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The Foundations of Constitutional Democracy:
The Kelsen-Natural Law Controversy

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Abstract

In the immediate post-war period, a set of thinkers, most notably Jacques Maritain, developed influential natural law theories of constitutional democracy. The central tenet of the natural law approach to the post-war settlement was that, without the type of foundational understanding of the constitutional system it was proposing, the new democratic political institutions would relapse into totalitarianism. In response to this natural law challenge, Hans Kelsen sought to explicate and defend a self-consciously secular and relativistic understanding of the basis of constitutional democracy. This article will examine the debate between the Kelsenian and the natural law view of constitutional democracy. The debate raises questions of foundational importance, and a number of issues are of particular concern in the present global context. These issues concern the role of moral pluralism and its relevance to the structure of constitutional democracy, and the relationship between universal values and the common good of particular communities.

Keywords: *constitutional theory; Kelsen; natural law*

Introduction

As the twenty-first century extends into its third decade, the basic institutions of constitutional democracy and the linked sets of international institutions that historically accompanied them—institutions like the United Nations and its associated agencies, the Council of Europe, and the European Union—remain key building blocks of a legal order characterized by nation-states nested within a global system. Despite facing a range of different challenges since the end of the post-war period when the basic shape of this framework was established, its essential structure has been remarkably constant.

However, following the work of political scientists like Carlos Accetti and intellectual historians like Samuel Moyn, it might be said that the underlying spirit of this institutional framework has been subject to contestation and discontinuity even as the formal or external shape and setting of these institutions has remained relatively static.[1] In brief, this shift can be characterized as follows: During the

1. See Carlo Invernizzi Accetti, *What is Christian Democracy? Politics, Religion and Ideology* (Cambridge University Press, 2019); Samuel Moyn, *Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press, 2010); Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015).

era of post-war constitutional reconstruction, a set of ideas concerning the priority of human rights to political or state institutions was embodied in institutions at a national and international level that guaranteed such rights (in particular through adjudicative institutions). At the time, and influenced by the work of thinkers like Jacques Maritain, the object of the international human rights movement primarily aimed at securing the fundamental principles of constitutional democratic governance, understood principally in relation to limits on political authority.[2] Over the decades that followed, the idea of human rights was adjusted to function as a more demanding vector of general social transformation, with a focus on an extended and dynamic interpretation of human rights. Whilst the details of the accounts offered by Moyn and Accetti might be contested, the idea that the same set of constitutional arrangements could be subject to considerable change over time due to different conceptions of their basic ethos and purpose is certainly a plausible starting point for an analysis of contemporary constitutional democracy. In particular, it seems appropriate to re-examine what fundamental principles and ethos best secure its stability.

In what follows, I would like to offer a theoretical analysis of the question relating to the underlying principled structure of post-war constitutional democracy as it has developed to the present, by focusing on a comparison between the work of Hans Kelsen and that of a number of champions of an alternative vision of constitutional democracy which we might term the 'natural law' or Christian-democratic theory of constitutional democracy.[3] The benefit of this type of theoretical analysis is that, from a historical point of view, it sheds light on aspects of the debate over the character of constitutional democracy as it emerged even in the immediate post-war period. Whilst the predominant focus of a historical analysis of this period will perhaps try to locate the leading influences in play at a specific point in time, the type of analysis conducted here helps prepare the ground for a jurisprudential examination of the concrete principles that might best support, in this case, the post-war constitutional system. In this respect, a theoretical perspective on this historical debate can help to address the problem of the underlying foundation of constitutional democracy in concrete historical terms to better inform its future development and defence. In brief, an examination of this debate reveals a contrast between the 'natural law' or 'Christian-democratic' view that constitutional democracy needed to be understood in the context of a relatively comprehensive and stable set of principles of social and political morality, and the view of Hans Kelsen to the effect that constitutional democracy formed an institutional structure informed by the combined principles of individual liberty and equality, adjusted to the demands of social order and potentially compatible with a broader dynamic societal pluralism. If, as Accetti and Moyn's work suggests, the societal ethos underlying constitutional democracy has shifted, is this simply a normal part of its operation (as would logically be the

2. See Jacques Maritain, *Man and the State* (Hollis & Carter, 1954).

3. A useful overview of this debate is provided by Sara Lagi, "Against Natural Law: The Political Implications of Kelsen's Legal Positivism" in Peter Langford, Ian Bryan & John McGarry, eds, *Hans Kelsen and the Natural Law Tradition* (Brill, 2019) 462.

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case for Kelsen), or could this weaken the integrity of these institutions (as might be the case from a natural law point of view)?

The inquiry outlined is particularly pressing, since the post-war model of constitutional democracy, despite its institutional resilience, has been subject to a number of political and theoretical challenges such that a reconsideration of its ethical foundations in light of the history of its development seems opportune. Two types of challenges should be mentioned here, both of which are usefully illuminated by reviewing the earlier theoretical debate. First, there is the movement toward what might broadly be termed 'political constitutionalism'.[4] Although advanced with different emphases by the theorists associated with this movement and by political actors linked with its development, for present purposes it might be characterized as follows: a tendency to reject the validity of constitutional judicial review as a legitimate part of constitutional democracy, a rejection based on a sceptical view of the relevance of the objectivity of moral principles in constitutionalism given broader disagreement over these principles. The latter is crucial because, as we shall see, this perspective on the irrelevance of objective moral principle is, in a practical sense, shared by Kelsen, albeit from a more fundamental stance associated with metaethical relativism. For both Kelsen and the political constitutionalists, contrasting views of the right and good in politics are best treated cautiously and sceptically, in relative rather than objective terms. Furthermore, both views result in an argument that political institutions are constructed through combining broad principles of liberty and equality with the demands of effective social coordination and order.[5] A closer examination of Kelsen's position is accordingly of assistance in testing the possible underlying basis and implications of this view, since both a stronger metaethical relativism and the idea of irreducible disagreement encounter similar difficulties in grounding and specifying commitments to values like liberty or equality once political stances are treated in relativistic terms—whether for reasons of irreducible disagreement or as a result of deeper metaethical commitments. A second point concerns the development of an increasingly global dimension to the present constitutional order. Whilst this aspect was present in the immediate post-war period, it has both developed an increasing dynamism and has also provoked counter-pressures in terms of a renewed emphasis on the centrality of the

4. Perhaps the two leading texts in the recent resurgence of 'political constitutionalism' are those of Waldron and Bellamy. See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

5. There are subtle differences between the political constitutionalists and Kelsen to be noted in this respect. The political constitutionalists tend to view equal dignity as pivotal in leading to a strict majoritarian approach to democracy, whereas Kelsen sees individual liberty as primary, with equality connected to its realization in all instances. This means that he does not see a strict majoritarianism as required by the principle of equality, but rather he sees majoritarianism as connected with reducing the individual wills that conflict with the collective decision. This idea that equality is interpreted in relation to the maximization of individual liberty would then justify counter-majoritarian constitutional review. See Hans Kelsen, *The Essence and Value of Democracy*, translated by Brian Graf (Rowman & Littlefield, 2013) at 31 [Kelsen, *Essence and Value*].

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nation-state to the development and operation of constitutional democracy.[6] Once again, the connection between universal standards, local community, and political authority is one of the key themes raised in the debate between the Kelsenian and the 'natural law' approach to constitutional democracy.

Whilst the course of this post-war foundational debate between the natural law theory and the Kelsenian theory of constitutional democracy will be examined in more detail in what follows, it would be worth providing a preliminary overview of the main elements of this debate. The central tenet of the natural law view underpinning the post-war settlement was that, without the type of foundational understanding of the constitutional system it was proposing, the new democratic political institutions would relapse into totalitarianism due to the absence of an ethical basis for constitutional rules and principles. In response to this 'natural law' challenge, Kelsen sought to explicate and defend a self-consciously secular and relativistic understanding of the basis of constitutional democracy. In part, this was an argument against any attempt to ground democratic procedures in *religious* principles (in particular the Christian religion) and in part, it was also an argument against any attempt to ground democracy on *objective* moral principles (including 'natural law' principles). Instead, according to Kelsen, democracy required a systematic commitment to "philosophical relativism."[7] Kelsen's negative characterization of the natural law position thus paralleled his own constructive project, which was to develop a narrow institutional or procedural model of constitutional democracy, emphasizing its secular character and its commitment to moral relativism.

Kelsen's distinctive understanding of constitutional democracy, founded on a rigorous form of philosophical relativism, is arguably emblematic of a type of perspective on constitutional democracy of lasting relevance over the course of its post-war evolution. At the core of many issues—like scepticism over constitutional review, the shifting ethos of constitutional-democratic norms charted by Moyn and Accetti, and the varying assessments of the role of universally-indexed values and institutions in underpinning constitutional democracy—there appears to be a connection with the problem of relativism that characterized Kelsen's earlier work. This is now put in terms like the 'irrelevance of moral objectivity'[8] or 'the burdens of judgment,'[9] but the concerns relating to the capacity of objective ethical principles to guide the structure and operation of constitutional democracy are very much shared by Kelsen. Equally, other strands

6. For a thorough general discussion of the historical and conceptual links between constitutionalism and the centralized scope and authority of the territorial state, see Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016).

