

# Hans Kelsen's Political Theology Science, Pantheism, and Democracy

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## Abstract

This article argues that the field of political theology should pay greater attention to Hans Kelsen. Kelsen developed a unique, epistemological form of political theology. For Kelsen, a subject's beliefs about what is knowable determines the form of theology and jurisprudence both. He argued that subscribing to a modern scientific epistemology led one to embrace a pantheist theology and democracy. Drawing on the structural analogy between theology and jurisprudence, Kelsen offered an alternative theory of democratic legitimacy. He argued that pantheism's immanent conception of the divine, of truth and right, is a model for understanding democratic legitimacy. Democratic proceduralism is valid because it generates valid law relatively and immanently, not absolutely and transcendently.

## Keywords

Hans Kelsen, Political Theology, Democracy, Relativism, Science

# Hans Kelsens Politische Theologie Wissenschaft, Pantheismus und Demokratie

## Zusammenfassung

Die Politische Theologie, so wird in diesem Artikel argumentiert, sollte Hans Kelsen mehr Aufmerksamkeit schenken. Kelsen entwickelte eine einzigartige, erkenntnistheoretische Form der politischen Theologie. Für Kelsen bestimmen die Überzeugungen eines Subjekts über das, was man wissen *kann*, sowohl die Form der Theologie als auch der Jurisprudenz. Er argumentierte, dass das Bekenntnis zu einer modernen wissenschaftlichen Erkenntnistheorie zu einer pantheistischen Theologie und Demokratie führt. Unter Berufung auf die strukturelle Analogie zwischen Theologie und Rechtsprechung bot Kelsen eine alternative Theorie der demokratischen Legitimität an. Er argumentierte, dass die immanente Konzeption des Göttlichen, der Wahrheit und des Rechts im Pantheismus ein Modell für das Verständnis demokratischer Legitimität ist. Der demokratische Prozeduralismus ist gültig, weil er gültiges Recht relativ und immanent, nicht absolut und transzendent erzeugt.

## Schlüsselwörter

Hans Kelsen, Politische Theologie, Demokratie, Relativismus, Wissenschaft

The author has declared that no competing interests exist.

## 1. Introduction

Despite all the volumes written on political theology, there is scarcely mention of Hans Kelsen. With the notable exceptions of Baume (2009), Neumann (2008), and Górniewicz (2020), if Kelsen is mentioned in the context of political theology, he tends to be a mere footnote to Carl Schmitt.

This article argues that the field of political theology should pay greater attention to Kelsen. Kelsen developed a unique, *epistemological* form of political theology. Kelsen's epistemological political theology can be described briefly: a subject's beliefs about what is knowable determines the form of theology and jurisprudence both. He argued that subscribing to a modern scientific epistemology led one to embrace a pantheist theology and democracy. Drawing on the structural analogy between theology and jurisprudence, Kelsen offered an alternative theory of democratic legitimacy, one that complements his more well-known writings on democracy. He argued that pantheism's immanent conception of the divine, of truth and right, is a model for understanding democratic legitimacy. Democratic proceduralism is valid because it generates valid law relatively and immanently, not absolutely and transcendentally.

## 2. What is Political Theology?

Of the different ways to define political theology, Böckenförde argues that Schmitt gave political theology its "classic" *juristic* definition. Throughout, political theology will be used in a juristic sense. Juristic political theology examines how juridical concepts are analogous to theological concepts and, in many cases, how juridical concepts trace their origins back to theology (Böckenförde 2020, 251-254).<sup>1</sup> Schmitt described a "structural identity of theological and juridical concepts, arguments, and insights" (Schmitt 2008, 42). This structural identity, Schmitt famously wrote, means that "all significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state [...] – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts" (Schmitt 2005, 36). In other words, Schmitt argued, because juridical concepts

were imported from theology, their nature mirrors that of their theological counterparts. Schmitt argued that this structural identity makes it imperative for jurists to recognize and understand the theological analogues of their juridical concepts.

That structural identity helps jurists to answer juridical questions. Juristic political theology is a method for examining the nature and legitimacy of public order by appealing to ontological and normative arguments in theology and metaphysics. Jurists can draw inspiration from *structurally* similar problems and solutions in theology and metaphysics. For example, juridical arguments about the nature and legitimacy of political sovereignty can be made by drawing on theological arguments about the nature and legitimacy of god's sovereignty.

