Introduction

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Conventional readings of Hans Kelsen (1881–1973) mischaracterise him as a theorist of ordinary legality who took for granted the long-term stability of democratic institutions. The cardinal goal of this volume is to show, on the contrary, that Kelsen never lost sight of the dangers threatening constitutional democracies in his time but instead made them foundational to his overarching political and legal writings and, by doing so, authored one of the most significant chapters in the history of twentieth-century democratic theory. This chapter merits renewed attention today for its timely and largely forgotten resources – historical, conceptual, normative, and practical – to ongoing debates about the present and future of constitutional, liberal democracy.

I.1 A Prejudiced Reception

Responsible for the prolonged oversight of Kelsen's contribution to democratic theory, both in his time and in ours, is a prejudice that has protractedly affected the reception of both halves of his oeuvre – that is, his philosophy of law and his political and democratic theory. This bias still makes Anglophone scholars of democracy largely indifferent to his work. Ever since the short-lived experience of the Weimar Republic (1919–1933), Kelsen's political writings have been criticised or altogether dismissed for supposedly lacking normative and practical antidotes to cope effectively with moments of crisis. According to conventional (mis)readings, his theory of democracy applies only to ordinary, not extraordinary, political circumstances. As the architect of the 'pure theory of law' and the foremost representative of legal positivism in twentieth-century Continental Europe,[1] Kelsen has been routinely charged with blindness to the complexities and messiness of political life. According to his numerous critics,

[1] See T. Spaak and P. Mindus, *Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021), especially M. S. Green, 'Hans Kelsen's Non-Reductive Positivism',

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the flawlessly linear structure of jurisprudential systems built on the postulate of the *Grundnorm* is inadequate to capture, understand, and solve the disruptions that real world politics creates in the pattern and texture of legal normativity. Precisely because of its signature attempt to make jurisprudence autonomous from both empirical social sciences and moral theory, a Kelsenian approach to democracy allegedly leaves it defenceless on the impervious battleground of politics.

This critique was influentially articulated by Carl Schmitt – Kelsen's most (in)famous antagonist – in the early Weimar years. In his *Political Theology* ([1922] 2005), he ridiculed Kelsen's neo-Kantianism as short-sighted vis-à-vis the concrete possibility of the 'exception' and thus unable to envision emergency measures that could protect constitutional democracies on the verge of implosion. Mariano Croce and Marco Goldoni have recently recalled how Schmitt's decisionism and exceptionalism were engineered precisely as responses to 'the (alleged) self-sufficiency of the positivist theoretical toolkit' – specifically, its emphasis on the normal case, its equation between the state and the law, and its silence on the source of the legal order. Schmitt claimed he could flip the legal positivist script on multiple levels. Against Kelsen's account of the rule of law, his defence of judicial review, and his theory of democratic legitimacy, the future *Kronjurist* of the Third Reich dismissed normality as secondary in the life of democratic regimes, bringing the 'jurisgenerative force' of the state and the constituent power of the exception back under the magnifying glass of legal and political theorists.[2]

Schmitt's intellectual and ideological critique inaugurated a long history of distrust towards Kelsen that would loom large in the aftermath of the Second World War, affecting the transatlantic reception of his work and significantly impacting the circulation of his democratic theory among Anglophone readers. During the Cold War, the antithesis between Marxism, pervasively critical of the institutions and procedures of the rule of law, and a strand of liberalism built on the primacy of natural law (as in the influential case of Leo Strauss)[3] did not favour

in T. Spaak and P. Mindus (eds.), *Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021), pp. 272–300.

[2] M. Croce and M. Goldoni, *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford University Press, 2020), p. 105.

[3] On Kelsen's rejection of natural right, and Strauss's critique of Kelsen, see, more recently, D. Novak, 'Haunted by the Ghost of Weimar. Leo Strauss' Critique of Hans Kelsen', in L. V. Kaplan and R. Koshar (eds.), *The Weimar Moment: Liberalism, Political Theology, and Law* (Lexington Books, 2012), pp. 393–408.

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a theory of democracy such as Kelsen's, which rejected the assumptions of both. Concomitantly, the increasing hegemony of behaviouralism, especially throughout the 1950s and 1960s, made American departments of political science unfriendly to a vision of politics that was perceived as unappealingly abstract.[4]

Interestingly, the critique of Kelsen's thought as 'politically anaemic' extended far beyond his democratic theory.[5] It was also one of the main charges against his philosophy of law in postwar American academia, at a time when legal realism had established itself as the new dominant paradigm in jurisprudence and legal theory.[6] The slanderous claim that Continental legal positivism had failed to stand up against Nazism was often cited as evidence of its dangerous implications for political practice. According to their critics, Kelsen's arguments on law and democracy entailed a moral relativism that was deemed 'utterly sterile' (in the words of Karl Llewellyn),[7] a 'useless exercise in logic rather than life' (in the words of Harold Laski, rephrasing the famous dictum by Judge Holmes),[8] and a paradigmatic example of a 'legalistic ideology' obfuscating the delusions of neutrality and the political ideology intrinsic to a system of norms (in the view of Judith Shklar).[9] Twenty-five years before her influential essay on *The Liberalism of Fear* (1989), the Harvard theorist developed in her book *Legalism* a full-throated critique of all approaches that either insulate law from morality and politics (as in the case of Kelsen's and Hart's analytical positivism) or conflate these three domains (as in the case of natural law theories). While defending the legitimacy of the Nuremberg trials, she voiced her scepticism towards any 'peace through law' approach in the international arena, such as that theorised by Kelsen throughout the 1940s and 1950s. In addition, she rejected Kelsen's 'pure theory' as a 'homeless ghost' and the

[4] N. Urbinati and C. I. Accetti, 'Introduction', in H. Kelsen (ed.), *The Essence and Value of Democracy* (Rowman & Littlefield Publishers, 2013), pp. 1–25; D. A. J. Telman, *Hans Kelsen in America – Selective Affinities and the Mysteries of Academic Influence* (Springer, 2016).

[5] D. A. J. Telman, 'A Path Not Taken: Hans Kelsen's Pure Theory of Law in the Land of the Legal Realists', in R. Walter, C. Jabloner and K. Zeleny (eds.), *Hans Kelsen Anderswo. Hans Kelsen Abroad* (Manz, 2010), pp. 353–76 (at pp. 365–67).

[6] On which see Telman, *Hans Kelsen in America*.

[7] K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962), p. 356.

[8] H. J. Laski, *A Grammar of Politics* (George Allen & Unwin, [1925] 1938), p. vi.

[9] J. Shklar, *Legalism* (Harvard University Press, 1964), pp. 17, 33.