7. Hans Kelsen, "Foundations of Democracy" (1955) 66:1 Ethics 1 at 14ff.

8. See Jeremy Waldron, "The Irrelevance of Moral Objectivity" in Robert P George, ed, *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 158.

9. John Rawls developed this idea to refer to the sense in which political deliberation must, from the outset reckon with ineliminable disagreement. See John Rawls, *Political Liberalism* (Columbia University Press, 2005). Waldron extends the scope of this area of ineliminable disagreement to matters of the right as well as the good. For Waldron's discussion of the Rawlsian concept see Waldron, *supra* note 4 at 149.

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within modern constitutionalism have been concerned with emphasizing, like Kelsen, the flexibility of constitutional democracy and its ability to undertake different types of transformative projects. However, an important question to ask is whether these different types of relativism pose a danger to the long-term stability of constitutional democracy through failing to provide it with a proper ethical foundation.

Overall, the article will develop the case that Kelsen's opposition to Christian-democratic conceptions of post-war constitutional democracy was misplaced and, in a positive sense, that Christian-democratic principles of constitutional democracy do supply a coherent understanding of those institutions. The critical problem as it emerges over the course of this analysis is that Kelsen's adherence to and understanding of the basic institutions and principles of a constitutional-democratic order were ultimately not well-served by the 'philosophical relativistic' foundations he provided for them. This article will accordingly begin with the connections between Kelsen's legal theory in the strict sense, his broader understanding of moral epistemology (his meta-ethical relativism), and his theory of constitutional democracy.[10] Section 1 of the article lays the groundwork for this discussion by setting out the nature of Kelsen's basic neo-Kantian epistemological and metaethical framework that is integral to the way he constructs his theory of law and democracy. This discussion will show how Kelsen held to the distinctive ideas about law that he outlined, but will also explore how his understanding of the functions of law and its distinctive technical procedures fit into a broader account of constitutional authority in modern societies, a conception founded on his basic practical and theoretical presuppositions. Section 2 explains Kelsen's ideas concerning the essential connection between democratic institutions and philosophical relativism and the dangers to democracy posed by 'philosophical absolutism'. This section will also discuss, in a more critical vein, the tension between Kelsen's theory of law and his theory of constitutional democracy. Section 3 goes on to explore Kelsen's understanding and critique of the post-war natural law view of constitutional democracy. As we shall see, according to Kelsen, the central problem for the 'natural law' theory of constitutional democracy related to a critically important idea within classical natural law theory: namely, that positive or human law was best generally conceived either as a contextually relative re-statement of basic principles of natural law or as a contextually relative 'determination' of its content. Kelsen then uses this feature of natural law theories to argue that this acknowledgement of a certain level of context relativity in relation to natural law in effect amounted to a concession that human or positive law was a response to context and in that sense essentially 'relativistic' in nature. A subsidiary argument is to the effect that the specifically religious content of the Christian context for some of these natural law arguments did not provide a clear enough support for constitutional-democratic principles. Section 4 seeks to show how the natural law or Christian-democratic understanding

10. This topic has been most comprehensively explored and developed in Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007).

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of legal authority and its relation to democracy can respond to Kelsen's relativity critique and how it develops a theory of constitutional democracy, establishing a coherent and significant connection between moral principles, legal authority, and democratic procedure. This conception in turn provides an answer to Kelsen's overall charge that absolute moral principles are connected with political totalitarianism and absolutism.

Section 1: Kelsenian Metaethics and the Dynamic Theory of Law

Kelsen's theory of law is widely known for the scope of its exposition, its distinctive categories, and its development over time, and we can describe different 'periodizations' in Kelsen's work.[11] As this is not an article that contributes to the historical scholarship about Kelsen's work but is rather an attempt to explore the central challenges and insights his work provides for the broader theorization of constitutional democracy, the purpose of this outline is to sketch those elements that clarify the basic features of his project. In particular, I will seek to set out a general overview of Kelsenian legal theory and its relationship to a broader metaethical position as a background for developing an examination of the problem of the foundation of constitutional democracy.

The most striking feature of Kelsen's work is accordingly its distinctive set of methodological commitments that could be described as "metaethical."[12] First, in a point that we will return to later, Kelsen's work is often noted for its attempt to draw a sharp distinction between scientific inquiry and activity (theory) and the sphere of moral commitment and action (practice). For Kelsen, only scientific inquiry is properly concerned with truth as such. In the sphere of moral commitment, resulting action cannot be based on any set of assumptions, principles, or judgments that can be regarded as 'objective.'[13] This leaves Kelsen with the

11. See Stanley L Paulson, "Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization" (1998) 18:1 Oxford J Leg Stud 153. One of the key points Paulson makes regarding the issue of periodization with Kelsen is that it is not plausible to see this in terms of drastic shifts in epistemology and method. Rather, distinctive emphases are produced in terms of the subject matter and more specific sets of problems Kelsen engages with over time.

12. Torben Spaak, "Kelsen's Metaethics" (2022) 35:2 Ratio Juris 158 at 166ff. A broader intellectual context for Kelsen's turn to metaethics is usefully set out in Katherina Kinzel, "Relativism in German Idealism, Historicism and Neo-Kantianism" in Martin Kusch, ed, *The Routledge Handbook of Philosophy of Relativism*, 1st ed (Routledge, 2019) 69. The specific context provided for the debate in neo-Kantianism is usefully set out in Fred Beiser, "Historicism and Neo-Kantianism" (2008) 39:4 Studies in History & Philosophy of Science 554. See also Katherina Kinzel, "Wilhelm Windelband and the Problem of Relativism" 25:1 (2017) British J for the History of Philosophy 84 for a helpful clarification of the development of the neo-Kantian problem of relativism as it developed in Windelband's thinking, a discussion of the problem of self-refutation, and the difficulties with Windelband's attempted solutions within the neo-Kantian paradigm.

13. Spaak usefully highlights the diverse texts in which Kelsen discusses and characterizes this issue over the course of his career, often in a manner that is not entirely systematic (see Spaak, *supra* note 12). For the current discussion and for analytical and substantive reasons focused on mid-period Kelsen, see Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (The Lawbook Exchange) [Kelsen, *General Theory*] Part One at IAc; Hans Kelsen, *The Pure Theory of Law,* 2d ed, translated by Max Knight (University of

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problem of characterizing what individuals purport to be doing when acting on moral principles and in accordance with moral judgments. Kelsen's answer is straightforward: they are acting on the basis of criteria whose validity is relative to their own personal or individual judgment and evaluation of their situation. Insofar as they present these criteria as having a wider absolute or universal validity, they are engaging in the construction of an 'ideology' to justify their decisions and moral judgments. Any practical activity thus proceeds on the basis of an inherently subjective judgment.[14]

The most pressing problem posed by the type of metaethical relativism embraced by Kelsen is the problem of self-refutation. Put briefly, if Kelsen is asserting that moral truth is relative to subjective valuation, then that assertion is itself being put forward as a universal truth. If so, there is a contradiction between that universal assertion of truth and the view that every other truth is relative or subjective. Carlo Accetti, who is broadly sympathetic to a modified version of the Kelsenian project, believes that the self-refutation problem can be avoided by the appeal to the distinction between "second-order" statements and "first-order" statements.[15] On this view, a 'first-order' statement would be a statement of a moral principle by someone acting from a relative point of view. By contrast, a 'second-order' statement would be that of a moral theorist explaining the sense in which the 'first-order' statement only had relative value.

In response to Accetti's view that Kelsen's 'second-order' conception of moral relativism secures him against the self-refuting character of moral relativism/scepticism, the point can be made that Kelsen is arguably entitled to the 'second-order' position if he can provide a full account of its epistemological basis; in other words, he has to show that it amounts to more than a merely argumentative device. Such an account is, to a degree, supplied by the neo-Kantian presuppositions of his work: the idea of a 'transcendental' critical philosophy. From this point of view, the 'second-order' position is precisely that of 'transcendental' criticism: the examination of the conditions of the possibility of a certain construction of the world, whether in terms of natural science or morality. For Kant himself, transcendental inquiry into practical activity ushered in a set of objective principles of moral action. Kelsen's relativism denies this, but he does not provide a sufficiently clear account of why practical reason as opposed to theoretical reason is appropriately characterized as 'relativistic' in his sense of that concept.

California Press, 1967) at 63-65 [Kelsen, *The Pure Theory*]; Hans Kelsen, "Absolutism and Relativism in Philosophy and Politics" (1948) 42:5 The American Political Science Rev 906.

14. In a review of Kelsen's distinctive relativistic stance, Carlo Accetti makes the important point that it should not be equated with emotivism—that moral judgments are simply expressions of emotions (although Kelsen does acknowledge this aspect as well). Rather, the key point is that they are moral judgments of value but judgments that are not capable of being grounded in absolute terms. See Carlo Invernizzi-Accetti, "Reconciling legal positivism and human rights: Hans Kelsen's argument from relativism" (2018) 17:2 J Human Rights 215 at 218. As Spaak says, Kelsen's texts themselves are somewhat more ambiguous on this point. See Spaak, *supra* note 12. However, as formulations progress over the different stages, it seems preferable to describe Kelsen's view on morality as primarily relativistic rather than emotivist.

