to practical philosophy in general. The idea of the general united will is formulated reflexively in practical judgment, much like the categorical imperative, and it gives form to political judgment and conditions the remainder of his practical reasoning in *The Doctrine of Right*, including the formulation of the state in idea. Of course, this is not the end of political

judgment in *The Doctrine of Right*. As we have seen, the state in idea is not a comprehensive ideal and even after the formulation of the state in ideal, there remains much practical political judgment that is necessary. For Kant, what matters is that for this to be truly political judgment, this must be judgment in accordance the idea of the general united will.

In addition to its reflexivity, as we have seen, the general united will is also like the categorical imperative in its capacity to mandate ends. In this chapter, we have assessed one of those ends, Kant's practical ideal of the state in idea. In the next, we will investigate another, perpetual peace. As we will see, perpetual peace is in fact not an ideal, but rather a phenomenal political good.

### Chapter Three – Perpetual Peace is not an Ideal

In this chapter, I conclude the systematic argument against the ideal-theoretic model of political judgment by showing that there is no ideal in *The Doctrine of Right* that conforms to the ideal-theoretic model. I have argued in Chapters One and Two that the state in idea is practical and not theoretical. I also argued that it is the only ideal in *The Doctrine of Right*. If these arguments are accepted, then the case against the ideal-theoretic model has been shown. However, I strongly doubt that most Kant scholars would accept the claim that the state in idea is the only ideal in *The Doctrine of Right* without something being said to address perpetual peace. This is a fair challenge, and my purpose in this chapter is to respond to it.

It is plausible that Kant conceives of perpetual peace as an ideal given both the language he uses regarding it and its systematic place within the text. Kant concludes *The Doctrine of Right* (and hence, may have intended his final words – literally – on political matters to be): “the highest political good, perpetual peace.”<sup>211</sup> The *highest* political good, either or perhaps both the “supreme” good “which is itself unconditioned” and “complete” good “that whole which is not part of a still greater whole of the same kind”.<sup>212</sup> It is thus plausible to read the state in idea as only a part of a broader, more complete, ideal of perpetual peace. After all, Kant does say that the right of state, the right of nations and cosmopolitan right are systematically connected such that “if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.”<sup>213</sup> To make my alternative reading of *The Doctrine of Right* as an exercise of practical political judgment itself plausible, in this chapter I argue that despite any initial plausibility, Kant does not, in fact, conceive of perpetual peace as an ideal.

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<sup>211</sup> *MM* 6:355.

<sup>212</sup> *CPrR* 5:110, where, of course, Kant speaks with reference to the highest good itself.

<sup>213</sup> *MM* 6:311. I will note that I take there to be no supposed ideal of cosmopolitan right apart from perpetual peace because although Kant refers to perpetual peace as “the ultimate goal of the whole right of nations” (*MM* 6:350) he also says “establishing a universal and lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of mere reason”. (*MM* 6:355) I therefore take perpetual peace to constitute the supreme and complete highest political good, including cosmopolitan right. I cannot see what supposed ideal – other than perpetual peace or the state in idea – could apply specifically to cosmopolitan right.

The core of my argument is that, unlike the state in idea, there is no individuated common being which can form the practical basis of an ideal of perpetual peace. This argument is complicated by the complexities involved in interpreting what Kant had in mind when discussing ‘perpetual peace’ in *The Doctrine of Right*. There is no agreement in the literature about what the content of an ideal of perpetual peace would be. In comparison to the state in idea, where there is at least agreement that it is the relationship of the three state authorities that comprises the core of the ideal, in the case of perpetual peace there is a debate over whether perpetual peace involves a *congress of states* or a *world state*. Within the latter, there is then a debate about whether such a world state must be a *federal* state of states or a *unitary* world state.

I argue that there is no interpretation of perpetual peace that can be consistently read as assigning it the status of a practical ideal. If perpetual peace involves a world state, then it is not practically possible. If it involves a congress of states, then it cannot be an ideal. If I am successful in this argument, I believe the case against an ideal-theoretic reading of political judgment in *The Doctrine of Right* has been concluded. More interesting, however, is what it enables us to conclude about perpetual peace and political judgment in *Doctrine of Right*. I argue that perpetual peace is best understood as a phenomenal political good, and that this secures an ongoing role for political judgment deep into Kant’s practical reasoning about matters of public right. Indeed, it secures a central role for judgment right up to the final words he wrote.

The structure of my argument is complex. This is a reflection of the wide debate in the literature concerning Kant’s supposed ideal of perpetual peace, and it is as follows. In Section One, I introduce the view that Kant’s supposed ideal of perpetual peace is constituted by a world state, and specifically a state of states. I interpret this as an argument for a kind of *federal* world state, and in Section Two, I argue that federalism is not compatible with the political philosophical framework of *The Doctrine of Right*. I then consider whether a *unitary* rather than federal world state could comprise the core of Kant’s supposed ideal of perpetual peace. In Section Three, I argue such an ideal of a unitary world state would reduce to the state in idea. In Section Four, I argue that the state in idea cannot be an ideal for perpetual peace as it is not practically possible to strive for it given that the right of nations presupposes the contingent existence of separate civil unions. I then turn to consider the possibility that Kant’s supposed ideal of perpetual peace is comprised by an ideal congress of states. In Section Five, I outline this possibility and, in Sections Six and Seven, I argue that the

Congress of states in *The Doctrine of Right* is not an ideal. I conclude in Section Eight by reflecting on the impact interpreting perpetual peace as a phenomenal political good has on reading *The Doctrine of Right* as an exercise in practical political judgment.

### Section One – A State of States

The first reading of Kant's supposed ideal of perpetual peace is that it involves a world state. The immediate source for this claim is the apparent analogy between the world state as a solution to the state of nature between states, and the state as the solution to the state of nature between individuals. Kant invokes such an analogy numerous times in his work. In *The Doctrine of Right*, he says that "Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about."<sup>214</sup> The logic of this analogy is that as individuals must submit to a state, so must states submit to a state of states.

In the literature on perpetual peace in Kant, the scholars who have taken this analogy furthest and formed a comprehensive account of the world state as the ideal of perpetual peace are Byrd and Hruschka. They begin from the analogy between the state of nature among individuals and the state of nature among states and argue to the conclusion that the state of states is the "ideal solution" to and "ideal model" of perpetual peace.<sup>215</sup> They may not quite say that the state of states is a practical ideal, but it is clear enough that this is what they have in mind. They speak of the "duty to strive" for it and towards its "perfection".<sup>216</sup> I will therefore treat this as an account that takes the world state of states to be the ideal of perpetual peace.

Byrd's and Hruschka's analysis of Kant's argument encompasses their reading of the argument for the postulate of public right. By their reading, it is the "presumption of badness", a moral presumption which is outside of but foundational to the system of right which necessitates the postulate, including the right to coerce others to enter into the civil

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<sup>214</sup> *MM* 6:350.

<sup>215</sup> B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010), p. 188.

<sup>216</sup> Byrd and Hruschka, *Commentary*, p. 203.

condition with you.<sup>217</sup> It follows from this and the analogy that “states have a right in the state of nature to coerce their neighbouring states to enter a juridical state of states.”<sup>218</sup> What follows then is an analysis of what Kant means by a ‘state of states’ in *The Doctrine of Right*, as well as in other texts. More specifically, Byrd and Hruschka ask what “construct Kant has in mind as the ideal arrangement for the juridical state of nation states”.<sup>219</sup>

To begin with, Byrd and Hruschka, distinguish the state of states from the ‘world state’ which they associate with ‘universal monarchy’. Kant is avowedly against the universal monarchy, but why should this be equated with the world state? Is it not possible to have a world state that is not a monarchy but is rather a global democracy or world republic? Given Byrd and Hruschka’s view that for Kant true republicanism requires democracy, it seems odd for them to make this equation.<sup>220</sup> However, Byrd and Hruschka seem to have exactly this point in mind when they write that “Kant does not use the word ‘monarchy’ to mean that one single person reigns... For a state with one single ruler, Kant uses the term ‘autocracy’. Instead, Kant means by ‘monarchy’ a state with only *one* source, only *one* origin of state power.”<sup>221</sup> That could well be read as a basic statement of republicanism. Rather than one origin of state power (say, the divine right of the king), there are multiple sources of state power in each one of the people. Thus, one could say that any republican state is not a monarchy, and thus the world republic remains a possible institutional form of the ideal of perpetual peace.

Yet this is not what Byrd and Hruschka want to say. Instead, they argue that “a ‘universal state of *nations*’ [*Völkerstaat*]” is a state in which “the peoples and the state representing them are preserved.”<sup>222</sup> Here, the significance of the rejection of the world state becomes clear. Byrd and Hruschka argue that Kant rejects a *unitary* world state that dissolves the individual states as constituent members, in favour of a state of states that preserves them. The multiple sources of state power are thus not merely all the individual people of the world but them collectively as peoples and the states which represent them. This is the true result of the analogy as “in a state of nations the individual states give up their ‘savage’ freedom and

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<sup>217</sup> Byrd and Hruschka, *Commentary*, p. 193. This reading of the postulate is disputable, but I will not engage with this here to keep the focus on the supposed ideal of perpetual peace.

<sup>218</sup> Byrd and Hruschka, *Commentary*, p. 195.

<sup>219</sup> Byrd and Hruschka, *Commentary*, p. 196.

<sup>220</sup> Byrd and Hruschka, *Commentary*, p. 181.

<sup>221</sup> Byrd and Hruschka, *Commentary*, p. 197.

<sup>222</sup> Byrd and Hruschka, *Commentary*, p. 198.

subject themselves to ‘public coercive laws...’.<sup>223</sup> The state of states thus involves fully coercive law, exercised over states which are already juridically sovereign.

This distinguishes the state of states from the league of states, which Byrd and Hruschka treat as more or less identical to the permanent congress of states one finds in *The Doctrine of Right*. Byrd and Hruschka continue “...whereas in a league of nations the states are not subject to ‘public laws and coercive force under them’”.<sup>224</sup> The key difference is the role of coercion. There is a court of some kind in the league of nations, but it does not have coercive power. Yet in a state of states the courts “must be supported by an executive power”.<sup>225</sup> We thus have three models. The unitary world state, the state of states and the league. The middle option is the one Kant chooses according to Byrd and Hruschka and is distinguished from the former because states are not dissolved and the latter because of the presence of coercive law.

## Section Two – Against Kantian Federalism

For Byrd and Hruschka then, the content of Kant’s supposed ideal of perpetual peace is a state of states. This state of states is not a unitary state, rather a state of states maintains its constituent states, and it may appropriately be called a *federal* state. It is my purpose in this section to argue that such a federal state is not compatible with the political framework Kant develops in *The Doctrine of Right*. In the scholarship on Kant’s international political philosophy, a federal world state is often marked by distinguishing the internal sovereignty of individual states from the external sovereignty of relations between them, which is governed by the sovereign of the federal world state. Byrd and Hruschka hint at this when they write that “logically an internal constitution *cannot* unilaterally govern the state’s external relations to other states”.<sup>226</sup> However, their argument on this point is relatively underdeveloped, so I will also engage with Pauline Kleingeld’s more lengthy defence of Kantian federalism along these lines.

It is important to begin by distinguishing federalism and a federal state, from an international federation or congress of states. The latter is characterised by a voluntary agreement between

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<sup>223</sup> Byrd and Hruschka, *Commentary*, p. 199.

<sup>224</sup> Byrd and Hruschka, *Commentary*, p. 199.

<sup>225</sup> Byrd and Hruschka, *Commentary*, p. 201.

<sup>226</sup> Byrd and Hruschka, *Commentary*, p. 196.

states which does not set up a central body with the power to coerce. At most it involves the creation of a court to arbitrate between states. Federalism, or the federal world state is as Pauline Kleingeld argues a “stronger ideal of a state-like international federation of states.”<sup>227</sup> For Kleingeld, Kant endorses the congress of states or non-coercive federation only as a step towards the ideal of a world federal state of states. She claims “the goal is still to form an international federation with the power to enforce its laws.”<sup>228</sup> As with Byrd and Hruschka, Kleingeld believes that the ideal of perpetual peace involves a global institution with the ability to coercively enforce its laws. Kleingeld’s account of the world federal state is valuable in that she gives a more developed argument for why Kant would reject a unitary world state.

Specifically, Kleingeld’s argument explains why the state of nature between states is not solved by a unitary state when the state of nature between individuals is. Kleingeld argues that states (at least ideally) have a “form of collective self-legislation [that] can be called political freedom or political autonomy”.<sup>229</sup> Kleingeld’s explanation for why Kant thinks this is embedded in her wider reading of the nature of Kant’s republicanism, much of which is highly contestable. For example, for Kleingeld, Kant seems to require democracy to realise true republicanism, and that is a highly debated claim in the literature.

However, this does not affect the use Kleingeld’s argument is being put to here. All that one needs to accept is that there is a relevant difference between individuals and states when it comes to the state of nature. States can still individually give themselves public and rightful law in the state of nature between states, whilst individuals cannot. Individuals do not have the right of external self-legislation, whilst states do. As Kleingeld puts it: “Individuals in the state of nature do not yet have anything analogous to this political autonomy; their external freedom is merely ‘wild’ freedom.”<sup>230</sup>

To maintain the political autonomy of states, Kleingeld argues that the federal world state requires states “give up only their sovereignty in their external relations toward each other,

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<sup>227</sup> Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge: Cambridge University Press, 2012), p. 44.

<sup>228</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 47.

<sup>229</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 53.

<sup>230</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 54.



and they could retain sovereignty in internal affairs.”<sup>231</sup> Against the view that Kant rejects such an approach, Kleingeld argues that if he did, he would have criticised “the Dutch or Swiss Republics or the very creation of the United States of America, which he does not.”<sup>232</sup> Like Byrd and Hruschka, then, Kleingeld sees in Kant a form of federalism in which states transfer external sovereignty to a federal institution, whilst maintaining internal sovereignty. In external matters, the federal body has coercive authority, but internal matters are the preserve of the states. Like Byrd and Hruschka, Kleingeld reads Kant’s rejection of a universal monarchy as a rejection of a unitary world state, and she writes that “this rejection of a fusion of states should not be mistaken for a rejection of a global federation of states”.<sup>233</sup>

There is much more to Kleingeld’s account, including a separate argument for federalism to the effect that there is no acceptable process by which a unitary world state could be formed from a plurality of states, whilst there is with a federal world state. However, I will postpone discussion of this until Section Four when I address the question of transitioning from a plurality of states to a single world state. For the present moment, the important point to is that for Byrd, Hruschka and Kleingeld a federal world state or state of states comprises Kant’s supposed ideal of perpetual peace.

This position rests on a division of external and internal authority, which I am not convinced is easy to sustain within the framework of Kant’s political philosophy. To begin, it is clear that for Kleingeld, on the federal level, the world state is one single state. This is clear in her discussion of objections to Kant’s claim that the idea of a state of states “*contradicts the presupposition*” of international right and is thus impossible because international right “must address the legal regulation of the interactions among a plurality of different states, not the internal laws of a single world state.”<sup>234</sup> For the objectors, this is a hopelessly formal argument that Kant should not have made, but Kleingeld argues that all Kant means by this is that until we transition beyond a plurality of states we must deal with laws of right for a plurality of states. Once we get beyond the plurality of states to the federal world state, then we are dealing not with international right, but with the internal laws of a world state. Whatever her success against Kant’s detractors on this point, it makes clear that Kleingeld

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<sup>231</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 60.

<sup>232</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 62.

<sup>233</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 61.

<sup>234</sup> Kleingeld, *Kant and Cosmopolitanism*, pp. 60-1.

conceives of the world federal state as one single state and this poses certain problems for the possibility of a Kantian federal world state. Kant holds a conception of the state that is unitary and not federal. Specifically, Kant does not think that any parts of the state can hold rights against the sovereign. Kant's rejection of discussion of 'mixed constitutions' and his claim that "moderate constitutions, as a constitution of the inner rights of a state, is an absurdity", which might provide for some such federal rights (as well as other inner rights), offer support for this reading.<sup>235</sup>

Now it might be objected that what is at stake in the federal world state is not inner rights but simply a division of external and internal sovereignty. This is what we saw Byrd and Hruschka claim above. They write that "logically an internal constitution *cannot* unilaterally govern the state's external relations to other states".<sup>236</sup> It is not clear to me why an internal constitution *cannot*. It seems to me perfectly logical that an internal constitution can govern a state's external relations with other states. For example, the sovereign could make laws that bind the coercive authority of the executive such that it can only exercise its coercive authority externally in self-defence or in defence of allies. This would make any other external exercise of force by the executive wrong and grounds for dismissal of the regent. Indeed, Kant's division of the three authorities suggests that he does not see the need for a division of external and internal sovereignty. Given that external sovereignty is mostly characterised by rights to do with war, if Kant had in mind the separation of external and internal sovereignty, he might have followed Gottfried Achenwald (whose work Kant often used as the basis for his lectures on right) in having separate external and internal coercive authorities. However, it is notable, as Byrd and Hruschka themselves point out, that Kant rejects this.<sup>237</sup> Kant's state has only one coercive authority and it is not clear why sovereignty should need to be divided at all.

A similar concern arises even if this problem is somehow avoided. The specific right that Kleingeld (and Byrd and Hruschka) argue individual states must give up is the right of sovereignty over external relations. They thus give up their rights over the external use of coercive force. But this poses the question of whether a state can remain a state whilst giving up this right. It is important to note that what is at stake here is simply the *right* to exercise

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<sup>235</sup> *MM* 6:339; *MM* 6:320.

<sup>236</sup> Byrd and Hruschka, *Commentary*, p. 196.

<sup>237</sup> Byrd and Hruschka, *Commentary*, p. 146 fn. 17.

external coercive force, let alone giving up the capacity to do so. Even so, it seems an important part of the nature of states that they have the right to use coercion to maintain themselves. As argued in the previous chapter, the necessity of maintaining the civil union remains an imperative in a condition of public right, and the case has also been made by others. Arthur Ripstein explains Kant's claim that the "state must be regarded as perpetual" whilst the congress of states can be dissolved (as well as other domestic institutions), by appealing to the right states have to perpetuate themselves.<sup>238</sup>

And even if one can overcome this hurdle too, there are still further questions. For example, if a state gives up its right over external relations, could they take it back, or rather, do they have the right to take it back? On this, Kleingeld is not clear. She rejects the possibility of backsliding from the federal world state into independent states on account of Kant's teleology.<sup>239</sup> Such an appeal to teleology might explain what Kant thought states *would decide to do*, but it doesn't tell us whether they *would have the right to do it* or not. And to this latter question, there doesn't seem to be a satisfactory answer. If states can rightfully regain their rights to external sovereignty, then the federal world state was only ever voluntary, and thus no more than a mere federation with a highly empowered (but still voluntary) central body. If, on the other hand, states cannot rightfully take back their external sovereignty then, again, the question whether the states remain states at all rears its head.

Moreover, if the state did not have this right then it would seem they would be liable to coercive force from the federal world state were they to try, and this poses even more questions about the statehood of the individual states. At a fundamental level of individual political judgment, Kant is committed to the obedience of citizens to their states. 'Their states' is defined as the one which has power over them. Indeed, it is a categorical imperative of Kant's political philosophy that one "*Obey the authority that has power over you*".<sup>240</sup> If the individual states in the federal world state do not have even the right (let alone the capability) to withdraw their ceding of external sovereignty to the federal world state, then it seems that for their citizens, the authority with power is the federal world state, not their individual state. This puts into question the political obligations of the citizens towards their individual state,

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<sup>238</sup> *MM* 6:367; Arthur Ripstein, *Force and Freedom: Kant's legal and political philosophy* (Cambridge, MA: Harvard University Press, 2009), p. 230.

<sup>239</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 67.

<sup>240</sup> *MM* 6:371.

and with that in question, the statehood of the individual state must be in severe doubt yet again.

It therefore seems to me that a federal state, let alone a federal world state, is not conceivable within the framework Kant sets out in *The Doctrine of Right*. This firstly rules out a reading in which Kant's supposed ideal of perpetual peace involves a federal world state or state of states. Second, it means that if Kant's supposed ideal of perpetual peace is to involve a world state, then the only consistent reading is that this will be a unitary world state.

### Section Three – The Ideal of a World State is The State in Idea

The argument of this section is that if Kant's supposed ideal of perpetual peace is read as being comprised by a unitary world state, then this reduces to the state in idea – the ideal for the civil union discussed in the previous chapter. We have seen that a federal world state is not compatible with Kant's framework in *The Doctrine of Right*; this leaves us with the possibility that Kant's supposed ideal of perpetual peace involves a unitary world state. Byrd and Hruschka, though ultimately leaning towards a federal world state, tightly bind their reading of perpetual peace to the analogy between the world state and the state. They write: "We thus have a duty to strive towards the constitutional perfection of one single state of nations in an effort to approximate perpetual peace. The duty to strive toward an unattainable goal in an effort to approximate it is no different from the duty we have in our individual juridical states to strive towards constitutional perfection, where everyone's rights are perfectly secured."<sup>241</sup> Given that the world state or state of states must be a unitary world state, that the duty to strive for the ideal state of states 'is no different' to the duty to strive for the ideal state is, I suggest, truer than Byrd and Hruschka intended.

To put a finer point on it, what is the difference between the state of states and the state? We have seen that Byrd and Hruschka assume that the individual states are maintained in the state of states. A state for Kant being, as matter of right, "the whole of the individuals in a rightful condition, in relation to its own members".<sup>242</sup> As we have also seen in the previous section, the state must be unitary. So, what does it mean to say that the states are maintained in this context? To get to grips with this question, we can draw on a distinction Kant draws

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<sup>241</sup> Byrd and Hruschka, *Commentary*, p. 203.

<sup>242</sup> *MM* 6:311.

between ‘division’ and ‘aggregation’ in the context of property and land. He distinguishes “the necessary formal principle of *division* (division of land)” from “principles of *aggregation* which proceeds empirically from the parts to the whole).”<sup>243</sup> In the Kantian state, subdivisions are just that: *divisions*. They are not aggregations of separate entities, but divisions of a single whole entity.

One might wonder whether any implications should be drawn regarding perpetual peace from a distinction which occurs in the context of property and land. There are two good reasons for doing so. First, this distinction occurs in the context of the sovereign as the “supreme proprietor (of the land)” and Kant argues that all rights to land (and hence property) are “derived from the sovereign as *lord of the land*”.<sup>244</sup> Division is thus, in this sense, division under a sovereign and any state, including the world state, must involve subordination to a sovereign in Kant’s view. Second, the distinction is not unimportant for Kant. Historical scholarship indicates that one of Kant’s most consistent and strongly held political views was the rejection of perpetual hereditary nobilities.<sup>245</sup> It is therefore notable that Kant uses the distinction between aggregation and division to argue that the sovereign “can repeal such statutes” as the nobility does not represent an aggregation but a division under the sovereign.<sup>246</sup> The principle that a state is governed by division and not aggregation is thus one that is quite important in Kant’s political philosophy, and we have little reason to think it would not apply to the world state.

The distinction has important consequences for the unitary world state as the supposed ideal of perpetual peace. However, to fully appreciate this we also need to keep in mind a further division between what is a matter of right itself and what is a matter of empirical application of right. As discussed in Chapter One, this division is drawn at the very beginning of *The Doctrine of Right*, where Kant distinguishes between ‘remarks’ which deal with the “empirical application of rights”, and the “metaphysics” of right as a “system outlined a priori”.<sup>247</sup> Kant’s discussion of the state in idea is part of the system and the same is true of Kant’s entire discussion of the right of nations (the relevant section in fact contains no remarks). It is thus also entirely a priori. Given that what we are here discussing is a possible

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<sup>243</sup> *MM* 6:323-4.

<sup>244</sup> *MM* 6:323.

<sup>245</sup> Reidar Maliks, *Kant’s Politics in Context* (Oxford: Oxford University Press, 2014).

<sup>246</sup> *MM* 6:324.

<sup>247</sup> *MM* 6:205-6.

ideal of the unitary world state on the one hand, and the ideal for the state on the other, it is differences between them as a matter of right, not in empirical application, that matter to us. After all, one and the same ideal could be applied differently in two different empirical circumstances. My claim is that, *as a matter of right*, there is no difference at all between the state idea as the ideal of the state and the ideal of a unitary world state.

Within the individual unitary state Kant is well known, notorious even, for being unconcerned about the historical origins of states and the injustices that took place as part of this process.<sup>248</sup> He even argues that inquiry into origins with practical aim is impermissible.<sup>249</sup> He does, however, acknowledge that society is possible in the state of nature, for example “conjugal, paternal, domestic societies in general, as well as many others”.<sup>250</sup> Yet, from the perspective of right in an established state, this history is unknown, unknowable, and perhaps, practically speaking, non-existent. That is not to say that aside from what is strictly right historical societies cannot influence governance as a pragmatic concern. For example, one could well imagine that this category of ‘many others’ could include societies that emerge around particular towns and villages. They might share a bond of some kind and the sovereign or regent might find it prudent to devolve some authority to these societies in order to have more efficient government, or to lessen the chance of rebellion. Importantly, this is a matter of mere prudence, not a matter of right. As subjects of the state, the individuals in these towns and villages have no absolute rightful claim to this devolution. It is governed by a principle of division, not aggregation. For this reason, it is the civil union and not any sub-division which is the subject of the first political judgment.

Exactly the same reasoning would apply to the unitary world state. The contingent history of any such world state would be different than that of an individual state. Rather than towns and villages, we are now thinking of ‘states’ or peoples being represented as subdivisions of the world state. It may be that these peoples pre-exist the unitary world state, but as a matter of right this is irrelevant. There is no reason that the contingent history of a world state should be any more important to Kant than the contingent history of any individual state. It is not the contingent history of the civil union that matters for the first political judgment, it is rather that a contingent civil union *whatever its history* be formed, submitted to and maintained.

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<sup>248</sup> Sovereignty is “a *deed* that can begin only by seizing supreme power”, *MM* 6:372.

<sup>249</sup> *MM* 6:318; *MM* 371.

<sup>250</sup> *MM* 6:306.

Thus, in whatever form the peoples continue to be represented as ‘states’ within the unitary world state, they would do so only according to a principle of division. This means that, so far as right is concerned, these ‘states’ or peoples may hold certain rights but do so only according to the will of the sovereign. Rather than an aggregation of the parts to the whole, from the perspective of right, these states are in fact divisions of the whole. As such the sovereign may well revoke this status should this be judged to accord with the idea of the general united will. In a true federal state, which is governed by aggregation, such revocation of status is not possible.

If it is this unitary world state that is proposed as the ideal for perpetual peace, then this ideal is nothing other than the ideal of the state – the state in idea. It is one and the same ideal, and the state of states in ideal and state in idea are, as a matter of right, identical. In short, a priori, the unitary world state is just the state and not a distinct ideal. It would seem that only empirical differences exist, for example, that the unitary world state encompasses the whole world. But this is not something that can be conceived a priori. Only with additional empirical premises is one able to conceive of this difference. In terms of the system of right, there is not distinction between the state and the unitary world state, there is only difference in their empirical application. As a reading of what comprises Kant’s supposed ideal of perpetual peace, a unitary world state reduces to the state in idea.