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quintessential example of 'extreme formalism', treating law as 'a self-contained system of norms' and assuming its 'static timelessness'.[10]

In reinforcing the American bias against the Austrian jurist, Shklar followed in the footsteps of her Harvard mentor, German-American political scientist and theorist Carl Friedrich. His disagreement with Kelsen regarding the study of social theory, philosophy of law, and democracy was partly responsible for the latter's short-term appointment and subsequent failed contract renewal at Harvard Law School. Roscoe Pound – the Dean of Harvard Law School, who was introduced to Kelsen's work by Felix Frankfurter (a Viennese immigrant himself) and who had first invited him to Harvard in 1936 – described Kelsen as 'unquestionably the leading jurist of the time'; however, his endeavours to offer Kelsen a permanent job failed. Despite his cordial personal relationship with Kelsen, Lon Fuller, Professor of General Jurisprudence at Harvard Law School, expressed utter distaste for Weimar legal positivism, which he held accountable for the rise of Nazism due to its inability to distinguish between 'respect for constituted authorities' and 'fidelity to law'.[11] Whenever a legal system does not deserve our faithfulness, as in the case of Nazi law, citizens – so the argument of Fuller went – need 'to decide for themselves whether to stay with the system'.[12] This 'fidelity to law', Fuller concluded, cannot be expected from legal positivists *à la* Kelsen, and this shortcoming is precisely what made the parliamentary democracy of Weimar sink into the abyss of totalitarianism.[13] After the Oliver Wendell Holmes inaugural lectureship at Harvard Law in 1940–1941, followed by a research associate position in comparative law and a lectureship at Harvard's Department of Sociology in 1942, Kelsen had no other choice but to leave.[14]

[10] Ibid., pp. 34–35.

[11] Unlike the former, the latter entails a critical approach to a person's obligation to obey the law. On this point, see Fuller's famous exchange with H. L. A. Hart in 1958 in the *Harvard Law Review* and, again, in his 1964 book *The Morality of Law*.

[12] See chapter 5 of L. May, *Limiting Leviathan: Hobbes on Law and International Affairs* (Oxford University Press, 2013), pp. 122–38.

[13] Further complicating Kelsen's possibilities for permanent employment in American academia was, beyond his lack of a full mastery of the English language, his focus on continental jurisprudence and his distinctively European approach to the study of the law. A note was placed in his Rockefeller Foundation file detailing that 'especially the irrelevance of his philosophical approach when war conditions have weakened American law schools makes him a difficult problem', quoted from T. Ehs and M. Gassner, 'Hans Kelsen (1881–1973)', *Transatlantic Perspectives* (29 July 2018), www.transatlanticperspectives.org/entries/hans-kelsen/.

[14] He accepted a visiting professorship in political science at Wellesley College, before landing at Berkeley in 1943, initially as visiting professor in the political science department.

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Similar divergencies and oppositions shipwrecked the attempt of the University of Chicago, primarily by Charles Merriam, to recruit Kelsen for a joint appointment between its Law School and its Political Science department. Along with being the first American university to professionally court Kelsen, the University of Chicago was where the aversion to Kelsen's defence of relativism in liberal democracy gained its most powerful traction. The hostility of Catholic faculty members and of President Robert Maynard Hutchins – a fervent supporter of natural law theories who had quickly appointed Jacques Maritain and Leo Strauss[15] – derailed the initial enthusiasm for Kelsen's work. Sabotaging it once and for all was a letter to Hutchins by Waldemar Gurian, a Catholic convert who had attended Schmitt's seminars in the early 1920s and founded the political theory journal *The Review of Politics*:

> He is without doubt a brilliant legal technician, but without any understanding of political realities; though he 'understands' everything, he is in his most important works opposed to natural law, metaphysical concepts, etc. I think he represents a mentality which is completely out of date and which is responsible for the threatening breakdown of European civilization by the victory of primitive political religions. These religions arose partially in opposition to the empty logicism and relativism of an attitude *à la* Kelsen.[16]

Strauss, among the most prominent political scientists teaching at Chicago, echoed this judgement in a long unpublished paper on German nihilism and then, again, in the first pages of *Natural Right and History* (1953), attacking Kelsen without naming him and presenting his relativism and his rebuttal of natural right as a 'seminary of intolerance'.[17]

Our volume confronts, challenges, and seeks to overturn this long-standing and deep-seated prejudice against Kelsen both as a political thinker and, more specifically, as a theorist of democracy. It shows that the author of the *Pure Theory of Law* ([1934] 1967) was neither an ivory tower scholar nor a legal philosopher with a rarefied understanding of democratic politics and its most incendiary questions.[18] Quite the

[15] Both Maritain and Strauss are among the targets of Kelsen's criticism, together with Emil Brunner and Karl Niebuhr, for their democratic theology and neojusnaturalism.

[16] Quoted from S. P. Turner, 'Kelsen in American Political Theory', *OZP – Austrian Journal of Political Science*, 51 (2022), 11–21, 15.

[17] On Strauss and Kelsen, see Scheuerman's chapter in this volume, but also E. Lefort, 'Arriving at Justice by a Process of Elimination: Hans Kelsen and Leo Strauss', in D. A. J. Telman (ed.), *Hans Kelsen in America* (Springer, 2016), pp. 115–34.

[18] On this theme, see R. Schuett, *Hans Kelsen's Political Realism* (Edinburgh University Press, 2021).

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contrary, he conjoined theory and practice in ways that consistently shaped his scholarship across neighbouring fields – from legal and political theory to constitutional and international law and jurisprudence – allowing him to often play important roles on the chessboard of history, both in his native Austria and abroad.[19] In this way, our project follows the interpretive strategy deployed by Lars Vinx in his first major monograph[20] in an attempt to reconnect Kelsen's well-known 'legal theoretical' work and his less-mined but equally important 'political theoretical' writings as 'mutually support[ing] each other'.[21]

I.2 Kelsen on Democracy between History, Theory, and Practice

One century after their publication, Kelsen's writings on democracy – sharply dissecting its principles, institutions, and challenges – command the attention of theorists and historians alike. The chapters in this volume exemplify the collective effort to employ the double prism of history and theory to examine what is still relevant and worth

[19] S. Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton University Press, 2018); see also M. Siegelberg, *Statelessness: A Modern History* (Harvard University Press, 2020). As Schuett recalls, 'there was a great deal of applied theory or real practice' (p. 65) in the biographical trajectory of Kelsen: besides his well-known role in drafting the 1920 Austrian Constitution and in creating Austria's Constitutional Court (on which he served for several years: 1919–1930), he was a legal adviser to the Austro-Hungarian Minister of War during the First World War and, during the late stage of the Second World War, worked for the US government on European constitutional matters (in 1944). Soon afterwards, he became a consultant to the War Crimes Commission in Washington, DC, which was preparing the trial of Nazi war criminals (in 1946).

[20] Other English monographs that have either dissected Kelsen's democratic theory or relied on it prominently include S. Baume, *Hans Kelsen and the Case for Democracy* (ECPR Press, 2012); C. I. Accetti, *Relativism and Religion: Why Democratic Societies Do Not Need Moral Absolutes* (Columbia University Press, 2015); and S. Lagi, *Democracy in Its Essence: Hans Kelsen as a Political Thinker* (Lexington Books, 2020). For recent studies of Kelsen's philosophy of law and its place in the history of legal theory, see J. Von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, 2010); D. Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press, 2022); and N. Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press, 2023) – especially chapter 4. Dyzenhaus pioneered the study of Kelsen in the milieu of Weimar jurisprudence in his classic D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford University Press, 1999).

[21] L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), p. 2.

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re-examining in Kelsen's political work and how it can contribute to contemporary democratic theory and practice. However, this ambitious enterprise cannot succeed without proper consideration of the historical contexts (plural) in which the Austrian jurist developed his ideas. One of the main aims of our volume is to show that we lose something valuable – even crucial – whenever we fail to do so – that is, whenever we offer a monodimensional account of his democratic thought.

Predominantly penned throughout the Weimar years while also venturing into the first decade of the Cold War, Kelsen's political writings provide a razor-sharp analysis of democratic erosion during one of the darkest phases of European and world history. They also explore the challenges of a new age, when the consolidation of constitutional democracies from the ashes of the Second World War and the memory of mono-party dictatorships prompted wide-ranging debate on the procedures of democratic life, the shortcomings and potential of representative institutions, and the relationship between capitalism, socialism, and democracy. Hence, they encapsulate a crucial chapter in the history of twentieth-century democratic theory and offer compelling insights into some of the most pressing challenges facing liberal democracies in the present, as we shall explain in this chapter.