15. Accetti, *supra* note 14 at 218.

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Law and morality provide examples, as we shall see later, in which social and public norms can be followed that are not entirely subjective or 'solipsistic' in nature even on Kelsen's terms.[16] Is it then appropriate to characterize these norms as 'relative' in a second-order account? If a norm succeeds in maintaining the existence of a social group over time, is it appropriately characterized as essentially relativistic in nature? Whilst it may display aspects of adaption to local circumstances, and in that sense display 'relativity' in a certain sense, is this a sufficient characterization of all the different aspects of such a norm?

In brief, the idea that Kelsen's 'relativism' is a second-order position, whilst it might avoid the charge of self-refutation, entails a set of additional questions concerning whether this 'second-order' view appropriately construes the 'first-order' moral phenomena. As we shall see in Kelsen's debate with the Christian-democrat thinkers, different interpretations of the concept of relativism are possible as a way of analysing the context-dependent elements of ethical judgments. Ultimately, however, Accetti's attempt to save Kelsen's relativism from the charge of self-refutation does not do justice to the way Kelsen's concept of relativism does not itself clearly separate 'second-order' analysis and 'first-order' prescription. For example, as will later be discussed, Kelsen makes a case in favour of the idea that a commitment to democratic constitutional arrangements flows from the adoption of a relativist philosophical standpoint. Whether or not Kelsen is presenting his own commitment or an analysis of a type of commitment is not entirely clear from the context. Crucially, however, if the belief in a 'second-order' relativism moves into a 'first-level' prescriptive advocacy of constitutional democracy on that basis, this will re-introduce the problem of self-refutation if presented in a strong sense, or simply involve the mere expression of a personal preference if understood in a weaker sense.

In light of these metaethical views, Kelsen develops an extensive and influential discussion of the nature of law as a normative social practice. A brief descriptive overview of this theory will be provided here as a prelude to an evaluation of his views on constitutional democracy.[17] At its simplest, law is, for Kelsen, an objective normative order. How does Kelsen explain and develop this idea? At the level of legal practice itself, from the perspective of individuals involved in it, they will often seem to be engaged in the usual moral practice of evaluating and justifying claims. Individuals vindicate obligations whilst also claiming the implicit authority to do this. On Kelsen's metaethical premises, such claims are usually not capable of being presented as 'true' in that they do not derive from any principles of morality that could reasonably be construed as

16. For example, we have the following statement in *General Theory* of how legal science views a system of legal norms: "It differs from individualistic anarchism, the anarchism without ideal which views the supposed objective and normative validity of the politico-legal order as a mere fiction or ideology, just as the critical natural philosophy rejects the analogous subjectivist solipsism." Kelsen, *General Theory*, *supra* note 13 at 436.

17. The account that follows is based on the final developed version of the ideas contained in Kelsen's pure theory. See Kelsen, *The Pure Theory*, *supra* note 13.

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objective (even if they might be derived from more or less sophisticated ideologies). They are, in a terminology he later developed, personal "acts of will."[18] Speaking on behalf of legal science, Kelsen nevertheless concludes that, despite this apparent subjectivity, legal claims are ultimately made with reference to a genuinely objective pole of normative validity. How is this possible from Kelsen's point of view?

Crucial to explaining this objectivity of legal norms is that distinctively legal claims take place in the context of a hierarchical structure of norms. To make a successful legal claim, appeal must be made to a norm which would authorize such a claim, and the claim must be vindicated in a legal procedure which must itself have the jurisdiction, in accordance with a superior norm, to resolve the dispute. If we trace back such a hierarchy of legal claims and authorizations, do we simply arrive back where we started, with some kind of moral principle or personal subjective act from which the hierarchy of norms is derived? Kelsen posits his key idea at this point: the ultimate authoritative source for validating legal claims must *presuppose* that it has the authority to claim this competence. Kelsen tries to represent this implicit presupposition with the idea that the ultimate norm of the system is a "basic norm" whose function is to legitimize all legal claims, but which does not exist in fact as an act of will like all other legal acts.[19] Kelsen's formulations of what this 'presupposition' amounts to vary over time and are often somewhat ambiguous. Perhaps the best interpretation of this notion, consistent with the rest of Kelsen's project, is that it is a type of cognitive assumption (implicit in official acts of norm recognition and application) that constitutes specifically legal forms of normative activity.

Having set up this broader idea of a normative hierarchy to explain the normative 'objectivity' characteristic of legal claims, Kelsen, on the construction of his work presented here, completes the picture with the contrast between different types of normative systems. These contrasts further serve to highlight the distinctiveness of law as a normative system. The first set of contrasts highlights the distinction between static normative systems and dynamic normative systems.[20] A static normative system is one in which the normative claims that characterize it are presented as authorized by their logical derivation from underlying substantive normative principles.[21] Although not an exact example of this, Dworkin's ideal interpretive conception of law-as-integrity—which ultimately derives legal

18. Kelsen, *General Theory*, *supra* note 13 at 33.
19. *Ibid* at 110ff.
20. See Kelsen, *The Pure Theory*, *supra* note 13 at 70-71; 108-92. It should be noted that the term 'static' is also used by Kelsen to refer to a particular scientific interpretation of law. This is where the law is understood as it exists at a particular time and, in that sense, in abstraction from its identity as a dynamic normative order involved in ongoing acts of law creation and application. As such, it is interpreted as a set of conditions for the application of a sanction.
21. The more specific distinction between the static and dynamic as types of normative systems is outlined in Kelsen, *The Pure Theory*, *supra* note 13 at 195-98.

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'propositions' from the principle of equal concern and respect—seems to be closer to the idea of a 'static' legal system insofar as relations of principled derivation are central to the development of the legal order.[22] A 'dynamic' normative system, in which Kelsen places legal practice, is a normative order in which lower-level norms are not so much reasoned out or deduced from prior norms; rather, they can be said to owe their existence as norms of the system to a specific form of procedural validation by a superior norm. Finally, amongst dynamic normative orders, Kelsen distinguishes between coercive orders and non-coercive orders, where law belongs to the first of these categories.

Such is the general picture of the Kelsenian system and its presentation of the nature of law. What we have so far seen in Kelsen's work are two key layers of thinking: a first layer which is methodological or epistemological in character, and a second which we might describe as ontological. The 'methodological or epistemological' part relates primarily to Kelsen's commitment to moral relativism. The 'ontological' part relates to the presentation of Kelsen's 'dynamic' theory of law and legal authority as a coercive system of norms. The key point in this respect is that Kelsen's approach to metaethical questions decisively shapes his 'ontology' of legal practice; in other words, it provides him with the basic categories and ideas he uses to develop his substantive theory of the nature and character of law. Kelsen's moral relativism and subjectivism would suggest that for him, *prima facie*, law should be interpreted as subjectively as any other moral system. The objective normative dimension of law is, however, reintroduced consistently with his premises. The idea of authorization and the concept of the hierarchy of the legal system are capped by the presupposed basic norm, and the legal system as such is further differentiated from other types of normative moral orders by its coercive character. The legal system is thus presented—from the standpoint of legal science—as normatively binding, but in a restricted and somewhat uncertain sense given the difficulties in interpreting the concept of the basic norm.

Overall, the underlying problem of self-refutation affects Kelsen's metaethical position as well as the legal theory whose pivotal categories flow from this perspective. This is manifested in particular in the ambiguity of the objective normative status of law, grounded as it is in the concept of the basic norm. To complete the presentation of how Kelsen understands the connection between his metaethical relativism and the authority and operation of the legal system, we can now assess his views on the nature of constitutional democratic legal authority. As we will see, Kelsen attempts to define 'philosophical relativism', which builds on the broader understanding of metaethical relativism informing his account of the normativity of the legal system and is intended to serve as the foundation for his theory of constitutional democratic government.

22. See Ronald Dworkin, *Law's Empire* (Hart, 1998).

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Section 2: Metaethics, Legal Authority, and Constitutional Democracy in Kelsenian Theory

In "Foundations of Democracy," Kelsen sets out his view of political authority in relation to the themes and practical commitments of his distinctive approach to the science of law.[23] He proceeds *inter alia* to draw an important set of links between moral epistemology, value pluralism, legal authority, and democracy, themes that he has explored in a range of different contexts. The first part of this particular article attempts to answer the question as to why the symbol of democratic government can often be converted into and used to sustain what Kelsen regards as its polar opposite: authoritarian or totalitarian government. In particular, he has in mind the twentieth-century forms of communist and fascist authoritarian rule.[24] This 1955 essay accordingly tackles the problem of how to ensure the stability of post-war constitutional democracy—a concern that he shared with the Christian-democrats despite proposing very different and indeed opposed solutions.

The root of the problem is, according to Kelsen, that authoritarian ideology can distort the idea that democratic governance is generally understood not only in terms of procedure ("government by the people") but also in terms of substance ("government for the people").[25] In terms of its substance, namely in relation to ideals like self-determination and self-realization, the value of democracy is seen as lying in the capacity of democratic institutions to realize a notional "collective will" or "common good" of the people as such.[26] Kelsen's critique of this substantive conception of the symbol of democracy is that, in various ways, it replicates what for him is the sort of flawed aspiration that characterizes authoritarian and totalitarian ideologies generally; namely, for a putative 'objective' commonly-held interest or value that would underpin the legitimacy of the polity. In reviewing Kelsen's specific criticisms of the Christian-democratic theorists, it is worth bearing in mind that he would associate their views, insofar as they cannot be assimilated to his own, with this general critique of those democratic theorists that interpret democracy in terms of absolute and objective values or interests. Kelsen's positive project is, however, one of attempting to think through a rigorously procedural conception of democracy from more relativistic premises.