#### Section Four – The Practical Impossibility of the Ideal of the State as an Ideal for Perpetual Peace

In this section, I want to raise and reject one final possibility for salvaging a reading of *The Doctrine of Right* in which Kant’s supposed ideal of perpetual peace is comprised by a world state. The claim that I will argue against is that the state in idea can also serve as a practical ideal for perpetual peace as well as a practical ideal for the civil union. What I mean by this is that the ideal of the state may not be formulated by Kant as an ideal of perpetual peace – it is an ideal of the state – but that doesn’t mean that it cannot be applied in political judgment as the ideal we strive to realize when we strive for perpetual peace. This is to say that one and the same ideal of the state could apply both in the context of international right and of the right of state; it would thus be an end for political judgment in both contexts. When one judges in the context of domestic politics, the ideal would apply in one way – for example by requiring each of us to strive to reform the laws of the state – but when judging in the context

of international politics it would apply in another. The thought is that what Kant means by perpetual peace is the overcoming of separate states and the formation of a global civil union which takes, as its ideal form, the state in idea. This possibility is opened by the argument of the previous section in which I argued that, as a matter of right, an ideal of a unitary world state reduces to the state in idea. If this reading were correct, perpetual peace and practical reason would require that we transition from a world of a plurality of states to a world of one single unitary world state through which we can then strive to realise the state in idea on a global scale.

The argument against this possibility turns on whether the transition from a plurality of states to a single world state is practically possible, that is, morally permissible. When introducing the right of nations in *The Doctrine of Right*, Kant emphasizes that the right of nations is “the right of *states* in relation to one another”.<sup>251</sup> The question is, is it practically possible to transition beyond this? I will refer to Byrd’s and Hruschka’s and Kleingeld’s arguments about the transition to a world state throughout this section. None supports the proposal that the state in idea is the ideal for perpetual peace, which I have suggested here, but they do argue that a transition from a plurality of states to a world state is practically possible, otherwise they could not have thought the ideal of perpetual peace requires a world state. The former favour the coercion of states into a world state, the latter only a non-coercive route. I argue that neither approach is practically possible because in both cases it would involve an impermissible dissolving of the already existing civil union which is the condition for questions of public right to arise in the first place.

Byrd and Hruschka’s argument for a coercive transition from a plurality of states to a world state begins from their analysis of the analogy between the state of nature between individuals and the state of nature between states, as discussed in Section One. Byrd and Hruschka’s argument is based on three pillars. The first is the general force of the analogy, they write “everything valid for the individual human beings in their interrelations concerning their right to use force to coerce others to enter a juridical state is likewise valid for the states.”<sup>252</sup> The force of this entirely depends on how far the analogy holds true, and they present both a positive and negative case for this. First, they cite Kant’s claim concerning “the original right that free states in a state of nature have to go to war with one another (in

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<sup>251</sup> *MM* 6:343.

<sup>252</sup> Byrd and Hruschka, *Commentary*, p. 195.



order, perhaps, to establish a condition more closely approaching a rightful condition).”<sup>253</sup> Naturally, Byrd and Hruschka read ‘a rightful condition’ to mean a world state. Second, they argue that Kant’s claim in *Toward Perpetual Peace* that states cannot be coerced because they already have a juridical constitution internally is abandoned in *The Doctrine of Right*, and, moreover, that this is a good thing too as “this position is beside the point anyway, since logically an internal constitution *cannot* unilaterally govern the state’s external relations to other states.”<sup>254</sup> I have said above that this last point does not hold. A state can govern its external relations based on its internal constitution because the sovereign could pass laws that restrain the external coercion of the regent. However, perhaps it would be more charitable to read Byrd and Hruschka as claiming that states ought not to govern their external relations based on their internal constitutions, and thus that some coercion will be necessary. They thereby position themselves against arguments, such as Kleingeld’s, that states cannot be permissibly coerced.

It is clear from the passage Byrd and Hruschka cite that there is a right of states to use coercion against each other, including in pursuit of something closer to a rightful condition. However, what Byrd and Hruschka require is not only that it be permissible to coerce states, but that it be permissible to coerce states into a civil union with each other, thus dissolving the civil unions that exist within them. It does not follow from the right of states to coerce each other that coercion of states into a single world state is permissible. In fact, Kant does place limits on the use of coercion that pertain precisely to this point.

First, Kant argues that wars, though permissible, cannot be wars “*of extermination (bellum internecinum)* or of *subjugation (bellum subiugatorium)*, which would be the moral annihilation of a state (the people of which would either become merged in one mass with that of the conqueror or reduced to servitude).”<sup>255</sup> That such a ‘merger’ of people is to be rejected suggests that the merger of states into a world state is impermissible. However, Kant’s reasoning in defence of this claim is not conclusive. Kant writes “The reason there cannot be a war of subjugation is not that this extreme measure a state might use to achieve peace would in itself contradict the right of a state; it is rather that the idea of the right of nations involves only the concept of an antagonism in accordance with principles of outer

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<sup>253</sup> *MM* 6:344; Byrd and Hruschka, *Commentary*, p. 195.

<sup>254</sup> Byrd and Hruschka, *Commentary*, pp. 195-6.

<sup>255</sup> *MM* 6:347.

freedom by which each can preserve what belongs to it, but not a way of acquiring, by which one state's increase of power could threaten others."<sup>256</sup> The point is thus not that there is an internal constitution as part of the right of a state that is violated, but that such a subjugation would upset the balance of power between states, and thus threaten the future prospects of peace. Byrd and Hruschka could then well argue that though in most cases such coercive merging is impermissible as it would upset the balance of power, if it were possible for a state to subjugate all others all at once and form a world state without the need for a balance of power at all, then this would be permissible. This is surely an unlikely scenario, but the fact that it is unlikely doesn't mean it is not possible, either theoretically or practically. That being the case, the world state as an ideal would itself remain practically possible.

However, a second passage rules this out, and shows Kant did not abandon his view that coercion against a state in order to merge it with another is impermissible because of its internal constitution. Kant writes that even the case of a war against an unjust enemy – that is, “one whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible”<sup>257</sup> (as opposed to other wars that might result from good faith disputes about rights) – does not permit states “*to divide its territory among themselves and to make the state, as it were, disappear from the earth*”.<sup>258</sup> This time, Kant's reasoning is clear: “since that would be an injustice against its people, which cannot lose its original right to unite itself into a common being, though it can be made to adopt a new constitution that by its nature will be unfavourable to the inclination of war.”<sup>259</sup> The rights of war and coercion against states then go very far indeed. Even to the degree of putting pressure on the state to adopt a new constitution. But even here, it is not allowed to merge this state with others as this is an injustice against the people. We might even say that the people have a right to form a civil union. It thus seems that although Byrd and Hruschka are right that coercion between states in pursuit of something closer to a rightful condition is permissible, it is not permissible to coerce states into a single world state. This means that one path to the practical possibility of the ideal of the state as an ideal for perpetual peace is ruled out too.

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<sup>256</sup> *MM* 6:347. We see in this passage Kant's balance of power reasoning which is the subject of Chapter Five.

<sup>257</sup> *MM* 6:349.

<sup>258</sup> *MM* 6:349.

<sup>259</sup> *MM* 6:349. Translation amended. Cf. *PP* 8:346.

There is, however, another path, and this is the non-coercive path Kleingeld supports. More clearly than Byrd and Hruschka, Kleingeld rejects the unitary world state. I have already rejected Kantian federalism on the grounds that the separation between internal and external sovereignty that Kleingeld requires is not possible on Kant's conception of the state.

However, I mentioned in Section Two that there is another argument for federalism in Kleingeld's account. This is that while there is no morally permissible process by which a unitary world state could be formed out of a plurality of states, there is a permissible process by which a federal world state could be formed. I postponed discussion of this until now because it deals with the question of the transition from a plurality of states to a single world state. The time has now come to discuss it. I argue that this argument cannot ground the possibility of Kantian federalism, because the argument can equally support a unitary world republic, and federalism has been ruled out for other reasons.

Kleingeld writes that the universal monarchy, one form of world state, is ruled out not because it is a world state, but because "this kind of fusion is dangerous". "*This* kind of non-federal world government, established by one imperialistic state that swallows all others, leads to 'soulless despotism' and the peace of the graveyard. In light of the importance of the political autonomy of peoples ... Kant's objection to this kind of ... fusion is all too understandable."<sup>260</sup> There is some unclarity in this argument. It is not clear whether the problem is that political autonomy is not respected by the institution of a universal monarchy/unitary world state, or whether it is the process of violent fusion that is the problem. In other words, for Kleingeld is the problem 'imperialism' or is it 'non-federal world government'? It is, of course, possible to entertain the notions both that states voluntarily agree to merge into a unitary state, and for coercion to be used to produce a federal state. Yet Kleingeld seems to assume that a coercive process must yield a unitary state, whilst a non-coercive process would yield a federal state. This is perhaps because in situating Kant in the context of Anacharsis Cloots, who supported the coercive expansion of revolutionary France into a unitary world republic, Kleingeld is able to run the two issues together. However, they need not be run together, and so an additional premise is needed to support this argument. On my reading of Kleingeld, this would be the political autonomy of states.

For Kleingeld, Kant's reasons for rejecting coercion motivate his initial support for a voluntary league of states, with an eye to the future realisation of a federal world state. "Even

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<sup>260</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 60.

if it might seem that citizens of brutally oppressive states would prefer to live in a republican federation rather than under their oppressive rulers, and hence that their political autonomy might be *served* by coercing them into a federation, in fact these citizens should be granted the opportunity to *decide for themselves* in this matter.”<sup>261</sup> However, it is not only that states could join such a league with a view to the future world state, but rather that “they *ought to do so*, but they should not be *forced to do so*.”<sup>262</sup> Over time, Kleingeld argues, this peace will provide an “institutional context for conflict resolution” in which an “increasing consensus on normative principles” could develop, at which point the time will be right for the transfer to a world state.<sup>263</sup> This is further bolstered by “Kant’s teleological account of history, in particular his claim regarding the moral development of humanity” which makes this growing consensus more likely.<sup>264</sup>

Now all of this is a process Kleingeld describes as resulting in a federal world state, but it is hard to see how any of it would not equally apply to a unitary world state. If a politically autonomous people can give up their external sovereignty, why could they not also merge their internal sovereignty with other states to form a unitary world republic? It seems to me that so long as a politically autonomous people make this decision for themselves there is no reason why Kleingeld and Kleingeld’s Kant should rule this out. The reasons Kleingeld gives do not seem sufficient to justify the claim. Her suggestion that a universal monarchy or any non-federal world government is ‘dangerous’ and produces despotism, relies on equating universal monarchy and a unitary world state.<sup>265</sup> Whilst I understand why a universal monarchy might be conducive to despotism, it is not clear to me – especially *a priori* as any proposition of the system of right must be – why a world republic should be dangerous in this way. As Kleingeld writes “many commentators read Kant’s arguments against the ‘universal monarchy’ as arguments against all forms of world government, but it is a mistake to do so.”<sup>266</sup> This is quite right, but it is also not clear why it should be read as an argument against a unitary world republic either. Certainly, if one takes political autonomy to be the guiding

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<sup>261</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 54.

<sup>262</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 56.

<sup>263</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 68; 62.

<sup>264</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 69.

<sup>265</sup> Even if there is this danger, it is not clear this would justify restricting the people’s autonomy. There seems to be some mixing of instrumental and principled reasoning occurring here.

<sup>266</sup> Kleingeld, *Kant and Cosmopolitanism*, p. 62.

concept, there seems to be no reason for Kant to rule it out. I therefore do not take Kleingeld's process argument to rule out a unitary world state. It seems to me this concern with the process that requires that it reflect the political autonomy of states could apply to either a unitary or a federal world state. Given that I have already ruled out federalism for other reasons, it in fact seems the argument is most plausibly considered in relation to a unitary world state.

The significance of this is that it would open a path to the practical possibility of the unitary world state as an ideal for perpetual peace. For all subjects of a state, there is a duty of right to merge one's state with other states to form a world state, and it is this future world state to which the ideal of the state can be applied. In this forward-looking sense, the ideal of the state becomes practically possible as an ideal for perpetual peace. However, this path relies on holding that political autonomy is the decisive concept. Perhaps even political autonomy exercised in a particular manner. For Kleingeld, it is political autonomy that prevents the coercion of states, but it is also the exercise of political autonomy that allows for the transition to a world state. But it is not clear that political autonomy is quite what Kant has in mind in this context. Recall the above cited passage about the impermissibility of causing a state to "disappear from the earth" but the permissibility of pressuring it to "adopt a new constitution".<sup>267</sup> This does not seem to reflect the political autonomy of the citizens of that state. If it is permissible to force citizens of a state to change their constitution, but not permissible to force the citizens of a state with an unjust constitution to join another more just state, it does not seem political autonomy is the key concern. Instead, it seems that the wrong is not based on the rightfulness of the internal constitution of the state, but on the very fact that it has an internal constitution at all. It is, after all, only because the people has a constitution that it is a people at all.<sup>268</sup> In other words, what counts is not political autonomy, but rather the common being; the contingent civil union by virtue of which public right is practical in the first place.

The mere presence of a common being, however imperfect, is what makes the enforced disappearance of a state wrongful. It is not about the political autonomy of states, but rather about the very fact that they are civil unions. To have the right to sustain a civil union is fundamental to what it is to be a state, as discussed in Section Two and Chapter Two. What is

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<sup>267</sup> *MM* 6:349.

<sup>268</sup> A point Kleingeld also acknowledges at *Kant and Cosmopolitanism*, p. 50.

wrong with the destruction of a state is that it destroys the civil union, whilst the mere putting of pressure onto a state to change its constitution does not. This applies as much to a voluntary merger of states as it does to forcible annexation. The problem, as such, is not the political autonomy of the state that is forced to merge, but rather the destruction of the civil union.<sup>269</sup>

This then poses the question of whether the state could voluntarily dissolve its civil union in order to join or create a new one at a global scale? When Kant discusses such a possibility of dissolution, he does so in the context of the death penalty, not of creating a world state. He appears to use the point to reinforce his commitment to the death penalty, he says: “Even if a civil society were to be dissolved by the consent of all its members (e.g. if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed”.<sup>270</sup> Kant’s commitment to the death penalty is clear, but it is not clear whether this would permit the destruction of one state to form a new one with others. Kant describes the former citizens separating and dispersing, rather than coalescing with others. This is in accordance with the general duty of right: “*Do not wrong anyone (neminem laede)* even if, to avoid doing so, you should have to stop associating with others and shun all society (*Lex iuridica*).”<sup>271</sup> This would not seem to provide much support for the idea that Kant supports the voluntary dissolution of the civil union of a state to form a world state.

Further problems for this view also come from Kant’s comments on the impermissibility of revolution. He says that revolution is for one “*to destroy his fatherland*” and amounts to “abolishing the entire legal constitution.”<sup>272</sup> This is true even when, and perhaps especially when, the aim of such a revolution is to bring the civil union closer to the state in idea. It is this reasoning that rules out a revolution as impermissible, and it seems to me that this reasoning can be just as well applied to the ‘abolishing of the entire legal constitution’ that is necessary to merge two states together. Even if revolution is the wrong analogy to forming a world state, and reform is a better one, the prospects still don’t look good. For Kant, the

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<sup>269</sup> My point here is similar to Katrin Flikschuh’s in “Kant’s Sovereignty Dilemma: A Contemporary Analysis”, *Journal of Political Philosophy*, 18 (2010), 469-493. One difference, however, is I take this to rule out only the destruction of states, rather than coercion in general.

<sup>270</sup> *MM* 6:333.

<sup>271</sup> *MM* 6:236.

<sup>272</sup> *MM* 6:320.

sovereign is not permitted to undertake reforms that would see the transition of the state from one form of sovereignty into another.<sup>273</sup> Nor is the sovereign permitted to relinquish sovereign power: “The right of supreme legislation in a common being is not an alienable right, but the most personal of all rights.”<sup>274</sup> Either relinquishment of their right or self-reform would alienate the sovereign’s right which they have no right to alienate because it would have the effect of a revolution, and it would destroy the civil union which is formed through submission to the sovereign.

So, we are left saying that a merger of states is possible only if it doesn’t involve a transformation of the form of sovereignty, or if it allows the sovereign to retain their rights of sovereignty. This would place severe limits on the circumstances in which such a merger is possible. For one, no autocracy, a republic in which a single person is sovereign, could merge into a world state because even if the autocrat were to retain their sovereign right, they could only do so as part of an aristocracy (because there would be at least one person from the other state who would also need to remain sovereign) which would involve an impermissible transformation of the form of sovereignty. All of this makes it very unlikely that Kant thinks a general principle in favour of the merging of states is permissible. And it seems to me that his reason for this is that attempting to merge states to form a world state, even if voluntary and in accord with political autonomy, would require the destruction of a civil union.

There cannot be a duty to destroy the civil union, and the merging of states whether by force or by choice is to do just this. As Kant says, only the unconditional submission to the sovereign’s will is what “first establishes public right.”<sup>275</sup> It is only after the first political judgment that public right and hence the right of nations becomes a matter for practical political judgment. As argued in Chapter Two, it is only then that an ideal for the civil union becomes practical. To claim that there is a duty to pursue the state in idea as an ideal for perpetual peace would be to create a conflict of duties between the duty to maintain the civil union and to dissolve the state in favour of some future state. Unlike the state in idea, there is no formulation of the ideal of a world state that is compatible with both imperatives. This means that, given the current division of the world into multiple states, no citizen of a state

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<sup>273</sup> *MM* 6:322, for example from democracy to an aristocracy, or autocracy to democracy.

<sup>274</sup> *MM* 6:342.

<sup>275</sup> *MM* 6:372.

can judge that they have a duty to dissolve their state and form a world state with all others, in other words, the state in idea is not a practically possible ideal for perpetual peace.

This has an important consequence for how we think about political judgment in *The Doctrine of Right*. I have argued throughout Chapters One and Two that the first political judgment is a practical imperative to form, submit to and maintain a contingent civil union. This contingency at the heart of *The Doctrine of Right* should be taken very seriously. It is an implication of my argument in this section that the state in idea *could have been* but *contingently is not* a practical ideal at a global scale. The only differences between applying the state in idea at a global scale and at the level of a single state amongst a plurality of states are empirical matters such as the size and population of the state, none of which can have an effect on the a priori system of right. Indeed, *a priori*, there is no reason to think that the ideal should not apply globally. However, the contingent history we live in has not borne this out.

It is a mere contingency, but nonetheless the existence of multiple states and multiple civil unions is the situation in which Kant and we have to judge politically. It is the contingent context of practical political judgment. It would be in contradiction with the first political judgment to dissolve these civil unions now, even voluntarily, in the attempt to form a world republic. A global civil union through which we could have striven to approximate to the state in idea is ruled out only through the contingency of history. We may have been ‘unlucky’ not to have lived in a different contingent history where a single world state formed, but we can only judge politically from within the contingencies in which we find ourselves. If we lived in a contingent history where a single global civil union had formed, we could have striven to approximate the state in idea at a global scale. We don’t, however, and so, Kant judges, we cannot.

Kant’s supposed ideal of perpetual peace cannot, therefore, consist of any form of world state. Indeed, Kant cannot have thought that any such world state is an end for political judgment. A federal world state is incompatible with Kant’s political philosophical framework, and a unitary world state would involve an impermissible imperative to destroy contingently existing civil unions. A reading of *The Doctrine of Right* in which attributes to Kant an ideal of perpetual peace comprised of a world state is thus not practically possible.

#### Section Five – Ripstein’s Ideal Congress of States



We now turn to a second possibility, according to which Kant's supposed ideal of perpetual peace is comprised of a non-coercive federation of states, or what I will call a congress of states. My focus will be on Arthur Ripstein's interpretation of perpetual peace as requiring an ideal congress of states.<sup>276</sup> My claim is a simple one: the congress of states is not an ideal. Though the congress of states, unlike the world state, is practically possible, it lacks two other features of ideals. First, it is not noumenal. Second, it does not realise an idea of reason. The congress of states should thus not be read as an ideal. Instead, it should be read as a phenomenal political good. In this section, I will outline Ripstein's interpretation.

Ripstein treats perpetual peace as an ideal. He writes that "the ideal [of perpetual peace] is 'a permanent Congress of states' which realizes the idea of 'a public right of nations' through which nations establish a procedure 'for deciding their disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.'"<sup>277</sup> For Ripstein, perpetual peace requires the congress of states as the institution which can manifest the public right of nations as a form of non-coercive international law to regulate relations between states. When this congress of states is realised, perpetual peace is too.

Ripstein's argument for this is based on his broader reading of Kant's political philosophy. This is now so well known that I will not repeat it in full here. Instead, I will focus on the aspects that account for his interpretation of perpetual peace. Of particular focus is Ripstein's famous argument, in many ways the central argument of his whole account, about the problems of the state of nature. Ripstein discusses three problems that the state is to solve: unilateralism, assurance and indeterminacy.<sup>278</sup> Each of the three state authorities – legislative, executive and judicial – solves one of these defects of the state of nature. Following Kant's

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<sup>276</sup> I have engaged with Ripstein's account in *Force and Freedom* here because it is one of the primary texts I engage with and write about in the context of in this thesis. However, I acknowledge for the next three sections in particular his more recent *Kant and The Law of War* is also relevant. On the questions I address in this section, specifically that perpetual peace is an ideal and that it has the form of a congress of states, I do not think Ripstein has substantially modified his position. He discusses the necessity of "institutions" (p. 218) to the right of state, and specifically a "league of nations" (p. 216). That he still conceives of the league of nations/ congress of states as an ideal is clear in his claim that for the league of nations and other institutional realisations of right "the ideal case remains regulative" (p. 217). As such, though I maintain my focus on *Force and Freedom*, I will include comparative references to Arthur Ripstein, *Kant and The Law of War* (Oxford: Oxford University Press, 2021).

<sup>277</sup> Ripstein, *Force and Freedom*, p. 229.

<sup>278</sup> Ripstein, *Force and Freedom*, pp. 145-225.

initial analogy between the state of nature between individuals and the state of nature among states, Ripstein argues that the same logic holds but that the problems of the state of nature among states are fewer than that between individuals. For Ripstein, the state of nature between states is only characterised by Kant as suffering from the problem of indeterminacy. This is because Kant “does not suggest that one state may seize another’s territory unless it has assurance that the other state will not seize its territory. Nor does he say that a state’s acquisition of its own territory is somehow problematic because dependent upon a unilateral act.”<sup>279</sup>

Ripstein argues that unilateral choice cannot be a problem for states as “they do not have external objects of choice. The state does not acquire its territory; its territory is just the spatial manifestation of the state.”<sup>280</sup> That is to say that states have nothing to make problematically unilateral choices about. He then argues that as a state is a “public rightful condition” the state “is not entitled to set and pursue its own private purposes, but only public ones,” and so “it could never have grounds for going to war” except in limited cases of self or collective defence, and so there is no problem of assurance between states.<sup>281</sup> Instead, there are only indeterminacy problems, caused by good faith disagreements and lack of knowledge about territorial boundaries. This requires a judicial authority, but not a legislative or executive authority to adjudicate. The congress of states can provide this arbitration; however, states can withdraw from the congress and its membership is voluntary and uncoercible.<sup>282</sup>

Based on this argument, Ripstein concludes that the congress of states is the required institution for realising perpetual peace in the form of international law or in Kant’s terms a public right of nations. Much as public right in general is only fully realised in the ideal state for Ripstein, the public right of nations is only fully realised in the ideal congress of states. It is this last claim that I am focused on here. It is clear enough that the congress of states is practically possible as unlike the world state we could pursue it without coming into conflict with the first political judgment. However, it is another thing to suggest that this congress of states comprises an ideal. Practical possibility is not the only feature of Kant’s understanding

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<sup>279</sup> Ripstein, *Force and Freedom*, p. 227.

<sup>280</sup> Ripstein, *Force and Freedom*, p. 228.

<sup>281</sup> Ripstein, *Force and Freedom*, p. 228.

<sup>282</sup> Cf. Ripstein, *Kant and The Law of War*, p.220: “the league is voluntary and can be ‘revoked at any time,’ precisely because it is a matter of independent nations coming to an agreement.”

of ideals that is in play here. In Chapter Two, I discussed Kant's particular conception of ideals, and from that I wish to draw out two further features of ideals. First, they are noumenal, and, second, they realise ideas in an individual thing. It is my view that a plausible reading of Kant's congress of states cannot meet these two criteria, and thus it should not be read as an ideal.

### Section Six – A Phenomenal Congress

Turning first to the question of the noumenality or phenomenality of the congress of states, we know that if it is an ideal, then it must be practically possible for us as partially phenomenal beings such that it can orientate practical judgment. However, because it is an ideal it must be impossible to fully realise in the phenomenal world. That is to say that though we may, and indeed must, practically strive for it in the world of experience and of history, we know that we will never achieve it so long as we remain in the phenomenal world.

Another way to put this is that we would never be able to reach a theoretical judgment that the ideal congress of states has been achieved in the phenomenal world. We would not be able to point at any empirical congress of states and claim with certain theoretical knowledge that it realises an ideal of a congress of states. Ripstein implies strongly that he holds this view. He argues that perpetual peace is "unattainable" because the congress can dissolve, that states have the right to dissolve it, and that it doesn't have the resources to perpetuate itself.<sup>283</sup>

However, there is reason to doubt this reading, and to instead to read the congress of states as realisable phenomenally. A useful way to illustrate this is to compare it to the case of the state in idea, which undoubtedly is an ideal. In this case, Kant is clear that it is not realisable in the phenomenal world, that it is noumenal, and that it is an object of pure practical reason. For example, he writes: "Every actual deed (fact) is an object in appearance (to the senses). On the other hand, what can be represented only by pure reason and must be counted among ideas, to which no object given in experience can be adequate – and a perfectly rightful constitution among human beings is of this sort – is the thing in itself."<sup>284</sup>

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<sup>283</sup> Ripstein, *Force and Freedom*, p. 230. Cf. Ripstein, *Kant and The Law of War*, p. 235: "the international legal order will inevitably be defective in relation to its own ideal principle."

<sup>284</sup> *MM* 6:371.

The case regarding perpetual peace is not so clear. Consider the following passage. In the conclusion to *The Doctrine of Right*, Kant claims “Now it is evident that what would be made our duty in this case is not the assumption (*suppositio*) that this end [perpetual peace] can be realized, which would be a judgment about it that is merely theoretical and, moreover, problematic; for there can be no obligation to do this (to believe something). What is incumbent upon us as a duty is rather to act in conformity with the idea of that end, even if there is not the slightest theoretical likelihood that it can be realized as long as its impossibility [Unmöglichkeit] cannot be demonstrated either.”<sup>285</sup> What Kant explicitly states here is that perpetual peace cannot be shown to be impossible by theoretical reason. But that does not fully answer the question as Kant does not tell us whether this theoretical possibility is noumenal or phenomenal. It is conceivable that when Kant here says that perpetual peace is theoretically possible, he actually means theoretically possible but only noumenally i.e., that its theoretical impossibility cannot be shown. This would be perfectly compatible with perpetual peace being an ideal.

However, there is one curious phrase in this passage that suggests Kant is here concerned with phenomenal possibility. This is Kant’s claim about the ‘theoretical likelihood’ [theoretische Wahrscheinlichkeit] of perpetual peace (or rather its unlikelihood) because it is a judgment about probability not possibility. That is, he is claiming that it is unlikely, though possible that perpetual peace will be achieved, and this is a theoretical judgment. If perpetual peace were an ideal then it ought to be noumenal, known only through pure practical reason. Whilst I can understand how pure practical reason could allow us to reach judgments about the actuality, possibility, or impossibility of ideals, I’m not clear how it would enable us to make judgments about probability. Indeed, I’m not clear how the concept of probability could apply to the noumenal world ideals inhabit. That Kant would discuss the theoretical likelihood of perpetual peace thus suggests to me that it is not noumenal, but rather a phenomenal state of affairs to which probabilistic theoretical judgments could apply.