Relentlessly developed over several decades (early 1920s–mid 1950s), Kelsen's democratic theory stemmed from first hand experience and careful study of the political vicissitudes of Continental Europe between the two World Wars. It started as an attempt to capture 'the essence' and 'the value' of (multi)party democracy in response to the October Revolution of 1917, the 'neo-Communist theory of Bolshevism', and its gospel of the proletariat's dictatorship. It soon turned into a nuanced and cross-disciplinary analysis of the converging attacks on parliamentary government and liberal pluralism by left and right wing ideologies. Indeed, as the contestation of multipartyism and free elections grew louder and democratic erosion eventually gave way to democratic breakdown,[22] Kelsen's political writings acknowledged the urgency of understanding what made liberal democracy so vulnerable at its core. This task entailed the unsettling effort to let go of all the 'fictions' of 'democratic ideology',[23] which had turned 'democracy' into an empty

[22] See A. Fung, D. Moss and O. A. Westad, *When Democracy Breaks: Studies in Democratic Erosion and Collapse, from Ancient Athens to the Present Day* (Oxford University Press, 2023).

[23] In explaining the epistemological fallacy of fictions and criticising the ideology of natural law (metaphysical – mythical) with the arguments of legal positivism (juristic – scientific),

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catchword at the mercy of anti-democratic actors, and the ambitious attempt to explain what 'real' democracies were truly about. His critical study of the principles that form the democratic imagination – freedom above all – was propaedeutic to his project to *re*form how democratic institutions operated and thus to reduce the gap between the ideal and the real state of democracy (a recurring theme of his political theory). This approach to the study of democracy – at once philosophically sophisticated and pragmatically orientated – encapsulates the fulcrum of Kelsen's multiple political writings, published across decades, countries, and continents, as he fled Nazi Germany and relocated to Geneva, Cologne, Prague, and then Boston (Harvard and Wellesley) and eventually San Francisco (University of California, Berkeley).

As many contributors to this volume aptly show, a contextual study of Kelsen's political writings allows us to uncover the historical impetus behind his vigorous defence of parliamentarism, constitutionalism, and liberal democracy. In turn, it shows how the unfolding of his democratic theory throughout the decades reflected the changes in the fraught political landscape that he observed and thus reveals his constant endeavour to bridge the domains of theory and practice in the study of constitutional democracy.[24]

Sara Lagi is among the Kelsen scholars who have meritoriously emphasised the importance of a contextual and diachronic analysis of Kelsen's political writings against the backdrop of the political history of post-First World War Austria, Germany, and Europe. The first edition of *Vom Wesen und Wert der Demokratie* (1920) was partly built on Kelsen's 1911 *Hauptprobleme der Staatsrechtslehre*, especially its critique of the 'fictions' of state and sovereignty at the core of late nineteenth-century German legal positivism (Carl Friedrich Von Gerber, Paul Laband, and Georg Jellinek). Published the same year as *Das Problem der Souveränität*, it primarily targeted the inconsistencies

Kelsen relies extensively on Hans Vaihinger's philosophy of 'as-if'. At the same time, his thinking is also deeply influenced by Freud: 'Kelsen made an extremely bold attempt as a legal theoretician to apply Freud's theory of totemism – collective consumption of the same sacrificed animal by the tribal community as an act of identification – to legal theory; C. Jabloner, 'Kelsen and His Circle: The Viennese Years', *European Journal of International Law*, 9 (1998), 368–85, quoted from Schuett, *Hans Kelsen's Political Realism*, p. 89.

[24] For such reasons, as Sara Lagi has recently pointed out (2021, p. 26), Kelsen's defence of liberal democracy entails a choice among competing options on the battleground of politics at the time and thus partly swims against the tide of his commitment to the study of law and democratic life in purely scientific terms. (S. Lagi, *Democracy in Its Essence*, (Lexington Books, 2021), pp. 131–70.)

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of Bolshevism and rejected Lenin's calls for 'direct' or 'pure' democratic self-rule in lieu of parliamentary democracy. Its second – and significantly expanded – edition engaged with the diversified and, unfortunately, much broader range of critics of democratic representation, including the legion of far right ideologies (i.e., the Nazis and the fascists) and those who dismissed elections-based parliamentarism as outdated, calling for a 'corporative Parliament' (*Ständeparlament*) built on vocational representation, that is, on the multiplicity of professional interests at work in the social order.[25]

As Peter Langford recalls in this volume, Kelsen took his first steps as a theorist of democracy in the distinctive context of Austria's newborn First Republic, at a time when Austria's Social Democrats were conflicted about the specific state form of their country following the collapse of the Austro-Hungarian Empire. In the mid 1930s, Kelsen placed the backsliding of European interwar democracies at the core of his 1935 *La Dictature de Parti*, overcoming his earlier dichotomy between democratic and autocratic governments and developing the concept of 'party dictatorship' to capture the actual regression of constitutional democracies from multiparty to monoparty regimes. In 1948, in the aftermath of the Second World War and in the context of the Cold War, Kelsen further examined the contested nature of the concept of democracy within a global order polarised between Western powers and the Soviet Union. In his 1948 book *The Political Theory of Bolshevism*, he unveiled 'the paradoxical contradiction which exists within Bolshevism between anarchism in theory and totalitarianism in practice' and alerted his readers to 'the attempt to obliterate and adulterate the true idea of democracy by presenting a party dictatorship as the political self-determination of a free people'.[26] In Part Two of that book, titled 'Democracy or Party Dictatorship', Kelsen questioned the dual-track logic underpinning the Cold War fight over democracy (either formal—political or substantive—economic) and painstakingly untangled the gradual shifts in the

[25] 'Corporative representation' is the title of chapter 5 of Kelsen's 1929 edition of H. Kelsen, *Essence and Value* (Rowman & Littlefield, 1929). Four years earlier, German political economist Moritz Julius Bonn addressed the same problem in his book M. J. Bonn, *The Crisis of European Democracy* (Yale University Press, 1925), distinguishing between the nineteenth-century theory of 'government by conference' (Chapter 1) – that is, parliamentarism as government by discussion or talking – and contemporary arguments for 'vocational parliaments' (Chapter 5).

[26] H. Kelsen, *The Political Theory of Bolshevism: A Critical Analysis* (University of California Press, 1948), pp. 1–2.

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visions of Marx and Engels and then Lenin and Stalin. He also examined the distinctive kind of representation at the core of the Soviet Union (i.e., the most emblematic case of a mono-party state) and assessed the relationship between democracy and two competing orchestrations of economic life – socialism and capitalism. Effectively, *The Political Theory of Bolshevism* took Kelsen's long-standing concerns about the fragilities of European (interwar) democracies into a new era of global afflictions. By doing so, it set the stage for many of the ideas discussed in his two-part essay on the *Foundations of Democracy* that he would publish in the journal *Ethics* in 1955.

Nadia Urbinati similarly highlights the importance of a historically situated analysis of Kelsen's democratic theory. Kelsen theorised about the essence and value of parties at two different junctures: first throughout the 1920s and early 1930s, when multipartyism was under the converging attacks of Bolshevism, fascism, and Nazism, and then, in the late 1940s and mid 1950s, when the urgency was no longer to oppose party dictatorships but to preserve party pluralism in liberal, constitutional democracies.