## 3. Was Kelsen a Political Theologian?

At first glance, Kelsen's marginalization in discussions of political theology might seem appropriate. On the one hand, one of the most well-known goals of Kelsen's thought is to purify jurisprudence of meta-judicial influences. Kelsen believed that, as long as extra-legal elements pervaded jurisprudence, the law was open to abuse. Accordingly, he theorized how to purge law of the influence of disciplines such as philosophy, sociology, and, of course, theology. Because it insists on a definite relationship between theology and jurisprudence, political theology seems to exemplify what troubled Kelsen about some trends in modern jurisprudence. In fact, Kelsen even polemicized against political theology in *Secular Religion*, calling out Schmitt explicitly for overstating the significance of analogies between the two disciplines (Kelsen 2012, 17-38).

On the other hand, Kelsen's marginalization might also seem appropriate because Schmitt wrote his 1922 *Political Theology* in part as a direct attack on Kelsen's thought. As Roberts (2015, 468) argues, Schmitt theorized political theology as a "direct response" to Kelsen's goal of purifying the law. Against Kelsen, Schmitt argued that law's meta-judicial elements were ineliminable, both genealogically and structurally. The conceptual work of political theology, Schmitt believed, demonstrates that a pure theory of law was a quixotic goal. For these reasons, Kelsen's relative absence from work on political theology makes sense at first glance.

Yet closer inspection clouds this impression. In his *Political Theology*, Schmitt (2005, 40) writes a curious remark: "Kelsen has the merit of having stressed since 1920 the methodical relationship of theology and jurisprudence." Schmitt acknowledged that Kelsen engaged in political theology two years before he wrote

<sup>1</sup> Besides juristic political theology, Böckenförde identifies institutional and appellative political theology. Institutional political theology analyses whether and to what extent a political order is justified by theological beliefs. Appellative political theology analyses how Christians can reconcile their beliefs with regard social and political issues, responding to Christianity's apolitical and private qualities.

his book.<sup>2</sup> This acknowledgement should give pause. Of course, Schmitt goes on to argue that he wrote about political theology even earlier than Kelsen, in his 1914 *Der Wert des Staates* (Schmitt 2004).

Yet, as both Baume and Neumann have argued, Kelsen actually discussed the analogy between politics and theology even earlier than Schmitt did, in 1913 (Baume 2009, 371; Neumann 2008, 180). In *Über Staatsunrecht*, Kelsen first drew an analogy between the microcosm of legal order and the macrocosm of the order of the universe (Kelsen 1913, 9-18.). He argued that, just as god personifies the natural order, so too does the state personify the legal order. He added that, for both theology and jurisprudence, personification leads subjects of that normative order to perceive a kind of creative, sovereign will that generates the respective order (Kelsen 2013, 17-18). Finally, Kelsen examined how, like in theology, any worldview about how law functions rests on dogmatic, unchallengeable presuppositions (Kelsen 1913, 20-21).

Building on this account, Górnisiewicz describes how Kelsen argued that the similarities between theology and jurisprudence become “most conspicuous in the following pairs of analogies. God’s omnipotence, personal nature, transcendence to the world order, and the possibility of acting against the laws of nature through miracles have their respective analogies in the state’s sovereignty, personality, non-overlapping with the legal order, and its ability to waive the rules of law” (2020, 51). Górnisiewicz argues that not only did juristic political theology as we understand it today begin with Kelsen, but so are some of the most well-known analogies of political theology – analogies typically associated with Schmitt.

Neumann offers one plausible explanation for Kelsen’s and Schmitt’s near simultaneous engagement with political theology: coincidence. Kelsen and Schmitt independently theorized the structural identity between theology and jurisprudence, each offering his own idiosyncratic interpretation of the meaning of that identity (Neumann 2008, 180, 185-186). An alternative explanation for this coincidence could be that political theology is another of Schmitt’s “hidden dialogues.” Political theology could be similar to the cases that Scheuerman identified, in which Schmitt appropriated and built on another’s work without fully acknowledging his debts (Scheuerman 2019). Regardless of how we explain this coincidence and although Kelsen might

have found it deeply ironic that he would one day be associated with political theology, it is clear that Kelsen is more than a mere footnote to Schmitt. The relationship between Kelsen’s thought and political theology merits closer scrutiny and direct confrontation.

The remainder of this article presents a fuller picture of how Kelsen’s thought can be construed as a kind of political theology. While it is true that, as Mehring argues, Kelsen never systematized his thoughts on this subject (Mehring 2004, 269-270), there is enough among Kelsen’s writings to understand the broad sketches of what could be called Kelsen’s political theology. To develop Kelsen’s argument, this article begins with an exposition of existing work on Kelsen’s political theology. I reconstruct Kelsen’s *critical* political theology by drawing on the work of Baume, Neumann, and Górnisiewicz. I then argue that existing scholarship has overlooked Kelsen’s *positive* political theology. I show how Kelsen also used political theology to offer an alternative theory of democratic legitimacy. Kelsen justified democratic proceduralism by appealing to theological-metaphysical concepts like immanence, pantheism, atheism, and relativism. Although Kelsen opposed transcendental justifications of politics and law, he nevertheless showed how the structural identity between jurisprudence, politics, and metaphysics (broadly construed) could be used to understand the legitimacy of democratic proceduralism. I conclude by briefly discussing why this argument matters.