If we then turn to consider what Kant actually says about the nature of perpetual peace, we can see why he would be open to probabilistic judgments. The purpose of the congress of states is to achieve perpetual peace, and what Kant means by peace is a state of the phenomenal world without hostilities. In setting out the elements of the right of nations, Kant distinguishes between a “nonrightful condition” which “is a *condition* of war” and “a

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<sup>285</sup> *MM*, 6:354.

condition of actual war” with “actual attacks being constantly made (hostilities)” and he goes on to say that the point of the right of nations is “to avoid getting involved with a state of actual war”.<sup>286</sup> If perpetual peace amounts to a permanent cessation of hostilities, that is, of actual war, it is entirely unclear to me how this could be a noumenal condition, and thus unclear how perpetual peace could be an ideal.<sup>287</sup> It is, however, to my mind, clear why Kant could make the theoretical judgment that, given the history of interstate relations, this phenomenally possible state of affairs is theoretically unlikely.

### Section Seven – The Non-Realisation of a Public Right of Nations

In arguing that the congress of states is not noumenal but rather phenomenal, I had recourse to different textual considerations about the possibility of realising the congress of states in the world of experience. These textual considerations point to the congress’ phenomenality, but they do not offer any systematic reason for holding that the congress is not an ideal. In this section, I outline such a systematic reason based on the claim, discussed in Chapter Two, that ideals involve the determining of an individual thing *in concreto* and *in individuo* by an idea of practical reason.

In Chapter Two, I noted that Kant only discusses one ideal in *The Doctrine of Right* which is “the ideal of a rightful association”.<sup>288</sup> I argued that this ideal should be identified with the state in idea as the ideal for the common being of the civil union.<sup>289</sup> Kant never mentions an ideal of perpetual peace. Whilst Kant speaks of an *idea* of perpetual peace or “the idea of a public right of nations”, he never in *The Doctrine of Right* refers to perpetual peace as an ideal.<sup>290</sup> Nor is there any equivalent of the state in idea. There is no congress in idea. This could be overlooked as a merely terminological issue, but I think there is a systematic reason for it. The lack of an ideal of perpetual peace suggests there is not, as such, a ‘thing’ or

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<sup>286</sup> *MM* 6:344.

<sup>287</sup> Cf. Ripstein, *Kant and The Law of War*, p.220: “This is not the ideal contractual language of possible agreement that figures in the idea of republican government, but rather that of actual agreement.”

<sup>288</sup> *MM* 6:355.

<sup>289</sup> In this I differ from Otfried Höffe, who also believes perpetual peace is not an ideal, but only because he thinks there are no ideals in Kant’s politics, Otfried Höffe, *Kant's Cosmopolitan Theory of Law and Peace*, trans. by Alexandra Newton (Cambridge: Cambridge University Press, 2006).

<sup>290</sup> *MM* 6:351.

‘being’ which we strive to perfect or to bring into total conformity with an idea of reason. It is precisely the point of the congress of states that it does not comprise a single civil union as there is no constitution uniting the states into a world state. All that is present is a collection of separate states, but there is no common being of the congress. Without this there is no practical possibility to realise the idea of a public right of nations *in concreto* and *in individuo*.

Perhaps, however, this is too quick. Perhaps a supporter of the view that the ideal of perpetual peace consists in an ideal congress of states, would argue that the individual thing that can be brought into conformity with the idea of a public right of nations is not supposed to be the congress, but the system of international law itself. Yet there is no second ‘first’ political judgment; no second postulate of public right; no second corollary, and no remark to this effect. We should expect there to be one as the system of international law would be a different kind of common being to a civil union. Indeed, Ripstein doesn’t seem to take this view. He points out that Kant only sees the congress as resolving disputes “as if before a court” or in Kant’s words “as if [*gleichsam*] by a lawsuit”.<sup>291</sup> This suggests there is no system of international law as such, and certainly suggests that it does not involve an ideal system. How could ‘as if’ or quasi-law be taken to realise the idea of a public right of nations? If the congress is set up as arbitrator of disputes between states only “so to speak” [*gleichsam* again] rather than in reality, how could this amount to an actual system of international law?<sup>292</sup> This alone suggests that the idea of a public right of nations is not realised, and that suggests that there is no common being in which the idea could be realised as an ideal.

Even if we put Ripstein’s claim that congress doesn’t realise law aside, it is hard to see how to avoid Kant’s explicit claims that the congress of states only resolves issues ‘as if’ by law. Especially when there are good reasons that law could not be realised in the congress of states. The congress lacks executive power and coercive authority, and as others have pointed out, this separates right and coercion, despite the analytic connection between them being so central to Kant (and Ripstein’s reading of Kant).<sup>293</sup> How could this kind of separation of right and coercion become possible, and in particular how could this still be a realisation of law? Additionally, we might add that there are good reasons to think legislative, executive and

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<sup>291</sup> Ripstein, *Force and Freedom*, p. 230 & *MM* 6:351. Cf. Ripstein, *Kant and The Law of War*, p. 214.

<sup>292</sup> *MM* 6:350.

<sup>293</sup> Kleingeld makes this point at *Kant and Cosmopolitanism*, p. 52, fn. 20.

judicial authorities cannot be separated, with some held by the state and some not, whilst still retaining statehood, as discussed in Section Two. We thus have good reason to think that Kant not only says that the congress of states cannot realise the idea of a public right of nations, but also that there are good systematic reasons for him to think this.

As such, that there is no ideal of perpetual peace is more than a terminological issue. I believe that Kant does not use the term because he did not hold that such an ideal is practical. Having rejected the possibility of a world state, he finds that the congress of states cannot realise the idea of public right of nations to any further degree than ‘as if law’. This is because there is no practical possibility of any common being that could realise this supposed ideal.<sup>294</sup> The civil unions of separate states cannot be destroyed, and the congress of states cannot be unified by a constitution and thus there is no practical possibility that it become a common being in its own right. Unlike the civil union, through which it is practically possible to strive to approximate the idea of rightful omnilateral external law making through the state in idea, there is no common being that could realise the idea of a public right of nations, and so no ideal of perpetual peace. Without the contingent yet practical context of a global civil union, it is impossible to posit a further ideal beyond the state in idea.

I now reach the end of the argument against the ideality of the congress of states. There are three criteria for the congress of states to be the ideal of perpetual peace. First, that it be noumenal, and I showed good textual evidence that this is not a plausible reading. Second, that it must realise an idea of reason in an individual thing, and I showed not only that there is textual evidence that Kant rejected this, but also supplied a systematic reason for the inability of the congress of states to realise the idea of a public right of nations; that there is no common being which could be entirely determined by the idea of a public right of nations. Third, that an ideal must be practically possible, and I have concluded this section by arguing if it is read *as an ideal*, the congress of states is not practically possible. Either because it is impossible to realise the idea of a public right of nations, or because to do this one would have to form a uniting constitution between the states, thus destroying the congress.

## Section Eight – Perpetual Peace as A Phenomenal Political Good

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<sup>294</sup> This is not a contingent practical impossibility. The right of nations presupposes separate states without a constitution uniting them.

Perpetual peace is, as Kant says, the highest political good even if it is not an ideal.<sup>295</sup> As we have seen, the congress of states is a phenomenal state of the world. One in which all states are publicly committed to the congress and resolve disputes by negotiation and not through war leading to a permanent cessation of hostilities. The congress of states, then, is not an ideal but a phenomenal political good. It is this that forms the end of political judgment in international politics. “Phenomenal political good” might seem a mysterious term, but all that is meant by it is an end that is realised in the world of appearances, in contrast to an ideal which is an end in the noumenal world.

If this is right, then an ideal-theoretic reading of political judgment in *The Doctrine of Right* is in a difficult place. My task in the first part of this thesis has been to reach this conclusion, whilst beginning to formulate an alternative reading of *The Doctrine of Right* as practical political judgment. In Chapter Two my argument was that we must see Kant’s state in idea as being posited through practical political judgment subsequent to the first political judgment which requires the formation, submission to and maintenance of a contingent civil union. Only through this common being which citizens strive to perfect is it possible to strive for the ideal state. The consequence of this is that political judgment is not ideal-theoretic, and characterised only by a striving for ideals, but by genuine moral deliberation between the need to maintain the civil union and the need to strive for rightful unilateral external law making.

In this chapter, my attention turned to perpetual peace. In contrast to the ideal of the state, I have argued that there is no ideal of perpetual peace. Firstly, because giving form to perpetual peace through a world state is not practically possible, and secondly because although Kant’s formulation of perpetual peace as a congress of states is practical, it lacks any common being that citizens can strive to perfect and it is thus not an ideal. Perpetual peace, despite the disagreements within the literature as to what exactly it comprises, cannot be understood as a practical ideal. This clearly rules out perpetual peace as an additional, more comprehensive ideal which could rescue an ideal-theoretic reading of political judgment in *The Doctrine of Right*. I thus take myself to have, if not refuted, then presented reasons to severely doubt the ideal-theoretic model. The more interesting question, which I have not yet answered comprehensively, is how Kant understands the relationship of perpetual peace to political judgment.

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<sup>295</sup> *MM* 6:355.



There are two senses in which the nature of Kantian political judgment is similar at the domestic and international levels. Firstly, in domestic politics questions of political judgment are in part about the need to prudently judge between the imperative to realise rightful omnilateral external law making and the imperative to maintain the state. So too, in international politics, one must judge between the need to maintain one's state (as we have seen in the impermissibility to transition beyond the state to a world state) and the imperative that "*there is to be no war*"<sup>296</sup>. Secondly, in domestic politics one strives to realise the ideal of the state through making laws in accordance with a priori principles. So too, in international politics, as a matter of possible external law giving, the principles of the right of nations are to be realised in the laws of one's own state. One might, for example, strive for the sovereign to bind the coercive power of the executive through a law prohibiting wars of extermination.<sup>297</sup>

Despite these similarities, the difference between domestic and international political judgment lies in what guides judgments. In domestic politics, one strives to realise the ideal subject to the conditions of possibility for that striving. In international politics, what guides judgment is not the aim of realising an ideal but preventing the outbreak of hostilities. Practical reason offers an idea of perpetual peace one ought to act in accordance with, but not an ideal of perpetual peace that one ought to realise.

Consider an example Kant gives us when discussing perpetual peace: the assembly of The States General at The Hague.<sup>298</sup> This was a congress of states publicly committed to peace. Now, clearly, The States General was not a condition of perpetual peace for the key reason that it had dissolved by Kant's time, and thus was not perpetual. But, if The States General wasn't perpetual peace, what is it an example of? I believe Kant thinks it is an example of what perpetual peace could be, or the form perpetual peace could take. The States General at The Hague was a phenomenal political good, it was a congress of states publicly committed to resolving conflict over their rights by negotiation and not war, and thus to peace. It failed as a candidate for perpetual peace simply because it was not perpetual. The point of the example is not to say that The States General was an ideal that fell apart. The point is that a congress along these lines is the phenomenal political good that the principles of the right of

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<sup>296</sup> *MM* 6:354.

<sup>297</sup> *MM* 6:347.

<sup>298</sup> *MM*, 6:350.

nations require us to strive to achieve and to maintain. The point is not that The States General realises an ideal of perpetual peace, but that when one acts to create and maintain it, one acts in accordance with the idea of perpetual peace.

There is more to say about the congress of states. In particular, as it cannot be brought about by the coercive general united will of the sovereign as the state in idea can be, what means are permissible to bring in about? In Chapter 5 I explore this topic in greater depth. There I explain the role of coercion, the balance of power and quasi-law making in creating and maintaining the congress of states and the peace it forms. One thing is clear already, however. The congress of states – perpetual peace – as a phenomenal political good does not transcend practical political judgment. It is posited through practical political judgment and from within the contingent context of practical political judgment. No ideal of perpetual peace is possible because rightful unilateral external law making cannot be realised between states. It is nonetheless possible to strive perpetually to create and maintain a contingent, phenomenal peace. Indeed, it is an imperative: “*there is to be no war*”; “*Do not wrong anyone*”<sup>299</sup> No citizen, in accordance with the idea of a general united will, could judge any other way.

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<sup>299</sup> *MM* 6:354; *MM* 6:236.

## **Part Two – Judgment and Application**

## Chapter Four – Ambiguous Sovereignty

Part One of this thesis has made a systematic argument that the ideal-theoretic model of political judgment is not found in *The Doctrine of Right*. I have proposed in its place that *The Doctrine of Right* should be read as practical political judgment in which Kant reflexively establishes principles for political judgment including as the formal principle of political judgment the idea of the general united will. In Part Two, I offer three chapters which consider the role of political judgment in public right; one for each of the three divisions of public right: the right of state, the right of nations and cosmopolitan right. These chapters do not build on each other to construct a single argument. Instead, they are intended to substantiate and exemplify the interpretation that I began to develop in Part One. Kant is engaged in practical political judgment in *The Doctrine of Right* and this continues through to Public Right. Scholarship on *The Doctrine of Right* currently places preponderant philosophical emphasis on Private Right, but in light of Part One, we have good reason to revisit Public Right. As we do so across the next three chapters, we will see that throughout Public Right Kant is engaged in practical political judgment and that political judgment is central to his conception of public right.

In this chapter, I address the right of state and specifically the role of sovereignty. I argue that a systematic ambiguity in Kant's conception of sovereignty can be accounted for if we understand that sovereignty is a political and not a legal concept in *The Doctrine of Right*. The key interpretative move to enable this is to see the ambiguity, not as a mistake, but as result of the centrality of sovereign political judgment in Kant's conception of the politics of the state. To make this argument, I draw on one of the conclusions reached in Chapter Two, namely that striving for the practical ideal of the state in idea as an end of political judgment yields two imperatives. First, to establish rightful unilateral external law making, and second to maintain the civil union.

I begin, in Section One, by setting out the ambiguity before in Section Two discussing some problems in the Kantian legalist reading of sovereignty as a legal concept. In Section Three, I argue for a political conception of sovereignty in *The Doctrine of Right* which takes the ambiguity as a reflection of the centrality of the sovereign's political judgment to Kant's understanding of the politics of the state. In Section Four, I use this analysis to support a broader claim of this thesis that the principles Kant formulates in *The Doctrine of Right* are

best read as principles of political judgment. In Section Five, I conclude by considering the prudential and yet moral quality of political judgment in *The Right of State*.

### Section One – The Ambiguity

In Chapter Two I introduced Kant's three state authorities – sovereign or legislative, executive and judicial – and three persons who each hold one of these authorities – sovereign or legislator, regent and judge. The ambiguity in the concept of sovereignty that I am focused on concerns the scope of the sovereign's authority in relation to the other authorities of the state.<sup>300</sup> The ambiguity is thus a less familiar one than those common to the history of European political philosophy, which involve either the relation of the state to the sovereign, or that of the people to the sovereign state, though one finds these in *The Doctrine of Right* too.<sup>301</sup> The ambiguity I am focused on may well be responsible for the noted obscurity of Kant's discussion of the three authorities.<sup>302</sup> Kant's concept of sovereignty is ambiguous between two conceptions. First is *sovereignty as public authority*, which refers to the three authorities of the state taken together:

*The three authorities in a state, which arise from the concept of a common being as such (res publica latius dicta), are only the three relations of the united will of the people, which is derived a priori from reason. They are a pure idea of a head of state, which has objective*

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<sup>300</sup> There is some debate as to whether the Kant's term *Gewalten* should be translated as "authorities" or "powers". As Paul Guyer points out, "powers" would be the usual translation, though Mary Gregor's Cambridge Edition translation of *The Metaphysics of Morals* also uses "authorities". I use "authorities" here to emphasise the moral and normative quality of Kant's use of the term. This is also the translation used by Kantian legalists for the most part. As Guyer also points out, use of one English term for each German term is preferable, so I stick to the use of "authorities" throughout. See Paul Guyer, "Achenwall, Kant, and The Division of Government Power" in *Kants Naturrecht Feyerabend: Analysen und Perspektiven*, ed. by Margit Ruffing, Annika Schlitte, and Gianluca Sadun Bordoni (Berlin: De Gruyter, 2020), pp. 201-228, p. 201, fn. 1.

<sup>301</sup> These ambiguities are most clearly in play at *MM* 6:340 where Kant discusses the obligation of the 'Konstituierenden Gewalt', the constituting authority, to reform "the kind of government". See, for example, discussions in Quentin Skinner, "Hobbes and the Purely Artificial Person of the State", *Journal of Political Philosophy*, 7 (1999), 1-29; Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016); *Popular Sovereignty in Historical Perspective*, ed. by Richard Bourke and Quentin Skinner (Cambridge: Cambridge University Press, 2016); Lucia Rubinelli, *Constituent Power: A History* (Cambridge: Cambridge University Press, 2020).

<sup>302</sup> Guyer, "Achenwall, Kant, and The Division of Government Power.", p. 201.

*practical reality. But this head of state (the sovereign) is only a thought-entity (to represent the entire people) as long as there is no physical person to represent the supreme authority in the state and to make this idea effective on the people's will.*<sup>303</sup>

In this passage, the sovereign – as a thought entity – represents the people as united in a common being and as containing within it the three authorities.<sup>304</sup> This thought entity is then represented by a physical person, the sovereign, and so this physical person also represents public authority in general. This person, Kant goes on to say, could be an autocrat, or an aristocratic or a democratic assembly.<sup>305</sup>

The second, opposing, conception of sovereignty is *sovereignty as legislature*. Instead of conceiving of sovereignty as containing all three authorities, this conception conceives of sovereignty as only one of the authorities: “the sovereign authority (sovereignty) in the person of the legislator”.<sup>306</sup> This sovereign authority only has part of the authority of the state, that of legislation. As a consequence, Kant describes the sovereign as interacting with the other state authorities: “The sovereign may take the regent's authority away from him...” and “the sovereign must also have in his power, in this case of necessity (*casus necessitatis*), to assume to role of the judge (to represent him) and pronounce a judgment...”<sup>307</sup> This

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<sup>303</sup> *MM* 6:338, translation amended. Cf. *R* 7653 19:477.

<sup>304</sup> Cf. *R* 7971 19:567; *R* 7989 19:574.

<sup>305</sup> As this ‘person’ could be an aristocratic or democratic assembly, the person could be a moral but not natural person (see above, fn. 175). Kant's use of autocrat, as opposed to monarch, reflects his hostility to hereditary succession. On this see Helga Varden, “Self-Governance and Reform in Kant's Liberal Republicanism - Ideal and Non-Ideal Theory in Kant's Doctrine of Right”, *Doispontos* 13 (2) (2016), 39-70. I take it from Kant's claim that reform of the state cannot include reform of the sovereign itself “from one of the three forms into another” that the sovereign can take on a non-democratic form permanently, see *MM* 6:338-40. This is a contested view, for opposing views, see B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010), p. 181 and Paul Guyer, “Hobbes Is of the Opposite Opinion’ Kant and Hobbes on the Three Authorities in the State”, *Hobbes Studies*, 25 (2012), 91-119 (p. 114). The arguments of this chapter do not depend on one's views of Kant's endorsement or not of democracy. They apply to any morally legitimate form of sovereignty, be that autocratic, aristocratic or democratic, or only democratic. Cf. *F* 27:1383; *R* 7977 19:570.

<sup>306</sup> *MM* 6:313.

<sup>307</sup> *MM* 6:317; *MM* 6:334.

sovereign holds not public authority *in general* but only one part of public authority, that of *legislation*.<sup>308</sup>

This ambiguity between *sovereignty as public authority* and *sovereignty as legislature* is carried over into scholarly interpretations of *The Doctrine of Right*, including Kantian legalism. I say ‘carried over’ intentionally as the ambiguity is not an actively theorised element of most interpretations – rather, the same ambiguity is simply repeated. Take Arthur Ripstein as an example. He writes ‘the three branches: legislature, executive and judiciary. Together, they comprise the sovereign.’<sup>309</sup> He also writes “the sovereign (legislature) also has the power to tax and to spend monies on the creation of public spaces...”<sup>310</sup> In the first sovereignty refers to sovereignty as public authority, in the second it refers to sovereignty as legislature. Jacob Weinrib is an exception in noting the ambiguity, but his purposes lead him away from discussing it further.<sup>311</sup> One might be tempted to chalk the ambiguity up to poor drafting, Kant’s self-confessed rushed exposition, or *The Doctrine of Right*’s troubled publication history.<sup>312</sup> However, the fact that scholarly interpretations do not iron out the ambiguity at least suggests that there may be systematic importance to it and motivates further investigation.

Before doing so, I want to forestall concerns that the ambiguity can be defused with a more precise delineation of terms. The first such approach relies on the distinction drawn by Ripstein and others between a public office and the person who holds it. On this view, the office is a legally defined position, and the person who holds it is a public official who draws

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<sup>308</sup> In these passages, Kant contrasts the sovereign with the regent and the judge. There are thus two tripartite distinctions at play. Here, the sovereign is a species of the genus of state authorities, which also includes the regent and the judge. In the above passages containing the conception of sovereignty as public authority, the sovereign is the genus and autocrat, aristocratic assembly and democratic assembly are the species.

<sup>309</sup> Arthur Ripstein, *Force and Freedom: Kant’s legal and political philosophy* (Cambridge, MA: Harvard University Press, 2009), p. 173.

<sup>310</sup> Ripstein, *Force and Freedom*, p. 194. The formulation “sovereign (legislature)” is directly carried over from *MM* 6:317.

<sup>311</sup> Jacob Weinrib, “Sovereignty as a Right and as a Duty: Kant’s Theory of the State” in *Sovereignty and the New Executive Authority*, ed. by Claire Finkelstein and Michael Skerker (Oxford: Oxford University Press, 2018) pp. 21-46, (p. 28 fn. 21).

<sup>312</sup> On Kant’s self-admitted less than thorough drafting, see *MM* 6:209, as discussed in Chapter One. On the publication history, see the texts cited in fn. 47.

authority from their position to act in ways which private individuals are not permitted to.<sup>313</sup> One might use this distinction to claim that the ambiguity is a result of Kant sometimes referring to the office and at other times to the person. As we have seen, however, when conceiving of sovereignty as public authority, the sovereign is a thought entity that comprises the three authorities taken together which is itself represented by a physical person. By contrast, when sovereignty is conceived as legislature, the sovereign authority as an office is represented in the person of the sovereign (legislator). In other words, Kant conceives of both sovereignty as public authority and sovereignty as legislature as both an office and a person and so the ambiguity remains.<sup>314</sup>

The second approach draws on the concept of representation to diffuse the ambiguity.<sup>315</sup> For Kant, the sovereign represents the general united will, and one might think that because the sovereign as legislature is closely connected to the general united will, that this is what needs to be represented by a physical person, and this physical person is the sovereign as public authority; however, this would be to miss the point. The question is, what is the idea or thought entity of sovereignty that is represented? Is it the conception as one legislative authority, or the conception of three public authorities together?

## Section Two – Problems with a Legal Reading of Sovereignty

To understand this ambiguity in Kant's account of sovereignty, it is helpful to draw on the interpretation of the state in idea I discussed in Chapter Two. There we saw that the sovereign *as legislature* – i.e. as one authority among three – is embedded in complex relations with the regent and the judge. We saw that there was both a separation of authorities with the purpose of establishing rightful omnilateral external law making, and a hierarchy of authorities to ensure that pursuing the state in idea is compatible with the first political judgment. This resulted in two imperatives which are involved in striving to realise the state in idea. First, to establish rightful omnilateral law making, and second to maintain the civil union. Also note

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<sup>313</sup> Ripstein, *Force and Freedom*, pp. 190-198; Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy" in *Oxford Studies in Political Philosophy, Volume 4*, ed. by David Sobel, Peter Vallentyne and Steven Wall (Oxford: Oxford University Press, 2018), pp. 28-51.

<sup>314</sup> This distinction between office and person elides Kant's own distinction between an office and dignity. Offices are "salaried administrative positions", whilst dignities are "eminent estates without pay". *MM* 6:328.

<sup>315</sup> My thanks to Daniel Peres for this objection.



the effect that the hierarchy of authorities has on the ambiguity. There is a certain fuzziness to the conception of sovereignty as legislature that blurs the distinction with the conception of sovereignty as public authority. The sovereign legislature does not hold all authority in the state, but because of the hierarchy of authorities it does hold some authority over all other authorities in the state. In other words, Kant's sovereign legislature does not hold all state authority, but is not simply one authority among three either. The sovereign, on account of the hierarchy, holds some authority over the regent and the judge.

Though not addressed in terms of the ambiguity in Kant's conception of sovereignty, the authority of the sovereign over the regent and the judge is not missed in the literature, notably by the group of scholars I have dubbed Kantian legalists. However, this sovereign authority is most often understood in legal terms. Byrd and Hruschka argue that the sovereign is "'higher' than both the highest executive and the highest judge and thus stands *above* them, because the second and third powers are *subject to*, or *under* the law".<sup>316</sup> This is true, but it does not seem to me to account for the features of the sovereign's authority. In the passage cited by Byrd and Hruschka in support of their understanding, Kant does say "the regent is subject to the law".<sup>317</sup> However, he also says "The sovereign can *also* take the ruler's authority away" indicating that the authority of the sovereign over the regent consists in more than the subordination of executive authority to law; it also consists in the right to appoint the regent and the judge.<sup>318</sup> The fact that executive and judicial authority must be exercised in accordance with law seems to be more of an expression of the separation of authorities with regard to rightful unilateral external law making than an account of the hierarchy which gives the sovereign authority over the regent and the judge. The subordination of the regent and judge to law is perfectly compatible with the three authorities being "coordinate and subordinate".<sup>319</sup> To account for the sovereign's hierarchical rights of appointment, something more is needed.

Ripstein also argues that "the legislative will takes priority" because "the exercise of judgment and the enforcement of rights" by the judge and regent respectively "must be done in accordance with law."<sup>320</sup> But he goes further to argue that "The only way a judge or

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<sup>316</sup> Byrd and Hruschka, *Commentary*, p. 161.

<sup>317</sup> *MM* 6:317.

<sup>318</sup> *MM* 6:317, emphasis mine.

<sup>319</sup> *MM* 6:316.

<sup>320</sup> Ripstein, *Force and Freedom*, p. 173.

enforcer can be empowered consistent with right is through an act of legislative will.”<sup>321</sup> This is suggestive in that not only is the sovereign higher because the powers of the regent and judge must be exercised under law, but the sovereign’s authority also consists in their right to appoint the regent and the judge through legal means. This, I think, does address the sovereign’s authority over the regent and the judge, because these powers of appointment are not reciprocal. This idea is further expanded by Marie Newhouse when she argues “the legislative authority is first among equals” because it has “the capacity to make constitutional laws that allocate authorities among institutions within the empirical state.”<sup>322</sup>

There remains a problem with this approach. The hierarchy of authorities is based on the imperative to maintain the civil union and it is the sovereign that appears to bear the burden of this. Recall the population-wide murder conspiracy discussed in Chapter Two.<sup>323</sup> This case involves a judge being confronted by a murder conspiracy that includes all or nearly all of the state’s population. In accordance with the separation of authorities and rightful omnilateral external law, the judge ought to deliver a verdict to execute the entire population and the regent ought then to carry out these executions. Yet Kant claims that the sovereign must intervene via a ‘Machtspruch’ in order to maintain the civil union. This Machtspruch is, Kant explicitly tells us, not an act of “public law” and, indeed, acts contrary to established positive legislation.<sup>324</sup> Moreover, this is not the only case in which Kant argues that the sovereign has the right to act extra-legally or even illegally to maintain the civil union. Kant also argues that the sovereign, in addition to rights of taxation, may further levy forced loans, even in cases where that deviates “from previously existing law”, when “the state is in danger of dissolution”.<sup>325</sup> The sovereign’s authority over the regent and the judge is not always expressed through legal means.

It might be pointed out that there are other cases where Kant judges that the sovereign ought to act to maintain the civil union that are not necessarily extra-legal. Kant’s justifies the right of the sovereign to tax where it is necessary to maintain “the *poor, foundling homes and church organizations*”; this is based on his view that “The general will of the people has united itself into a society which is to *maintain itself perpetually*; and for this end it has

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<sup>321</sup> Ripstein, *Force and Freedom*, p. 173.