Given Kelsen's constant struggle to protect democracy from illiberal, authoritarian currents, it is surprising how tenuous, erratic, and truthfully unfair its reception has been in the English-speaking world – at least until recently.

I.3 The Kelsen Renaissance in Anglophone Democratic Theory

Despite the role that Kelsen played in the intellectual history of twentieth-century Continental debates on democracy and his contributions – both theoretical and practical – to democratic constitutionalism after the First World War and the Second World War, Anglophone scholars continue, almost by default, to associate the name of Kelsen with his towering work in legal theory and jurisprudence. Indeed, pervasive across the Kelsen literature in English is a major asymmetry. While his legal philosophy has been thoroughly dissected over the past four decades, turning Kelsen into a classic of twentieth-century philosophy of law ever since his death in 1973,[27]

[27] In the extensive scholarship on Kelsen's legal and state theory, see, in English, R. Moore, *Legal Norms and Legal Science: A Critical Study of Kelsen's Pure Theory of Law* (University of Hawai'i Press, 1978); R. Tur and W. Twining, *Essay on Kelsen* (Clarendon

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systematic explorations of his theory of democracy remain scarce. Over the past fifteen years, at least since Vinx's important monograph (2007), Anglophone scholars have occasionally studied specific aspects of Kelsen's democratic vision.[28] Their exegesis has been driven mostly

Press, 1986); L. Gianformaggio, *Hans Kelsen's Legal Theory: A Diachronic Point of View* (Giappichelli Editore, 1990); S. L. Paulson, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press, 1999); U. Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (Springer, 2002); Vinx, *Hans Kelsen's Pure Theory of Law*; L. Vinx, 'Austin, Kelsen, and the Model of Sovereignty', *Canadian Journal of Law and Jurisprudence*, 24 (2011), 473–90; L. Vinx, 'The Kelsen/Hart Exchange: Kelsen's Legal Monism Reconsidered', in D. A. J. Telman (ed.), *Hans Kelsen in America: Selective Affinities and the Mysteries of Academic Influence* (Springer, 2016); L. D. D'Almeida and J. Gardner, *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, 2013); C. Kletzer, *The Idea of a Pure Theory of Law: An Interpretation and Defence* (Hart Publishing, 2018); D. Gruber, *Law without Authority or Limits: Kelsen's Dilemma* (Self-Published, 2019); A. Orakhelashvili, *Domesticating Kelsen: Towards the Pure Theory of English Law* (Edward Elgar, 2019); K. Katsuyoshi, *Introduction to the General Theory of Law: Understanding Hans Kelsen's Pure Theory of Law* (Self-Published, 2021); Dyzenhaus, *The Long Arc of Legality*; C. Heidemann, *Hans Kelsen's Normativism* (Cambridge University Press, 2022). In the German literature on Kelsen's *Rechts-* and *Staatslehre* (and, occasionally, its connections to his *Demokratietheorie*), see R. A. Métall, *33 Beiträge zur Reinen Rechtslehre* (Europa Verlag, 1974); H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Nomos Verlagsgesellschaft, 1990); R. C. Van Ooyen, *Der Staat der Moderne: Hans Kelsens Pluralismustheorie* (Duncker & Humblot, 2003); S. L. Paulson and M. Stolleis, *Hans Kelsen: Staatsrechtslehrer und Rechstheoretiker des 20. Jahrhunderts* (Mohr, 2005); R. Walter, *Hans Kelsen als Verfassungsrichter* (Facultas Verlag, 2005); M. Jestaedt and O. Lepsius, *Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie* (Mohr Siebeck, 2006); H. Brunkhorst, *Rechts-Staat: Staat, Internationale Gemeinschaft und Völkerrecht bei Hans Kelsen* (Nomos, 2008); L. Vinx, 'Kelsen's Identitätsthese und das Problem der Rechtsstaatlichkeit', in T. Ehs (ed.), *Hans Kelsen und die Europäische Union: Erörterungen Moderner Staatlichkeit* (Nomos, 2008), pp. 57–74; P. Römer, *Hans Kelsen* (Dinter, 2009); H. Dreier, *Kelsen im Kontext*, M. Jestaedt and S. L. Paulson (eds.) (Mohr Siebeck, 2019). The relevant French literature (with a stronger emphasis on Kelsen's legal *and* democratic theory) includes C. M. Herrera, *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt* (L'Harmattan, 1995); C. M. Herrera, *Théorie juridique et politique chez Hans Kelsen* (Éditions Kimé, 1997); C. M. Herrera, *Actualité de Kelsen en France* (LGDJ, 2001); C. M. Herrera, *La philosophie du droit de Hans Kelsen: une introduction* (Presses Université Laval, 2004); P. Raynaud, 'Introduction', in H. Kelsen (ed.), *La democratie: sa nature et sa valeur* (Dalloz, 2004); O. Jouanjan, (ed.), *Hans Kelsen: forme du droit et politique de l'autonomie* (Presses Universitaires de France, 2010) (especially the chapter by O. Lepsius, 'Kelsen, théoricien de la démocratie', pp. 135–70).

[28] For an earlier emphasis in the English secondary literature on Kelsen as a political theorist, see S. L. Paulson, 'Kelsen as Political Theorist', in Goyard-Fabre (ed.), *La pensée politique de Hans Kelsen* (Centre de Publications de l'Université de Caen, 1990), n. 17, pp. 81–95; and B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997); H. Dreier, 'The Essence of Democracy: Hans Kelsen and Carl

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by the attempt to craft new readings of its signature themes: democracy's relativism and its connection to majority rule;[29] the role of parties and the nature of partisanship;[30] the value of political compromise;[31] the relationship between legal positivism and human rights;[32] the connection between ethical principles and political institutions;[33] the temporality of legal validity in democratic orders;[34] the divide between autonomy and heteronomy in democratic constitution making;[35] and democracy's material constitution.[36] Sometimes, these scholars have excavated his liberal cosmopolitan project to examine the relationship between his *Pure Theory of Law* and his international law writings.[37] Previously, they have drawn on Kelsen to provide fresh perspectives

Schmitt Juxtaposed', in D. Diner and M. Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition* (Bleicher Verlag, 1999), pp. 71–79.

[29] Accetti, *Relativism and Religion*; E. Lagerspetz, 'Kelsen on Democracy and Majority Decision', *Archiv für Rechts- und Sozialphilosophie*, 103 (2017), 155–79.

[30] Y. Mersel, 'Hans Kelsen and Political Parties', *Israel Law Review*, 39 (2006), 158–81; T. Stanton, 'Popular Sovereignty in the Age of Mass Democracy: Politics, Parliament and Parties in Weber, Kelsen, Schmitt and Beyond', in R. Bourke and Q. Skinner (eds.), *Popular Sovereignty in Historical Perspective* (Cambridge University Press, 2016), pp. 320–58; D. Ragazzoni, 'Political Compromise in Party Democracy', in C. Rostbøll and T. Scavenius (eds.), *Compromise and Disagreement in Contemporary Political Theory* (Routledge, 2017), p. 18; S. Baume, 'Rehabilitating Political Parties: An Examination of the Writings of Hans Kelsen', *Intellectual History Review*, 28 (2018), 425–49; F. Wolkenstein, 'Agents of Popular Sovereignty', *Political Theory*, 47 (2019), 338–62; F. Wolkenstein, 'Democratic Parties and Popular Sovereignty', in F. Wolkenstein (ed.), *Rethinking Party Reform* (Oxford Academic, 2019), pp. 15–34.