Kelsen's approach to handling the question of how to progress from this type of moral relativism to some kind of public normative order and procedural model of democracy follows an analogy from broader types of scientific inquiry.

23. See Kelsen, *supra* note 7. There is a recent translation of a work by Kelsen that is an inter-war piece on the theme of democracy. See Kelsen, *Essence and Value, supra* note 5. However, the 1955 "Foundations of Democracy" extended essay is useful for present purposes in that it explores the variety of personal attitudes that sustain democratic and authoritarian rule and develops the basic positions contained in *Essence and Value* in the context of post-war debates on re-founding constitutional-democratic rule.
24. See Kelsen, *supra* note 7 at 1-2.
25. *Ibid* at 2.
26. *Ibid* at 25, 2ff.

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Kelsen's neo-Kantian understanding of the nature of objectivity relevant to *cognitive* judgment is that there are certain common criteria that guarantee the truth of these types of judgments. His discussion of the point in "Foundations of Democracy" emphasizes the 'constructed' nature of this cognitive objectivity in accordance with the distinctively neo-Kantian direction of his work. In contrast to what he terms 'philosophical absolutism'—which would recognize an overarching objective normativity in relation to the use of both theoretical reason and the framing of practical action—Kelsen stresses a range of different philosophical positions that would deny this, which he terms solipsism, pluralism, and relativism (with relativism as his preferred option).[27] All three represent reflective responses to a shared disavowal of or scepticism toward any kind of objective a priori and 'given' normativity in respect of the exercise of theoretical reason and the organization of practical action.

In defending philosophical relativism as the preferred approach for dealing with a basic scepticism about the foundations of pre-existing criteria of objective truth (initially in the field of straightforward theoretical or cognitive activity), Kelsen develops a critique of the solipsistic and pluralistic options. First, solipsism is seen as the least convincing response to a sceptical approach to an absolutist conception of truth insofar as it refuses the problem of developing a shared conception of the world and refuses to acknowledge any other perspective than its own. Pluralism, although it recognizes the fact of different perspectives on the world, from the outset rules out the prospect of constructing a shared understanding of the world. Finally, Kelsen argues, philosophical relativism not only recognizes the subjectivity of world views but also goes on to affirm their *equal* validity in terms of their right to be held.[28] For Kelsen, this then opens up, in an apparently straightforward manner, the possibility of recognizing *shared* norms of 'rationality' in pragmatic or cognitive dealings with the objective world.[29] Already it is possible to see an awkward leap in Kelsen's case for relativism, in which the problem of self-refutation seems to return in another context. How can 'equal validity' be ascribed to differing judgments in the light of the apparent absence of objective moral or ethical criteria for evaluating them as equal?

The remainder of this argument brings the discussion of relativism closer to the problem of how a unified legal order is maintained despite these relativist premises. Kelsen envisages social order as capable of emerging through the creation of an authoritative system of norms that replaces the influence of subjective conviction in the field of social interaction with a normatively structured and effective system of procedural or dynamic norms that pacify social conflicts,

27. *Ibid* at 14ff.
28. *Ibid* at 17-18.
29. *Ibid.* Where Kelsen recognizes the possibility of shared criteria of rationality, this is arguably best interpreted on the basis of a more fundamental relativism and subjectivity. Accordingly, what Kelsen seems to be describing is a pragmatic set of rational principles focused on the construction of a reliable, shared understanding of the world given a shared instrumental interest in successful cooperation.

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coordinate conduct, and sanction non-conformity. Thus, the specific character of law as a constructed and dynamic normative order emerges as the answer to the problem of sharing a common social order in the light of the relativity of moral judgment. The challenge remains, however, to provide, on the basis of these premises, an account, not only of the possibility of the existence of an organized normative legal order but also of why these foundations provide the most appropriate basis for liberal democratic institutions. This is the point that Kelsen seeks to elaborate on in the 1955 essay.

Kelsen's conception of democracy as a fundamental and distinctive way of configuring norm-creating procedures emerges out of a careful examination of the premises of philosophical relativism. The primary commitment of philosophical relativism that connects it to constitutional democracy is to the principles of individual freedom and equality (the affirmation of all moral judgments subject to the requirement of co-existence); these then flow through into the commitment to establish democratic procedures for the creation of legal norms.[30] However, the commitment to the principles of freedom and equality itself presupposes a certain psychological attitude or frame of mind characteristic of philosophical relativism. As Kelsen puts it:

> From a psychological point of view the synthesis of freedom and equality, the essential characteristic of democracy, means that the individual, the ego, wants freedom not only for himself but also for the others, for the *tu*. And this is possible only if the ego experiences itself not as something unique, incomparable and unreproducible, but, at least in principle, as equal with the *tu*.[31]

Kelsen then explains how, in accordance with a standpoint that has come to accept the principles of equality and freedom, a distinctively procedural notion of democracy emerges.[32] The value of freedom would imply a kind of unfettered capacity to execute and realize subjective judgment in the social field. In some respects, Kelsen considers that philosophical absolutism exercised in the form of political authoritarianism represents an ideological form in which freedom in this relatively unconditional sense is exercised by a minority of rulers in a society. The value of equality accordingly qualifies the value of freedom in that, from the standpoint of philosophical relativism, the equal right of each subjective judgment is accepted. The result is that, on the basis of the need to recognize this value of freedom in creating the legal order, the right to participate in political decision-making is affirmed. At the same time, due to the dimension of equality, this right to participate is converted into a broader right to equal involvement in

30. Kelsen's conception of philosophical relativism insofar as it concerns attitudes to moral problems resembles—at the level of content, if not in justification and form—the post-Kantian tradition of morality and legal theory, which emphasizes law precisely as a natural outworking of these types of assumptions concerning equal freedom and dignity. For a clear and thorough explanation of Kant's own standpoint on these issues, see Patrick Capps & Julian Rivers, "Kant's Concept of Law" (2018) 63:2 Am J Juris 259.

31. Kelsen, *supra* note 7 at 25-26.

32. *Ibid* at 18ff.

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decision-making by all affected, yielding a strong proceduralist understanding of democracy. In line with this analysis, Kelsen thus provides the following definition of the 'essence' of democracy: "The term designates a government in which the people directly or indirectly participate, that is to say, a government exercised by majority decisions of a popular assembly or of a body or bodies of individuals or even by a single individual elected by the people."[33]

One of the questions raised by Kelsen's account is to what extent this proceduralist understanding of democracy—in combination with the idea of the legal order as a dynamic structure of norms—is entirely formalist in character, or whether it implies that these procedures need to be underpinned and constrained by certain substantive principles as well. It certainly seems that the formalist character of Kelsen's understanding of constitutional authority is strongly marked in several different respects. The first of these is his insistence on the majoritarian and institutionally structured character of democracy as against Rousseauian models that would emphasize the idea of realizing a specifically collective will. This underpins Kelsen's strong affirmation of a representative model of democracy—which is otherwise defended on technical and functional grounds—against any insistence on direct democracy.[34] Equally a dynamic normative system, the formal character of the legal system as interpreted by Kelsen is quite apparent insofar as power-authorizing rules become more central to the structure of the legal order than relations of subsumption or implication drawn from a primary substantive norm. In fact, this is perhaps one of the most consistently formalistic interpretations of the idea of legality that has been attempted.

Crucially, this type of proceduralist conception of law was used to defend the Kelsenian model of constitutional review against the charge, advanced by Carl Schmitt, that abstract a priori constitutional review was inconsistent with the nature of court-based adjudication.[35] For Schmitt, adjudication was essentially a participation in the sovereign power of the State but in the form of the inherently personal indexed judgment of how to apply the law to the facts of *a particular case*. By consequence, Schmitt argued, the so-called abstract and a priori model of judicial review promoted by Kelsen, in theory and in practice, was not an adjudicative process in the proper sense. Kelsen's answer to this rested heavily on his dynamic conception of the form of the legal system. Any institution involved in law creation and application was in essence involved in the same activity: the authorized creation of law. The only distinction was whether the norms were more general or whether they were particular in character. In that sense, the distinction between adjudication and legislation was one of degree rather than kind (as Schmitt thought it was).

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33. *Ibid* at 2-3.

34. "Parliamentarism thus represents a compromise between the democratic demand for freedom and the division of labor, which is the necessary basis for all progress in social technique." Kelsen, *supra* note 5 at 49.

35. For this debate in general, see Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" in Lars Vinx, ed, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015) 174.