<sup>322</sup> Marie Newhouse, “The Legislative Authority”, *Kantian Review*, 24 (4) (2019), 531-553 (p. 536).

<sup>323</sup> *MM* 6:334.

<sup>324</sup> *MM* 6:334.

<sup>325</sup> *MM* 6:325.

submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves.”<sup>326</sup> Beyond *The Doctrine of Right*, in *Toward Perpetual Peace*, Kant discusses the possibility of permissive laws that allow the sovereign to postpone putting laws into effect that see the state “devoured by other states”.<sup>327</sup> In these cases, Kant justifies the sovereign acting in defence of the civil union, but not extra-legally. There are two points to take from this. First, the range of examples indicates that, although the population-wide murder conspiracy is an incredibly unlikely and exceptional circumstance, the authority of the sovereign to maintain the civil union is invoked in the normal course of politics. Second, whilst it might be possible to understand some cases of the sovereign acting on their authority in legal terms, if one is available, an understanding of sovereignty that can account for both the legal and extra-legal exercises of the sovereign’s authority would be preferable. The legal understanding of sovereignty is not able to do so.

There is also a second problem with understanding the sovereign’s authority over the regent and judge in legal terms. It causes one to wonder in what sense a separation of authorities really obtains at all. In his analysis, Guyer argues that the sovereign’s authority over the regent and the judge overrides any claim Kant might have to a true separation of authorities. Relying on a similarly legal understanding of the sovereign authority that results from the hierarchy of authorities, Guyer presents us with a useful challenge.<sup>328</sup> Guyer claims “there is no clear sense in which the legislature is ever *subordinate* to the executive” and “As long as the entire judicial process – finding of fact, application of law, enforcement of law – is governed by the laws of the legislature, the authorities involved in the judicial process remain subordinate to the legislature. There is no obvious sense in which the judiciary is coordinate to the legislature”.<sup>329</sup> Hence, Kant’s claim that the three authorities are coordinate and subordinate to each other is a “rhetorical flourish”.<sup>330</sup> Yet given that Kant’s coordinate and subordinate claim occurs within the main text of *The Doctrine of Right*, hence as part of Kant’s system of right, and not, for example, in the remarks or in the preface, it would be

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<sup>326</sup> *MM* 6:326, second emphasis added.

<sup>327</sup> *PP* 8:347; *PP* 8:373. Cf. *dPP* 23:184.

<sup>328</sup> Guyer’s analysis of the separation and hierarchy of authorities does differ from those of Byrd and Hruschka, Ripstein and Newhouse, which are my focus, but on this point the interpretations are relevantly similar.

<sup>329</sup> Guyer, “Achenwall, Kant, and the Division of Governmental Powers”, pp. 222-3.

<sup>330</sup> Guyer, “Achenwall, Kant, and the Division of Governmental Powers”, p. 223.

surprising if the claim were entirely rhetorical.<sup>331</sup> How, then, can we explain the sovereign's authority but not reduce Kant's subordinate/coordinate claim – and hence the separation of authorities – to mere rhetoric?

### Section Three - Political Sovereignty

The key to understanding the sovereign's authority over the regent and the judge and to understanding the ambiguity in Kant's conception of sovereignty is to not attempt to eliminate the ambiguity, but rather to understand it. The ambiguity in Kant's concept of sovereignty in *The Doctrine of Right* is not a failure of precise definition of a legal concept, but the use in practical reasoning of a political concept – hence I call this interpretation *the political conception of sovereignty*. Understood politically, Kant's sovereign holds all authority in the state – as they do according to the conception of sovereignty as public authority. However, they are also under an obligation to alienate their authority over legislative and executive matters onto other persons – as they do in the conception of sovereignty as legislature. The authority of the regent and the judge is ultimately the sovereign's but ought to be actioned by different persons. This also means that in cases such as the population-wide murder conspiracy and the others discussed above, the sovereign has the authority and right to intervene on the executive and judge in their functions, because the sovereign is only interfering with rights to executive and judicial authority that they already hold.

Thus, on this political conception of sovereignty the ambiguity is not eliminated but is rather incorporated into the concept of sovereignty. Each of the conception as public authority and the conception as legislature hold in certain respects. The sovereign holds all public authority but is subject to an obligation to rule as a sovereign legislature. Rightful unilateral external law making is established through the separation of authorities, and so the sovereign is obligated to alienate executive and judicial authority onto other persons in order to rule rightfully. We can now respond to Guyer that there is a sense in which the regent subordinates the sovereign as the sovereign is ideally subordinate to the regent and the judge with regard to their functions in rightful unilateral external law making. Kant's claim that

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<sup>331</sup> As discussed in Chapters One and Three, in the Preface to *The Metaphysics of Morals* Kant distinguishes the system of right from its application, which is put into remarks, *MM* 6:205-6.

the three authorities are coordinate and subordinate to each other holds in the form of an imperative on the sovereign. Given that the separation of authorities comprises part of the ideal state in idea, this imperative structure of the claim is not out of place. As we have also seen, the state in idea yields a second imperative – to maintain the civil union – and the sovereign is subject to this second imperative as well. These two imperatives are not inherently contradictory, but they can become so under certain empirical conditions in which we strive to realise the state in idea. This is why, as I described in Chapter Two, Kant’s ideal state in idea does not eliminate the need for practical political judgment in politics. Kant’s ambiguous concept of sovereignty accommodates this key insight. Kant’s sovereign is ambiguous because they are active in the politics of the state, not a static legal institution which frames political life. The sovereign is tasked with judging when the empirical circumstances permit rule through establishing rightful omnilateral external law making, and when they require the sovereign to exercise their extra-legal authority. Once we understand this extra-legal or political quality of Kant’s sovereign, we can also see how the sovereign’s judgment in the population-wide murder conspiracy case can be understood as rightful, and do so in a way consistent with other instances where the hierarchy is either expressed or invoked in *The Doctrine of Right*. This is another reason to favour a political over a legal reading of Kant’s conception of sovereignty.

On my reading of *The Doctrine of Right*, this kind of sovereign political judgment is central to Kant’s vision for the politics of the state. As an example of political sovereignty in action, consider the right to punish. This is a coercive right, and as such a right of executive authority.<sup>332</sup> The political conception implies that the right to punish is a right of the sovereign, because all rights of the state ultimately adhere to the sovereign. However, given the obligation to establish rightful omnilateral external law making and hence to rule through a separation of authorities, the exercise of this authority ought to be carried out by the regent. The sovereign then rules rightfully as a sovereign legislature without executive or judicial functions. This is “to make the *kind of government* suited to the idea of the original contract” or, as Kant would put it elsewhere, to rule in “the spirit of a representative system” or in a republican “manner of governing”.<sup>333</sup> Fulfilling this obligation may require reforms of the state, which Kant holds must “be carried out only through *reform* by the sovereign

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<sup>332</sup> *MM* 6:313.

<sup>333</sup> *MM* 6:340; *PP* 8:352; *CF* 7:88.

itself...”<sup>334</sup> The sovereign is required to judge when doing so is compatible with the ongoing existence of the civil union. However, even once this step to separate authority is taken, the sovereign cannot absolve themselves from affairs of state other than giving law. In Chapter Two I highlighted the unlikely population-wide murder conspiracy case, but also the more plausible scenario in which a regent becomes a threat to the state by refusing the sovereign’s attempts to separate judicial authority from their executive authority. It is easy to imagine how a rogue regent with coercive rights might be such a threat and why Kant would want the sovereign to act against them by deposing them. According to the political conception of sovereignty, the political judgment as to when this is necessary falls to the sovereign.

This emphasis on the role of sovereign political judgment in the politics of the state allows Kant a certain flexibility when judging the rightfulness of the sovereign’s attempts to reform the civil union and approximate the state in idea in circumstance which may make this very difficult. For example, Kant is extremely hesitant about allowing the sovereign to exercise executive authority under any circumstances. He writes “In that case the sovereign behaves through its minister as also the regent and so as a despot.”<sup>335</sup> He is also concerned that any form of coercive resistance to the regent would be self-contradictory as the executive authority is the supreme coercive authority. If another authority could resist this, it would no longer be supreme. But the sovereign still has a course of action open to them which they can take if they judge it necessary to maintain the civil union. They can strip the regent of executive authority and appoint another in their place.<sup>336</sup> The previous regent would then return to being only a private citizen. Were they to continue to try to exercise coercion this would be a clear wrong, and the new regent would be acting rightfully in coercively putting down what now could only be described as a rebellion. These are the kinds of fine political

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<sup>334</sup> *MM* 6:322. In the same passage, Kant limits reforms to the executive authority, and not the sovereign itself. We can infer that, as citizens are prohibited from attempting to reform through revolution and overthrowing the sovereign, since this would amount to “abolishing the entire legal constitution” and “destroying the fatherland”, so too the sovereign may not reform themselves, for example by transitioning from an aristocracy to a democracy. If they did, they would no longer be sovereign and so would have destroyed the state, see *MM* 6:320; *MM* 6:340. Perhaps because of this Kant also holds at *MM* 6:342: “The right of supreme legislation in a commonwealth is not an alienable right, but the most personal of all rights.” Self-reform would alienate the sovereign’s right which they have no right to alienate.

<sup>335</sup> *MM* 6:319.

<sup>336</sup> One might say that this is in effect coercive, but in terms of the exercise of rights, the sovereign does not directly exercise coercive authority.

judgments that the political sovereign is tasked with whether or not a separation of authorities has already been established. The challenge for the sovereign is to approximate the state in idea as closely as the circumstances allow, which may even involve backwards steps if the circumstances demand it.<sup>337</sup>

#### Section Four – Principles of Political Judgment

Once we have the *political* character of Kant's concept of sovereignty in view, we can see that the ambiguity in sovereignty eventually resolves into a contradiction between two obligations on the sovereign, which is itself then resolved in contingent and practical politics through the political judgment of the sovereign. One might say that this amounts to clearing up the ambiguity and restoring consistency to Kant. In one sense, this is correct. In so far as *The Doctrine of Right* is read as establishing principles that should enable us to make consistent political judgments, the ambiguity is not problematic. However, this is not how *The Doctrine of Right* tends to be read, especially Public Right. It is more often read by Kantian legalists as a blueprint for a legal state or system of law. If this reading is correct, then the ambiguity is still problematic. Kant does not define the circumstances in which sovereign judgment may subordinate the ordinary processes of rightful omnilateral external law making and the separation of authorities, he leaves it to the judgment of the sovereign. We might be able to say that if the sovereign is wrong about whether there is a threat to the civil union, then they have exercised judgment poorly. We might also be able to say that if the sovereign is not acting in good faith and is using the threat to the civil union as a pretext for usurping other authorities, then this is wrong. But in both cases, what we don't have is a set of conditions and circumstances by which the rightfulness is to be judged without either relying on empirical judgment about how bad a threat to the civil union is, or on suppositions about what the sovereign is really thinking.

This very tolerance of ambiguity inherent in political sovereignty stands in stark contrast to Kantian legalist readings of *The Doctrine of Right*, which prize fine distinctions, set categories and strict legal precision.<sup>338</sup> More importantly, however, it suggests that Kant's

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<sup>337</sup> Cf. *dMM* 23:283.

<sup>338</sup> A critique of legalistic readings along these lines is Katrin Flikschuh, "Exactitude and Indemonstrability in Kant's Doctrine of Right" in *The Public Uses of Coercion and Force*, ed. by Ester Herlin-Karnell and Enzo Rossi (Oxford: Oxford University Press, 2021), pp. 117-132.

political principles are principles of political judgment, not principles of ideal legal systems or even of legal judgments. It would be wrong to say of *The Doctrine of Right*, and of Public Right in particular, that they are not concerned with the elaboration and justification of a system of a priori legal principles which are to serve as the normative ideal for all positive legal systems. Nonetheless, it is my view that this is not the philosophical heart of the text. Kant of course does elaborate the state in idea as an ideal for the civil union by which it is entirely determined in accordance with the idea of rightful omnilateral external law making. As I have argued in Chapter Two, however, this is a practical ideal posited through political judgment. The core of *The Doctrine of Right* is the reflexive formulation of principles of political judgment which establish a system of external duties that concern interaction between agents from which all rights derive.<sup>339</sup> Such external duties are not exhausted by those a priori legal principles that ground a system of law; they concern all external duties, including those that cannot be captured within a legal system. This renders *The Doctrine of Right* an inherently *political* text; it aims to orientate the agent in a world shared with others by establishing grounds for external duties and principles for practical judgment.<sup>340</sup> *The Doctrine of Right* is thus best understood as offering a sustained attempt at political and practical reasoning of which the ambiguous concept of political sovereignty is a key part. Kant's aim is not legal precision, but principles that guide the judgment of political agents. In Kant's practical reasoning in *The Doctrine of Right* the perspective of the finite, which is to say the human, judging agent is never lost. If sovereignty is political, ambiguous, and active, rather than legal, precise and static, then it is not possible to eliminate judgment from our politics. Nor is it (always) possible to constrain it through law. Judgment is needed at each stage of political thinking and acting, never allowing us to rest assured that law grounded on a priori principles justifies everything we do. The political sovereign is active within the Kantian state and must exercise judgment in contending with all the vagaries of empirical political circumstance.

There are no explicit conditions that could frame a constitutional provision determining when the sovereign exercises their judgment, because the framing of such an ideal constitution is not Kant's primary concern. Indeed, the means by which he could do this are ruled out. As

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<sup>339</sup> *MM* 6:239.

<sup>340</sup> For the importance of the first-personal orientation of the agent to Kant's philosophy in general, see Karl Ameriks, *Kant and the Fate of Autonomy: Problems in the Appropriation of the Critical Philosophy*, (Cambridge: Cambridge University Press, 2000).



we have already seen, the positive law (constitutional or otherwise) does not constrain the sovereign's judgment. Recall that Kant claims that the sovereign's usurpation of the judge in the population-wide murder conspiracy case "cannot be done in accordance with public law".<sup>341</sup> This is an explicit statement that when the sovereign usurps the role of the judge, the sovereign does not act through law by changing it or introducing a loophole. It is perhaps because Kant invokes "justice, as the idea of judicial authority" as the grounds for his policy of an-eye-for-an-eye that such legal solutions are unacceptable in this case.<sup>342</sup> Kant instead turns to a different solution, one that takes us beyond the law, to a "Machtspruch" or executive decree.<sup>343</sup> Recall also Kant's rejection of discussion of 'mixed constitutions' and his claim that "moderate constitutions, as a constitution of the inner rights of a state, is an absurdity", which show that he is also not concerned with other legal institutions constraining the sovereign's judgment, as discussed in Chapter Three.<sup>344</sup> The other authorities do not hold rightful authority over the sovereign and so cannot constrain the sovereign's judgment.<sup>345</sup>

Kant's primary concern is not framing the ideal constitution because his political principles are principles of political judgment, not of ideal legal systems. This is the core difference between reading of *The Doctrine of Right* presented here and that of Kantian legalists. For Kantian legalists, political judgment is legal in the sense that it is constrained within the established legal order. State authorities are empowered by law to make judgments that would otherwise be wrongful. This leaves open the matter of the political judgments reached by different state authorities, but it requires that these judgments be grounded in law or given

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<sup>341</sup> *MM* 6:334.

<sup>342</sup> *MM* 6:334.

<sup>343</sup> *MM* 6:334.

<sup>344</sup> *MM* 6:339; *MM* 6:320. Cf *R* 7673 19:485.

<sup>345</sup> There is something Schmittian about this aspect of Kant, and especially the notion of the *Machtspruch*. That sovereign authority, and their political judgment, undergirds law and that it can overturn it might be especially uncomfortable for Kantian legalists, just as Schmitt's account of 'the exception' was abhorred by the neo-Kantian legalist Hans Kelsen. However, there are clear differences between Schmitt and Kant. The most important is that Kant formulates moral principles for the sovereign's exercise their authority, whilst Schmitt stresses that no such justification is needed, or even possible. See discussion in Section Five and also fn. 353 below. On Schmitt's critique of Kant, see, Seyla Benhabib, "Carl Schmitt's Critique of Kant: Sovereignty and International Law", *Political Theory*, 40 (6) (2012), 688-713; on how Schmitt got Kant wrong, see Paola Romero, "Why Carl Schmitt (and others) got Kant wrong", *Con-Textos Kantianos. International Journal of Philosophy*, 13 (2021), 186-208.

expression through law. I reject this understanding of the role of political judgment in Kant's vision of the politics of the state. Political judgment in Kant is not constrained by the principles of the ideal legal system, but rather the latter depends on the former. The sovereign's judgment is political. It is, as Kant terms it in the population-wide murder conspiracy example, a "Machtspruch". It is an exercise of power, unconstrained by law upon which the possibility of the legal system and of rightful unilateral law making depends.

### Section Five – Moral Prudence

Kant's political sovereign carries a heavy burden of responsibility; "the most sacred office that God has on earth, that of trustee of *the right of human beings*".<sup>346</sup> They are bound to make political judgments, but neither a priori principles nor positive law can alleviate this burden. The centrality of judgment to Kant's conception of sovereignty, and thus to the politics of the state, recognises that the force of empirical political circumstances on us finite beings mandates that judgment is exercised at every step in politics. Pursuit of the state in idea requires a form of prudential judgment from the sovereign, on whom the responsibility for the pursuit rests most heavily.<sup>347</sup> However, he also holds that this prudent judgment has a moral quality and a moral force. Recall my discussion from Chapter Two of the conflict in the grounds of obligation Kant addresses in the introduction to *The Metaphysics of Morals*.<sup>348</sup> Recall Jens Timmermann's analysis, that the conflict "arises in moral practice".<sup>349</sup> Applying this idea to the case of the sovereign exercising political judgment, the sovereign must judge which of the grounds of obligation – the idea of rightful unilateral external law making, or the maintenance of the civil union – is stronger in the circumstances of their moral practice. In this political instance of a conflict in the grounds of obligation, the sovereign will have to make a kind of prudential judgment: Will reform towards establishing rightful unilateral external law making and the separation of authorities threaten the ongoing existence of the civil union? In the case of the population-wide murder conspiracy the answer is clear, it will

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<sup>346</sup> *PP* 8:352 fn.; cf. *dPP* 23:166.

<sup>347</sup> Cf *R* 6855 19:180-1: "State prudence is grounded solely on empirical principles, state right on rational. One blends the conditions of the former with those of the latter in the concept of the state constitution in general."

<sup>348</sup> *MM* 6:224.

<sup>349</sup> Jens Timmermann "Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory", *Archiv für Geschichte der Philosophie*, 95 (1) (2013), 36-64, (p. 58).

do so and so the ground of obligation to maintain the civil union is stronger. In other cases, the answer won't be so clear, and the sovereign may have to accept some risk to the state in order to rule rightfully. Kant thus morally vindicates the role of prudence at the heart of his politics; exercised in aid of the right ends, prudence is not amoral or immoral, but is, to the contrary, deeply moral. This is what he means when he claims in *Toward Perpetual Peace* that a moral politician is "one who takes the principles of political prudence in such a way that they can coexist with morals".<sup>350</sup> This is the conception of sovereignty that Kant develops in *The Doctrine of Right*: prudential, moral, and political.

There is much more that needs to be said to develop this account. In particular, I have said that the sovereign must accept some 'risk' in their pursuit of the state in idea. But how is the sovereign to judge such a risk? Clearly, they have to negotiate between the imperatives to establish rightful unilateral external law making and to maintain the civil union, but how are they to do this? When, for example, is the state in such "danger of dissolution" that the sovereign must judge it right to deviate "from previously existing law" and levy forced loans?<sup>351</sup> A full answer to such a question takes us beyond *The Doctrine of Right*. Just because *Doctrine of Right* is read as reflexively establishing principles of political judgment, we should not expect it to define principles with such precision as to remove the burden of judgment from us as readers. No more than reading the *Groundwork* relieves us of the burden of judging, in moral practice, what it is our duty to do. In other works, Kant does supplement *The Doctrine of Right* with further principles for judgment. We might look to the third *Critique* and most especially the teleological power of judgment. But even in aesthetic judgment we find resources to refine political judgment. For example, Kant discusses the aesthetic or symbolic aspect of politics, distinguishing between the monarchical state "ruled in accordance with laws internal to the people" and one ruled by a "single absolute will" and their respective symbology of "a body with a soul" and a "mere machine" or "handmill".<sup>352</sup> What role in the sovereign's judgment should these aesthetic and symbolic qualities of politics play? A full picture of the role of political judgment in Kant's political philosophy would certainly require this analysis, and indeed, analysis of Kant's historical, anthropological, and pedagogical writings, and well as other texts on politics. But my purpose here is limited to showing that the principles derived in *The Doctrine of Right* itself are

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<sup>350</sup> *PP* 8:372-3.

<sup>351</sup> *MM* 6:325.

<sup>352</sup> *CPJ* 5:352.

principles of political judgment, not only of legal systems. Though these other writings take up the question of the *refinement* of political judgment, it is in *The Doctrine of Right* that the central importance of political judgment is established.

Despite this, there are two points about the refinement of political judgment in the context of the state that can be drawn at least primarily from *The Doctrine of Right* with which I will conclude this chapter. The first of these is that there is a principle to which the sovereign, or indeed any citizen who is called upon to judge politically, may refer and that is the idea of the general united will.<sup>353</sup> *The Doctrine of Right*, especially in the General Remark in The Right of State,<sup>354</sup> as well as his other political writings contain numerous references to the sovereign being guided by what the people can or cannot judge;<sup>355</sup> what they would judge;<sup>356</sup> what they do judge i.e., by the “public opinion”;<sup>357</sup> or what they “unconditionally *ought*” to judge.<sup>358</sup> Now, obviously there is some unclarity in this – what counts as what the people would, could or should judge? However we decide this question, there is one aspect to the principle of the general united will that is clear. When Kant says in the third *Critique* that a people ought to be ruled by “laws internal to the people” he means by the laws of the people as a whole.<sup>359</sup> To judge politically is, for Kant, to judge as a citizen who is part of a contingently existing civil union and not simply as a person. For this reason, Kant praises Frederick II, with perhaps a hint of irony but with a dose of philosophical sincerity too, because he “at least *said* that he was only the highest servant of the state”.<sup>360</sup> The sovereign, as any citizen, judges between the imperatives to establish rightful unilateral external law making and to maintain the civil union, and must not do so simply as a private, individual person. They ought to judge as a citizen and in accordance with what the people *as a whole* could, would and should judge.

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<sup>353</sup> Above in fn. 345 I aimed to forestall the concern that the reading of sovereignty in *The Doctrine of Right* presented here is overly Schmittian and this point is crucial in this. The idea of the general united will serves as a formal *moral* principle of political judgment, and it applies to the sovereign as much as any other citizen.

<sup>354</sup> Noting again that as a remark it involves ‘application’ rather than ‘system’, *MM*, 6:205-6.

<sup>355</sup> *MM* 6:327; *MM* 6:329.

<sup>356</sup> *MM* 6:328.

<sup>357</sup> *MM* 6:329.

<sup>358</sup> *OTB* 8:434.

<sup>359</sup> *CPJ* 5:352.

<sup>360</sup> *MM* 8:352.

Secondly, the burden a sovereign holds regarding political judgment is heavy, but the sovereign does not bear it alone. Kant's place in a broad European tradition of republican political theory should be enough to indicate that all citizens have to bear the burdens of political judgment. Indeed, as I have argued, *The Doctrine of Right* is itself an exercise in practical political judgment and Kant's broader political philosophy is too. Kant is no sovereign, indeed, he rejects the need for philosopher kings.<sup>361</sup> He is, however, a citizen philosopher engaged in practical political judgment. There are, I would argue, two distinct but connected tasks involved in this. In this thesis, I have primarily concerned myself with the first, which concerns the reflexive formation of the principles of the system of right. Kant's political philosophy is engaged in practical reasoning, and moral deliberation about the principles of political judgment i.e., what are the duties of the citizen? These are duties that must accord with the form of political judgment as contained in the idea of the general united will. This is the central task of *The Doctrine of Right*.

The second is, perhaps, less a matter of system and more a matter of application. If the idea of the general united will of the people is the principle that should guide the sovereign's judgment, then for citizens there is an obligation to play one's part in forming that general united will. Moreover, there is a role for the citizen in determining the sovereign's will in accordance with the system of right via reasoned argument but not necessarily pure reasoned argument. In *The Doctrine of Right*, this is a task that takes place in the remarks. It is reflected in the inclusions of 'impure' practical reasoning in the application of the system of right in those remarks, as well as in other less academic, but no less philosophical, texts such as *Towards Perpetual Peace*. Even if one doesn't take the claim that the three authorities are coordinate and subordinate to be rhetorical, as Guyer does, one cannot deny that Kant intends his writings to persuade and affect the politics of his day and his state.

If "*freedom of the pen*" is the "sole palladium of the people's rights", then a duty falls on citizens to exercise their reason in its "*public use*".<sup>362</sup> *The Doctrine of Right* as an exercise of practical political judgment is engaged with both tasks, as is the rest of Kant's political philosophy, even if at times he is more focused on one task or the other. That is to say that despite my separating of the two tasks, there really is not radical separation between them, and neither is there between system and application. In practical philosophy and practical

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<sup>361</sup> *PP* 8:369.

<sup>362</sup> *TP* 8:304; *WE* 8:36.

politics, the guiding thread of judgment in accordance with the form of the general united will links the two tasks. Each practical judgment made is an affirmation, a re-derivation of principle and an application. To judge that one must “*Obey the authority that has power over you*” is to affirm and reformulate Kant’s corollary, the first political judgment that “the subject must be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another’s to enter along with him into a civil constitution.”<sup>363</sup> The tasks are bound up together. In this way, Kant’s political philosophy, including *The Doctrine of Right*, is read as a sustained exercise in practical political judgment.

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<sup>363</sup> *MM* 6:371; *MM* 6:256.

## Chapter Five – Kant and the Balance of Power

In Chapter Three, I argued that Kant conceives of perpetual peace as a phenomenal political good and not as an ideal. Perpetual peace is achieved by a congress of states modelled on The States General at The Hague.<sup>364</sup> This congress of states prevents the outbreak of hostilities between states and allows states to settle disputes about their rights “as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”<sup>365</sup> This peace is an empirical and contingent condition of the absence of active hostilities between states, and because disputes are settled only ‘as if’ by lawsuit, this condition is not characterised by rightful law. Perpetual peace is thus not an ideal, but a phenomenal political good in which states remain divided in separate civil unions but avoid active hostilities with each other. As the peace is not characterised by rightful law, legal processes and legal judgments are not sufficient to secure and maintain it. Instead, perpetual peace is only secured and maintained through the prudent exercise of practical political judgment in international politics. In this chapter, I discuss the role of political judgment in The Right of Nations in *The Doctrine of Right* in the context of an important but much neglected principle in Kant’s right of nations – the right to a balance of power.

I suspect for many readers invoking the balance of power in the context of Kant’s political philosophy is a surprising move. Kant’s account of perpetual peace is generally read as an emphatic rejection of power politics, whether this is taken to be a fatal flaw or a meritorious feature. In the former camp are those who argue Kant’s supposed rejection of power politics betrays his neglect or his failure to take seriously the fact that politics is centrally to do with power.<sup>366</sup> Kant, on these accounts, fails to understand the nature of politics. In the latter camp are those liberal international political theorists such as Jürgen Habermas, John Rawls as well as theorists associated with (neo-)liberalism in International Relations theory, and democratic peace theory, especially Michael Doyle.<sup>367</sup> For these interpreters, it was supposedly a great

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<sup>364</sup> *MM* 6:350.

<sup>365</sup> *MM* 6:351.

<sup>366</sup> Richard Bourke, “Theory and practice: the revolution in political judgement”, in *Political Judgement: Essays for John Dunn*, ed. by Richard Bourke and Raymond Geuss (Cambridge: Cambridge University Press, 2009), pp. 73-110.