[31] D. Ragazzoni, 'Political Compromise in Party Democracy'; S. Baume, 'What Place Should Compromise be Given in Democracy? A Reflection on Hans Kelsen's Contribution', *Négociations*, 27 (2017), 73–89.

[32] D. Ingram, 'Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights', *Philosophy and Social Criticism*, 40 (2014), 237–67; C. Chwaszcza, 'Kelsen on Democracy in Light of Contemporary Theories of Human Rights', in P. Langford, I. Bryan, and J. McGarry (eds.), *Kelsenian Legal Science and the Nature of Law* (Springer, 2017); C. I. Accetti, 'Reconciling Legal Positivism and Human Rights: Hans Kelsen's Argument from Relativism', *Journal of Human Rights*, 17 (2018), 215–28.

[33] G. De Angelis, 'Ideals and Institutions: Hans Kelsen's Political Theory', *History of Political Thought*, 30 (2009), 524–46.

[34] C. I. Accetti, 'The Temporality of Normativity: Hans Kelsen's Overcoming of the Problem of the Foundation for Legal Validity', *Philosophy and Social Criticism*, 42 (2016), 25–43; and in French, C. I. Accetti, 'Hans Kelsen et le fondement de la validité du droit', *Droit et Société*, 92 (2016), 181–99.

[35] A. Kalyvas, 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory', *Philosophy and Social Criticism*, 32 (2006), 573–99.

[36] L. Vinx, 'Hans Kelsen and the Material Constitution of Democracy', *Jurisprudence*, 12 (2021), 466–90.

[37] Von Bernstorff, *The Public International Law Theory*.

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on the foundations, normativity, and institutions of liberal democracy in the present.[38] At the same time, historical narratives of twentieth-century legal and political thought have often studied Kelsen's ideas vis-à-vis those of other authors – from the broad church of Weimar jurists, their predecessors, and epigones[39] to the many Jewish intellectuals whose thought was forged by the traumas of exile, statelessness, and migration.[40]

Consequently, references to Kelsen's political writings are not difficult to find in articles, volume chapters, and portions of monographs; they have even multiplied over the past several years,[41] with

[38] N. Urbinati, 'Representative Democracy and Its Critics', in A. J. Keane and W. Merkel (eds.), *The Future of Representative Democracy* (Cambridge University Press, 2011), pp. 23–49; Urbinati and Accetti, 'Introduction'.

[39] P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Duke University Press, 1997); Dyzenhaus, *Legality and Legitimacy*; A. Jacobson and B. Schlink, *Weimar: A Jurisprudence of Crisis* (University of California Press, 2002); P. C. Caldwell and W. E. Scheuerman, *From Liberal Democracy to Fascism* (Humanities Press, 2000); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press, 2001); E. Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004); Novak, 'Haunted by the Ghost of Weimar'; J. P. McCormick, 'Legal Theory and the Weimar Crisis of Law and Social Change', in P. Gordon and J. McCormick (eds.), *Weimar Thought: A Contested Legacy* (Princeton University Press, 2013), pp. 55–72; Ingram, 'Reconciling Positivism and Realism'; S. L. Paulson, 'Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the "Guardian" Controversy of 1931', in J. Meierhenrich and O. Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016), pp. 510–46; Stanton, 'Popular Sovereignty in the Age of Mass Democracy'; P. Magalhães, *The Legitimacy of Modern Democracy: A Study on the Political Thought of Max Weber, Carl Schmitt and Hans Kelsen* (Routledge, 2020); Wheatley, *The Life and Death of States*, pp. 141–80. See also some of the chapters in Telman, *Hans Kelsen in America* (at least those by Lefort, Rice, Rentsch, Ingram, and Günther) and in P. Langford, I. Bryan, and J. McGarry, *Hans Kelsen and the Natural Law Tradition* (Brill, 2019) (at least those by Favuzzi, Donhauser, Fillafer and Feichtinger, Gostmann). In French, see Herrera, *Le Droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*.

[40] Benhabib, *Exile, Statelessness, and Migration*; J. Loeffler and M. Paz (eds.), *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century* (Cambridge University Press, 2019), pp. 49–90.

[41] For example, J. Ferejohn and P. Pasquino, 'The Law of the Exception: A Typology of Emergency Powers', *International Journal of Constitutional Law*, 2 (2004), 210–39; P. Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, A. Goldhammer trans., (Cambridge University Press, 2008); P. Pasquino, 'Samuel Pufendorf: Majority Rule (Logic, Justification and Limits) and Forms of Government', *Social Science Information*, 49 (2010), 99–109; A. Przeworski, 'Consensus, Conflict, and Compromise in Western Thought on Representative Government', *Procedia – Social and Behavioral Sciences*, 2 (2010), 7042–55; A. Przeworski, 'Divided We Stand? Democracy as a

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the most recent handbook on contemporary democratic theory devoting entire sections to Kelsen's proceduralism and the various strands of 'Kelsenians' in early twenty-first-century debates about democracy.[42] Testaments to the enduring interest in Kelsen's political life and thought[43] and the increasing traction that both have been gaining in the English-speaking world are the following works, inaugurating possibly new chapters in his *Rezeptionsgeschichte*: the first English translation of his Weimar-era debate with Schmitt on constitutional guardianship and the legitimacy of constitutional review;[44] two edited volumes on his place within twentieth-century European jurisprudence and his absence in twentieth-century American legal theory;[45] a recent biographical study conducted through the lens of his political realism;[46] and, most recently, a magisterial intellectual biography published in

Method of Processing Conflicts', *Scandinavian Political Studies*, 34 (2011), 168–82; A. Przeworski, *Democracy in a Russian Mirror* (Cambridge University Press, 2015); N. Urbinati, *Representative Democracy: Principles and Genealogy* (The University of Chicago Press, 2006); N. Urbinati, 'Competing for Liberty: The Republican Critique of Democracy', *The American Political Science Review*, 106 (2012), 607–21; N. Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press, 2014); N. Urbinati, 'Democracy and Republicanism', in Y. Elazar and G. Rouselliere (eds.), *Republicanism and the Future of Democracy* (Cambridge University Press, 2019), pp. 152–70; N. Urbinati, 'Political Theory of Populism', *Annual Review of Political Science*, 22 (2019), 111–27; J. L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press, 2012); N. Urbinati and M. P. Saffon, 'Procedural Democracy, the Bulwark of Equal Liberty', *Political Theory*, 41 (2013), 441–81; I. Accetti, *Relativism and Religion*; C. I. Accetti and C. Bickerton, 'Populism, Technocracy and the Critique of Party Democracy', in C. Mudde, P. Taggart and R. Kaltwasser (eds.), *Oxford Handbook on Populism* (Oxford University Press, 2018), pp. 326–41; O. Lepsius, 'Hans Kelsen on Dante Alighieri's Political Philosophy', *The European Journal of International Law*, 27 (2016), 1153–67; J. W. Müller, *What is Populism?* (University of Pennsylvania Press, 2016); J. W. Müller, *Democracy Rules* (Straus and Giroux, 2021); J. White and L. Ypi, *The Meaning of Partisanship* (Oxford University Press, 2016); Wolkenstein, 'Agents of Popular Sovereignty'; D. Ragazzoni, 'The Populist Leader's Two Bodies: Bobbio, Berlusconi, and the Factionalization of Party Democracy', *Constellations*, 27 (2020), 213–30.