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On the whole, Kelsen's view of law and constitutional authority stresses the importance of formal legality and procedural validity in connection with a relativistic stance toward moral judgment. At the same time, Kelsen insists that even within a formal, procedural type of democracy, certain substantive rights are crucial to maintaining the integrity of democratic institutions, based on the concepts of freedom and equality. As Kelsen puts it, "Modern democracy cannot be separated from political liberalism. Its principle is that the government must not interfere with certain spheres of interests of the individual, which are to be protected by law as fundamental human rights or freedoms."[36] The difficulty with this additional complication of the overall institutional framework of democracy is that it seems to be introducing specific sets of substantive rights into a highly procedural framework. Can such rights be guaranteed in a meaningful way in light of Kelsen's broader point that law is (a) a dynamic normative system that emphasizes relations of empowerment rather than *substantive* ethical implication; and (b) a model of judicial review that emphasizes norm creation rather than interpretation or subsumption? This is again where Kelsen's commitment to philosophical relativism would—interpreted ultimately as a commitment to freedom and equality—imply that these types of rights should form part of any constitutional order. However, there are certainly tensions between Kelsen's formalist approach to the dynamic nature of law and the sense that a particular set of constitutional rights should in fact be guaranteed in a stable manner to secure a democratic type of constitutionalism. Whilst these tensions do not go as far as to create a contradiction between Kelsen's constitutional theory and his theory of law, the formalism of the latter and his emphasis on adjudication as a process of law creation leave constitutional review in an uncertain position as a guarantor of the substantive content of liberal-democratic norms.

To sum up this section, it might be said that Kelsen's dynamic theory of law is in tension with his preferred theory of constitutionalism. Whilst Kelsen makes a carefully thought-through case that both law and constitutional democracy are capable of being related, in different ways, to a common metaethical principle—philosophical relativism—his substantive constitutional principles ultimately seem in tension with the neutral formalism of the legal system through which they are to be enacted.

Section 3: Kelsen's Engagement with the Natural Law Defence of Constitutional Democracy

In light of the difficulties, outlined above, between substantive values and formal law, we can now examine the coherence of the alternative natural law or Christian-democratic view of constitutional democracy, reviewed by Kelsen in "Foundations of Democracy." In the first of these next two sections, I evaluate key features of Kelsen's critical engagement with contemporary 'natural law'

36. Kelsen, *supra* note 7 at 27-28.

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approaches to the development of a foundational justification for constitutional democracy. In the second section of these (Section 4, below), we will examine the case for a non-proceduralist conception of democracy as a theory of constitutional authority advanced within the context of a natural law approach.

Kelsen's critical examination of the competing natural law or Christian-democratic conception of constitutional democracy provides a useful way of testing different approaches to the foundations of constitutional democracy. At the outset, it would be helpful to set out Kelsen's own summary of his twofold argument before going into the details. According to Kelsen, "I intend to ... demonstrate that Christian theology, too, can justify democracy only as a relative value, but also ... to examine the claim ... that there is an essential connection between democracy and Christian religion."[37] In other words, there are two distinct parts to Kelsen's argument. The first argument he uses is to deny any 'essential connection' between democracy and the Christian religion. It should be noted that this formulation of the point presupposes some kind of connection between the Christian religion and the sort of natural law arguments invoked by the theorists Kelsen discusses. As we will see, there is a broad connection between the two insofar as the Christian religion typically involves a commitment to some kind of idea of natural law. However, as Kelsen explains and discusses it, the argument perhaps only deals with one aspect of the range of issues raised by the theorists he examines. The second of his arguments is broader in scope, insofar as it applies to both Christian and natural law elements in the works he examines; namely, that the theories of constitutional democracy put forward by these writers involve a disguised type of relativism.

Kelsen begins his examination of these writers and their connected set of ideas with the work of the Protestant theologian Emil Brunner and in particular with Brunner's book, *Justice and the Social Order*.[38] The stakes of the debate between Kelsen and Brunner are immediately apparent, especially since, as Kelsen accurately summarizes, Brunner's thesis is that the totalitarian systems of the time had their roots in the type of relativistic and exclusively positivistic view of law espoused by Kelsen.[39] Accordingly, Brunner argued that when theoretical or philosophical reflection on law eschewed elaborating a connection between law and absolute standards of justice—a movement culminating in legal positivism—the way was opened for seeing politics and law as entirely grounded "in the will of the ruling power."[40] Kelsen's principal counter-argument to this accusation rests on the fact that, at a different point in his treatise, Brunner distinguishes between "worldly justice," a concept of justice conditioned by its historical context that applies to social institutions, and "heavenly justice," presented as an absolute and unchanging criterion of justice.[41] For Kelsen, this distinction is

37. *Ibid* at 41.
38. See Emil Brunner, *Justice and the Social Order*, translated by Mary Hottinger (Lutterworth Press, 2002).
39. See Kelsen, *supra* note 7 at 42.
40. Brunner, *supra* note 38 at 15.
41. *Ibid* at 20. Brunner's distinction between 'worldly' and 'heavenly' justice is developed in a preliminary way early in the book (see *ibid* at ch 2). It becomes apparent that we are dealing

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tantamount to admitting the thesis, which Kelsen himself holds to, that 'worldly justice' is simply historically relative to a particular set of institutions. In this way, Kelsen's principal argument against Brunner is the 'disguised relativism' argument outlined above.[42]

A subsidiary point that Kelsen develops against Brunner is one that he will elaborate against some of the other Christian-democratic theorists reviewed in this article. Although Brunner's distinction between 'worldly' and 'heavenly' justice seemed to place the justice of social institutions on a different plane from the justice of God, he clearly envisaged some kind of connection between the two (despite Kelsen's perhaps overly stark emphasis on this distinction). In elaborating on the idea of equality as pursued in social institutions, Brunner states that it had been influenced by the biblical principle of a universal equal human dignity. After mentioning the idea that such a radical notion of equality was unknown to influential theorists of 'worldly justice' like Aristotle, he goes on to state: "That conception of justice by which all human beings, old or young, man or woman, bond or free, have equal rights in the sense that they *ought* to be treated alike, is in essence derived from the revelation of Scripture, according to which God created man 'in his image.'"[43] Elaborating on this point, such recognition of a universal equality is not abstract in nature but is rather a concept of recognition that applies to the concrete personality of each individual. As Brunner puts it, "the concrete individuality of the human creature takes on a new meaning: the difference between men is the condition of the community of natural created beings."[44] In short, this results in a view of "equality of dignity" that involves a recognition of "difference in kind and function."[45] The position Brunner articulates and endorses here seeks to secure a balance between the recognition of each person's distinct dignity as an individual and the sense in which that identity is expressed in concrete ways by belonging to and service to community. Accordingly, Christianity uniquely, for Brunner, achieves a conception of justice that "can protect men from the demands both of one-sided individualism and one-sided collectivism."[46]

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with a unified notion of justice but one operating in different spheres: first, the justice of social institutions, and second, a 'heavenly justice' which Brunner—viewing the matter somewhat from the standpoint of Protestant theology—defines in terms of a personal virtue of charity and the objective atoning righteousness of Christ. The point is developed in accordance with the theology of the Protestant Reformation, *ibid* at ch 14.

42. This argument is developed against Brunner in Kelsen, *supra* note 7 at 41-48.

43. Brunner, *supra* note 38 at 37 [emphasis in original]. Brunner denies that Stoicism is properly considered the source of this notion of equality. First, it does not accord sufficient room for recognition of personal differences. In the second place, as a philosophical school, it lacked the influence that a religious movement like Christianity could have on history. For this discussion, see Brunner, *supra* note 38 at 38.

44. *Ibid* at 43.

45. *Ibid* at 45. It should be noted that Brunner enters an important caveat here; namely, that although he wishes to endorse a conception of equal dignity that links it to community and functional difference within such a community, he is nevertheless keen to emphasize that, unlike the "Romantic theory of organism," dignity itself does not derive from service to the whole but from the individual's immediate personal relationship to God (*ibid*).

46. *Ibid* at 46.

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In response to this emphasis on the idea that Christianity provided a unique and decisive influence on the concept of equality in relation to the justice of social institutions, Kelsen is content to make the point that the ideas of equality and freedom which, as we have seen, underpin his procedural notion of equal participation in the exercise of power, are not supported by Christianity in a sufficiently specific manner. Kelsen highlights at this point Brunner's view that a number of possible governmental forms might be supported on the basis of the Christian understanding of the basic principle of equal dignity. Kelsen concludes from this that, as he puts it, Brunner demonstrates an "attitude of indifference toward the problem of political freedom, the very problem of democracy, [an attitude] quite consistent from the point of view of Christian religion."[47] Whilst I will return to the connection between Christianity and constitutional democracy in what follows, it should be pointed out that Kelsen's argument at this point perhaps places too much weight on Brunner's admission that Christianity might support a range of governmental types. Such an admission is still consistent with the view that Christianity offers particular support for constitutional-democratic institutions given the concept of equal dignity Brunner discusses. Some of Kelsen's connected critiques focus on the vagueness of key concepts contained in the work of writers like Brunner (such as his idea that the Christian notion of equality consists of both a universal dignity and the acknowledgment of function-related differences in respect of communal life). After a review of Brunner's views on the range of issues examined, he concludes, "to reach such empty generalities no recourse to the divine order of creation is necessary."[48] The key to answering this criticism is to bear in mind the notion of constitutional authority and its relation to the formation of political community as it is understood in the natural law tradition, which will be developed in the next section. The developing link between Christian doctrine and natural law thinking provided a more precise formulation of these issues.

Before evaluating these arguments and drawing some conclusions in the following section, it would be worth outlining Kelsen's case against two more notable theorists of post-war Christian democracy; namely, Reinhold Niebuhr and Jacques Maritain.