#### 4. Kelsen’s Critical Political Theology

Baume, Neumann, and Górnisiewicz analyze how Kelsen used the structural identity between theology and jurisprudence in order to criticize early twentieth century “dualist” state theory. In the early twentieth century, German state theory tended to be dualistic. For example, Jellinek’s seminal *Allgemeine Staatslehre* exemplifies dualism. Dualist state theorists believed that the state was sovereign and independent of the positive law. The state was, in a sense, more than the sum of its positive legal parts. Its independence produced two overlapping but distinct systems of public order. Hence the term “dualism.”

Kelsen developed his critical political theology in order to theorize the basis for the dualist relationship between the state and positive law – and then to criticize it. He argued that, for dualism, the dynamic of state and positive law was analogous to that of God and the laws of nature. As God willed nature and its laws into existence, the state wills positive law into existence. Because the state creates positive law, it cannot be bound by it (except voluntarily) – just like God cannot be bound by laws of nature. By theorizing the state’s *transcendence*, dualism

2 In his polemic against Kelsen, Sander argued that the political theological arguments in Kelsen’s 1922 *Der soziologische und der juristische Staatsbegriff* were indebted to exchanges with Sander, beginning with Sander’s 1920 habilitation lecture on “God and the State.” Kelsen, for his part, similarly suggested that Sander borrowed from his ideas (Olechowski 2020, 321-341). Regardless of who influenced who in 1920, the fact remains (as noted above) that Kelsen discussed the structural identity already in 1913, predating Sander’s work on the subject.

strengthened state authority vis-à-vis the positive law – in the same way that God transcends the laws of nature and God's authority supersedes the laws of nature (Kelsen 1974a, 70-72, 77-78; 2002a, 97-98; 2008, 182; Górnisiewicz, 50). Transcendence amounts to a kind of freedom of the will for both god and the state (Neumann 2008, 171-172). Kelsen goes on in his critical analysis of dualism. When the state violates the positive law, it is analogous to when God commits a miracle and violates the laws of nature. A miracle is an event that cannot be explained according to laws of nature. Similarly, some state actions may not be comprehensible through the framework of positive law. But, for a dualist, their legal incomprehensibility does not invalidate them, just as our inability to understand how God's miracle violates the laws of nature does not mean the miracle did not happen. Kelsen characterized the dualist conclusion about state sovereignty through analogy: the state may validly intervene into the legal order *at will* because its will created that legal order in the first place – for the same reason that God may validly intervene into God's natural order at will.

Yet, Kelsen argued, the structural identity between theology and jurisprudence provided a way to criticize dualist state theory. The foundation of Kelsen's critique is his analysis of the role that *personification* plays in both theology and jurisprudence (Neumann 2008, 170; Górnisiewicz 2020, 52). Kelsen argued that personification allows a complex system of individual norms to be conceived as a coherent whole (Kelsen 1913, 9; 2002a, 101; 2008, 93). In the domain of theology, God personified the system of norms governing the universe, both the laws of physics and the moral law. In the domain of jurisprudence, the state personified the system of positive legal norms of a juridical order. In the same way that "god" personifies the natural order, "the state" personifies the positive legal order.

Kelsen believed that personification was valuable because it was useful. Personification makes comprehensible what might otherwise be an incomprehensible mess of individuated norms and actions (Kelsen 1913, 12). It creates a conceptual point, onto which the aggregate of individual actions on behalf of the legal order can be attributed (Kelsen 1913, 13-15; 1974a, 76; 2002a, 100-101; 2008, 99). Górnisiewicz summarizes Kelsen's argument as follows: "The legal personality of the state in the final analysis proves to be nothing else than the point of imputation, and the central point – at which the imaginary lines of particular imputations cross (although these lines 'come through' the acts of particular human beings acting as the state's organs, they do not stop there and cannot be located in any physical person) – is the proper will of the state" (Górnisiewicz 2020, 54; see also Kelsen 1913, 13; Neumann 2008, 170). By imputing to a fictional

state-person all individual human actions performed on behalf of a complex normative system, subjects of that normative system can understand it as a unitary, contradictionless, and intentional system (Kelsen 1913, 11; 1920a, 20-21; 2002a, 50-51). Thus, for Kelsen, the will of god serves as an attribution point for all being, which began with god's transcendental normative command "to become" and who bridges normative and 'explicative' worlds. Similarly, the will of the state serves as the attribution point for a positive legal order. The state willed the legal system into existence and it maintains a correspondence between juridical facts and norms.