<sup>367</sup> Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight” in *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal*, ed. by James Bohman and Matthias Lutz-Bachmann (Cambridge, MA: MIT Press, 1997), pp. 113-154; John Rawls, *The Law of Peoples*, (Cambridge, MA: Harvard

achievement of Kant's right of nations to propose a congress of states that disrupts and replaces an international politics based on power.

My disagreement with the former camp which takes Kant to fail to grasp the integral role of power in politics will be clear from the foregoing chapters. Kant's political philosophy is practical. It grasps directly the contingency of politics, and as an exercise in practical political judgment *The Doctrine of Right* never tries to escape this. The first political judgment and the context of the contingent civil union is itself a recognition of the central role of power. As Kant says, forming the civil union "is a *deed* that can begin only by seizing supreme power and so first establishing public right."<sup>368</sup> My account in this chapter thus takes the second camp, which takes Kant's supposed rejection of power politics as a merit, as its theoretical backdrop. This seems to me more in line with the mainstream of Kant scholarship, and more useful for highlighting what is distinctive in my reading of *The Right of Nations* in *The Doctrine of Right*.

I therefore begin the chapter in Section One by highlighting the treatment of the balance of power in contemporary Kantian accounts of international politics. I then proceed to my argument that the balance of power and the political judgment needed to sustain it are important parts of Kant's conception of the right of nations. My approach in this chapter is different to my approach in previous chapters. I have previously been engaged in close analysis of *The Doctrine of Right* with other texts relegated to a secondary concern. In this chapter, *The Doctrine of Right* remains my primary concern, but to highlight the role of the balance of power in the right of nations it is instructive to compare what Kant says about it with two other political texts from the 1790s: *On the common saying: That may be correct in theory, but it is of no use in practice* and *Toward Perpetual Peace*.

Kant's political philosophy is engaged in practical political judgment, and it is thus engaged with the developing political issues of its time. So, in Section Two I situate Kant in the 18<sup>th</sup> Century intellectual debate about securing a peaceful international political order in Europe.

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University Press, 1999); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984); Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs" *Philosophy & Public Affairs*, 12 (3) (1983), 205–35; Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 2" *Philosophy & Public Affairs*, 12 (4) (1983), 323–53; Michael Doyle, *Ways of War and Peace* (New York, NY: W. W. Norton & Company, 1997), pp. 251–300.

<sup>368</sup> *MM* 6:372.



In this debate the balance of power and perpetual peace are conceived as opposing approaches. The fact that Kant combines the two is one of the distinctive aspects of his approach to the right of nations. In Section Three, I undertake the comparison of *Theory and Practice, Toward Perpetual Peace* and *The Doctrine of Right*. I show that Kant changes his views about the balance of power across these texts concurrently with his changing views on whether a world state or a congress of states is necessary to secure perpetual peace. In Section Four, I propose a link between these two changes of mind. I argue that as Kant moves away from a world state towards a congress of states, the question of the stability of the peace becomes a more pressing question. I suggest the balance of power is part of Kant's answer to it. In the final section, I conclude with a discussion of the central role of prudent political judgment in Kant's account of the right of nations.

### Section One – Kant and Kantians

Kant's argument that a congress of states is a condition of perpetual peace is arguably one of his most influential. Two of the most significant political philosophers of the second half of the twentieth century – John Rawls and Jürgen Habermas – both take their cue from Kant on matters of international politics. Moreover, Kant's influence on democratic peace theory, and on the liberal tradition of international relations theory is immense, a large part of the credit for which can be given to Michael Doyle. In each case, different aspects of Kant's argument are taken on board, whilst simultaneously going beyond Kant in different respects. A commonality between them, however, is that they take Kant to have rightly rejected power politics and a right of nations based on the balance of power.

Habermas directly cites Kant's claim in *Theory and Practice* that "a lasting universal peace by means of the so-called European balance of power is nothing but an illusion."<sup>369</sup> He goes on to argue that international politics needed to move further away from a politics based on the sovereignty of states than Kant allows it to get in order for it to be consistent with itself and to secure a lasting peace. Nonetheless, Habermas saw Kant as having taken an important step in that direction.

Rawls also goes beyond Kant, but still cites him approvingly in his supposed rejection of power politics. In *The Law of Peoples*, Rawls dismisses peace based on a balance of power

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<sup>369</sup> Habermas, "Kant's Idea of Perpetual Peace", p. 116.

because it renders “peace between states to be at best a *modus vivendi*, a stable balance of forces only for the time being.”<sup>370</sup> A mere *modus vivendi* falls short of peace as Rawls conceives it. He argues: “the just society of liberal peoples would be stable for the right reasons, meaning its stability is not a mere *modus vivendi* but rests in part on an allegiance to the Law of Peoples itself.”<sup>371</sup> For Rawls, the peace must be based on peoples respecting each other’s equal status as self-determining political societies, and a mere balance of power would not achieve this. Peace is a matter of being morally *reasonable* as well as instrumentally *rational* on Rawls’ account.

Perhaps even more explicit in drawing influence from Kant is Michael Doyle. Doyle brings Kant’s influence into International Relations Theory proper (as opposed to international political theory) in his formulation of a liberal theory of international relations and associating it with democratic peace theory. Doyle draws on Kant’s argument in *Toward Perpetual Peace* for the necessity of republican states and the congress of states for perpetual peace to support democratic peace theory, and to argue that liberal international institutions can disrupt and replace an international politics based on the balance of power.<sup>372</sup>

None of these Kantians claims to be purely engaged in Kant scholarship, yet I suspect that their shared view that the balance of power and power politics is firmly rejected in Kant’s account of the right of nations would be shared by many if not most Kant scholars. Yet it strikes me that there something distinctly un-Kantian about a proposal for perpetual peace that transcends the conditions of international politics. Kant’s transcendental philosophy is as much about the limits imposed by conditions as it is about what they enable. In the politics of the state, we have seen how the contingent civil union constrains the ideals that can be posited in practical political judgment. In the right of nations too, Kant recognises the limits which the conditions of international politics impose. This leads him to adopt, perhaps surprisingly, a rather more nuanced position on the balance of power and, ultimately, concludes it is a right held by states under the right of nations. As a way of further emphasizing the distinctiveness of Kant’s approach, let me now turn to the intellectual context of Kant’s discussion.

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<sup>370</sup> Rawls, *The Law of Peoples*, p. 45.

<sup>371</sup> Rawls, *The Law of Peoples*, p. 45.

<sup>372</sup> See texts cited in fn. 367. See also Sid Simpson, “Making liberal use of Kant? Democratic peace theory and Perpetual Peace”, *Research on Social Work Practice*, 33 (1) (2019), 878–897.

## Section Two – The Balance of Power and Perpetual Peace

The concept of the balance of power, in the broadest terms, claims that stability in politics requires that the relevant political actors have more or less attained an equilibrium in power, however conceived. Despite its association with IR realism, the balance of power has its origins in early modern European republican theory.<sup>373</sup> For these republicans, the balance of power is not merely a descriptive principle, but also a normative principle which seeks to secure liberty as/or non-domination. Contemporary republican political theorists continue to draw on these ideas in theorising the necessary republican state institutions to secure non-domination.<sup>374</sup>

As a theory of international politics, however, the balance of power gains prominence as a principle for European diplomacy at least as early as the 16<sup>th</sup> Century, before reaching its peak in the 17<sup>th</sup> and 18<sup>th</sup> centuries. In the 17<sup>th</sup> century, The Thirty Years War dominates European politics. The war begins along confessional lines in the 1618 Bohemian Revolt, and this continues through Sweden's 1630 intervention against the Catholic Habsburgs. However, in 1635, despite being Catholic, geopolitical rivalry spurs France to join the war against the Habsburgs. This lasts until a series of peace treaties end the conflict and create the 1648 Peace of Westphalia. It is the third phase that is crucial as it laid bare the political motivations of the actors in the conflict. Power, not religion, drove European politics.<sup>375</sup>

Thus began an explicitly geopolitical period of state competition known as the 'Stately Quadrille' during which the balance of power rose in prominence. Initially an English idea

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<sup>373</sup> Kevin Blachford, "The balance of power and the power struggles of the polis", *Journal of International Political Theory*, 17 (3) (2021), 429-447.

<sup>374</sup> E.g. John McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011); Camila Vergara, *Systemic corruption: Constitutional Ideas for an Anti-oligarchic Republic* (Princeton, NJ: Princeton University Press, 2020); Gordon Arlen and Enzo Rossi, 'Must Realists Be Pessimists About Democracy? Responding to Epistemic and Oligarchic Challenges', *Moral Philosophy and Politics*, 8 (1) (2020), 27-49.

<sup>375</sup> This brief summary is not intended as historical scholarship. It only serves to illuminate the context under which the balance of power and perpetual peace are developed as opposing conceptions of European international order. It is the distinction between the two, not the history that is key for the argument of this chapter. I also make no direct claim of historical continuity or influence between the early republican conception of the balance of power and the later conception of the balance of power as a normative principle of the international order.

aimed at securing their own position by ensuring a balance of force on the European mainland,<sup>376</sup> the concept became central to the diplomacy of the period. The clearest example is the so called ‘Diplomatic Revolution’ in 1756 during which Austria allied with long standing rival France and, to secure the balance of power against this new alliance, Britain and Prussia formed their own alliance. The balance of power was thus at the forefront of both the thought and practice of European international politics during Kant’s life.

This does not tell us precisely what the balance of power is but one thing that is hopefully clear is that it is not merely a descriptive claim about how international politics functions.<sup>377</sup> It is also a normative diplomatic principle.<sup>378</sup> There are several variations in how this balance of power as a diplomatic principle or aim of foreign policy is understood in the 18<sup>th</sup> Century. Following Randall Lesaffer, who in turn follows Bruno Arcidiacono, we can distinguish three main variations.<sup>379</sup> First, *bilateral* security of powers. Second, a negative, *anti-hegemonic* balance of power such that no power can become preponderant and as a result belligerent externally and oppressive internally. Third, a *positive* principle for pacifying relations between powers forming part of the system of states. The latter two are most interesting as they offer differing conceptions of the balance of power as a means to ordering international relations as a whole. Both are ubiquitous in 18<sup>th</sup> Century thought, but as Lesaffer argues, there is a shift in prominence from the solely negative *anti-hegemonic* to the *positive* conception late in the century and into the next.<sup>380</sup> This period also happens to be when Kant wrote the vast majority of his political writings, and thus forms the immediate intellectual context for Kant’s discussion of the balance of power.

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<sup>376</sup> Stella Ghervas, “Balance of Power vs. Perpetual Peace: Paradigms of European Order from Utrecht to Vienna, 1713–1815”, *The International History Review*, 39 (3) (2017), 404-425 (p. 406).

<sup>377</sup> That claim might better be characterised as classically Realist.

<sup>378</sup> It is normative principle of the diplomatic order designed to secure the independence of states and peace between them. As above (fn. 375), I make no attempt to discuss the historical transformation of the balance of power as a republican normative principle designed to secure non-domination.

<sup>379</sup> Randall Lesaffer, “The Peace of Utrecht, the Balance of Power, and the Law of Nations”, *Tilburg Law School Legal Studies Research Paper*, 5 (2014) (p. 20); and Bruno Arcidiacono, “De la balance politique et de ses rapports avec le droit des gens: Vattel, la ‘guerre pour l’équilibre’ et le système européen”, in *Vattel’s International in a XXIst Century Perspective/Le droit international de Vattel vu du XXe siècle*, ed. by Vincent Chetail and Peter Haggenmacher (Leiden: Martinus Nijhof Publishers, 2011), 77-100.

<sup>380</sup> Lesaffer, “The Peace of Utrecht”, p. 21.

At least among Kant scholars and political theorists more broadly, the intellectual context of the idea of perpetual peace is likely better known than is that of the balance of power. Today, the most famous proposals for perpetual peace are Kant's own, Rousseau's and The Abbe de Saint-Pierre's. It was Saint-Pierre's plan for perpetual peace which catapulted perpetual peace to the forefront of the European intellectual scene and so I will begin there. The proposal is complex, but its core includes sovereign states submitting to common law, arbitration by a senate of states, and enforcement by great powers. He aimed to remove territorial expansion as a justification to wage war, whilst enticing major powers to agree through the savings in military budgets. As Stella Ghervas points out, we would today no doubt describe this as some form of loose federation.<sup>381</sup> What is crucial is that this proposal was a result of Saint-Pierre's view that the balance of power had failed as a means to secure European peace, as Ghervas also argues. Saint-Pierre publishes this plan on the occasion of the 1713 Peace of Utrecht, one of the treaties that concluded the War of The Spanish Succession.<sup>382</sup> This treaty is famous amongst international lawyers because it was the first time the balance of power was explicitly included in the terms of such a treaty. It enshrined the balance of power as an anti-hegemonic principle,<sup>383</sup> and it had the standing to supersede other legitimate claims and rights. In this case, the patrimonial principle of succession was superseded. The Bourbon monarchs of France and Spain retained their respective kingdoms, but each of their heirs had to renounce claims to the other throne.

For Saint-Pierre, this was a disaster. Though he acknowledged the role of the balance of power in preventing the hegemony of any single state, he didn't think this amounted to a guarantee of peace.<sup>384</sup> The evidence for this is the War of The Spanish Succession itself, which was fought to prevent France gaining the Spanish crown and overturning the balance of power in Europe. Saint-Pierre thus understood perpetual peace as an alternative to the balance of power as the dominant principle for the ordering of European international politics. Later plans for perpetual peace differed in other details but agreed on this. Rousseau, for example, criticised Saint-Pierre for failing to include in his proposal the transition of patrimonial states into republics. For Rousseau, the problem is that patrimonial states would

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<sup>381</sup> Ghervas, "Balance of Power vs. Perpetual Peace", p. 411.

<sup>382</sup> Although Saint-Pierre had long be considering and working on such a project, I'll take the liberty of inferring that Saint-Pierre had it published in Utrecht at this moment for a reason.

<sup>383</sup> As argued in Lesaffer, "The Peace of Utrecht".

<sup>384</sup> Ghervas, "Balance of Power vs. Perpetual Peace", p. 412.

simply never agree to Saint-Pierre's proposals.<sup>385</sup> However, in republics, in which citizens themselves decide on foreign policy, including fighting in wars, there is a much better hope for agreement. On this latter point, Kant agrees with Rousseau.<sup>386</sup> But he disagrees with both Rousseau and Saint-Pierre in arguing that the balance of power must also be understood as part of any proposal for perpetual peace. From Saint-Pierre he takes the idea of a federation; from Rousseau that this must be a federation of republics; and he adds the thought that this federation is made stable by the balance of power.

Kant's position on the balance of power is thus doubly interesting. First, he understands it, the right of nations, and perpetual peace quite differently to contemporary Kantians. As I argue below, this is not merely a terminological difference. Second, he bridges the 18<sup>th</sup> Century intellectual and political divide between the balance of power and perpetual peace as two conceptions of European international political order, as I've outlined in this section. We now turn to Kant's position, and reasons why he held it.

### Section Three – Kant's Changes of Mind

As we saw in Chapter Three, Kant's writings on perpetual peace have inspired a vast scholarly debate on many issues, but the question of the institutionalisation of perpetual peace - whether perpetual peace requires a world state or a non-coercive federation - is most prominent. In this chapter, what comes into focus more than the debate itself is the reason why such an extensive debate has resulted in the first place. Kant's apparent vacillations in the 1790s mean that the questions of what he should have said and what he in fact said are intertwined.<sup>387</sup> Some scholars argue that Kant holds true to his initial endorsement of a world state throughout his writings, or that the world state is his final considered opinion.<sup>388</sup> Others argue that Kant's views change through the 1790s until he finally settles on a non-coercive

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<sup>385</sup> Ghervas, "Balance of Power vs. Perpetual Peace", p. 411.

<sup>386</sup> *PP* 8:349.

<sup>387</sup> Thomas L. Carson, "'Perpetual Peace': What Kant Should Have Said", *Social Theory and Practice* 14 (2) (1988), 173–214.

<sup>388</sup> B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010).

federation.<sup>389</sup> Still others argue that he, in effect, endorses both.<sup>390</sup> Finally, some argue that the whole matter is fundamentally ambiguous, possibly irresolvable, and Kant never truly settled on a satisfactory position.<sup>391</sup>

As is clear from Chapter Three, I favour a reading under which Kant endorses a non-coercive federation or congress of state in *The Doctrine of Right*. I also have sympathy for the reading of his position as ambiguous, and I take the argumentative structure of Chapter Three to be evidence for it. However, in this section it is the view that Kant changes his mind that I am engaged with. Kant's political philosophy is engaged in practical political judgment, and it is thus engaged with the developing political issues of its time, and so the fact that Kant does change his mind should not be surprising. As argued in Chapter One, in matters of public right, there was still "so much discussion" which "can well justify postponing a decisive judgment for some time."<sup>392</sup> Kant's political philosophy develops over the course of his career. For example, one can note the dramatic shift in Kant's thinking about the nature of the first political judgment between the so-called *Feyerabend Lectures* of 1784 where it is neither a necessary nor a priori judgment, through to the position in the 1797 *Doctrine of Right* where it has both these qualities as discussed in Chapter One.<sup>393</sup> Pauline Kleingeld has similarly noted a change in Kant's views on race, though her reading is much disputed, by Robert Bernasconi amongst others.<sup>394</sup>

On my reading of 1793's *On the common saying: That may be correct in theory, but it is of no use in practice (TP)*; 1795's *Toward perpetual peace (PP)*; and 1797's *The Metaphysics of*

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<sup>389</sup> Arthur Ripstein, *Kant and The Law of War* (Oxford: Oxford University Press, 2021) endorses the federation as Kant's final considered opinion.

<sup>390</sup> Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge: Cambridge University Press, 2012) argues Kant endorses the world state as an ideal, but the federation as a key step in the moral development of humanity that will, ultimately, allow us to realise perpetual peace as our species telos.

<sup>391</sup> Katrin Flikschuh, "Exactitude and Indemonstrability in Kant's Doctrine of Right" in *The Public Uses of Coercion and Force*, ed. by Ester Herlin-Karnell and Enzo Rossi (Oxford: Oxford University Press, 2021), pp. 117-132.

<sup>392</sup> *MM* 6:209.

<sup>393</sup> *F* 27:1381 and *MM* 6:256.

<sup>394</sup> Pauline Kleingeld, "Kant's Second Thoughts of Race", *The Philosophical Quarterly*, 57 (2007), 573-92; Robert Bernasconi, "Kant's Third Thoughts on Race" in *Reading Kant's Geography*, ed. by Stuart Elden and Eduardo Mendieta (New York, NY: State University of New York Press, 2011), pp. 291-318.

*Morals (MM)*, the balance of evidence supports the view that he does change his mind about the right of nations as well. It is possible (with some smoothing of the rough edges) to discern a coherent development in Kant's thinking through the three texts. He initially endorses a world state but ends up endorsing a congress of states. I have already argued for this reading as regards *The Doctrine of Right* extensively in Chapter Three, so I will treat it only briefly here. My main aim is to show how this change of mind is paralleled by a second change of mind concerning the balance of power. The most radical shift happens between *TP* and *PP*. It is here that Kant's shift in position between the world state and the congress of states happens, and here, as I will show shortly, that he changes his mind on the balance of power. Nonetheless, it is important to also cover *MM*, both because *MM* is Kant's most complete and considered statement of his political philosophy, and because he refines his view of the balance of power in an interesting way when compared to *PP*. In Section Four, I go on to highlight a justificatory link between these two changes of mind.

(i) Kant's First Change of Mind – World State or Congress of States?

Kant's comments on perpetual peace in *TP* are brief, but clear enough for our purposes. He writes that the only possible remedy for war is "a right of nations, based on public laws accompanied by power to which each state would have to submit (by analogy with civil right, or the right of a state, among individuals)".<sup>395</sup> The key point here is that the states need to submit to a higher power analogous to individuals submitting to the state. This is a clear endorsement of a world state, not of a non-coercive federation.

Two years later in *PP*, things have changed. Kant writes "in place of the positive idea of a world republic [there is] only the negative surrogate of a league that averts war".<sup>396</sup> And, even more clearly "This would be a league of nations, which, however, need not be a state of nations. That would be a contradiction, inasmuch as every state involves the relation of a superior (legislating) to an inferior (obeying, namely the people)".<sup>397</sup> By contrast with *TP*, Kant here rejects the idea that the states would have to submit to a higher power that would coerce them. It is therefore most plausible to read this as Kant endorsing a non-coercive congress of states.

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<sup>395</sup> *TP* 8:312.

<sup>396</sup> *PP* 8:357.

<sup>397</sup> *PP* 8:354.



In *MM* we find much the same. We need not spend much time on it at this point; the following rather substantial quote from Kant's outlining of the elements of the right of nations should suffice: "3) A league of nations in accordance with the idea of an original social contract is necessary, not in order to meddle in one another's internal discussions but to protect against attacks from without. 4) This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an association (federation); it must be an alliance that can be renounced at any time and so must be renewed from time to time."<sup>398</sup>

(ii) Kant's Second Change of Mind – The Balance of Power

Having (plausibly) documented the change of mind on the institutional question, we can now turn to his parallel change of mind on the balance of power. *TP* is the text in which Kant addresses the balance of power most explicitly, and he is derisive: "an enduring universal peace by means of the so-called *balance of power in Europe* is a mere fantasy, like Swift's house that the builder had constructed in such perfect accord with all the laws of equilibrium that it collapsed as soon as a sparrow alighted upon it."<sup>399</sup> He goes on to align himself with Saint-Pierre and Rousseau in adhering to the traditional opposition between the balance of power and perpetual peace. I suspect that this clear rejection of the balance of power in *TP* is the reason why most theorists believe Kant rejects the balance of power and power politics because when he changes his mind he does so in less brash fashion.

Nonetheless, in subtle remarks on the balance of power in *PP*, Kant does change his mind. In the relevant passage, Kant is addressing the question of why he opposes a universal monarchy, which for him, would result in despotism.<sup>400</sup> Kant writes: "... a peace that is produced and secured, not as in such a despotism (in the graveyard of freedom), by means of a weakening of all forces, but by means of their equilibrium in liveliest competition."<sup>401</sup> The key term for us here is 'equilibrium' [*Gleichgewicht*], the very same term that he uses in *TP* when disparaging the balance of power.<sup>402</sup> Moreover, the talk of 'forces' indicates that he has something very like the balance of power in mind.

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<sup>398</sup> *MM* 6:344.

<sup>399</sup> *TP* 8:312.

<sup>400</sup> See discussion of these issues in Chapter Three.

<sup>401</sup> *PP* 8:367.

<sup>402</sup> To be exact, the terms are *Gleichgewicht* and *Gleichgewichts*, respectively.

Unlike *TP*, Kant is now favourably inclined towards it, arguing that peace is produced and secured through it. Clearly, Kant no longer considers the balance of power a fantasy. What is not entirely clear is whether Kant thinks of the balance of power here solely negatively as *anti-hegemonic*, or as a *positive* ordering principle. The context of the discussion of universal monarchy suggests the former, whilst other passages in the paragraph such as that “*nature wills*” differences between peoples through language and religion have more of the feel of a cosmic positive ordering principle.<sup>403</sup>

We get a more decisive answer to this question in *MM*, as Kant’s thinking continues to develop. Here Kant discusses how one state may wrong another in undertaking preparations for war, which would justify a preventative attack, and in addition: “Accordingly, this is also the basis of the right to a balance of power [*das Recht des Gleichgewichts*] among all states that are contiguous and could act on one another.”<sup>404</sup> By proposing such a right to equilibrium, Kant adopts the balance of power as a *positive* ordering principle for international politics. The qualification ‘contiguous and could act on one another’ should not lead us to conclude the balance of power is *bilateral* here. Firstly, because for Kant any individual right is part of a system of Right, and as such all individual states’ rights to the balance of power are systematically connected to all others. Second, the capacity for ‘active affecting’ [*tätig berührenden*] or one state acting on another is not confined to single pairs of bordering states, as the continent-wide and increasingly globe-wide wars of the 18<sup>th</sup> Century make clear. By the close of the 1790s, Kant had thus moved from a position of scorn to actively advocating the balance of power as a *positive* ordering principle of international politics. He had also moved from endorsing a world state as the requirement for perpetual peace, to a non-coercive congress of states.

#### Section Four – The Right to a Balance of Power and a Stable Peace

This section links Kant’s two changes of mind and reveals the significance of this link for Kant. Recall that I suggested that the balance of power in broad terms amounts to the idea that stability in politics comes from an equilibrium of power between political actors. It is this idea of stability that is key to understanding the role of the balance of power in Kant’s

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<sup>403</sup> *PP* 8:367.

<sup>404</sup> *MM* 6:346.

perpetual peace. Stability in politics can also be secured from other sources. In Rawls through widespread adherence to norms or in Hobbes through the domination of a single all-powerful actor. Both of these sources are important for Kant, but what I will argue is that the balance of power is an important part of how the problem of stability arises and is resolved in Kant's conception of perpetual peace.

There are at least two kinds of questions about political stability. The first is technical, how can stability be achieved? The second is normative or moral, who is permitted to do what to secure stability?<sup>405</sup> Kant is interested in both, as evidenced by his concern that too large a state couldn't enforce laws,<sup>406</sup> but he is more interested in the second. In particular, he is concerned that the state should have the right to secure its stability – that is, its ongoing existence through time – which is of critical importance as it is the source of rightful unilateral external law making and this is the condition of rightful relations between individuals as a free, equal and independent citizens. For Kant, as with Hobbes, it is the sovereign that holds this right.<sup>407</sup> As a practical matter “a state must be regarded as perpetual” and the sovereign's right in this regard, is not to be questioned.<sup>408</sup> The ongoing maintenance of the civil union – the first political judgment – has been important to my reading of *The Doctrine of Right* throughout this thesis, and so it is here again.

In *TP*, Kant endorses a world state, so this normative story holds. In *PP* and *MM*, there is no world state, no superior power between states, so who has what right to do what to whom to stabilise the peace perpetually? First, we must recall (from Chapter Three) that this peace is not the same as the fully rightful relations secured in a state by law. For Kant, peace in this context is the absence of hostilities, the role of the federation is “to avoid getting involved in a state of actual war among other members.”<sup>409</sup> Even for this weaker notion of peace, the federation itself seems insufficient because its lack of coercive powers means the peace holds only if states want it to hold. If they do, the federation is superfluous, if not, useless. This is a

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<sup>405</sup> For the distinction of technical and moral political problems in Kant, see *PP* 8:377.

<sup>406</sup> *MM* 6:350.

<sup>407</sup> See Chapter Four.

<sup>408</sup> *MM* 6:367.

<sup>409</sup> *MM* 6:344.

frequent criticism of *Toward Perpetual Peace*, which goes back at least as far as Kant's former student and latter significant diplomat Fredrich Gentz.<sup>410</sup>

Now, "useless" would be too strong. The establishment of a federation as a cooperative endeavour may increase the chances of success assuming that states do want peace to hold. The federation allows states to resolve disputes in a quasi-legal manner: "as if by lawsuit, rather than in a barbaric way (the way of savages), namely war."<sup>411</sup> This is suggestive of a form of international norm in which states come to accept that rights disputes must be settled through arbitration. This approach, similar to Rawls' stability for the right reasons, involves states internalising norms. But this ultimately fails to solve the problem, as there is nothing about the federation that means that states would accept this legal norm for resolving disputes, nor that they would hold to it. Again, we have the worry that the federation is either useless, because it cannot compel adherence to the norm, or superfluous, as once the norm is accepted the peace itself is accepted.