As regards Niebuhr, a Protestant theologian with an interest in questions of political theory, Kelsen draws attention to the fact that as with Brunner, secularism and relativistic world views are criticized for their role in fostering the rise of totalitarianism: "Like the Swiss theologian Brunner, the American theologian Reinhold Niebuhr makes a positivistic, that is to say, an areligious philosophy responsible for totalitarianism."[49] As Kelsen discusses Niebuhr's views on this point, it becomes apparent that Niebuhr sees this prospective return to a religious ethic less as a return to an avowedly theocratic form of rule than as a matter of the benefits to be gained by an understanding of how the principles underpinning

47. Kelsen, *supra* note 7 at 52.
48. *Ibid* at 51.
49. *Ibid* at 54.

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political justice are best sustained by a religious ethic and world view. Kelsen thus discusses how Niebuhr believes that a renewed religious ethic will result in a more committed adherence to constitutional and democratic principles: such principles "can vindicate the democratic political system more effectively than skeptic secularism, hampered by its disavowal of religion and its pessimism in regard to man's capacity for justice."[50] In light of the developing 'global' dimension of post-war order, it is also worth noting the sense in which, for Niebuhr, the universality of constitutional democracy is better vindicated by the universality of a religious ethic.[51]

As with Brunner, Kelsen answers these points by arguing that, despite invoking absolute political principles, Niebuhr ultimately fails to show how they in fact shape democratic institutions in a way that is distinct from the relativistic 'foundations' Kelsen himself proposes. As he summarizes these issues, Kelsen correctly draws attention to Niebuhr's view that democracy involves a recognition of the relative and mutable character of the fundamental principles of political justice insofar as any given principle is contestable within the context of democratic institutions.[52] Accordingly, he sums up the position as follows: "But if natural law is only 'more' immutable than positive law and hence mutable and not absolutely immutable, then it is relative too."[53]

Kelsen's summary is broadly accurate at this point insofar as Niebuhr does invoke the notion that concepts of political justice need to be subject to periodic democratic debate and revision.[54] It is a position that certainly distinguishes him, in terms of its emphasis, from more classical natural law positions. However, it is worth stressing at this stage that Kelsen perhaps tends to equate his version of democratic relativism with the type of relativism put forward by Niebuhr. As we have seen, Kelsen's moral relativism is grounded in a particular type of neo-Kantian metaethics and epistemology. In the first place, Niebuhr's is more restricted in nature: he generally applies it to the way in which standards of political justice and morality might be *formulated* at a particular time. The following is a fairly unequivocal statement of this from Niebuhr: "The principles of political morality, being inherently more relative than those of pure morality, cannot be *stated* without the introduction of relative and contingent factors."[55] Secondly, the broader philosophical—and indeed religious—context for this statement of the relative quality of certain formulations of principles of justice and morality is considerably different. Developed throughout the work in question, there is a sense, first, that principles of justice and morality, and the possibilities for their criticism and development, are rooted in what Niebuhr describes as the

50. *Ibid* at 55.
51. See *ibid* at 54.
52. See *ibid* at 57.
53. *Ibid* at 58.
54. See Reinhold Niebuhr, *The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of its Traditional Defense* (Chicago University Press, 2011).
55. *Ibid* at 73 [emphasis added].

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"transcendent freedom" of the person.[56] This idea is also understood within the context of a religious philosophy insofar as this attribute of freedom is interpreted in relation to God understood as the ultimate ground of such transcendence. This is a complex point, but is well encapsulated in the following quotation: "The ultimate transcendence of the individual over communal and social process can be understood and guarded only in a religious culture which knows of a universe of meaning in which this individual freedom has support and significance."[57] Another aspect of this point is that a personal interpretation of the Christian doctrine of 'original sin' forms part of Niebuhr's theological and philosophical reflection on the necessarily contingent character of the formulation of moral precepts at any particular period of time (this is connected to Niebuhr's 'realism' concerning human institutions). Although this is not given a detailed examination in this work and no particular attempt is made to relate it to the range of doctrinal positions that have developed in relation to it, Niebuhr ultimately offers a straightforward sense of what he has in mind. As he puts it, the doctrine of original sin, in his interpretation, corresponds to the fact that "there is no level of human moral or social achievement in which there is not some corruption of inordinate self-love."[58] Clearly, this rather pessimistic view of human nature—in opposition to the optimistic view of the Enlightenment—would call for the standing possibility of revising fundamental political principles through democratic procedure.

Whilst Kelsen does acknowledge the religious context of Niebuhr's views concerning relativism and democracy (which makes it difficult for him to equate Niebuhr's relativism with his own), he nevertheless concludes his analysis with a couple of fairly straightforward assertions regarding Niebuhr's overall view that an acknowledgment of this religious dimension would assist the stability of constitutional democracy. The first is simply a re-working of his broader thesis that philosophical absolutism, of whatever sort, cannot provide a proper basis for democratic institutions. Kelsen accordingly takes the view that the abandonment of a more restricted form of 'philosophical relativism' for a more ambiguous form of 'religious relativism' created a space for 'absolutist' commitments to overthrow democratic institutions in the pre-war era. As he puts it, "it is rather the relativism of a religion, a religious relativism, such as advocated by Niebuhr, that should be made responsible for the victory of another religion, which in its demonism maintains the illusion of absolutism."[59] A second concluding point is that Kelsen ultimately asserts that more material factors better account for the rise and fall of totalitarianism. As he puts it,

> the Nazi religion is only the ideological superstructure of a real movement which has its causes in economic and political facts and not in the insufficiency of a

56. *Ibid* at 59.
57. *Ibid* at 79.
58. *Ibid* at 17.
59. Kelsen, *supra* note 7 at 62.

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> philosophical or religious system. And this movement has been brought to an end, not by an improved philosophy or religion, but by hard facts.[60]

Whilst this is an effective rhetorical way to conclude a wide-ranging and complex debate on the philosophical and religious basis of democracy, it seems to go too far, since this type of scepticism concerning the effect of ideas and ideals would also apply to Kelsen's own position.

Jacques Maritain, the third theorist Kelsen engages concerning the connection of religion and democracy was, like Brunner and Niebuhr, a significant public intellectual with a career spanning the inter-war and post-war period. As Moyn has discussed, he was perhaps the theorist most closely associated with the idea of human rights as it emerged in the post-war era in the context of a renewed Christian democracy.[61] Unlike Brunner and Niebuhr, he was a Roman Catholic philosopher with an allegiance to the metaphysical and philosophical views associated with the revival of St. Thomas Aquinas' Aristotelian realism in the twentieth century. On this point, Maritain's philosophical framework contrasts most sharply with that of Niebuhr, which departed from more existentialist premises emphasizing the historical conditioning of human knowledge and language. Maritain's moral realism, grounded in the universality of human nature, seemingly suggested a commitment to the universality and stability of moral principles and principles of political morality.[62] The position is qualified, however, by Maritain's understanding of the mode of knowledge of natural law precepts. Here, he stresses that knowledge of the necessary requirements of human nature cannot be fixed in conceptual or theoretical terms but is rather 'connatural'; i.e., "not clear knowledge through concepts and conceptual judgments," but rather "vital knowledge ... in which the intellect, in order to bear judgment, consults and listens to the inner melody that the vibrating strings of abiding tendencies make present in the subject."[63] In addition, such 'connatural' knowledge is understood as a 'dynamic scheme' in which, whilst there is a 'universal awareness' of the inclinations of human nature, nevertheless "an immense amount of relativity and variation is to be found in the particular rules, customs, and standards in which ... human reason has expressed its knowledge even of the most basic aspects of natural law."[64] Ostensibly, it would seem that many of Kelsen's criticisms of a latent relativism might apply in this case; it is nevertheless interesting that he adjusts the focus of his critique in the light of Maritain's more complex position regarding moral relativism.

Kelsen accordingly argues against Maritain's view that the developing societal commitment to democracy had its origins in an enhanced grasp of the natural

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60. *Ibid*.
61. See generally Moyn, *supra* note 1.
62. The following is a summary statement of Maritain's position on natural law: "[I]n its ontological aspect, natural law is an *ideal order* relating to human actions, a *divide* between the suitable and unsuitable, the proper and the improper, which depends on human nature or essence and the unchangeable necessities rooted in it." Maritain, *supra* note 2 at 90 [emphasis in original].
63. *Ibid* at 92.
64. *Ibid* at 93.

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law attributable to the effect of the Christian religion.[65] Kelsen starts his discussion with the remark that the Christian religion has tended not to support any specific type of political system, but he quickly acknowledges that this does not affect the substance of Maritain's argument, which is that the influence of the Christian religion promoted the adoption of democratic forms of government.[66] In response to this point, Kelsen argues that it confuses the essence of democracy with the effectiveness of democracy and suggests that Maritain has not provided an account of the conceptual relationship between Christianity and the essence of democracy.[67] Finally, Kelsen concludes that the notion of the spiritual dignity of the person—which he accepts is taught as an element of the Christian religion—also underpins democratic institutions. However, in a complex set of points, he suggests that a legal protection of individual autonomy—both in relation to the state and within civil society—owed more to the Enlightenment than to Christian principles. However, in order to support this point, he goes back to the Apostolic teaching contained in the New Testament Pauline Epistles to note that the principal political and social duties required were those of obedience to state authorities and of slaves to masters.[68] This inevitably raises a number of difficult questions about how the content of the Christian religion is determined, and Kelsen's argument perhaps assumes too simple an analysis of this point. Nevertheless, it might again be said that Kelsen can tend to prove too much insofar as, if the effectiveness of democracy is distinguished from its essence in this sharp sense, then it is not clear that its simple procedural essence can be definitely connected with any philosophical or religious position, including philosophical relativism. Equally, Kelsen's concession of the point that Christianity contributed, in some sense, to the effectiveness of democracy appears to accept the substance of the argument Brunner, Niebuhr, and Maritain were making.