Besides easing the cognitive burden on subjects of a normative order, Kelsen believed that personification was also valuable because it helped subjects to identify when an individual act represented that normative order. The fact/value divide was a central feature of Kelsen's thought (Kelsen 1955, 17; 2002a, 35-36; 2008, 120). He argued that norms have no tangible, material existence. Lacking any material reality, they are themselves incapable of causation (Baume 2009, 380; Kelsen 1913, 12). They cannot affect material reality themselves. Because the state is a personification of the normative order, neither its will nor personality has any psychological or causal reality either. The state – for Kelsen – is just a "juridical symbol" (Kelsen 1913, 15). Only human beings are capable of realizing norms in material reality (Kelsen 2008, 192; Baume 2009, 372). As Górnisiewicz argues, Kelsen believed that conceiving of the state as a juridical person allows subjects of the legal order to distinguish between when a human represents the state-person or himself (Górnisiewicz 2020, 53-54; see Kelsen 1974a, 77). When the law authorizes certain actions, then those actions are attributed to the legal order – the state –, rather than to the human being actually performing them. Those acts are treated *as if* they were willed by the state-person (Górnisiewicz 2020, 52). Phenomena like imputation, personification, and representation help subjects to distinguish when an individual validly represents the state-person and thus may act in ways that are otherwise legally proscribed.

Kelsen argued that personification plays an important constructive role in jurisprudence. Personification allows subjects to conceive of a manifold of norms as a coherent and intentional order. And it distinguishes valid representatives of that normative system. As Baume argues, Kelsen saw value in personification as a *heuristic* device (Baume 2009, 372; Kelsen 1920a, 18; 1974a, 69). It helps individuals understand the normative systems to which they are subject.

Kelsen argued, however, that there were limits to the value of personification. Kelsen's critical political theology begins by identifying these limits, and how his contemporaries had exceeded them. Kelsen argued that personification ceases to be useful when subjects of a

normative order *hypostasize* that personification (Kelsen 2002a, 105; 2008, 108). Hypostasis occurs when subjects believe a (fictitious) person actually exists, confusing its metaphorical and symbolic function for concrete reality.

Kelsen believed that both theological and juridical dualism originated in hypostasis. Through hypostasis, a normative order is reproduced – doubled, in a sense (Baume 2009, 372; Vatter 2014, 247ff.; Kelsen 1920a, 17-18; 1974a, 69; 2002a, 105; 2008, 420-421). But, Kelsen believed, the reproduction was flawed. Through hypostasis, “god” ceases to be merely a stand in for the system of physical and moral laws that make up the natural world and becomes “God,” a willing and intentional being somewhere out there. God’s will, rather than being merely a conceptual attribution point for the various laws of nature, is conceived as a real creative power. In this way, Kelsen argued, hypostasis produces the belief that god *transcends* the natural order. God becomes conceived as a being independent of the laws of nature, capable of suspending them with miracles and other acts of will.

The state was hypostasized in the same way, Kelsen argued. Through hypostasis, “the state” ceases to be merely a stand-in that unified a series of positive laws and becomes “The State,” a willing and intentional being somewhere out there that was actually responsible for that system of positive law (Kelsen 1974a, 70). Like God’s will, The State’s will becomes a real creative power, rather than serving as a conceptual attribution point. Just as hypostasis produced the belief in a transcendent God, it also produces the belief that The State *transcends* the positive legal order. The State becomes conceived as a being independent of the positive law, capable of suspending the positive legal order with juridical exceptions – as dualism had done.

According to Kelsen, the process of hypostasis leads subjects of a normative order to conceive of its symbolic person as a substantive, material being. In the process, the person becomes more than the sum of its parts. Subjects believe that the person transcends that normative order and has power over it.

What begins as an epistemological error becomes a normative problem. Subjects conceive of a transcendent person’s extra-legal acts as nevertheless legitimate acts. For example, if God transcends the natural order, and if God’s will produced that order, then not only is God independent from it but God must be able to *validly* do whatever God wants to do to that order, including suspending it. Similarly, if The State transcends the positive legal order, and if The State’s will produced it, then The State is independent from that order. The State can validly do whatever The State wants to do to that order, including suspending it. Transcendent persons are conceived to be omnipotent vis-à-vis the normative systems that they represent (Neumann 2008, 171;

Górnisiewicz 2020, 60). For Kelsen, this was the crux of the normative problem. By believing that The State was above the positive law, subjects would accept The State’s “right” to violate it. The belief in transcendence, a consequence of hypostasis, leads to a belief in the legitimacy of what is actually an arbitrary and extra-legal exercise of political power (Baume 2009, 371; Neumann 2008, 174; Górnisiewicz 2020, 49-50; Kelsen 1974a, 75-77).