The *PP* passage I referenced earlier contains a clue to Kant's response. In it, Kant says that perpetual peace involves "the separation of many neighbouring states independent of one another" but with an ever "greater agreement in principles, [leading] to understanding in a peace that is produced and secured, not as in such a despotism (in the graveyard of freedom), by means of a weakening of all forces, but by *means* of their equilibrium in liveliest competition"<sup>412</sup> The italicisation of '*means*' is my emphasis, and I put it there because it suggests that the balance of power is part of the means for producing and securing i.e. stabilising the peace, along with a growing agreement on principles which I take to include both agreement to the principle of quasi-legal resolution of interstate rights disputes and to the principles of republicanism. One can easily imagine how this would work. When states come into disputes about their rights, as even states which agree on much politically are liable to do, they know that these disputes are risky when a balance of power obtains because there is no guarantee of victory in a war between balanced forces. So, rather than prosecute their right through war, the federation provides an alternative, peaceful and quasi-legal resolution. This helps produce the peace, but also to secure and stabilise it. This is not a guarantee of

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<sup>410</sup> Fredrich Gentz, 'Über den ewigen Frieden', *Historisches Journal*, 2 (1800), 710–90. Reprinted in *Ewiger Friede Friedensrufe und Friedenspläne seit der Renaissance*, ed. by Kurt von Raumer (Freiburg: Karl Alber, 1953), 461–497 – cited in Kleingeld, *Kant and Cosmopolitanism*.

<sup>411</sup> *MM* 6:350.

<sup>412</sup> *PP* 8:367, my emphasis.

peace.<sup>413</sup> Kant does not make a theoretical claim about how agreement to principles and the balance of power will inevitably lead to peace, but they do make perpetual peace practically possible. Kant's point is similar to Lassa Oppenheim's claim that the balance of power is a precondition for international law.<sup>414</sup> For Kant, the balance of power is a necessary condition of peace. The balance of power is not transient, or transitional for Kant, but in *MM* is made a fundamental *right* of all states under the right of nations in Kant's conception of perpetual peace. The right to a balance of power is a claim to the moral equality of all states in the international order. The balance thus enters into Kant's system of right as a principle for ordering European international politics, and thus upending, contrary to the expectations of many contemporary Kantian theorists, the traditional opposition between the balance of power and perpetual peace.

#### Section Five – Peace through Judgment

By adopting the balance of power as a *right* of states Kant adopts the balance of power as a positive ordering principle and includes it within his plan for perpetual peace and his a priori system of right.<sup>415</sup> That is to say that he adopts it as a moral and a political principle. What this suggests to me is Kant has a particular conception of how the European political order is to be made and then kept peaceful. Importantly, however, the balance of power is not a principle of the political order, one which might, for example, prescribe some form of institutional set up. As I have been arguing throughout this thesis, *The Doctrine of Right* is concerned with the reflexive formulation of principles of political judgment. In assigning states a right to a balance of power, Kant is making a political judgment. He is making a

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<sup>413</sup> Though Kant does suggest that upsetting a balance of power could threaten peace: "The reason there cannot be a war of subjugation is not that this extreme measure a state might use to achieve peace would in itself contradict the right of a state; it is rather that the idea of the right of nations involves only the concept of an antagonism in accordance with principles of outer freedom by which each can preserve what belongs to it, but not a way of acquiring, by which one state's increase of power could threaten others." *MM* 6:347.

<sup>414</sup> Lassa Oppenheim, *International Law. A Treatise. Peace* (2nd edn., London: Longman and Green, 1912), vol. 1, (p. 80) – cited in Lesaffer, "The Peace of Utrecht", p. 1.

<sup>415</sup> It is worth pointing out again in this context that the right to the balance of power is found in the 'text' of *The Doctrine of Right* rather than in one of the 'remarks' which deal only with the "empirical application of rights". *MM* 6:205-6.

judgment in light of the considerations discussed in this chapter. He is also, however, formulating a principle to guide the ongoing practice of political judgment.

This is an important distinction, and it can help us make sense of how Kant responds to a basic fact of international politics which might pose a problem for him. If the moral equality of states is affirmed in the right to a balance of power, then this might be thought to depend on a rough natural equality of power between states. But if that is the case, then Kant would face a problem as it is noted fact of international politics that all states are not equal in power. Even if Kant is primarily concerned with the right to a balance of power as a normative claim and not a descriptive one, if it is going to play the important role of bringing stability to the congress of states in the right of nations that I suggest it does, then there has to be some prospect of success. Does this not depend on a rough natural equality of power?

Seeing that the balance of power is a principle of political judgment and not of the international order helps understand Kant's response to the natural inequality of states. Kant is conscious of the fact that power is often not evenly distributed among states and he is also aware that power does not only manifest within individual states, but also between them. In *Toward Perpetual Peace* he writes that there are "three powers, the *power of armies*, the *power of alliances* and the *power of money*".<sup>416</sup> States have the right to seek a balance of power not only through internal policies that increase the power of their armies and their money, but also through external policies aimed at forming alliances. There is thus no need for a rough equality of power between states as smaller states may ally to create a balance against a larger one.

Now, the power of alliances is not much help if one conceives of Kant as being engaged in a project of defining some form of global institution to secure the peace. It would be far too imprecise and flexible. But, if we read him as engaged in formulating principles of political judgment, then the conception of the balance of power that is fluid, dynamic and contested suggested by the power of alliances is less of a concern.<sup>417</sup> It may be difficult to seek a balance of power through alliances, but Kant's point is that it is rightful to do so. This is a task for which there is no substitute for political judgment.

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<sup>416</sup> *PP* 8:345.

<sup>417</sup> Such a dynamic conception of the balance of power is consistent with the republican tradition, cf. Blachford, "The Balance of Power", p. 436.

At the end of Chapter Four, I highlighted the central role of prudent political judgment to Kant's conception of sovereignty and of the politics of the state. We can now see that the same applies to international politics. For Kant, judging politically occurs within the context of the contingent civil union. The pursuit of peace understood as the absence of hostilities in accordance with practical reason's imperative that "*there is to be no war*"<sup>418</sup> also occurs from within that same context. There is need for judgment in pursuing peace whilst at the same time ensuring the ongoing existence of the civil union which such political judgments make practically possible, as well as the prudent judgment necessary for managing a flexible and changeable balance of power. There is thus a need for prudent judgment in international politics just as there is in national politics.

There is an added complication to political judgment in the context of international politics, however. In the politics of the state, political judgment is always directed towards the state in idea. This ideal forms the end for political judgment and it remains perpetually unachieved and, because it is unachieved, it is perpetually possible to strive for it. In international politics, the end is a phenomenal political good. That means that it is possible to achieve, but that even once achieved, it can be lost again. Recall my reading of Kant's discussion of The States General at The Hague in Chapter Three.<sup>419</sup> There I suggested that The States General is an example of what Kant thought perpetual peace could be, or what form it could take. It failed to be perpetual peace simply because it was not perpetual. Peace can be lost. The congress of states can dissolve. Political judgment in international politics never has a positive settled end like the state in idea, only the permeant negative imperative to prevent to outbreak of hostilities.

What is most challenging about perpetual peace is not whether it is possible to create a congress of states publicly committed to peace. Though this is hard enough, The States General at The Hague shows (enough for Kant's purposes) that it is possible. What is most challenging is that such a congress must be perpetual. Perpetual peace is an odd thing in Kant's philosophy because it requires a kind of 'phenomenal infinity'. That is, it requires a state of the phenomenal world – a congress of states publicly committed to peace and preventing an outbreak of hostilities – to be perpetual i.e. infinite. For Kant, such phenomenal infinities are inherently unknowable. As he argues in the first *Critique*, finite beings such as

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<sup>418</sup> *MM* 6:354.

<sup>419</sup> *MM* 6:350.

us cannot have empirical experience of infinity as we must always experience within time, and nor can pure reason give us any theoretical knowledge of whether the phenomenal world is infinite, let alone whether that infinity is characterised by perpetual peace.<sup>420</sup> A finite being is inherently ignorant of whether or not perpetual peace has been or will be achieved because to know that would require knowledge of a phenomenal infinity, something that they simply cannot have access to within Kant's philosophical system. A finite being cannot know whether any congress of states committed to peace, once established, will remain perpetually. There is thus always a place for practical political judgment in Kant's conception of the right of nations.

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<sup>420</sup> *CPR* A508/B536.



## Chapter Six – Kant and the Settler Contract

In the previous two chapters, we have seen how political judgment plays a central role in two of the three divisions of Public Right. In Chapter Four we saw how Kant’s political conception of the sovereign gives political judgment a central place in the politics of the state and, therefore, in The Right of State. In Chapter Five we saw how Kant’s inclusion of a right to the balance of power in The Right of Nations reflects the role of political judgment in securing and maintaining peace perpetually. In this chapter, we turn to the final division in Public Right, which is Cosmopolitan Right.

My focus in this chapter is a passage in Cosmopolitan Right which has spawned a significant literature in the last two decades.<sup>421</sup> Kant discusses an encounter between European settlers and non-agricultural, non-sedentary, non-European shepherds and hunters - “nomads” as they are called in the literature.<sup>422</sup> This passage – call it the nomad-settler passage – rejects arguments, common at the time, that European settlers were permitted or even obligated to coercively impose the European state model on non-European, non-state peoples. This has been taken to ground an anti-settler colonial argument, and one which could be meritoriously developed in current theorising.

I argue that we should exercise more caution regarding the anti-colonial credentials of the nomad-settler passage than the literature currently does. In the passage, Kant argues that the nomad-settler interaction should be governed by contract. This is odd given the reading of *The Doctrine of Right* developed in this thesis because the nomads and settlers are not part of the same civil union, and this should make rightful contractual relations between them impossible. Yet, Kant still judges that contract is the basis for a relationship of right between the nomads and the settlers.

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<sup>421</sup> Peter Niesen, “Colonialism and Hospitality”, *Politics and Ethics Review*, 3 (1) (2007), 90-108; Anna Stilz, “Provisional Right and Non-state Peoples” in *Kant and Colonialism: Historical and Critical Perspectives*, ed. by Katrin Flikschuh and Lea Ypi (Oxford: Oxford University Press, 2014), pp. 197-220; Katrin Flikschuh, “Kant’s Nomads: Encountering strangers” *Con-Textos Kantianos*, 5 (2017), 1-25; Martin Ajei and Katrin Flikschuh, “Colonial Mentality: Kant’s Hospitality Right Then and Now”, in *Kant and Colonialism: Historical and Critical Perspectives*, ed. by Katrin Flikschuh and Lea Ypi (Oxford: Oxford University Press, 2014), pp. 221-50; Katrin Flikschuh, *What is Orientation in Global Thinking?: A Kantian Inquiry* (Cambridge: Cambridge University Press, 2017); Stefano Lo Re, “Non-State Peoples and Cosmopolitan Exit from The State of Nature”, *Estudos Kantianos*, 8 (1) (2020), 111-130.

<sup>422</sup> Flikschuh, “Kant’s Nomads”. p. 349; Lo Re, “Non-State Peoples”, p. 113 n. 4.

We can best understand this interpretive puzzle by situating Kant in a broader tradition of European political philosophy. Here, I draw on Carole Pateman and Charles W. Mills and their theorisation of *the settler contract*. Pateman and Mill's settler contract forms part of their broader domination contract theory. It is a theoretical approach to interpreting both the historical process of settler-colonialism and the constitutive texts of political theory which legitimated that process.<sup>423</sup> The settler contract is a political fiction which makes salient both features of the world and aspects of texts for the purpose of theoretical purchase and argument.<sup>424</sup> In light of Pateman and Mill's work, Kant's recourse to contract in the nomad-settler passage is shown to have serious implications. Contract has a long history of serving as a justification for settlement and the subsequent expansion of European sovereignty and empire. Not only was contract used in historical processes of settler colonialism, but it has also served as a justification for it as a device in the hands of political theorists.

Pateman and Mills emphasise that settler contracts do not ratify the status quo, but instead are creative and form new relationships of subordination between settlers and indigenous peoples. By reading *Cosmopolitan Right* in *The Doctrine of Right* through Pateman and Mills' settler contract framework, I argue that Kant's nomad-settler contract creates its own condition of possibility. To make the nomad-settler contract possible, the settlers' European civil union extends its sovereignty and the nomads are subjected to it.

If I am correct in this reading, then we can see how Kant's judgment that the nomad-settler interaction is governed by contract is possible within his political philosophical framework, but it also means that *The Doctrine of Right* leaves open a path for the expansion of European sovereignty through a settler contract. This represents a limit on Kant's account of political judgment as formed by the idea of the general united will, which I have been developing in this thesis. By 'limit' I mean that Kant's account of political judgment leaves him with no option but to judge that the expansion of European sovereignty is permissible in order to secure rightful contractual relations between the nomads and the settlers. I take Kant's late anti-colonialism to be sincere, but because the possibility of right and external freedom depends on the idea of a general united will and its corollary – the first political judgment that it is necessary to form and submit to the civil union – Kant lacks the philosophical resources

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<sup>423</sup> Carole Pateman, "The Settler Contract" in *Contract and Domination*, ed. by Carole Pateman and Charles W. Mills, (Cambridge: Polity Press, 2007), pp. 35-78.

<sup>424</sup> Pateman, "The Settler Contract", p. 46.

for his recourse to contract to be a repudiation of settler-colonialism in the way he would have hoped.

The argument of the chapter proceeds as follows. In Section One, I introduce the nomad-settler passage and the literature which draws anti-colonial implications from it but which breaks off its analysis at the point Kant invokes contract. In Section Two, I briefly explain Kant's theory of contract in *The Doctrine of Right*. This is important background as it explains why the civil union is necessary for contract and this enables me, in Section Three, to show why it is a problem for Kant's nomad-settler contract that the nomads and settlers are not part of the same civil union. To resolve this interpretative problem, I draw on and outline Pateman and Mill's theorisation of the settler contract in Section Four, before in Section Five applying this framework to the nomad-settler passage. Section Six concludes by arguing that the nomad-settler contract marks a limit to Kant's account of political judgment.

### Section One – Kant's Nomads and Settlers

Kant's cosmopolitan right has been variously interpreted as either a racist endorsement of the superiority of the European enlightenment; a searing critique of European colonialism; an argument for multilateral or international government; a justification for liberal interventionism; an argument for international law; and a self-involved European meditation concerned with peace in Europe and little else.<sup>425</sup> Kant's explicit anti-colonialism and the evident racism of his work have also made him an important node in debates about how

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<sup>425</sup> A small selection of a very large literature: Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge: Cambridge University Press, 2009); Sankar Muthu, *Enlightenment Against Empire*, (Princeton: Princeton University, 2003); Jürgen Habermas, "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight" in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. by James Bohman and Matthias Lutz-Bachmann (Cambridge, MA: MIT Press, 1997), pp. 113-154; Arthur Isak Applbaum, "Forcing a people to be free", *Philosophy and Public Affairs*, 35 (2007), 359-400; Arthur Ripstein, *Kant and the Law of War* (Oxford: Oxford University Press, 2021); Inéz Valdez, *Transnational Cosmopolitanism: Kant, Du Bois, and Justice as a Political Craft* (Cambridge: Cambridge University Press, 2019).

political theorists ought to relate to the so-called Western canon considering its complicity with imperialism and global White supremacy.<sup>426</sup>

The Right of State covers the internal or domestic right of the state and its citizens. The Right of Nations concerns the external or international right of the state and its citizens.

Cosmopolitan right, however, covers the rights of “citizens of the world”, that is, without regard for their membership or not of a state.<sup>427</sup> Cosmopolitan right in *The Doctrine of Right* is limited to “the right of citizens of the world *to try to* establish community with all and, to this end, to *visit* all regions of the earth.”<sup>428</sup> This establishes a duty on all states – their sovereigns and their citizens – to “not behave toward it as an enemy because it has made this attempt.”<sup>429</sup> In *Toward Perpetual Peace* Kant puts the point by saying “Cosmopolitan right shall be limited to conditions of universal *hospitality*.”<sup>430</sup> It covers “commerce”, both in the familiar economic sense, and in Kant’s sense of any “possible physical *interaction*”.<sup>431</sup> It thus establishes the duties states – both their sovereigns and their citizens – owe all other individuals regardless of their membership or not of another state.

For those who read cosmopolitan right as anti-colonial, the fact that it is *limited* to hospitality is crucial. This implies that European settlers have no further rights with regard to ‘non-European cosmopolitan others’. They may not, for example, coercively conduct trade, or anything else which has served to justify colonialism both in theory and in practice. Another example of such a justification is the right to coercively impose the European state model. It is this right which is at stake in the current literature on the nomad-settler passage. The passage itself is not too long, so I will reproduce it in full:

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<sup>426</sup> Emmanuel Eze, “The Color of Reason: The Idea of “Race” in Kant’s Anthropology”, *The Bucknell Review* 38 (2) (1995), 200-241; Robert Bernasconi, “Who Invented the Concept of Race? Kant’s Role in the Enlightenment Construction of Race”, in *Race*, ed. by Robert Bernasconi (Oxford: Blackwell, 2001); Robert Bernasconi, “Will the Real Kant Please Stand Up-The Challenge of Enlightenment Racism to the Study of the History of Philosophy”, *Radical Philosophy*, 117 (2003), 13-22; Pauline Kleingeld, “Kant’s Second Thoughts of Race.”, *The Philosophical Quarterly*, 57 (2007), 573-92; Robert Bernasconi, “Kant’s Third Thoughts on Race” in *Reading Kant’s Geography*, ed. by Stuart Elden and Eduardo Mendieta (New York, NY: State University of New York Press, 2011), pp. 291-318.

<sup>427</sup> *MM* 6:353.

<sup>428</sup> *MM* 6:353.

<sup>429</sup> *MM* 6:352.

<sup>430</sup> *PP* 8:357.

<sup>431</sup> *MM* 6:352.

*The question arises, however: in newly discovered lands, may a nation undertake to settle (accolatus) and take possession in the neighbourhood of a people that has already settled in the region, even without its consent?*

*If the settlement is made so far from where that people resides that there is no encroachment on anyone's land, the right to settle is not open to doubt. But if these people are shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations) who depend for their sustenance on great open regions, this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands. This is true despite the fact that sufficient specious reasons to justify the use of force are available: that it is to the world's advantage, partly because these crude peoples will become civilised (this is like the pretext by which even Büsching tries to excuse the bloody introduction of Christianity into Germany), and partly because one's own country will be cleaned of corrupt men, and they or their descendants will, it is hoped, become better in another part of the world (such as New Holland). But all these supposedly good intentions cannot wash away the stain of injustice in the means used for them. Someone may reply that such scruples about using force in the beginning, in order to establish a lawful condition, might well mean that the whole earth would still be in a lawless condition; but this consideration can no more annul that condition of right than can the pretext of revolutionaries within a state, that when constitutions are bad it is up to the people to reshape them by force and to be unjust once and for all so that afterwards they can establish justice all the more securely and make it flourish.”<sup>432</sup>*

Let us note three things about the passage by way of preliminaries. First, we can see that Kant does not approach the passage as a neutral observer or representative of humanity in general. Rather he approaches it as a European for whom the lands under discussion are “newly discovered”, and Kant judges the interaction as a European. Second, we can note that Kant designates contract as the means for regulating the interaction of the European settlers and the non-European nomads. Although he here only mentions settlement, at Kant's time any possibility of sustained interaction between geographically dispersed people would require settlement of some kind.<sup>433</sup> He gives us no other means for regulating relations of this kind,

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<sup>432</sup> *MM* 6:353. Unmarked references in this chapter are to the nomad-settler passage.

<sup>433</sup> Liesbet Vanhaute makes this point regarding trade, but I think it applies to sustained interaction in general, “Colonists, Traders or Settlers? Kant on Fair International Trade and Legitimate Settlement” in *Kant and*

and so we might assume that nomad-settler relations, and, indeed, cosmopolitan relations regarding right in general are characterised by legal contract.<sup>434</sup> Third, Kant opts for contract in contrast to force, and specifies that he holds this position regardless of the need for force in establishing a rightful condition in the first place.<sup>435</sup>

What makes the nomad-settler passage of such interest to Kant scholars is the third claim – it implies that Europeans do not have the right to coercively impose the European state model onto the nomads. This, it is argued, could ground an anti-colonial reading of *The Doctrine of Right*. It is particularly interesting because it appears to be a rejection of a previous judgment that is central to his entire politics. Namely, that there is a universal duty of state entrance, one which can be coercively enforced if necessary, or what I have described in this thesis as the first political judgment, to form and submit to a civil union.

That Kant appears to revise the universal duty of state entrance in the nomad-settler passage, apparently due to anti-colonial concerns, demands explanation and interpretation. I offer my own account of Private Right in Chapter One, but as I am here engaging with the interpretations of others, let us begin with a brief summary of the mainstream position in the literature on Kant's political philosophy, which is that the duty of state entrance stems from Kant's so-called property argument.<sup>436</sup>

Recall that, for Kant, any assertion of a rights claim (e.g. to property) unilaterally places obligations on others (e.g. to refrain from interfering with said property). This amounts to violation of freedom and equality. To avoid this result, Kant introduces a “permissive law”.<sup>437</sup> This allows for provisional property claims on external objects which are vindicated in the ‘civil condition’. For these property claims to be compatible with the equal freedom of all, these obligations must be reciprocal. Moreover, since for Kant “Right is connected with an authorization to use coercion”, these obligations must also be coercible.<sup>438</sup> To secure the

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*Colonialism: Historical and Critical Perspectives*, ed. by Katrin Flikschuh and Lea Ypi (Oxford: Oxford University Press, 2014), pp. 127-45 (p. 134).

<sup>434</sup> There is similar passage at *MM* 6:266. This passage is limited to a discussion of the wrongfulness of coercion and doesn't discuss contract, nor any other permissible nomad-settler interaction.

<sup>435</sup> Recall, for Kant, forming the civil union “is a *deed* that can begin only by seizing supreme power and so first establishing public right.” *MM* 6:372.

<sup>436</sup> I problematise the label ‘property argument’ below.

<sup>437</sup> *MM* 6:247.

<sup>438</sup> *MM* 6:231.

equal freedom of all, a general united or omnilateral will must therefore be established in a state. The sovereign of the state then represents this omnilateral will and can make laws governing property claims. As these laws are omnilateral, property claims no longer impose unilateral obligations and freedom and equality are secured. This is the basis for the duty of state entrance. Moreover, this duty is a coercive duty. That means that each also has the right to coerce others to fulfil this duty.<sup>439</sup>

Peter Niesen is the first scholar to draw attention to the anti-colonial implications of the tension between the nomad-settler passage and the duty of state entrance. The argument for the universal duty of state entrance is one of private right, i.e. it concerns relations between individuals in a state of nature. Niesen calls the process by which first unilateral property claims are made and eventually the universal duty of state entrance emerges as the ‘dynamic of private law’.<sup>440</sup> This creates a situation with problematic implications in a colonial context. Niesen takes the nomads to be non-state peoples,<sup>441</sup> and the dynamic of private law seems to imply that the settlers have a right to coerce the nomads into a state, otherwise any competing claims between them would be problematically unilateral. Niesen, however, argues that in the nomad-settler passage Kant limits the dynamic of private law because the nomads don’t raise property claims. Since they don’t raise property claims, the dynamic of private law doesn’t emerge, and so the nomads have no duty of state entrance. For this reason, the settlers have no right to coerce the nomads into a civil condition or impose a state. This, for Niesen, is the basis for Kant’s critique of colonialism in the nomad-settler passage.<sup>442</sup>

Niesen’s core interpretative moves and concerns: nomads as non-state peoples, property claims, and the duty of state entrance, have defined the subsequent literature. Moreover, this literature has also accepted Niesen’s key claim that this passage is the philosophical basis of Kant’s anti-colonialism. Anna Stilz, for example, disagrees with Niesen both about the nomads raising property claims, and therefore about the duty of state entrance. However, for Stilz it is precisely because the nomads raise provisional property claims that the settlers have no right to coerce them. The settlers have arrived in the vicinity by their own choice, so whilst the raising of provisional property claims by the nomads grounds a duty of state

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<sup>439</sup> *MM* 6:307.

<sup>440</sup> Niesen, “Colonialism and Hospitality”, p.95.

<sup>441</sup> My purpose is to engage with this literature on its own terms, so I will accept this characterisation of the nomads as non-state peoples without question, though there is room for doubt.

<sup>442</sup> Niesen, “Colonialism and Hospitality”, p. 94.

entrance between the nomads, this is not extended to the settlers. Thus, through a different argument, but one which focuses on the same categories, Stilz reaches the same anti-colonial interpretation of this passage as Niesen.<sup>443</sup>

Katrin Flikschuh, on the other hand, agrees with Niesen that the nomads do not raise property claims and do not have a duty of state entrance. But she further argues that the asymmetrical relationship of settlers who are already citizens of a state and nomads who are not limits the rights of the settlers such that they cannot exercise coercion against the nomads. One way to put this point is that, for Flikschuh, the settlers and nomads do not encounter each other in a state of nature – the settlers being already in a civil condition. Hence, the dynamic of private law doesn't apply to the settlers simply because they are already in a state. Their interactions with the nomads can only be governed by contract, or, if the nomads either will not or cannot agree to contract, then interaction is governed on the nomad's terms.<sup>444</sup> Finally, Stefano Lo Re, agrees with much of Flikschuh's analysis, but argues that the nomads cannot entirely determine nomad-settler interaction. They have a duty not to refuse to interact with the settlers indefinitely.<sup>445</sup> Crucially though, he also argues that there cannot be an exercise of coercion against the nomads, and that this is the ground of Kant's anti-colonialism.

Thus, the current interpretative literature on this passage agrees on several core concerns and on its final evaluation. The literature is concerned with property claims, the duty of state entrance and the lack of right of the settlers to coerce the nomads. This last point is the basis for the central theme of these interpretations, that in the passage Kant takes up a clearly anti-colonial position. There is then one further point common to the accounts. There seems to be a general acceptance that if the nomad-settler interaction proceeds via contract, this is non-problematic or even stands to strengthen Kant's anti-colonial credentials.

It is easy to see why this would be the case. Kant's admonishment to European settlers to deal with nomads and other non-Europeans through contract is an admonishment to treat non-Europeans as juridical equals. When the settlers propose a contract of settlement, the nomads have the choice to accept or refuse. Should they refuse, and because they treat the nomads as juridical equals, the settlers have to accept that decision and the interaction ends. The right of

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<sup>443</sup> Anna Stilz, "Provisional Right and Non-state Peoples".

<sup>444</sup> Flikschuh, "Kant's Nomads"; cf. Ajei and Flikschuh, "Colonial Mentality"; Flikschuh, *What is Orientation in Global Thinking?*

<sup>445</sup> Lo Re, "Non-State Peoples".



the settlers under cosmopolitan right only extends to trying to establish community with the nomads.<sup>446</sup> The settlers have no option but to leave, and perhaps try again another day. However, if the nomads do accept, then they continue to be treated as juridical equals by the settlers and as equal partners to the contract.

The current literature essentially draws the analysis to a close at this point. Kant appears to write little about what happens if a contract is agreed, and given the questions raised about property claims and the duty of state entrance, it seems difficult for Kant to proceed further even if he had wanted to. Flikschuh is most explicit about this. She writes Kant “does of course counsel the ‘offer’ of trade and the ‘attempt’ to engage in commerce – but these remarks remain rather vague and open-ended: who knows whether the nomads will accept the offers and what will happen even if they do?”<sup>447</sup>

I do think there is more that can be said about the nomad-settler passage. Moreover, I think that what can be said problematises the anti-colonial credentials of the passage. That is not to say that I disagree that Kant defends the claim that the nomads have to right to refuse contract with the settlers. I also agree that there is a huge amount that is deeply interesting and quite radical in the way Kant reaches this conclusion. However, his judgment that contract should govern the nomad-settler interaction is significant and I believe it has worrying implications.