[42] S. Chambers, *Contemporary Democratic Theory* (Polity, 2024).

[43] For example, O. Beaud and P. Pasquino, *La controverse sur le gardien de la constitution et la justice constitutionnelle: Kelsen contre Schmitt* (LGDJ, 2007); Jestaedt & Hans Kelsen Institut, *Hans Kelsen Werke* (Mohr Siebeck, [2007] 2020).

[44] L. Vinx, (ed. and trans.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015).

[45] Telman, *Hans Kelsen in America*; Bryan, Langford, and McGarry, *Kelsenian Legal Science and the Nature of Law*.

[46] Schuett, *Hans Kelsen's Political Realism*.

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German by the director of the Hans Kelsen Institut in Wien and currently being translated into English.[47]

However, the piecemeal approach to Kelsen's democratic theory and the overall scholarship on his work, profoundly unbalanced in favour of his legal theory, have failed to alert Anglophone readers to the breadth, depth, and nuances of his decades-long work on constitutional democracy.[48] Only two books have been published in English on Kelsen, specifically as a political thinker and democratic theorist,[49] while the first full English edition of his most famous book on democracy (*Vom Wesen und Wert der Demokratie*, 1929) appeared only in 2013, approximately one century after its original release and several decades after its translation into multiple languages.

Through this volume, we hope to make Kelsen's account of constitutional democracy a common currency across multiple adjacent fields and finally place his democratic theory on the intellectual map of Anglophone scholars and readers. To date, no publication in English (or in any other language) has offered what our project seeks to offer: an all around examination of Kelsen's democratic theory, its genesis, its major axes, its internal tensions, its connections to his legal theory, as well as a critical analysis of its relevance and overlooked potential to theorise the challenges of liberal, constitutional democracy in our troubled present.

I.4 A Conceptual Compass for Navigating Kelsen's Democratic Theory

In the following pages, we would like to draw our readers' attention to six key themes of Kelsen's writings on democracy that run through this volume and that remain central to ongoing debates in historical and contemporary democratic theory and the social sciences at large. These six

[47] T. Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers* (Mohr Siebeck, 2020). Due to its massive scope and the amount of unpublished material and archival research supporting its findings, it has replaced R. A. Métall, *Hans Kelsen: Leben und Werk* (Verlag Franz Deuticke, 1969). See also R. Walter, W. Ogris, and T. Olechowski, *Hans Kelsen: Leben – Werk – Wirksamkeit* (Manzsche Verlags- und Universiätsbuchhandlung, 2009) (and, obviously, Kelsen's autobiographical writings).

[48] Indicative of this deep-rooted unbalance is the fact that even Olechowski's intellectual biography is published under the title Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers*.

[49] S. Baume, *Hans Kelsen and the Case for Democracy* (ECPR Press, 2012); Lagi, *Democracy in Its Essence*.

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thematic blocks include the role of political parties in democracy; the qualities of democratic leadership; the protection of plurality and minorities through the practice of political compromise; the principles and mechanisms that limit majority powers in constitutional democracy; the tension between the inclusivity and accountability of democratic governments; and the resources that Kelsen offers to theorise and study the populist transformations of constitutional democracy in the early twenty-first century.

I.4.1 Political Parties: From the Ideal to the Reality of Self-Determination

Framing Kelsen's account of political parties is an overarching theme of his democratic theory: the tension between the ideal and the real state of democracy (which is analysed by Lagi in this volume). In ways that are highly reminiscent of Weber, Kelsen unveils the implications of what he calls, in both his political and legal writings, 'the fictions of democratic ideology'. The latter range from the personification of the State as a sociopolitical unity to the definition of 'the People' as a collective sovereign, from the notion of political representation as popular sovereignty to the idealisation of the Parliament as the cradle of the general will. Deceptively mixing descriptive and prescriptive arguments, political 'fictions' propel democratic concepts and practices into the realm of metaphysical abstractions. Thus, they obscure the way in which (multi) party democracy works and ultimately favour its detractors, who, from the left and right alike, champion (mono)party dictatorship as the only way to overcome the shortcomings of representative institutions in the age of mass politics.[50]

Parties are among those institutions that turn the idea of democratic freedom as political self-determination and participation in government into a palpable reality. At the same time, their imperfections – and the party reforms that Kelsen vigorously recommends – offer powerful reminders of the need to constantly, gradually, and perhaps asymptotically implement how real democracy works. Anticipating Eric Schattschneider's famous lines in the opening paragraph of *Party Government* (1942) – that is, 'modern democracy is unthinkable save in terms of parties'[51] – Kelsen argues that '[m]odern democracy virtually

[50] Kelsen, *Essence and Value*, pp. 25–26.
[51] E. Schattschneider, *Party Government* (Transaction Publishers, [1942] 2009), p. 1.

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rests on political parties'; that '[o]nly self-deception or hypocrisy could lead one to suppose that democracy is possible without political parties'; finally, that '[a] democratic State is necessarily and unavoidably a multi-party state'.[52] According to Kelsen, the necessity of parties in democracy is a corollary of his deliberate dismantling of the sociopolitical unity of the People: '[f]ollowing this line of investigation' – that is, the progressive shift from the idea to the reality of democratic life – 'we encounter one of *real* democracy's most important elements: the political party' (our emphasis).[53]

If competing interests are intrinsic to mass democracy, if their clash is inevitable,[54] and if the will of society always results from a compromise among such interests, it follows that parties are essential. For Kelsen, 'the People' as a group agent capable of participation in government comes into being only through the organisation and division of citizens into political parties. From the amorphous mass of scattered individuals, parties carve out the 'People' as a ruling, rather than ruled, subject capable of collective political agency, bringing together like-minded individuals, coalescing their claims, granting them a presence and a voice inside representative institutions, and assembling and organising citizens based on issues of common concern.[55]

Kelsen also explores and subsequently rejects the claim that parties exemplify an 'atomistic – individualistic' mindset. He defends 'partisanship' as a natural feature of real democracies, dismisses the idea of a nonpartisan (*überparteilich*) common interest and of a general solidarity among all of society's 'parts' as a 'metaphysical – or, better, metapolitical – illusion',[56] and deconstructs the arguments of those – Carl Schmitt and Heinrich Triepel[57] above all – who accuse parties of undermining the unity and sovereignty of the State. On Kelsen's account, what makes

[52] Kelsen, *Essence and Value*, pp. 38–39.
[53] Ibid., p. 38.
[54] See H. Kelsen, *General Theory of Law and State* (Routledge, [1945] 2007), p. 185: '[…] the population of a State is divided into various interest-groups which are more or less opposed to each other'.
[55] A passage in Chapter 2 of *Essence and Value of Democracy* makes this argument crystal clear: '[…] since the "People" does not actually exist as a viable political force prior to its organization into parties, it is more accurate to state that the development of democracy permits the integration of isolated individuals into political parties and, hence, first unleashes social forces that can be reasonably referred to as the "People"' (Ibid., p. 40).
[56] Ibid.
[57] For a summary of Schmitt and Triepel's objections to political parties and Kelsen's responses, see Baume, 'Rehabilitating Political Parties'.