Kelsen believed engaging in critical political theology could reveal how this epistemological error crept into our thought. Critical political theology provided a framework for deconstructing *and delegitimizing* how dualist state theory could enable the arbitrary exercise of state power (Kelsen 2002a, 106). The structural identity between theology and jurisprudence could be turned into a liability for dualist state theory. Scientific method had allowed scientists to deconstruct “God” into its constituent laws of nature. By collapsing god into the laws of nature, the Church could no longer use phenomena that *seemed* to violate those laws as a source of power over believers. Scientific method deprived the church of arbitrary power and authority over its subjects.

Kelsen believed that jurists could deprive the state of arbitrary power by similarly deconstructing the state-person. He aimed to create a kind of Copernican revolution in jurisprudence that would collapse the concept of the state back into the system of positive law. Kelsen hoped to show that the state was no more than the sum of its parts (Kelsen 2008, 182-183, 190-191). It was merely a juristic construct. As such, it has no will and was incapable of causation (Kelsen 1913, 12). The state was merely the aggregate of legal norms and dependent on their content (Neumann 2008, 173-174; Górnisiewicz 2020, 53). Thus, the aim of Kelsen’s critical political theology was to deconstruct the foundations of dualism scientifically in order to clear the ground for his own *monistic* state theory (Baume 2009, 371; Górnisiewicz 2020, 50). That monistic state theory was Kelsen’s pure theory of law.

To summarize the argument so far, juristic political theology uses the structural identity between theology and jurisprudence to examine the nature and legitimacy of public order by appealing to ontological and normative arguments in theology and metaphysics. Kelsen used juristic political theology *critically*. He used the structural identity between jurisprudence and theology to analyze *illegitimate* aspects of public order. The structural identity becomes a tool for deconstructing dualism, through the use of modern scientific epistemology.

Scholars have so far only gone this far, however, arguing that Kelsen used political theology merely to discredit dualistic state theory. In the next section, I show how there is more to Kelsen’s political theology. I

show how Kelsen used the structural identity between theology and jurisprudence to theorize the legitimacy of two ideal-typical state forms: autocracy and democracy. And in so theorizing the bases of democratic legitimacy, Kelsen also used political theology constructively.

## 5. Kelsen's Positive Political Theology

Unpacking Kelsen's constructive, positive political theology requires first taking a step back and analyzing something that makes it distinctive from other political theologies. As Neumann and Górniewicz argue, what makes Kelsen's political theology distinctive is its epistemological foundation (Neumann 2008, 173-174; Górniewicz 2020, 60-61; see Kelsen 1922, 210-212). In contrast, for example, Schmitt's political theology is ontological, in the sense that it legitimates concrete order (*Ordnungsdenken*).<sup>3</sup> Schmitt used political theology to understand the essence or nature of juridical phenomena. Political theology allowed him to explain the nature of the state by reference to the nature of god. Kelsen, on the other hand, used political theology to analyze the consequences of theories of knowledge.

That epistemological orientation allowed Kelsen to explain the structural identity of political theology differently – epistemologically. Rather than tracing juridical concepts back to their theological origins genealogically, Kelsen argued that similarities between how a subject's conception of theological and juridical matters were due to how a subject confronts external reality. In other words, the underlying way in which a subject confronts and apprehends external reality – and, Kelsen adds, in a sense seeks to possess it – explains why theology and jurisprudence offer similar explanations and use structurally similar concepts (Kelsen 1974b, 96). What was decisive, for Kelsen, was the psychological disposition of a particular *apprehending* subject (Kelsen 1974b, 97; 1955, 17-18; 2008, 424-425). Kelsen believed that the particular way that a subject conceived of external reality would be reproduced from discipline to discipline. The structural analogy could be applied beyond theology and jurisprudence. For example, Kelsen briefly explains how it applies also to psychology and physics (Kelsen 1922, 253). In sum, the structural identity was rooted in the human mind and the way an individual subject conceived the world around his or herself.

Kelsen believed that how a subject apprehends external reality could be summed up by a single "decisive question" (Kelsen 1974b, 109; see also Kelsen 1955, 14-18). That question is "whether one believes in an absolute

value, and thus in an absolute truth and reality, or whether one assumes that only relative values, and hence only relative truth and reality, are accessible to human knowledge." Effectively, this question asked whether one believes that there is something beyond human experience, some value and truth, that is knowable.