In concluding this section, it might be said that Kelsen does not seem to have shown that the type of 'relativism' espoused by the Christian-democratic thinkers he reviewed can be equated with the type of 'philosophical relativism' which he argued formed the foundation of constitutional democracy. As will be further discussed, there are significant differences in their respective interpretations of what relativism means. His denial that the thinkers he discussed established an 'essential connection' between Christianity and democracy was, as we have seen, stated in terms that placed too high a burden of proof in establishing such a connection. In addition, Kelsen seems to have been unable to muster sufficient evidence to contest the type of pragmatic connections for which these theorists seem in fact to have been contending.

65. Maritain provides a general statement to this 'effect' (not only in relation to democracy): "Only when the Gospel has penetrated to the very depth of human substance will natural law appear in its flower and its perfection." *Ibid* at 90.
66. See Kelsen, *supra* note 7 at 62-63.
67. *Ibid* at 65.
68. For a summary of these points, see *ibid* at 65-67.

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Section 4: Constitutional Authority in the Natural Law Tradition

In this final section, a broader perspective on the debate between Kelsen and the Christian-democrats will be adopted in light of the basic thesis of each. For Kelsen, philosophical relativism is the only valid basis for constructing a procedural theory of constitutional democracy. Any theory—like the Christian-democratic theory reviewed above, whatever specific criticisms that can be made against it—fundamentally belongs to a type of philosophical absolutism that results necessarily in what Kelsen describes as absolutism and totalitarianism. For the Christian-democrats on the other hand, Kelsen's type of relativistic positivism involves a risky detachment of politics and the legal system from the objective values that would act as a condition and limit on the will of rulers and thus of a degeneration into totalitarianism. In this section, I will argue that Kelsen misinterprets the central focus of the broader movement of Christian democracy which cannot be characterized as a defence of political absolutism or of totalitarianism. Rather, it provided a way of understanding the important connections between the classical concept of political authority and the democratic procedures of consent and accountability. In developing this point, it will be argued that some of the more specific criticisms Kelsen mounted against the set of Christian-democratic thinkers also miss the mark.

As we have seen in his review of Brunner, Niebuhr, and Maritain, Kelsen comes back to a recurring theme that, where problems of the justice of social institutions are concerned, these thinkers tend to gravitate to a 'relativistic' approach to legal order, and in that sense their difference with his own position collapses in practice. He presents them with the apparent dilemma that, if they continue to insist on the absolute character of natural law, he then equates their views with philosophical absolutism and thus with political absolutism and totalitarianism. The difficulty for Kelsen's position is that he assumes that his version of philosophical relativism is equivalent to the limited type of relativism put forward in the body of thought he reviews. In this respect, it seems that Kelsen does not sufficiently acknowledge that a qualified type of 'relativistic' specification—or even prudential qualification of absolute ethical standards—has always been recognized as legitimately required by those very standards within the 'natural law tradition' in a broad sense. The view that natural law simply needs to be 'copied' or 'mirrored' by positive law was not part of the natural law tradition, despite forming one of Kelsen's long-standing arguments.[69] There was always an

69. For the classic statement by St. Thomas Aquinas of the view that human law can 'derive' from natural law in the sense of finding concrete ways of instantiating fundamental principles in particular circumstances, see Thomas Aquinas, *Summa Theologica* I-II, Q 96, a 2. John Finnis, a more recent natural law theorist working in this classical Aristotelian-Thomist tradition, also discussed this matter. See John Finnis, *Natural Law and Natural Rights*, 2d ed (Oxford University Press, 2011 at ch X.7. See also Hans Kelsen, "The Natural-Law Doctrine Before the Tribunal of Science" in Hans Kelsen, ed, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (University of California Press, 1957) 137. The arguments discussed in Kelsen's piece are closely criticized by Robert George. See Robert P George, "Kelsen and Aquinas on Natural Law Doctrine" (2000) 75:5 Notre Dame L Rev

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acknowledgement that natural law only forms a template for human law and that accordingly there needs to be an adaption of natural law standards to political circumstances.[70]

This issue concerning the qualified relativity of natural law standards in fact connects with a significant point about the natural law tradition which is occluded in Kelsen's analysis of it. The idea that absolute standards can simply be 'copied' or transcribed as a set into the positive law of different societies obscures the sense in which adaptions are required for local contexts, particularly in the context of dynamic circumstances and varying possibilities. Crucially, this is the function of legal or political authority in natural law theory. The specific type of context-relativity recognized by the natural law tradition was thus closely connected with its account of political authority as the means of deciding how natural law principles should be applied in specific contexts, and it is in connection with the notion of political authority that a fuller understanding of the Christian-democratic position becomes possible. As we will see, this position coherently integrates a natural law account of political authority with constitutional-democratic procedure.

Unlike the philosophers and theologians Kelsen focuses on in his extended essay, the concept of authority in constitutional thinking is the specific focus of the work of more politically orientated thinkers working within the Thomistic-scholastic tradition of Christian theology and philosophy.[71] Of some significance in this regard is Yves Simon and in particular his work, *Philosophy of Democratic Government*.[72] For current purposes, Simon builds his understanding of democratic government on a particular theory of authority grounded in the

1625. One of the important points that George highlights alongside acknowledging the nuances in the natural law tradition regarding the (limited) relativity of human law is the question of the natural law method. This is a more complex point and there are differences between George and Finnis and other natural law theorists like Maritain on this point, but it is clear that Kelsen's criticism that natural law illegitimately infers moral norms from scientific data about human nature does not do justice to the fact that natural law is discerned through practical reason (reasoning about action) rather than scientific rationality (reasoning about matters of fact).

70. Kelsen appears to recognize this point in his discussion of Brunner when he asks: "What, then, is the function of a natural law which is not valid?" Kelsen, *supra* note 7 at 47. In other words: what is the relationship between natural law and the law of a particular community? He goes on: "It has, according to Brunner, 'the function of a criterion.' But if the absolute justice of the Christian law of nature refers to a status where no change takes place, it cannot serve as the criterion of justice of a dynamic order which applies to a continuously changing social reality. This social theology tries in vain to differentiate itself from relativistic positivism, which it so passionately rejects" (*ibid*). This objection rests on a verbal contrast between 'unchanging' natural law and 'changing' human/positive law. This ignores the substantive but complex point that natural law and human law are deemed, with the classical natural law tradition, to belong to 'eternal law', a metaphysical/theological category that is explored by Aquinas. See Aquinas, *supra* note 69 at I-II, Q 93. Human law is changeable but the criteria for enacting valid law as an exercise of practical reason are not given solely by its immediate context but more fundamentally and ultimately by the standards of the eternal law.

71. There is the strongest overlap between Maritain, Brunner, and Yves Simon. There appear to be stronger philosophical and theological differences with Niebuhr, but they are arguably not material to the point under consideration at present.

72. See Yves R Simon, *Philosophy of Democratic Government* (University of Chicago Press, 1951).

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broader Thomistic-scholastic tradition. In what follows, we will examine key features of this theory of political authority and its essential functions before setting out Simon's understanding of the nature of democracy in that context.

For Simon, political authority performs a number of important functions, some of which are peripheral and some of which are core to the very idea of political authority.[73] The peripheral functions are largely what he terms functions of 'substitution'. In essence, these involve political authority in coercing harmful activity by overriding deficiencies of information or deciding matters of significant controversy. At the core of the concept of political authority, however, is the idea that political authority allows a community to come to a unified judgment concerning the means to achieve the common good of the community in the case where a choice needs to be made. The notion of the common good is relatively complex both in Simon's work and in the tradition of Thomist scholasticism at large. A working definition of it in a political context involves both conformity with the standards of natural law in establishing the goals of a social group and the unification of the action and will of the life of the community to achieve those ends.[74] In the light of the common good, then, there is an "essential function exercised by authority in the unification of action for the common good when the means to the common good *is not* uniquely determined (so that there is no ground for unanimity)."[75] Alongside this more definite practical essential function, Simon also recognizes something that might be described as a broader and more on-going essential role; namely, that of exercising a type of overarching specialized guardianship of the affairs of the community in its relation to the common good. Simon's own characterization of this role is as follows: According to Simon, this role consists of "the most essential function exercised by authority in the volition of the common good, and of the whole of the common good materially considered."[76]

On the basis of this understanding of political authority, Simon then proceeds to explore the question of how democratic procedures and institutions should be understood from these sorts of premises. In brief, he sees democratic procedure as a mode of organizing and holding to account the ruling authority of a community charged with the task of organizing the common good of the community in question. This understanding of the democratic process results from a subtle reading of how the Thomistic tradition developed a theory of constitutional legitimacy from Aquinas through to the scholastics of the Counter Reformation such as Bellarmine and Suarez. Without examining the exegetical questions posed by Simon's analysis of these earlier figures,[77] for current purposes it might be noted

73. A useful summary list of these is provided in *ibid* at 60-61, n 23.
74. For a characterization of the 'common good,' see "The Volition of the Common Good" in Simon, *supra* note 72 at 36-71; Finnis, *supra* note 69 at ch VI. St. Thomas Aquinas is also important to note in this context because the essence of all types of law, considered as precepts of action—both in general and in a secondary sense in relation to eternal law, Divine law, natural law, and human law—are all connected to the common good. See Aquinas, *supra* note 69 at I-II, Q 92.
75. Simon, *supra* note 72 at 60-61, n 23 [emphasis added].
76. *Ibid*.
77. See *ibid* at ch 3.