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parties necessary and resourceful for democracy is their twofold function: as collectors of preferences outside institutions and as vehicles for deliberation, negotiation, and decision-making within the legislative assembly.[58]

However, parties are no angels. Kelsen fully acknowledges that the frequent misbehaviour of elected officials seriously undermine the legitimacy of party democracy in citizens' eyes. In a *Parteienstaat* based on proportional representation, electors cannot choose individual candidates; they can only vote for a list of candidates compiled and presented by each of the competing parties. Therefore, examining whether parties enhance, or undermine, democratic lawmaking is a key concern for Kelsen. In this volume, Wolkenstein examines the scope of what he calls Kelsen's 'party constitutionalism', that is, 'the idea of subjecting party organisations to constitutional regulation' to guarantee their conformity with democratic principles.[59] Giving parties legal recognition in democratic constitutions,[60] as Kelsen explicitly advocates, allows to curb the 'aristocratic-autocratic tendencies' of intraparty life (extensively and influentially documented by Robert Michels in his book in 1911);[61] at the same time, it also aims to bring parties closer to democratic citizens in the absence of the imperative mandate.

Kelsen lists several reforms that would make parties better in terms of their accountability and responsiveness to their constituents but also stronger and less prone to internal fragmentation within the legislative assembly, interestingly combining the mechanisms and resources of representative and direct democracy. Such reforms range

[58] Kelsen, *Essence and Value*, p. 40: 'Consciously or not, a position, that opposes the formation of parties and so ultimately democracy itself, aids political forces that aim to achieve the sole domination of a single group's interest. To the extent that this interest is unwilling to tolerate opposition, it seeks to disguise itself ideologically as the "organic", "true" or "apparent" interest of all. In a democratic multiparty state, however, where the will of society emerges from competing parties, there is no need for the fiction of an "organic" common will'.

[59] See Wolkenstein in this volume: 'Revisiting Kelsen's Party Constitutionalism', p. 174.

[60] Kelsen, *Essence and Value*, pp. 40–41: 'Thus, when democratic constitutions – which are still subject to the influence of monarchic ideology in this and many other points – deny political parties legal recognition, this no longer has the same meaning as it did under constitutional monarchies. Rather than seeking to hinder the realization of democracy, they are simply refusing to face facts'.

[61] Michels' *Political Parties: A Sociological Study of the Oligarchic Tendencies of Modern Democracy* is explicitly referenced by Kelsen in both the 1920 and the 1929 editions of *Essence and Value*, as well as by Schmitt's *The Crisis of Parliamentary Democracy* (1923, 1926).

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from legislative (not just constitutional) referenda for both passed and standing laws to minimise the gap between parliamentary decisions and public opinion and thus strengthen the legitimacy of parties in the Parliament, to petitions for enabling citizens' participation in the lawmaking process between elections. He also insists on the importance for citizens to be able to recall their elected officials whenever their votes in the legislative assembly differ from the agenda they presented while campaigning and for parties to control their elected MPs by means of party discipline. According to Kelsen, restoring the democratic credentials of parties entails two additional steps: party representatives should lose their seat in the legislative assembly whenever they change their party affiliation simply to advance their career, and each party should consult nonpolitical experts to make sounder decisions on highly technical issues that will affect the lives of citizens at large.

Underpinning Kelsen's account of parties – their nature, functions, shortcomings, and reforms – is an emphasis on the responsibility of political actors, especially towards their electorate. The rationalisation of power in liberal democracy requires accountability, which entails active citizenship, a vigilant public opinion, an open-ended and transformative interaction between civil society and representative institutions, the legitimacy of disagreement and opposition, and the alternation of power through free and competitive elections[62] – characteristics of regimes that successfully bridge the gap between ideals and reality and that instantiate the foundational principle of political self-determination.

I.4.2 Political Leadership: Democratic and Autocratic Models

Political leaders are another key factor in the pursuit of self-determination under conditions of representative politics. Kelsen's conception of leadership is a constitutive piece of his democratic theory that, quite surprisingly, has received significantly less scrutiny in the literature than other concepts at the core of his political and legal writings. According to Invernizzi Accetti and Peisajovich,[63] the democratic method of appointing rulers rests, for Kelsen, on five pillars: first, the

[62] Ibid., p. 93.
[63] See Invernizzi Accetti and Peisajovich in this volume, Chapter 11, p. 307.

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multiplicity of leaders both synchronically (i.e., in the same context – to provide citizens with a plurality of options) and diachronically (i.e., over time) to ensure the circulation of new blood through the democratic body politic; second, the accountability that stems from people's power to electorally dismiss their incumbents; third, a certain fluidity and dynamism in power relations – unlike in autocracies, which are crystallised and immune to contestation and change; fourth, competition by means of elections; last but not least, the fact that positions of power are truly up for contestation by virtually anyone in the democratic arena. Taken together, these five features outline a theory and practice of political leadership in liberal democracy that points in the direction of enhanced accountability thanks to the multiplicity of contenders, the actual possibility of their rise and fall, the open competition among candidates, and the possibility of electoral disavowal.

As the contributors of this volume point out, Kelsen's demand for stronger accountability – of parties and leaders alike – stems from the relativism that permeates his entire democratic theory. It is the relativistic mindset that subjects leaders as well as parties to a rational assessment of their behaviour and tenure, in contrast to 'the system of autocratic ideology', which turns 'the origin, selection, and creation of the leader' into a question of blind faith beyond any possibility for rational inquiry or discussion.[64]

Another crucial aspect of Kelsen's theory of democratic leadership is the fact that 'in a democratic "election", the leader is not only chosen by the subjects but selected from their midst'.[65] Kelsen eloquently echoes Weber's phrase 'autocephalous selection' to capture this distinctive feature: the leader (the head/*kephalē*) is not dissimilar to the remainder of the political body but made of the same substance. In other words, the rulers and the ruled come from the same pool in a democratic system since leaders are not imposed from the top down but rather are elected from the bottom up by citizens among themselves. Conversely, as Scheuerman reminds us, 'in autocratic states, political leaders are viewed as standing above the social community […]. Typically, autocracies rely on a version of the obsolescent idea of a supreme or transcendent moral or political good, accessible only to leaders possessing superhuman or supernatural qualities'.[66]

[64] Ibid., p. 92.
[65] Ibid.
[66] See Scheuerman in this volume, Chapter 10, p. 284.

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Kelsen's concern with how autocratic leaders, unlike democratic ones, present themselves and are in turn perceived as 'superhuman', 'supernatural' individuals capable of exclusive access to a 'supreme', 'transcendent' good is noteworthy. As is well known, he was deeply familiar with the psychoanalytical innovations of his time, specifically those by another prominent Austrian – Freud. He drew on Freud's *Totem and Taboo* (1913) in his *Gott und Staat* (1922–1923) to explain the political psychology of authority, as well as on Freud's *Group Psychology and the Analysis of the Ego* (1921) to dismantle the ontology of the State in two extensive essays from 1922 to 1924.[67] In December 1911, Freud and Kelsen met at a seminar held by Hanns Sachs under the auspices of the Viennese Society of Psychoanalysis and soon developed a relationship of mutual intellectual esteem. In 1921, Freud invited Kelsen to give a lecture on the concept of the State and the psychology of the masses that critically engaged with Freud's work and that Freud, in turn, briefly but critically referenced in the second edition of his *Group Psychology and the Analysis of the Ego*. In addition, the first edition of the *Pure Theory of Law and State* (1934) was released by Freud's publisher, Franz Deuticke. Finally, the question of the roots of authority and the dynamics of obedience and imputation, together with the analogy between God and the State, would continue to be on Kelsen's mind through the late 1950s, as shown by some of the essays collected in *What is Justice? Justice, Law, and Politics in the Mirror of Science* (1957). Robert Schuett has recently pointed out[68] that Kelsen's 'Freudian moment' deeply influenced how a younger generation of political realists – from E. H. Carr to Reinhold Niebuhr and Hans Morgenthau – understood power politics and domestic leadership in the international arena. For many of them, nations were best understood as the macrolevel projection of the individual ego of 'the man in the street', with his 'lust for power and prestige', 'indulg[ing] his anarchic lusts vicariously'.[69] Echoing Kelsen almost verbatim thirty-five years later, Morgenthau, who dedicated *Truth and Power* to his teacher and friend Kelsen, wrote that 'the people project their desire for power' and

[67] H. Kelsen, 'Der Begriff des Staates und die Sozialpsychologie: Mit besonderer Berücksichtigung von Freuds Theorie der Masse', *Imago*, 8 (1922), 97–141 and H. Kelsen, 'The Conception of the State and Social Psychology – with Special Reference to Freud's Group Theory', *The International Journal of Psycho-Analysis*, 5 (1924), 1.