Kelsen believed that one's answer to that "decisive" either/or question determined which of two ideal-typical worldviews one held. If there was 'the absolute,' and some objective external reality was knowable, one would adopt a worldview acknowledging transcendence. Those who answered in the affirmative believed that being existed beyond both natural and juridical experience. That transcendent being determined, or should determine, material reality. Conversely, if there was no 'the absolute,' and no objective external reality was knowable, there was no transcendence. Individuals' experiences and their interpretations of material reality was all that could be known about both natural and juridical order.

Kelsen's critical political theology examines how affirmation of "the absolute" bears on personhood. Regarding theology, "God" lies above and beyond the natural order. And it is God's will that ultimately matters, not the natural order or empirical reality. Jurisprudence is similar. The will of "The State" is ultimately what is decisive. In both cases, sovereignty rests in the transcendent person. The transcendent person can *at will* suspend and intervene into its normative order. Which means it is their will, and not the norms themselves, which are decisive in the last instance.

So far, literature on Kelsen and political theology has not discussed the relationship between how one apprehends external reality and state form. Kelsen makes this argument first in his 1920 *Vom Wesen und Wert der Demokratie*, a text that has been overlooked by analyses of Kelsen and political theology. By recognizing that there is transcendent being, which generates order, one also recognizes the existence of absolute value and absolute truth. Their existence, Kelsen argues, legitimates *autocratic* politics (Kelsen 1920b, 84). The recognition of transcendent truth and value determine what is objectively right. This objectively right order may be justifiably imposed on subjects – regardless of whether they recognize its legitimacy or not (Kelsen 1920b, 76). It is the state's purpose to realize right in the world. If there were absolute truth and value, then Kelsen argues that it would be "absurd" to allow laws to be enacted contrary to them (Kelsen 1955, 38; 1957b, 206). The leader of the autocratic state, is similarly transcendent. The leader sits above and outside the political community that he governs (Kelsen 1974a, 105). Kelsen argues the transcendentally justified state and leader can validly "close itself off" from subjects ignorant of "the absolute" (Kelsen 1920b, 83-84; 1957b,

<sup>3</sup> To be sure, Schmitt's use of political theology is more complicated than merely an ontological account. Among other things, he sometimes uses "political theology" in ways inconsistent with its juristic definition.

201). The state does not need to consult with its subjects because its knowledge of truth and right is sufficient legitimation already. In this way, the absolutist state is greater than the sum of its parts (Kelsen 1955, 33).

Kelsen did not discuss the following, but it seems like he has religious orthodoxy in mind as the theological analogue to autocratic politics. For both, grasp of “the absolute” legitimizes its imposition. In a passage that seems to anticipate Karl Popper, Kelsen describes how the relationship between knowledge of “the absolute” and autocratic politics has a long history in political thought, extending back to Plato (Kelsen 1974b, 110).<sup>4</sup> That argument matures in his 1938 *Platonic Justice* (Kelsen 1957a). There, Kelsen argues that Platonic political doctrine boils down to the following insight: because only the philosopher can have knowledge of the good and the true, the masses have no justifiable option but total submission to his rule (Kelsen 1957a, 105-106). For this reason, Kelsen concludes, Platonic political thought is “the ideology of every autocracy” (Kelsen 1957a, 109; 1957b, 204).

It is the denial of “the absolute,” however, that tells us what Kelsen’s constructive or positive political theology is. Kelsen is inconsistent in how he characterizes the worldview that denies “the absolute,” varying it across his writings. He describes it as “epistemological anarchism,” because it denies the independent existence of transcendent entities, like the state (Kelsen 1974a, 80-81). He describes it as “relativistic,” because its empiricism, along with the fact/value divide, means value cannot be objectively determined (Kelsen 1920b, 83). As Urbinati and Invernizzi-Accetti argue, because it did not attempt to impose any transcendent conception of truth, Kelsen believed that democracy was the only regime that could validly respond to the fact of the pluralism that characterizes modern societies (Urbinati/Invernizzi-Accetti 2013, 8). And he describes it as “scientific” and “modern scientific,” because it uses empiricist criteria to determine the validity of truth-claims and because that validity is temporary, lasting as long as it has not been falsified and superseded (Kelsen 1922, 248). Finally, he characterizes it as “immanent,” because it holds that validity is determined by correspondence to empirical reality instead of to some transcendent one (Kelsen 1922, 210; 1955, 30). That is, validity emerges out of material reality – instead of coming down from a higher plane.

Although epistemological anarchism, relativism, modern science, and immanence are not completely identical, I do not see Kelsen’s use of different terms relatively interchangeably as a problem for his

underlying argument. To the contrary, they are united by Kelsen’s underlying epistemological presupposition that individual experience determines the limits of what can be known.