## Section Two – Kant on Contract

No analysis of the nomad-settler passage is complete without an analysis of the nomad-settler contract, and such an analysis must begin with Kant’s well-developed theory of contract in Part I of *The Doctrine of Right*, though it is admittedly brief in exposition. There he considers contract alongside property and status as three forms of a broader concept of possession. I have just described how in the literature the ‘duty of state entrance’ is based on what is called Kant’s ‘property argument’. Given the analysis of Private Right in Chapter One, this is a bit of a misnomer; in that it is actually the argument about the concept of possession that grounds the first political judgment to form and submit to the civil union. Possession concerns rights to external *objects* which includes property rights to *things*, but also to “possession of another’s choice” to perform a certain action (which is governed by contract), and rights to

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<sup>446</sup> *MM* 6:353.

<sup>447</sup> Flikschuh, “Kant’s Nomads”, p. 365.

“persons akin to rights to things”, which we can call status rights, such as that of a parent.<sup>448</sup> One may say, in Kant’s theory, that a parent has possession of their child, but the child is not property in the way that a physical thing, such as an apple, can be.

Contract, then, is the right to the “possession of another’s choice, in the sense of my capacity to determine it by my own choice to a certain deed in accordance with laws of freedom.”<sup>449</sup> That is, it is a performance of an action by another which I am in possession of. Thus, I can conclude a contract with another for many things besides the transfer of property. It can be for lending of a thing, or a service, or simply an undertaking to do or not do something.<sup>450</sup> It can even be for another person via their status in the form of, for example, a marriage contract.<sup>451</sup>

A contract begins with two persons, a promiser and an acceptor, who each through an act of choice respectively promise and accept.<sup>452</sup> For these acts of choice to result in a contract, however, they must take place simultaneously. Otherwise neither party could be sure the other would not back out at the last moment.<sup>453</sup> For this it is required that the promiser and acceptor unite their wills into a “*common will*”.<sup>454</sup> This requires “a transcendental deduction of the concept of acquisition by contract” by which Kant means that the acts of promise and acceptance are represented absent the empirical condition of time.<sup>455</sup> To put the point more simply, contract must be conceived as the act of the common will of the promiser and acceptor, not as two entirely separate acts of willing.<sup>456</sup> In contract it is not the case that the object ceases to be the possession of one party, becoming the possession of no one, and then

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<sup>448</sup> *MM* 6:260; *MM* 6:271; *MM* 6:276.

<sup>449</sup> *MM* 6:271.

<sup>450</sup> *MM* 6:285-6.

<sup>451</sup> Cf. B. Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right: a Commentary* (Cambridge: Cambridge University Press, 2010), p. 259 fn. 53.

<sup>452</sup> I leave out the additional complication of two prior acts of choice on behalf of the promiser and acceptor, namely offering and assenting. This does not have an impact on the aspects of contract I go on to discuss. See *MM* 6:672.

<sup>453</sup> *MM* 6:272.

<sup>454</sup> *MM* 6:273.

<sup>455</sup> *MM* 6:272-3.

<sup>456</sup> Byrd and Hruschka, *Commentary*, pp. 223-40; Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), *Force and Freedom*, pp. 107-46.

is acquired by a new party. In a contract, the possession of the object passes directly from one to another. That is what is meant by the idea of a common will.

The final, but crucial, element of Kant's theory of contract is that as a form of possession, contract is made possible by the idea of a general united will, in the same manner as property. Recall Kant's property, or better, *possession* argument. Recall that the problem with asserting a possession claim is that it imposes unilateral obligations on others, and thus such claims appear incompatible with the equal freedom of all. The solution is that such law giving must be the law of the general united will. Only in accordance with the idea of the general united will are judgments concerning rights and external objects practically possible. This is the form of political judgment on Kant's account and the first political judgment is to form and submit to a civil union and the contingent yet practically necessary possibility condition for a general united will.

Under a general united will possession becomes possible because the laws governing individual possession claims are given omnilateral legitimation by the sovereign. In the case of property, the threat of unilateralism stems from the implied exclusion of all from interfering with the thing that is claimed as one's property without consent. Now, at first glance, contractual relations might not seem to suffer from the same concerns. Contract, resulting as it does from the common will of promiser and acceptor, does not appear to be problematically unilateral.

That appearance is dispelled at second glance, however. As a form of possession, a contractual claim on the choice or act of another also excludes all others from interfering with the parties claims under the contract.<sup>457</sup> In an intuitive case, if one concludes a contract for the transfer of a horse with another, this is taken to exclude others from preventing that horse being delivered or from concluding their own contract to take possession of the horse. These kinds of claim require omnilateral legitimation because "a bilateral but still *particular* will is also unilateral".<sup>458</sup> It is thus inherent in Kant's theory of contract that legitimate contractual claims require omnilateral legitimation. This means that contract, like all forms of legitimate possession, depends on the civil union and on the sovereign.

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<sup>457</sup> Byrd and Hruschka discuss this at *Commentary*, pp. 236-239.

<sup>458</sup> *MM* 6:263.

### Section Three – A Problem for Kant’s Settler Contract

With Kant’s theory of contract in hand, let us look again at the nomad-settler passage. The nomad-settler contract is primarily a settlement contract though, as noted above, any sustained interaction would have been based on settlement at Kant’s time, so contract is also the model for any form of rightful interaction between settlers and nomads. For Kant, these kinds of settler contract need not make reference to property at all, despite the focus given to it in the current literature. He makes a sharp distinction between settlement and possession of land. Thus he says “*Residing [Sitz] on land (sedes) is to be distinguished from being in possession (possession) of it, and settling or making a settlement (incolatus), which is a lasting private possession of a place dependent upon the presence of the subject on it, is to be distinguished from taking possession of land with the intention of some day acquiring it.*”<sup>459</sup> So when he asks in the nomad-settler passage “may a nation undertake to *settle (accolatus)* and take possession in the neighbourhood of people a people that has already settled in the region”, this should not be taken to imply that the nomads pre-owned the land or that the contract involves property claims. Rather, it only implies that a contract be made that allows the settlers to reside in a place and to take possession of things in the future e.g., they might hunt for furs, or trade with the nomads.

As well as its content, Kant also has views about the negotiation by which this contract should be agreed. He writes “this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands.” Much can be made of this ignorance/fair bargaining proviso, whether one reads it as patronising or a recognition of the nomad’s possible unfamiliarity with European conventions of contract. At the very least it would require the settlers to explain in no uncertain terms the way contract works, and what the nomads are signing up for. I’d reason that there is a mix of both patronising the nomads and awareness of the parochial nature of European forms of possession going on.<sup>460</sup>

In this regard, it is worth noting that earlier in *The Doctrine of Right*, Kant argues the opposite when he claims individuals are “authorized to do to others anything that does not in

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<sup>459</sup> *MM* 6:251. This quote is drawn from a passage which has a questionable place within modern editions of the text. It was, however, printed in the original text, even if clearly misplaced. So, there is no reason to reject it out of hand, especially since it consistent with what Kant says elsewhere.

<sup>460</sup> This is also suggested by a passage concerning different forms of property claims in “Mongolia”, *MM* 6:265.

itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not.”<sup>461</sup> In other words, normally it is up to the acceptor of a contract to do their due diligence, whereas in the nomad-settler contract, there is a responsibility on the settlers to make clear the terms and process.

Such a contract, especially with the patronising/fair bargaining proviso, might initially appear to be free and equal. Indeed, as I suggested above, I think the idea that relations between nomads and settlers would proceed on contractual lines is a core reason why the nomad-settler passage has been read as squarely anti-colonial. And I wouldn’t deny, as Flikschuh puts it, that in signing the contract the settlers recognise the juridical equality of the nomads.<sup>462</sup> I would only add that such rightful agreements in *The Doctrine of Right* are reciprocal, and the nomads are required to recognise not only the settlers as juridical equals, but the entire architecture of contract that comes with it.

This begins with a recognition and reciprocal acknowledgement of possession claims. If the contract is agreed, then this necessarily follows. I have shown how contract depends on possession for Kant, and so any agreed contract requires mutual recognition of possession claims. For Kant, what it is to have a contract is to make a possession claim on the act or choice of another. This follows even if the nomads do not make recognition claims prior to the contract being signed. Indeed, from the perspective of the nomad-settler contract, the debate in the literature about whether or not the nomads make possession claims is moot. If Kant thought it was possible for the nomads and settlers to sign a contract, as is strongly implied by his inclusion of it in the passage, then he also thought that they could mutually recognise possession claims. One way to put this point is that if it turns out it is correct to read Kant as thinking that the nomads do not make possession claims prior to the contract being signed, then once the contract is signed the contract makes possessors out of the nomads.

There is a problem, however. Kant’s theory of contract makes the possibility of contract dependent on the state. For the contract between the nomads and settlers to be compatible with the equal claims to freedom of the nomads and the settlers, the contract must be

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<sup>461</sup> *MM* 6:238.

<sup>462</sup> Flikschuh, “Kant’s Nomads”, p. 365.

omnilaterally legitimated. There is an obvious complication in the nomad-settler case. The contract is agreed between settlers who are already in a state, and nomads who are not. The nomads and settlers do not share the same civil union and are not subject to the same sovereign representing the same general united will. The nomads and settlers seem to relate to each other ‘as if’ in a state of nature, and this should make legitimate contract impossible.<sup>463</sup> Kant nonetheless judges that the interaction between the nomads and the settlers should proceed via a settler contract. How, then, is this possible?

#### Section Four – Settler Contract Theory

To answer that question, it will be helpful to situate Kant within the wider history of settler contracts in political philosophy. Fortunately, the troubled history of contract has not escaped the attention of political philosophers. We have to hand a well-developed theorisation of the role of contract in settler-colonialism that can be fruitfully applied to the nomad-settler passage. This theorisation is *the settler contract* of Carole Pateman and Charles W. Mills. In this section, I want to layout the basics of the settler contract, before applying this framework to the nomad-settler passage in the Section Five. I say “the basics” because there are many debates about how it is best understood, including debates between Pateman and Mills themselves.<sup>464</sup> With regards to these debates, I aim to be as ecumenical as possible.

Pateman’s seminal text on the settler contract is situated in the broader theoretical project of Pateman and Mills, which takes up the idea of an original contract as a political fiction from the social contract tradition in the history of political thought and uses it to critically assess both the world and texts.<sup>465</sup> In this tradition – encompassing Hobbes, Locke, Kant, Rawls, and others – ‘the original contract’ justifies political society or the state and is a standard of legitimacy for government and politics. But, as Mills tell us, the original contract is a concept that has been used in a bewildering array of different ways. It is variously “literal, metaphorical, historical, hypothetical, descriptive, prescriptive, prudential, moral,

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<sup>463</sup> ‘As if’ because, of course, the settlers are not in a state of nature.

<sup>464</sup> Carole Pateman and Charles W. Mills, “Contract and Social Change” in *Contract and Domination*, ed. by Carole Pateman and Charles W. Mills (Cambridge: Polity Press, 2007), pp. 10-34.

<sup>465</sup> Pateman, “The Settler Contract”.

constitutional, civil, regulative ideal, device of representation."<sup>466</sup> Within this diverse tradition, Pateman and Mills take social contract theory in a new direction. This has been variously called “subversive contractarianism”<sup>467</sup> or “radical contract theory”,<sup>468</sup> and I will call it simply “domination contract theory”.<sup>469</sup>

The foundational claim of domination contract theory is that the familiar *social contract* by which free and equal white European men agreed the terms of political society is only one part of the multifaceted *original contract*. The latter also comprises the *sexual contract* by which women are subordinated and dominated by men; the *racial contract* by which whites subordinate and dominated non-Whites; the *class contract* by which the propertied subordinate and dominate labour; and the *settler contract*, by which European settlers subordinated, dominated, colonised, and eradicated non-European peoples around the world.<sup>470</sup> The first and second of these are theorised in Pateman’s and Mills’ respective books of those names, which are now classics of contemporary political theory. The third Mills sees as the origins of domination contract theory in Rousseau’s *Discourse on the origins of inequality* and the contract through which “the condition of rich and poor was authorized”.<sup>471</sup> The fourth is the focus of this chapter.

Each of these domination contracts is “meant as a “device of representation” for non-ideal theory. It maps not the ideally just society we want to attain, but the non-ideal unjust society we already have and want to get rid of.<sup>472</sup> That is, the domination contract represents the world as it is. It is the contract that would have had to be agreed to form the bases of societies

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<sup>466</sup> Charles W. Mills, “The Domination Contract” in *Contract and Domination*, ed. by Carole Pateman and Charles W. Mills (Cambridge: Polity Press, 2007), pp. 79-105, (p. 81).

<sup>467</sup> This is the name given by The Stanford Encyclopedia of Philosophy, see Ann Cudd and Seena Eftekhari, “Contractarianism”, The Stanford Encyclopedia of Philosophy (Winter 2021 Edition), ed. by Edward N. Zalta.

<sup>468</sup> Mills, “The Domination Contract” p. 96.

<sup>469</sup> My reason for referring “domination contract theory” is that it does not prejudge the question of whether contract theory can be put to progressive normative use, a question on which Mills and Pateman disagree. It emphasises the focus first and foremost on the ‘domination contract’, as we shall shortly see.

<sup>470</sup> Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); Charles W. Mills, *The Racial Contract* (New York, NY: Cornell University Press, 1997).

<sup>471</sup> Mills, “The Domination Contract” p. 81. Jean-Jacques Rousseau, *The Social Contract and The Discourses*, trans. by G.D.H. Cole (London: Everyman’s Library), p. 109.

<sup>472</sup> Carole Pateman and Charles W. Mills, “Introduction” in *Contract and Domination*, ed. by Carole Pateman and Charles W. Mills (Cambridge: Polity Press, 2007), pp. 1-9 (p. 7).

like ours, beset by gender, racial and class domination. As Mills puts it “in Pateman’s sexual contract and my racial contract, men and whites, through a mixture of force and ideology, subordinate women and people of color under the banner of a supposedly consensual contract. So, the latter are the victims, the objects, of the resulting “contract” rather than subjects, freely contracting parties, and are oppressed by the resulting sociopolitical institutions.”<sup>473</sup>

A domination contract, then, is a theoretical representation of the systematic subordination of one group by another, conceptualised as an agreement by the dominators to subordinate the dominated. In addition, domination contract theory also theorises *subordination contracts*. A subordination contract is a contract between individuals of the political groups created by the domination contract, which are conceptualised as free despite being subordinating if one ignores the domination contract. Pateman’s famous example is the marriage contract. It appears as a freely agreed contract between a man and a woman, yet the theorisation of the sexual contract as a domination contract reveals the systematic role the marriage contract plays in subordination of women to men, and thus reveals domination.<sup>474</sup> Subordination contracts “constitute relations of subordination, even when entry into the contracts is voluntary”.<sup>475</sup> Once the domination contract is theorised, we recognise the systematic role of individual subordination contract where “The consequence of voluntary entry into a contract is not freedom but superiority and subordination.”<sup>476</sup>

Though domination contract theory might seem to be primarily a theorisation of the world, for Pateman and Mills the domination contract is also a framework for interpreting texts. As Pateman puts in in *The Sexual Contract*: “the classics are thus read in the light of the construction of modern civil society in the texts themselves”.<sup>477</sup> This is not a strong claim with a direct mechanism by which the texts of the social contract tradition created the modern world. It is rather the claim that the theoretical categories of social contract theory resonate with the modern world in part because they have had some influence on its creation. The

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<sup>473</sup> Mills, “The Domination Contract” p. 87.

<sup>474</sup> Pateman, *The Sexual Contract*, pp. 238-88.

<sup>475</sup> Pateman and Mills, “Introduction”, p. 2.

<sup>476</sup> Pateman and Mills, “Contract and Social Change”, p. 17.

<sup>477</sup> Pateman, *The Sexual Contract*, p. 221.



tradition can thus be read in light of the representation of the world in the domination contract.

Each domination contract is inherently connected to the others. Most relevantly here, the settler contract “is also a racial contract. The Native peoples are excluded from it yet their lives and lands are governed by it.”<sup>478</sup> In addressing the settler contract in isolation, as I will here, it is important to keep this point in mind, even as the contracts are separated for analytical clarity.<sup>479</sup> The settler contract is a part of the racial contract because of the global dimensions of White supremacy.<sup>480</sup> It is nonetheless specific because it theorises settler-colonialism rather than white supremacy, or even colonialism in general.

Pateman traces the emergence of the settler contract to the rejection of Spanish arguments that legitimised settler-colonialism in the basis of conquest.<sup>481</sup> In the arguments of Grotius, Locke and others, as well as in settler-colonial history, territories not claimed by European powers are declared *terra nullius* – empty, vacant and unclaimed – despite the presence of indigenous peoples. These arguments undergo several developments and changes. For Grotius, uncultivated land should be considered unoccupied.<sup>482</sup> Locke added that cultivated land was not realising its worth until it was brought into the international trading system, putting its ownership status into doubt.<sup>483</sup> In Vattel, indigenous peoples are declared not to be possible owners of land or anything else.<sup>484</sup> This claimed lack of ownership allowed these theorists to reject the sovereignty of indigenous peoples, whether entirely (as in Hobbes), partially (as in Grotius), or to declare that indigenous government was not sovereign but only military (as in Locke).<sup>485</sup> Crucially, this allowed both theorists and colonists to declare native lands to be a state of nature.<sup>486</sup>

This was a state of nature that awaited the original contract and the institutions of the modern state. In the hands of these European political theorists, “The state of nature and original

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<sup>478</sup> Pateman and Mills, “Introduction”, p. 7.

<sup>479</sup> Following Pateman’s approach, “The Settler Contract”, p. 38 n. 6.

<sup>480</sup> Pateman, “The Settler Contract”, p. 38; Mills, *The Racial Contract*, p. 24.

<sup>481</sup> Pateman, “The Settler Contract”, p. 44.

<sup>482</sup> Pateman, “The Settler Contract”, p. 50.

<sup>483</sup> Pateman, “The Settler Contract”, p. 52.

<sup>484</sup> Pateman, “The Settler Contract”, p. 52.

<sup>485</sup> Pateman, “The Settler Contract”, p. 53.

<sup>486</sup> Pateman, “The Settler Contract”, p. 54.

contract are powerful political fictions and their power derives from the fact that they have had purchase on and have helped create the modern world.”<sup>487</sup> In Pateman’s hands, the political fiction becomes a way of understanding the process of the colonization of the New Worlds as “a series of origins, of settler contracts.”<sup>488</sup> The political fiction of the settler contract is that it founds new institutions, a new society, which excludes the indigenous peoples from its terms on the basis of *terra nullius*, but nonetheless still subjugates them to that new society.<sup>489</sup> The process of settler-colonialism is thus theorised as a domination contract, and in addition, individual historical settler contracts are revealed to be subordination contracts.

Pateman argues a “tempered logic” of the settler contract was followed in North American, where native peoples were allowed remnants of jurisdiction within settler colonial societies.<sup>490</sup> However, what she finds in the political theorists – and argues was implemented in Australia – was the strict logic. Here the settler contract presupposes, extinguishes and replaces the state of nature all at once. That is, the colony is declared *terra nullius* – to be empty – in the very act of setting up the new civil society and its institutions. So far as the new sovereign, and the new law, is concerned the native people inhabiting that territory and now subject to colonial power did not exist. If they are to have any legal claim, their claim must be recast in terms of the juridical system of the modern state.<sup>491</sup> Here Pateman draws on a legal case in Australia in which *terra nullius* was said to be “a matter of law, not a matter of fact.”<sup>492</sup> Under the strict logic, the settlers declare that the native inhabitants were simply non-existent, so far as law and politics is concerned.

### Section Five – Reassessing the Nomad-Settler Passage

With the settler contract framework in hand, I can summarise my reading of the nomad-settler contract. I contend that Kant’s invocation of contract in the nomad-settler passage is a subordination contract. It appears to be a freely agreed contract between juridical equals, yet

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<sup>487</sup> Pateman, “The Settler Contract”, p. 55.

<sup>488</sup> Pateman, “The Settler Contract”, p. 55.

<sup>489</sup> Pateman, “The Settler Contract”, p. 56.

<sup>490</sup> Pateman, “The Settler Contract”, p. 61.

<sup>491</sup> Pateman, “The Settler Contract”, p. 67.

<sup>492</sup> Pateman, “The Settler Contract”, p. 67.

it permits the expansion of European sovereignty. The settler-colonial subordination and domination that the nomad-settler passage permits are revealed as such when read through the framework of the settler contract as a domination contract. I thus aim to raise a challenge to the purported anti-colonial implications of the nomad-settler passage and to contribute, in a small way, to the theoretical, historical and political project of Pateman and Mills.

What is particularly useful in Pateman and Mills when considering the nomad-settler passage is the creative quality of the settler contract as they theorise it. Contracts in general, and domination and subordination contracts in particular, do not merely codify the status quo, rather they “create relationships”, in particular, “relationships of subordination”.<sup>493</sup> I have already suggested that this is true of Kant’s settler contract in Section Three. There I noted that the contract makes possessors out of the nomads. Even if they don’t raise possession claims prior to the settler contract, on the supposition that the settler contract is agreed, they must at least raise contractual possession claims.

This is not the end of the matter, however, nor the end of the creative power of Kant’s settler contract. As well as the concept of possession, Kant’s theory of contract requires the state. It requires omnilateral legitimation, and this requires a civil union. In the nomad-settler passage, a sovereign is available to omnilaterally legitimate the settlement contract even if they are not explicitly mentioned, and this is the sovereign of the settlers’ state. This sovereign would be required to recognise the nomads and settlers as juridical equals through the contract, but the nomads would also have to recognise this sovereign as their own through the contract. The settlement contract creates a new relationship between the nomads and the settler sovereign, one that brings them into juridical equality with the settlers as citizens of the settler state and, which is on Kant’s account to say the same thing, subordinates the nomads to the European sovereignty. The nomads become members of the European civil union – but this is a civil union that contingently pre-exists the contract and pre-exists the nomad-settler interaction.<sup>494</sup>

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<sup>493</sup> Pateman and Mills, “Introduction”, p. 2.

<sup>494</sup> There is one *Reflection* that hints that Kant thought this at least conceptually possible: “The proposition *exeundum est a statu naturali* [one must leave the state of nature] means that one can force everyone to enter *in status civilis* with us *or our republic*.” (R 7735 19:593, my emphasis). That addition “or our republic” suggests a pre-existing civil union which others are brought into. If, as is suggested here, this is possible by force, why shouldn’t it be possible by contract?

In terms of moral and political right as Kant understands them, this process is no different from the way he conceives the forming of any state by the subordination of citizens to the sovereign. As he writes, the sovereign and the citizen “are not fellow-members: one is *subordinated to*, not *coordinated with* the other; and those who are coordinate with one another must for this very reason consider themselves equals since they are subject to common laws.”<sup>495</sup> In agreeing to the settlement contract, the nomads demand mutual recognition of their possession claims as juridical equals, as a consequence, they in turn are required to recognise the sovereign who makes the contract possible.

As a consequence of their juridical equality, either the nomads or the settlers may appeal to the sovereign for a resolution of a dispute. In practice, one might well imagine that the settlers would get a better hearing. Perhaps this is another reason Kant cautions the settlers to be aware of the possible lack of knowledge on behalf of the nomads through the ignorance/fair-bargaining proviso. He is aware that though the contract recognises the nomads as juridical equals in its terms, the likelihood is that the sovereign favours the settlers in any dispute. Even this modicum of concession to the nomads does not get us far, however. The ignorance/fair-bargaining proviso loses any force it once had once the contract has been agreed. As well as making the contract possible, the settler sovereign is also required to enforce the contract. The nomads cannot appeal to the ignorance/fair-bargaining proviso, the only appeal they have is as juridical equals subject to the same sovereign as the settlers.

Now, one might think there is a slight of hand going on here. For the settler contract to be possible requires a civil union, but why does this civil union have to be the European settler state? Is it not possible that the civil union would be an entirely new one formed and submitted to equally by the nomads *and* the settlers? One might cite as evidence for this view Kant’s claim that cosmopolitan right “has to do with the possible union of all nations with a view to certain universal laws for their possible commerce”.<sup>496</sup> Even if one grants that the union of all nations Kant mentions here refers to a civil union, there is another reason this move is not open to him.

In the nomad-settler passage, Kant rejects the idea that the Europeans can directly and forcefully impose the European state on the nomads despite the concern that “such scruples” about using force in the beginning, in order to establish a lawful condition, might well mean

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<sup>495</sup> *MM* 6:306-7.

<sup>496</sup> *MM* 6:352.

that the whole earth would still be in a lawless condition”.<sup>497</sup> The analogy he draws to explain this rejection is instructive. Kant writes that “this consideration can no more annul that condition of right than can the pretext of revolutionaries within a state, that when constitutions are bad it is up to the people to reshape them by force”.<sup>498</sup> This is reasoning we have seen time and again in this thesis. Kant rejects the right of revolution on the basis of the first political judgment which requires the formation and submission of a contingent civil union. One cannot set out to destroy the civil union and still judge rightfully in accordance with the idea of the general united will. The nomads and settlers find themselves in an analogous position to citizens contemplating a transition to a world-state, as discussed in Chapter Three. The reason that a new civil union between nomads and settlers can’t be formed is the just same which prevents the merger of civil unions into a world state. The difference is only that whilst in Chapter Three we were contemplating the destruction of all contingently existing civil unions, here we are contemplating only the destruction of the settlers’ European civil union.

In the case of the nomad-settler passage, the implications of the first political judgment are that the citizens of the settler state cannot form a new civil union with the nomads because this would require them to adopt the maxim of a revolutionary with regards to their European civil union. As noted in Section One, Kant approaches the nomad-settler interaction from the perspective of a European, and thus from the perspective of the settler. Whilst it would not be a wrong against the nomads for the settlers to force them into a civil union after the settler contract is signed, it would be wrong “in the highest degree” to destroy their own civil union in the process of doing so.<sup>499</sup> To do so would take away “any validity from the concept of right itself”.<sup>500</sup> One might say that this only shows that the nomads and settlers cannot enter into a rightful contract – yet Kant suggests that they can. The expansion of European sovereignty seems to me to be the most plausible reading to make sense of this judgment.

The fundamental asymmetry of the situation cannot be avoided. Considered as a matter of right the European settlers’ sovereign in effect extends their sovereignty to encompass the nomads. In fact, it seems that the nomads would, in this circumstance, have a *moral duty* to

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<sup>497</sup> *MM* 6:353.

<sup>498</sup> *MM* 6:353.

<sup>499</sup> *MM* 6:307.

<sup>500</sup> *MM* 6:307 fn.

recognise the European sovereign as their own. It is Kant's view "that there is a categorical imperative, *obey the authority who has power over you*".<sup>501</sup> Once they enter into the contract, to use Niesen's terms, the nomads begin the dynamic of private law and become subject to the coercible universal duty of state entrance. I submit that in signing the contract with the settlers the nomads accede to the expansion of European sovereignty over them. This claim is not dependent on the empirical fact of a dispute, the logic of the contract is that sovereign is extended, whether or not there is a need to exercise it coercively, and the nomads have no route of appeal – except on the settlers' – for which we might read Kant's, for which we might read Europe's – terms.

This is nothing less than the logic of the settler contract in action. The nomad-settler contract is revealed as subjugation contract in which the settlers are able to extend the sovereignty of their state over the nomads. Despite being freely agreed; despite requiring the nomads be admitted into the European civil union, it creates the conditions for settler-colonialism and operates entirely on the basis of the political fiction of contract and its faulty model of consent that Pateman has been identifying and theorising through much of her work.<sup>502</sup> The nomad-settler contract "presupposes, extinguishes and replaces the state of nature" all at once.<sup>503</sup> After the contract, the nomad's claims can only be understood in terms of the contract, and from there on the terms of the settler state. Though the nomads do indeed agree to the subjugation contract, the terms of the sovereignty that they are subsequently governed by are already set and in action in the European state from which the settlers come. These terms are agreed without the nomads being present, but they are then subjected to them. That is the settler contract.<sup>504</sup>

In Kant, this appears to me to be a process that sits somewhere between the tempered and strict logic of the settler contract. Recall that under the strict logic, the settlers declare that the native inhabitants are simply non-existent, so far as law and politics is concerned. Under the

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<sup>501</sup> *MM* 6:371.