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that Simon argues that these writers developed a "transmission theory" of the source of political authority within a community.[78] According to this theory, the community itself is the primary holder of political power and it transfers this to an institutional sovereign (as opposed to the latter being merely nominated or designated by the people). The consequence of this theory was that it always remained possible in extremis, where the sovereign was acting to undermine the viability of the community, that the people could exercise its underlying authority to depose the despotic ruler. Simon brings this 'transmission theory' to bear on the idea of constitutional democracy in arguing that a democratic process of appointing and dismissing rulers in effect represents a rational organization of this residual power to replace a ruler. In that sense, it appears to represent an advance on more uncertain and ad hoc ways of exercising this power. The following statement provides a useful summary of his position: "In other words, over and above this nontransmissible power that the people retains under all circumstances, the people, in a democracy, retains the exercise of powers which are transmissible and would be transmitted if the regime were not democratic."[79]

Accordingly, Yves Simon's work provides an important elaboration of the basic understanding of political authority as developed in the Thomistic tradition. For present purposes, it assists in showing that there is a close connection between the type of relativism that Kelsen identifies in the writers reviewed in the "Foundations" essay and the role of political authority as Simon sets it out in *Philosophy of Democratic Government*. In addition, it shows that the Christian-democratic tradition, as it emerged in the post-war era, was concerned with the Christian natural law tradition not only as the source of a broad ethos of civic society and constitutional-democratic institutions but also as a very specific theory of how democratic procedures of government naturally flow from the 'transmission conception' of political authority. Simon's work thus usefully strengthens the Christian-democratic response to the critiques Kelsen developed against it. At one level, it provides a fuller answer to Kelsen's view that Christian democracy could not establish a necessary link as opposed to a de facto relationship between Christianity and the 'essence' of democracy. If the concept of Christianity is extended to include the scholastic natural law tradition, Simon's work shows how a strong practical-rational relationship can be established between a natural law theory of political authority and democratic procedure.[80] At a more fundamental level, the democratic procedure operates in a context in which a stable set of

78. *Ibid* at 158ff.
79. *Ibid* at 184.
80. The 'transmission theory' has not gone uncontested within the natural law tradition as the idea of a 'transmission' of authority has been seen as a legal fiction (see Finnis, *supra* note 69 at 248). However, it does capture an underlying reality given that the identity of the political community is defined in relation to its common good such that if the legitimacy of political authority derives from its ability to promote the common good, then this simply provides a different way of stating the point that political authority derives its normative authority from the political community.

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values are embedded in the common good of the polity such that the purpose of the democratic procedure is to ensure that political authorities remain responsive to the community and its values. Thus, far from collapsing into a position equivalent to philosophical relativism, as Kelsen's critique would have it, Simon's view sustains a very different sense in which the legal system always retains both a relation to the circumstances of particular political communities (the relative) and to the natural law (the absolute) via the common good (rather than to the relative value judgment of a particular individual or faction). For Kelsen, the function of democratic procedure is by contrast detached from the function of forming the common good and is simply seen as a way in which certain types of general norms are adopted as part of a broader dynamic legal order. This, it is worth highlighting again, makes it difficult for Kelsen to argue for substantive constraints on democratic procedure.

At this point it would be worth examining the overall tenability of Kelsen's critique of Christian democracy from a broader perspective. Ultimately, on the basis of his neo-Kantian philosophy and metaethics, Kelsen sought to present Christian democracy with an uncomfortable alternative: either it stressed a commitment to philosophical absolutism and hence, according to Kelsen, it tends to a political absolutism or totalitarianism, or it tacitly adopts a relativistic understanding of the legal order governed by majority decision-making and thus its commitment to philosophical absolutism is irrelevant to its conception of the constitutional-democratic order. As we have seen, there is a sense in which the Christian-democratic standpoint maintains a type of relativity for political communities but within the context of its commitment to moral absolutism. However, there remains a residual point to consider in this regard, which is whether Kelsen is correct to equate moral absolutism and political totalitarianism. Arguably, Kelsen's underlying neo-Kantian philosophical position provided him with a narrow template for characterizing this point. Values on this view could only be understood as a kind of subjective postulate so that the only question that could arise was the type of claim involved: absolute or relative. Kelsen could not find room for concepts like the common good in which elements of particularity and de facto communal relationships were involved alongside a commitment to moral absolutism. This is also attested to by the copy or transcription theory of natural law that he continued to advocate. Further, as we have seen, the way in which natural law theory understood the 'transmission' theory of political authority meant that a strong connection could be established between that concept of political authority and democratic procedure. In this way, the charge of totalitarianism becomes difficult to sustain.

A final point in connection with this issue is to consider whether Kelsen had a distorted understanding of totalitarianism. This is particularly important in light of the broader political context in which Kelsen and the natural lawyers were providing competing accounts of the foundation and character of constitutional democracy in the light of totalitarian challenges. Yves Simon argues that both totalitarianism, liberalism, and we might add Kelsen and contemporary political constitutionalism, see governmental authority as essentially concerned with managing evils: either self-interest carried to excess or a tragic inability to agree on

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matters of the common good.[81] He calls this the "deficiency theory" of government.[82] For Simon, there has to be a pre-existing consensus on the common good within which constitutional authority can then exercise its proper and essential functions. Given 'the people' is defined with reference to the common good, there is also a sense in which the concept of the common good underpins the transmission theory and, hence, the idea of constitutional democracy. Although Simon does not develop a complete account of the way a 'deficiency theory of government' functions in totalitarian and liberal systems respectively (and we might query now many 'liberal' theories fit this description), it might nevertheless be said that if governmental authority is seen as exclusively concerned with intervening to correct anti-social behaviour or as the only viable mechanism for solutions of intractable moral disagreements amongst citizens, then it is possible to see how social coordination becomes uniquely identified with the state and its jurisdiction. It cannot pre-suppose forms of consensus and coordination embedded in the logic of human interaction and orientated to the common good. In light of this understanding of the situation, it might *seem* justifiable to follow a Hobbesian logic according to which state authority may have to gain significant powers over the production of social order in the light of dangers of social disintegration. Evidently more might be said here regarding the nature of totalitarianism and the conditions for its emergence, but there seems to be a potential connection between an exclusively 'substitutionary' view of government authority and an overreliance on the role of the state in achieving social coordination, an overreliance which might pose totalitarian risks.

Conclusion

To sum up, in relation to Kelsen's work, the above discussion has shown how a careful reflection on Kelsen's distinctive epistemological concerns helps to reveal a rich theory of legal authority and the nature of constitutionalism, which attempted to confront the challenges of a developing public order in a modern society increasingly characterized by conflicting moral perspectives. However, the problem of self-refutation affects the transition from metaethical theory to constitutional prescription, and the formalist theory of law does not sit well with his view of constitutional democracy.

A fundamental challenge to Kelsen's understanding of constitutional democracy also emerges from reflecting on his debate with the post-war Christian-democrats and might be stated as follows: Kelsen is compelled by the internal logic of his position to draw a stark contrast between philosophical relativism and philosophical absolutism. On a different set of assumptions, as we have seen, this dichotomy has been drawn too sharply. Natural law theories accommodate a type of relativism regarding the applicability of universal or absolute principles in the

81. See Simon, *supra* note 72 at 4.
82. *Ibid.*

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context of political societies. There is a further implication that arises from this. The contrast between philosophical relativism and absolutism is correlated by Kelsen with the distinction between democratic constitutionalism and political totalitarianism. This, on the basis of what has been discussed—particularly in relation to the work of Yves Simon—does not seem to account for the sense in which philosophical absolutism (in the shape of a natural law theory) can support a robust conception of democratic authority. In addition, it seems that Kelsen's views presuppose a narrow view of governmental authority as essentially 'substitutionary' in nature: a view which itself potentially leads to the danger of an unconstrained role for the state.

Kelsen's principal rival in the project of providing the foundations for constitutional democracy in the post-war era, the renewed tradition of natural law thinking, is accordingly not only resistant to Kelsen's critiques but also provides a coherent ethical foundation for constitutional democracy, with a clear conception of the relation between the function of political authority and democratic procedure. In introducing this discussion, we noted that there are a number of challenges to the basic institutional structure of constitutional democracy from political constitutionalism through to the difficulty of balancing global and local problems. The continuity of post-war Christian democracy—with a long classical and Christian tradition of reflection on the role of political authority in mediating universal principles in specific contexts—arguably still provides a coherent set of ideas within which these new challenges can be framed.

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