Kelsen believes that a skeptical, scientific worldview also explains the structural identity of conceptions of personhood in theology and jurisprudence. Modern scientific method deconstructs hypostasized entities by dissolving the substance into its function (Kelsen 1974a, 82). Theologically, Kelsen argued that the modern scientific outlook “abolishes theology” – by which he means a *transcendent* god or gods (Kelsen 1922, 247-248). (Elsewhere, he argued that it ends or abolishes “metaphysics”, see Kelsen 1974b, 109; 2002b, 107; Kelsen 2008, 421.) He argued that modern science replaces theology with a type of pantheism in which god is everything that exists materially (Kelsen 1922, 223; 2008, 433). According to this form of pantheism, god is immanent in and coextensive with the empirical world. Pantheism absorbs god back into the laws of nature. God is a quality *already* part of each individual (Kelsen 1922, 229; 1974a, 75). Kelsen argues that this form of pantheism conceives of god as nothing more than an attribution point for all of the laws of nature. The “will” of god is merely the effect of the unfolding of prior causes according to those laws of nature. This pantheistic god has no distinct personality. Nor the ability to intervene into the natural order. God is nature and nothing more (Kelsen 1922, 246). Kelsen believed that scientific method’s denial of the absolute reduces the personality of god to its original (and correct, for Kelsen) symbolic and explanatory function. In sum, Kelsen argues that, theologically, pantheism corresponds to the positive outcome of the deconstruction of the person of god into the laws of nature.

Juristically, Kelsen argued that the modern skeptical, scientific outlook abolishes the sovereign, transcendent state. Just as how scientific pantheism absorbs the person of god back into the laws of nature, scientific jurisprudence absorbs the state-person back into positive law (Kelsen 1922, 248, 253). The state is immanent because it is coextensive with that positive legal order. It is just an attribution point. The state-person’s “will” is simply whatever legal causes and effects are dictated by the positive legal order. The “scientific” state, so to speak is like the pantheistic god. It has no agency and cannot intervene into the legal order at will – the legal order *is* its will. Viewed through the lens of modern scientific method, the state is nothing more than the sum of the positive laws. The structural identity of political theology allows Kelsen to deconstruct the state in the same way that pantheism deconstructed god.

Besides determining the nature of the state-person, Kelsen also argued that the epistemological outlook of modern science determines valid state form. Kelsen

<sup>4</sup> As Schuett describes, Kelsen played an important role in helping Popper to escape Vienna and write *The Open Society and Its Enemies*. Despite the significant differences between the two thinkers, there are important parallels between the value they place on “open society ideals” of freedom, democracy, human rights, and peace (Schuett 2021).

believes that the modern scientific epistemological outlook, with its denial of "the absolute," corresponds to a democratic state form. Democracy is the only valid form a state can take when one holds this epistemological anarchist, relativist, modern scientific, and immanent worldview. Kelsen believes that democracy is modern scientific method's state form (Kelsen 1955, 14; 1957b, 203-204; 1974b, 101-102; 2002b, 107-108).

Epistemology is the key to unpacking Kelsen's arguments about valid state form in the context of his positive political theology. If there is no absolute truth, if valid knowledge is determined experientially and contingently, then no individual or institution can claim privileged knowledge of truth or right (Kelsen 1920b, 84). Knowledge is relative to each individual's particular experience. Without "the absolute," there is no valid claim to authority based on truth or right. The validity of a truth-claim is relative to an individual's experience with it. But no individual's conclusions about his or her idiosyncratic experience supersedes another's. As transcendence produces hierarchy, immanence produces its opposite: equality. Every individual has equal claim to know truth and right. Each individual's will has the same value and dignity (Kelsen 1955, 18; 1957b, 204; 1974b, 111). Similarly, the system of norms that any individual would will, based on that knowledge, is as valid as any other's claim *a priori*.

At first glance, the relativity of truth and right seem to invalidate any coercive public order. On the one hand, there are no transcendent principles, like natural law, that are simply right and determine valid order. On the other, because of political equality, it's not immediately clear which norms should become part of the public order when there is disagreement. Without transcendence, positive law that is coercive does not seem justifiable. Yet Kelsen does not espouse political anarchism.

Kelsen believed that modern scientific method provides a solution. Just like the validity of laws of nature are determined by modern science's empirical methods, so too can the validity of positive laws be determined empirically.

Although relativism means that it is impossible to determine whether the normative *content* of a particular law is objectively right, it is nevertheless possible to observe, verify and measure the quantity of individuals who hold a particular belief about its rightness. By counting the number of individuals who are for (or against) a particular law, it is possible to establish its relative validity *a posteriori*, relatively, and immanently. The validity of law is determined *a posteriori*, based on individuals' experiences with what is right. Validity is determined relatively because there are no "higher" criteria with which to evaluate the validity of those experiences (Kelsen 1920b, 83; 2008, 434, 436). In addition, validity itself is dynamic and subject to change

as individuals' experiences, and the values they infer from them, change (Kelsen 1974b, 105). Finally, validity – of both laws and elected representatives – is determined immanently because it was the aggregate of individuals' experiences (Kelsen 1974b, 109).