<sup>502</sup> Pateman, *The Sexual Contract*, p. 19.

<sup>503</sup> Pateman, "The Settler Contract", p. 67.

<sup>504</sup> As members of the civil union the nomads have as much right as the settlers to set the ongoing terms of the civil union, but the point here is that they must enter the civil union under the terms set by Europeans.

tempered logic, the settlers instead declare that the native inhabitants are permitted some remnants of jurisdiction within the settler colonial societies that develop.<sup>505</sup>

Kant's nomad-settler contract clearly does not follow the strict logic as the contract recognises the existence of the nomads as juridical equals. Yet Kant's understanding of sovereignty would also not admit any 'remnants of jurisdiction' for the nomads. His centralised understanding sovereignty could not permit this. Though he accepts some form of society can exist before sovereignty, as we have seen in Chapter Three, he is also clear that the history of this society is irrelevant to the politics of the sovereign state.<sup>506</sup> Indeed, even to inquire into the origins of sovereignty and what lies behind it, is impermissible.<sup>507</sup> Once established, the pre-history of the state is irrelevant to what is right. Once established, sovereignty cannot be allowed to lapse, still less, intentionally overturned.

Kant's settler contract therefore operates somewhere between the strict logic and tempered logic of Pateman's settler contract. The nomads are recognised as juridical equals and *terra nullius* is neither declared in fact or in law. But the prior claims of the nomads have no status under the sovereignty of the settlers' state, and they serve as no basis for any nomadic jurisdiction. Indeed, to raise this in the form of a claim against the sovereign, amounts to sedition, high treason and a sign that the nomads are calling into doubt and reasoning subtly with practical intention to destroy their new "fatherland".<sup>508</sup> By the letter of *The Doctrine of Right*, once the nomads agree to the settler contract which they could rightfully have decided not to do, this is hostility and rebellion, and can and ought to be met with force.

### Section Six – The Limits of Kant's Account Political Judgment

In this thesis, I have been sketching out an alternative reading of *The Doctrine of Right*. On this reading, *The Doctrine of Right* is an exercise in practical political judgment. Kant's purpose is to reflexively formulate principles for political judgment. Most important is the formal principle of political judgment – the idea of a general united will. According to this

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<sup>505</sup> Pateman, "The Settler Contract", p. 61.

<sup>506</sup> "What is opposed to a state of nature is not (as Achenwall thinks) a condition of that is *social* ... but rather the *civil* condition... For in the state of nature, too, there can be societies..." *MM* 6:306.

<sup>507</sup> *MM* 6:318.

<sup>508</sup> *MM* 6:318-20.

principle, what it is to judge politically is to judge as a citizen. One consequence of my argument in this chapter is that in the nomad-settler passage this account of political judgment has reached a limit.

Cosmopolitan Right, as Kant gives it to us in *The Doctrine of Right* contains a settler contract. This is a subordination contract which extends settler and European sovereignty over the nomads. It is the European civil union which is the condition for the possibility of the settler contract. Even though – or perhaps *because* – the settler contract is freely agreed by the nomads, read in light of the theoretical framework of Pateman and Mills’ account of the settler contract, Kant can be situated in a broader tradition of European political philosophy which appeals to contract to justify settler-colonialism. Kant thus leaves a path open to legitimating settler-colonialism in *The Doctrine of Right* and this should give Kantians pause in drawing anti-colonial political philosophy from it.

This is not to say that one cannot draw anything from the nomad-settler passage, it is only to say that there is one additional issue to account for when doing so. Theoretically and politically, it is important to recognise that whatever basis for this we might find in the nomad-settler passage prior to the settler contract, the fact that Kant finds no alternative to contract for cosmopolitan political relations is a harsh limit on the power of *The Doctrine of Right* as an anti-colonial text.

Why, though, do I say that this is a ‘limit’ of Kant’s account of political judgment? A crucial premise of this claim is that I take Kant’s late anti-colonialism to be a sincere repudiation of his own prior support for it, even if I am less sure his views on race undergo such a radical revision. The philosophical impulse which spurs Kant conceive of Public Right as containing cosmopolitan right as well as the right of state and the right of nations, such that “if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse” is the same which spurs him to public right in the first place.<sup>509</sup>

The external equal freedom of all is only possible through rightful omnilateral external law giving. Hence, only in a condition of public right. It is the need for such law giving to determine the duties of citizens with regard to other persons regardless of the membership or not of a state that leads Kant to include cosmopolitan right within public right. *The Doctrine*

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<sup>509</sup> *MM* 6:311.



*of Right* is Kant's attempt to formulate principles according to which citizens can judge what is their duty and make external freedom possible. Kant formulates the idea of the general united will and as a corollary the first political judgment in pursuit of this possibility. In so doing, he acquires a series of commitments and accumulates political judgments that he cannot then disavow without undermining the entire course of his practical reasoning. If *The Doctrine of Right* can be read, as I have argued it can, as a sustained exercise in practical political judgment, then at the moment Kant confronts the nomad-settler interaction he has long been committed to a form of political judgment and to the necessity of a contingent civil union. He strains against these judgments but does not retreat from the need to formulate a system of duties for the citizen – including the duties owed to others as “citizens of the world”.<sup>510</sup> He does not retreat from the need to judge politically, even if his judgment about the settler contract is tentative. As a consequence, his argument as we read it in *The Doctrine of Right* fails to repudiate settler-colonialism entirely. The result is not, I think, what he would have intended or wanted. But it is, I think, as far as the text will take us.

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<sup>510</sup> *MM* 6:353.

## **Conclusion – Public Right Revisited**

In this thesis, I have argued that *The Doctrine of Right* is plausibly read as a sustained exercise in political judgment. By this, I mean that *The Doctrine of Right* begins – as all Kant’s philosophy – from the perspective of the finite, human, judging agent and that Kant doesn’t, and nor does he try to, escape that perspective. I propose that *The Doctrine of Right* at its philosophical core is not a doctrine of constitutional or legal theory. Instead, it is an attempt to formulate a principled way of continuing to judge politically faced with the difficulties posed to judgment by the contingent and yet practical context of a collective of free and equal subjects. It is this which necessitates the reflexive formulation of the idea of the general united will as the formal principle of political judgment in Private Right. It is, however, in Public Right that the importance of the political judgment is most clear. By revisiting it in this thesis, I have shown that *The Doctrine of Right* never leaves the need for judgment behind.

In Part One – System and Ideals – I have argued that Kant’s system of right and political ideal are formulated in and for political judgment. Neither the system of right, nor the ideal of the state in idea, are formulated outside of practical political judgment. Rather, it is only from the perspective of the practically judging political agent that either a system of right or a political ideal is possible. I first introduced the need for an account of political judgment; second proposed that the idea of the general united will is the principle of political judgment; and third argued that an ideal-theoretic reading of political judgment in *The Doctrine of Right* is not sustainable.

In Chapter One – Recovering Political Judgment – I traced the formulation of the idea of the general united will and proposed that it is the formal principle of political judgment and set this account of political judgment in *The Doctrine of Right* in opposition to an ideal-theoretic account. I argued that this form of political judgment mandates the ‘first political judgment’ to form and submit to a contingent civil union and motivates the transition to public right. For Kant, to judge politically is to judge as a member of this contingent civil union, that is, as a citizen.

In Chapter Two – A Practical Ideal – the focus switches from Private Right to Public Right, where it remains for the rest of the thesis. I continue the argument for my reading of the idea of the general united will as the formal principle of political judgment by arguing that “the state in idea”, the one and only “ideal of rightful association” in *The Doctrine of Right*, is best

understood as a practical ideal posited from the contingent context of the civil union and does not eliminate the necessity of political judgment.<sup>511</sup>

In Chapter Three – Perpetual Peace is not an Ideal – I argue that “the highest political good, perpetual peace”,<sup>512</sup> is not an ideal at all. Once the context of political judgment in the contingent civil union is recognised, no interpretation of perpetual peace can plausibly read it as a practical ideal. Instead, I argue perpetual peace is an end of political judgment that can be read as a phenomenal political good. With that, Part One concludes my arguments against an ideal-theoretic reading of political judgment in *The Doctrine of Right*.

In Part Two – Judgment and Application – I have revisited Public Right in *The Doctrine of Right* in three chapters with the aim to substantiate my reading of political judgment in *The Doctrine of Right*. If Part One is a systematic argument for favouring one reading of political judgment in *The Doctrine of Right* over another, Part Two offers three separate chapters which aim to show the consequences of this reading for interpreting public right in each of its three divisions: right of state, right of nations and cosmopolitan right. The systematic aim of Part Two in the context of the overall argument of the thesis is to show that Public Right is not merely the “application” of a system of right or of the principles developed in Private Right and is instead a continuation of Kant’s sustained exercise in political judgment.

In Chapter Four – Ambiguous Sovereignty – I argue that reading *The Doctrine of Right* as a sustained exercise in political judgment allows us to make sense of an ambiguity in Kant’s conception of sovereignty. If sovereignty is not a legal but a political concept, and if it is a concept concerned with political judgment and not with the constitution of the state, then the ambiguity is revealed as a reflection of two imperatives involved in striving to realise the state in idea as a practical ideal – to establish rightful unilateral external law making, and to maintain the civil union.

In Chapter Five – the focus shifts from the right of state to the right of nations. I argue that Kant includes a right to a balance of power in his account of the right of nations, and this reflects the need for judgment to sustain perpetually a condition of peace as a phenomenal political good. I also argued that Kant’s changing views on the balance of power in the course of the 1790s are part of a broader change in his views about the right of nations.

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<sup>511</sup> *MM* 6:313; *MM* 6:355.

<sup>512</sup> *MM* 6:355.

The main aim of Part Two is to trace Kant's attempt to formulate principles of political judgment but it also highlights where his account strains against its limits. Chapter Six – Kant and The Settler Contract argues that Kant reaches one such limit in Cosmopolitan Right when he confronts the nomad-settler interaction. I argue that the limit leads to a political judgment that contractual relations ought to govern the nomad-settler interaction which is unsatisfactory when considered in view of Kant's anti-colonial political commitments. Kant engaged in political judgment throughout *The Doctrine of Right*, but even at its end he does not reject the need to continue judging politically, even if Cosmopolitan Right shows how hard these judgments become. But this is no surprise. As he says in the Preface, on matters of public right, the issues are "so important" that he "can well justify postponing a decisive judgment for some time."<sup>513</sup>

Part Two also aims to show the contribution that this reading *The Doctrine of Right* as a sustained exercise in practical political judgment can make to three different areas of study and three different literatures. Chapter Four is a contribution to the scholarship on Kant's political philosophy, as are the other two chapters. In addition, Chapter Five aims to contribute to the literature on Kant's place in the wider scope of 18<sup>th</sup> century European political thought. For its part, Chapter Six also aims to contribute, even if that contribution is cautionary more than it is positive, to literature which develops on *The Doctrine of Right* to address contemporary issues in political philosophy.

To conclude this thesis, I want to say a little about where this interpretation of *The Doctrine of Right* leaves me in relation to Kantian legalism and to the literature on Kant's political philosophy more broadly, as well as some implications for future work on Kant, political judgment, and political philosophy.

As discussed in the Introduction, Kantian legalists read *The Doctrine of Right* as subordinating politics to law. It is through law and the legal system that the freedom and equality of citizens is secured. I have, in Part Two, presented a different position. I do not think politics is subordinated to law in *The Doctrine of Right*, simply because political judgment is inherent to each division of public right. The right of state is characterised by the pursuit of the state in idea through two potential conflicting imperatives that must be navigated through the sovereign's political judgment. The right of nations includes a right to a balance of power in which political judgment is necessary to maintain a phenomenal

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<sup>513</sup> *MM* 6:209.

condition of peace. In cosmopolitan right I have argued that Kant exercises his own political judgment in exploiting the creative political power of contract to navigate the nomad-settler interaction.

As well as this substantive commitment to the rule of law over politics, Kantian legalists also take a distinct philosophical approach to *The Doctrine of Right* and to public right especially. Kant's project in *The Doctrine of Right* is read as being the elaboration of a set of principles that make a legal system necessary, define its ideal form, and that ought to be enacted through the legal state. That is to say that the principles Kant derives in *The Doctrine of Right* are not simply realised through law, but rather *are* legal principles and the principles of the ideal legal system.

It is this philosophical approach that leaves Kantian legalism vulnerable to being read as attributing an ideal-theoretic account of political judgment to Kant, though I again stress that I do not think all or even most Kantian legalists would endorse such a view on reflection. On such a reading, political judgment is the task of applying these principles in the world. Political judgment becomes a matter of specifying what are abstract and general a priori principles of right through making law under empirical conditions. *The Doctrine of Right* on such a reading does not really concern judgment at all, only principles which might, in some other time and place, be applied.

It is to this ideal-theoretic Kantian legalism that I have contrasted my reading of *The Doctrine of Right* against throughout this thesis, especially in Part One. I have neither argued that Kantian legalism, not an ideal-theoretic account in general, are wrong. I have only argued that *The Doctrine of Right* is plausibly read in different way. The alternative I have proposed is that the philosophical project of *The Doctrine of Right* is the reflexive formulation of principles of political judgment, and that this makes *The Doctrine of Right* itself an exercise in political judgment.<sup>514</sup> My claim thus does not amount to the well-established understanding that Kant thought that moral principles, such as those found in *The Doctrine of Right*, require supplementation by judgment. Rather my claim is that the moral principles of *The Doctrine of Right* should be understood as apt for judgment. That is, they should be understood *as* principles of political judgment.

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<sup>514</sup> On Kant's reflexive method, see Karl Ameriks, *Interpreting Kant's Critiques* (Oxford: Oxford University Press, 2003).

*The Doctrine of Right* is fundamentally a political project, not a legal one; not an ideal-theoretic project, but a practical one. Putting the point this way might suggest I am reading *The Doctrine of Right* as a text in non-ideal theory. And in a certain sense there is something non-ideal about the conditioning of Kant's political judgments by contingency. However, this is not the way I conceive the account of political judgment I have presented. In contemporary English language political philosophy, non-ideal theory always makes reference to ideals separately formulated in ideal theory. By contrast, my reading of the state in idea in Chapter Two is that Kant's political ideal is formulated during Kant's judging politically in *The Doctrine of Right*. Moreover, I do not take a kind of non-ideal normativity to be central to *The Doctrine of Right*.<sup>515</sup> Instead, I simply think that *The Doctrine of Right* is not best read according to the ideal and non-ideal distinction. The ideal has a role in the project of *The Doctrine of Right*, but it is not central, culminating or defining in the way it might be taken to be. This is reflected in the fact that Kant's discussion of the state in idea reaches its conclusion only part of the way through Public Right, rather than at its end.

I also do not take myself to have offered a 'realist' reading of Kant.<sup>516</sup> This is despite the fact that on my reading, like many contemporary realists, Kant does take the first political judgment to involve the formation of and submission to a civil union, that is, the establishment of the state or, in a loose sense, the establishment of order. Unlike political realists, for Kant the first political judgment is a practical judgment.<sup>517</sup> Kant is not as such concerned with how one empirically creates a civil union, indeed, he judges from a context in which a civil union is already established.<sup>518</sup> Rather, his concern is with the practical judgment that is necessary to recognise oneself as a part of the common being of the civil

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<sup>515</sup> This distinguishes my account from Christoph Horn's *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie* (Berlin: Suhrkamp, 2014).

<sup>516</sup> In the sense of political realist, as in the work of Raymond Geuss and Bernard Williams: Raymond Geuss, *Outside Ethics* (Princeton (NJ): Princeton University Press, 2005); Raymond Geuss, *Philosophy and Real Politics* (Princeton (NJ): Princeton University Press, 2008); Bernard Williams *In the Beginning was the Deed: Realism and Moralism in Political Argument*, ed. by Geoffrey Hawthorn (Princeton (NJ): Princeton University Press, 2005).

<sup>517</sup> Compare what I say here to the interesting argument of Simon Hope, though he is concerned with issues in contemporary political philosophy. Simon Hope, "Political Philosophy as Practical Philosophy: A Response to 'Political Realism'", *The Journal of Political Philosophy*, 28 (2020), 455-475.

<sup>518</sup> I refer to the Prussian state, but equally could refer to society in state of nature though that would not be a civil union until the first political judgment. *MM* 6:306.

union in order to judge in accordance with the idea of the general united will. That is to say, to judge politically is to judge as a citizen.

For Kant, then, political judgment is exercised in the context of a contingent civil union. The role of this contingency is not to restrict or limit the practical or moral quality of political judgment. If anything, it is only because human beings are finite agents in contingent context that practical judgment is necessary at all. Of course, the matter of judgment may be affected by this contingent context, but the practical and moral quality of political judgment is secured by its form.<sup>519</sup> Any rightful political judgment must be a possible judgment in accordance with the idea of the general united will because political judgment is the practical judgment of the citizen.

There is still more work to be done on Kant's account of political judgment. In this thesis, I have only argued that political judgment is central to *The Doctrine of Right*. It is because Kant formulates the idea of the general united will as the formal principle of political judgment in this text that it is so important. However, as I indicated in Chapter Four, *The Doctrine of Right* alone cannot give us the complete picture. The question of the refinement of political judgment, is taken up by Kant in other political, as well as historical, anthropological and pedagogical writings. And, of course, there is the question of how this account of political judgment fits with Kant's general theory of judgment in the *Critique of The Power of Judgment*. What I hope I have done is shown, contrary to some interpreters, that Kant does have an account of political judgment and that *The Doctrine of Right* is where we can find it.<sup>520</sup>

That said, the questions of the refinement of political judgment and the relationship of political judgment to judgment still represent projects in Kant scholarship where the interpretation developed in this thesis can be taken forward. Indeed, it is in Kant scholarship that the insights of this thesis can be most immediately and directly expanded. Aside from those two routes for taking forward the insights of this project, which look out from *The Doctrine of Right* and *The Metaphysics of Morals* towards Kant's corpus more widely, there

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<sup>519</sup> Cf. Katrin Flikschuh, "Kant's Contextualism," *Kantian Review*, 23 (4) (2018), 555–579.

<sup>520</sup> Hannah Arendt, who claims Kant never wrote a political philosophy, and Ronald Beiner, who refines the claim by saying that, since Kant supposedly sees no place for prudence, he has no account of political judgment. Hannah Arendt, *Lectures on Kant's Political Philosophy* (Brighton: The Harvester Press, 1982), p. 7; Ronald Beiner, *Political Judgment* (Chicago: University of Chicago Press, 1983), p. 68.

is also space for this project to be developed into a more comprehensive account of *The Doctrine of Right* and *The Metaphysics of Morals*.

Concerning *The Doctrine of Right* itself, the most pressing area for development is a more comprehensive accounting of Private Right. I have, in Chapter One, indicated in some detail how the idea of the general united will as the formal principle of moral judgment is formulated, but I have discussed in less detail the implications this has for the details of matters of private right, especially those developed in Chapter Two and Chapter Three of Private Right. I have indicated, in structural and systematic terms, how I understand the position of these chapters within Private Right and within the whole *Doctrine of Right*. But I have not offered more than a cursory account of the material of these chapters, and how Kant is engaged in political judgment even in Private Right. The emphasis on judgment and the suggestion that private right be considered *political* would represent promising avenues for exploration in developing an interpretation of Private Right based on the interpretation offered here. However, I have not pursued this in the context of this thesis. This is for two reasons. First, because it is an intention of this thesis to focus to weight of philosophical analysis on Public Right and to show the role of political judgment never disappears even at the end of Kant's argument. Second, because for that purpose, tracing the formulation of the idea of the general united will as the formal principle of political judgment in Chapter One of Private Right is, in my view, sufficient.

Concerning *The Metaphysics of Morals* as a whole, the interpretation may offer a new perspective on the debate about the relationship between *The Doctrine of Right* and *The Doctrine of Virtue* and how each figure in Kant's overall account of morality. This debate, often referred to as the dependence/independence debate, has become focused on how the Universal Principle of Right relates to The Moral Law as expressed through the idea of The Categorical Imperative and as expressed in *The Metaphysics of Morals*: "act on a maxim which can also hold as a universal law".<sup>521</sup> The debate consists in a spectrum of views, from those who argue the Universal Principle of Right and *The Doctrine of Right* is grounded on Kant's fundamental moral principle such as Jürgen Habermas and Paul Guyer – hence 'dependency' views – and 'independency' views held by, for example, Allen Wood and Marcus Willaschek, according to which the principles are philosophically independent of

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<sup>521</sup> *MM* 6:226.



each other.<sup>522</sup> In the middle, are ‘complex dependency’ views, such as Arthur Ripstein’s, which argue that there is no simple or direct derivation of the Universal Principle of Right from The Moral Law, but rather the derivation requires something further to be added.<sup>523</sup>

Considering the debate according to this spectrum, the account offered in Chapter One adheres most closely to a complex dependency view. Although this argument cannot be fully worked out in this thesis, the interpretation of *The Doctrine of Right* given here has implications for how *The Metaphysics of Morals* is understood as a whole. Taking judgment as the central concern of *The Doctrine of Right* implies that judgment should be considered central to *The Doctrine of Virtue* as well, and hence to *The Metaphysics of Morals* as a complete work.<sup>524</sup> This opens up a possible complex dependency interpretation in which the crucial ‘addition’ to take us from The Moral Law to the Universal Principle of Right is the further mediating principle of the idea of the general united will. As argued in Chapter One, the Universal Principle of Right only attains practical validity once political judgment in accordance with the general united becomes possible as it is at this point that Kant’s practical reasoning in *The Doctrine of Right* transitions from analytic to synthetic practical reasoning. If this interpretation is correct – and it is far beyond the scope of this thesis to argue for it, even if is an implication – then judgment once again serves as a mediator in Kant’s philosophy. *The Metaphysics of Morals* could then be interpreted as a work concerned with moral judgment but in two forms – first the political judgment of a citizen, and then the ethical judgment of a person.

As well as implications for Kant scholarship, this thesis also has implications for the literature on political judgment. As discussed in the introduction to this thesis, that literature is highly influenced by Kant’s account of aesthetic judgment via Hannah Arendt, but it does

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<sup>522</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: Polity Press, 1996), pp. 104-106; Paul Guyer, “Kant’s Deductions of Principles of Right” in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 23-64; Allen Wood, “The Final Form of Kant’s Practical Philosophy” in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 1-22; Marcus Willaschek, “Which Imperatives for Right?”, in *Kant’s Metaphysics of Morals: Interpretative essays* ed. by Mark Timmons (Oxford: Oxford University Press, 2002), pp. 65-88.

<sup>523</sup> Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 355-88.

<sup>524</sup> See fn. 141 on a symmetry between *The Doctrine of Right* and *The Doctrine of Virtue* that an interpretation centred on judgment allows us to see.

not consider his moral and political philosophy a useful source. Philosophically, the reason for this is that Kant's deterministic and a priori account of morality and politics is supposedly unable to capture the contextualism and contingency of political judgment. Another reason, perhaps equally important, is the view that Kant does not have an account of political judgment and perhaps not of politics at all. To this last point, if this thesis has shown anything at all, it has shown that Kant's political philosophy is at minimum deeply engaged with politics and with political judgment. This alone is reason for Kant to be reconsidered as a source of philosophising about political judgment.

In a more philosophical key, the implication of this thesis for the literature on political judgment is that context and contingency in politics can be accounted for in political judgment in many different ways. For Kant, politics, as any other matter, must always be approached from a human perspective and this always in judgment itself. Kant's project is perhaps more than anything an attempt to orientate the human subject in the contingent context they find themselves through a critique of the possible forms of judgment.<sup>525</sup> Kant's engagement with politics in context and in all of its contingency is practical and it is moral, but it does not simply ignore or fail to account for context and contingency because of this. The task is the formulation of a priori principles of judgment in judgment *from* the contingent context in which the human subject finds themselves. I would submit that this makes Kant a worthwhile source for our ongoing discussions of the nature of political judgment, and that, even if his view is ultimately not one we can endorse, it is worth consideration in how it accounts for context and contingency in politics.

In the Introduction, I roughly defined political judgment as answering the question 'what should be done' in a collective context. This minimal definition was necessary as the project of the rest of the thesis was to elaborate Kant's account of political judgment, that is, to give an account of how Kant thinks such moral judgment in a collective context is possible. It is, as such, not really a full 'definition' of political judgment, and certainly not a theorisation of it as we get in the Arendtian literature on political judgment. I hope I have shown in the course of this thesis that thinking about *The Doctrine of Right* in relation to this minimal conception of political judgment has a certain interpretative utility, even if one does not accept in full the interpretation offered in this thesis. I think this utility is not only interpretative, but also has potential implications for political philosophy in general. So

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<sup>525</sup> WOT.

finally, let us consider a possible implication of this thesis that Kant's political philosophy could serve as a potential alternative method to ideal and non-ideal theory.

Political philosophy in English and in the so-called 'analytical' style has become increasingly concerned with its method in recent decades.<sup>526</sup> One of the first methodological debates involved a challenge against Rawlsian ideal theory by those who argued that because of its nature as ideal, it failed to account for contingent history and substantive facts in a way that is necessary for political philosophy.<sup>527</sup> The debate has developed in various directions and ebbed and flowed. But the role of contingency, and ideal theory's exclusion of it from the discussion remains a core concern for non-ideal theorists.

One implication of the interpretation of *The Doctrine of Right* offered in this thesis is that Kant's approach to political philosophy stands an alternative method for political philosophy that is able to account for the concerns distinctive of ideal theorists and non-ideal theorists without being subsumed to either and, as discussed above, without being constrained by the ideal theory vs. non-ideal theory paradigm. Like ideal theory, this Kantian approach to political philosophy allows morality and ideals have an important place in political philosophical reasoning. Like non-ideal theory, it allows for a central place for contingency and context in political philosophical reasoning. Unlike either, however, Kant's approach to political judgment allows ideals to be formulated from contingent political context. Whether or not this Kantian conception of *practical* ideals does have utility for political philosophy more generally is beyond the scope of this thesis. I believe, however, that this possibility is worth exploring in future work.

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I am cognisant of the distinctiveness of the interpretation of *The Doctrine of Right* offered in this thesis. It is distinct from the mainstream of Kant scholarship, and I think for non-specialist political theorists it might not even seem very 'Kantian'. However, all I have argued is that for Kant, the task of practical politics is to judge what it is the duty of a citizen of a contingent civil union to do to make freedom, equality, and peace possible. As Kant puts

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<sup>526</sup> See for example: *Political Theory: Methods and Approaches*, ed. by David Leopold and Marc Stears (Oxford: Oxford University Press, 2008); *Methods in Analytical Political Theory*, ed. by Adrian Blau (Cambridge: Cambridge University Press); Jonathan Floyd, "Political Philosophy's Methodological Moment and the Rise of Public Political Philosophy", *Society*, 59 (2) (2022), 129-139.

<sup>527</sup> Charles W. Mills, "'Ideal Theory' as Ideology", *Hypatia*, 20, 165-183.

it, politics is a problem, the problem of how to arrange society in accordance with freedom and equality.<sup>528</sup> It is a problem finite human beings face, perhaps perpetually, and which requires judgment. It is this thought of Kant's, though not necessarily 'Kantian' thought, that I have tried to understand by revisiting Public Right. It is an interpretation of *The Doctrine of Right* that embraces the practical and political perspective from which Kant wrote and judged.

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<sup>528</sup> OSR 4:429.

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