Kelsen believed that democratic procedures ideally bring about moderation in law, as individuals discuss and compromise on the nature of their own idiosyncratic beliefs about truth and valid law (Kelsen 1920b, 83). The immanence of those laws means they will align with what the majority believe – what the majority perceive about facts and values – maximizing the freedom of the will of actual individuals (Kelsen 1957b, 206-207). In this way, state authority is valid because it is believed to *emanate* from its subjects (Kelsen 2002b, 88). Kelsen grounds the legitimacy of democratic procedures in their immanence, in a way structurally analogous to the legitimacy of laws of nature for pantheism.

From the perspective of Kelsen's juridical *science*, the state form cannot be more than the sum of its parts (the individual citizens) just as the state-person cannot be more than the sum of its parts (the positive laws those citizens issue). The content of the positive laws that the state-person represents are determined by the wills of the individuals that constitute that state-person.

Kelsen uses political theology to deconstruct absolutist epistemology, which legitimates transcendence – and dualism – in both theological and juridical concepts. His goal was to prevent the arbitrary, extra-legal exercise of power by the state and its representatives, particularly their expression through autocratic politics. But its function is not strictly critical. Kelsen uses his epistemological approach to political theology to legitimate immanent forms in both theology and jurisprudence. Kelsen showed how scientific epistemology grounded both a pantheistic theology and a positivistic and democratic jurisprudence (Kelsen 1974b, 110).<sup>5</sup> He believed that scientific epistemology made democracy both a logical necessity, as democratic positivist procedures alone could produce valid law, and an ethical necessity, because "right" laws could only be generated immanently (Kelsen 1922, 252; 1974a, 81).

However logically and ethically necessary, Kelsen also recognized that democrats' epistemological principles committed them to political tragedy. He repeatedly used Pilate's trial of Jesus to illustrate that tragedy (Kelsen 1920b, 84-85; 1955, 39; 1957b, 207-208; 2002b, 108-109; Invernizzi-Accetti 2015, 184-186). Pilate was a skeptic who did not believe in absolute truth. Despite personally finding Jesus guiltless, Pilate put the decision on Jesus's fate to a plebiscite. The people demanded the release of Barabbas "the robber." Pilate could have acted on his own

<sup>5</sup> According to Kelsen this argument has roots in the thought of Spinoza, see also Kelsen 1957b, 205.



beliefs and used his political power to free an innocent man. Doing so, however, would have required him to betray his deeper epistemological principles. Kelsen concluded that some might read this parable as a strong argument against democracy. But only for those already certain of the truth.

## 6. Conclusion

Kelsen's political theology has been almost entirely overlooked. This is a shame. Kelsen's work on juristic political theology merits study both for historical and theoretical reasons. Historically, Kelsen's political theology predates Schmitt's. Kelsen may have even inspired Schmitt's work on political theology, including some of Schmitt's well-known and oft-repeated arguments. Theoretically, Kelsen explained the structural identity of political theology differently, in a way that may be salutary for the field. By linking legitimacy, and ontology, to epistemology, Kelsen can provide a way to rethink how juristic political theology should be done today.

Kelsen offers a way to rethink how democracy fits into discussion of political theology. Based on his epistemological approach to political theology, Kelsen defends the legitimacy of democracy by structural analogy to pantheism, derived from a materialistic and relativistic worldview. Kelsen's inspiration for this approach may have been drawn from how modern scientific method deconstructed the power and authority of pre-modern forms of theology, breaking down the beliefs that legitimated those institutions into a peculiar form of pantheism. He used this structural analogy of political theology to offer a model for how jurisprudence could be updated and modernized, how jurisprudence could have its own Copernican revolution.

To be clear, neither Kelsen's jurisprudence nor his theory of democracy stand or fall with his positive theory of political theology. Kelsen offers other, more conventional ways of understanding the legitimacy of democracy and positive law.<sup>6</sup> His political theology complements that work. Nevertheless, by grounding democracy in modern scientific epistemology, analogous to pantheism, Kelsen gives us an additional way to think about democratic legitimacy, which reinforces his other work. And it underscores just how original a thinker Hans Kelsen was.

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<sup>6</sup> For an analysis of Kelsen's democratic theory that is not based on political theology, see Vinx 2007.

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- illiberal and antidemocratic movements from using legal measures to abrogate and revolutionize liberal democratic fundamentals.

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