[68] Schuett, *Hans Kelsen's Political Realism*, ch. 3, pp. 66–93.

[69] R. Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (Knox, [1932] 2001), p. 93.

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'unsatisfied aspirations onto the international scene', 'find[ing] vicarious satisfaction in identification with the power drives of the nation'.[70]

As Jestaedt recalls in this volume, Kelsen's reflections on democratic leadership properly emerge in the second edition of *The Essence and Value of Democracy*,[71] precisely at a time when 'das Führerproblem in der modernen Demokratie'[72] is becoming increasingly and dramatically acute. Some twenty-five years later, Kelsen once again addressed the question of the essence and value – one could say, rephrasing the title of his famous book – of democratic leadership. As he explicitly writes, in *Foundations of Democracy* (1955), the question of leadership in multiparty democratic regimes is not one of efficiency (that is, of merely getting things done according to a logic of inputs/outputs) but of guaranteeing 'the greatest possible amount of individual freedom'[73] from an ostensibly relativistic perspective. In the intellectual milieu of the Cold War, Kelsen's emphasis on relativism in the making and remaking of democratic leaders closes the door on all attempts to justify the replacement of 'government by the people' with 'government for the people'[74] – most notably by the Soviet doctrine of democracy.

I.4.3 Preserving Plurality: Democratic Compromises and Their Virtues

Despite the safeguards provided by accountable political parties and democratic leaders, party democracy remains fragile, according to Kelsen. As Peter Langford argues in this volume,[75] Kelsen's realism unveils the constantly latent possibility of a deterioration of democratic politics, namely, from a condition of party pluralism, where parties interact as parts of the whole, to mono-partyism, where one party becomes the whole. Compromises, for Kelsen, are exactly what curbs parties' holistic temptation.

[70] H. J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Knopf, [1948] 1967), pp. 98–99.

[71] See Jestaedt in this volume, Chapter 3, p. 118.

[72] This is the title of a 1931 essay by Richard Schmidt, published in the 'Probleme der Demokratie' series under the joint auspices of the Deutsche Hochschule für Politik in Berlin and the Institut für Auswärtige Politik in Hamburg.

[73] H. Kelsen, 'Foundations of Democracy', *Ethics*, 66 (1955), 32, 1–101.

[74] Ibid., p. 2.

[75] 'Democracy, in the form of a representative democracy composed of political parties, includes, rather than excludes, fragility. Thus, that there remains in representative democracy an *inherent* fragility whose exacerbation and limitation become the common focus of their critical reflections' (Langford, in this volume, Chapter 2, p. 76).

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On the battlefield of party democracy, no single party can claim a monopoly of truth. Kelsen, in fact, firmly rejected the existence of any predefined and universal notion of the common good. Appeals to moral absolutes are indicative of an absolutistic mindset, whereas democracies, as the Austrian jurist consistently pointed out in his political writings, entail a relativistic mindset. For Kelsen, what makes a regime democratic, rather than autocratic, is precisely the procedure for forming the common will. As Wolkenstein recalls in this volume, Kelsen conceptualises popular will as 'the product of compromises between rival parties'[76] and, thus, as a dynamic process that 'can never be *unified* in pluralist party politics'.[77] In a *Parteienstaat*, where parties coalesce individual and group interests and flow into the Parliament 'like multiple springs into one riverbed', compromises are conducive to healthy democratic alchemy, making rival claims interact productively rather than clash destructively. Political views are based on group or class interests that parties make visible and audible in the legislative assembly. By doing so, parties facilitate decision-making processes in real democracies pervaded by pluralism and disagreement, creating 'the organizational precondition for the achievement of compromises' and 'steering the will of society in a moderate direction'.[78]

Within this framework, as Jestaedt emphasises, compromises enable social integration in a liberal democratic state, where decision-making is open-ended and requires mutually constraining interaction among equally legitimate interests and constant interaction between representative institutions and civil society.[79] For this reason, in Kelsen's view, the absence of compromises – whereby the interest of one party becomes the common or hegemonic will – is tantamount to the vanishing of democracy itself.

[76] See also Wolkenstein (in this volume, Chapter 6, p. 180, n. 35): 'Compromises between rival parties, argues Kelsen, constitute "a real approximation to the unanimity that the idea of freedom demands in the development of the social order by its subjects" (Kelsen, *Essence and Value*, p. 76).

[77] See Wolkenstein (in this volume, Chapter 6, p. 180). In a similar vein, Nadia Urbinati recalls the centrality of compromise in Kelsen's democratic theory: 'The politics of compromise that qualify party democracy are ingrained in the foundation of democratic society' (in this volume, Chapter 5, p. 155).

[78] Kelsen, *Essence and Value*, p. 40.

[79] The 'force of social integration' (Ibid., p. 69), 'which is inherent in the majority principle tempered by the protection of minorities, is essentially attributed by Kelsen in parliamentary democracy to the social technique of compromise, i.e., mutual yielding for the sake of togetherness. He thus rejects, from the outset, the intelligibility of the notion of an absolute majority – the impossibility of the absence of existence of a minority – within democracy' (See Jestaedt, in this volume, Chapter 3, p. 101).

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Already in 1918 – in the aftermath of the collapse of the Habsburg Empire and in the same year in which Weber published his highly influential *Parlament und Regierung im neugeordneten Deutschland* – Kelsen wrote three incisive articles[80] vigorously calling for a parliamentary democracy based on proportional representation, the protection of minority rights, and the centrality of compromise in the legislative assembly. Taken together, these three mechanisms 'soften the hiatus' between rulers and ruled and thus bring real democracy closer to the ideal of political autonomy.[81]

The nature and functions of compromise become prominent in the second version of *The Essence and Value of Democracy*,[82] as Jestaedt emphasises in this volume. However, the significantly shorter text from 1920 already sets the tone: '[…] it is precisely compromise that characterizes the politics of democracy'.[83] Kelsen's arguments draw explicitly on the considerations of economist and sociologist Gustaf Fredrik Steffen,[84] whose book *Das Problem der Demokratie* (1912) challenged the traditional objection to compromise: namely, that it is always at the expense of principle.[85] Steffen's reply to this critique of compromise closely aligns with Kelsen's later account of the formation of state will. Steffen, in fact, wrote that 'adherence to principle often means nothing more than adherence to the principles of whichever classes or groups within society believe they can best promote their special interests'.[86]

[80] 'Ein einfaches Proportionalwahlsystem', *Arbeiter Zeitung* (24 November 1918), pp. 2–3; 'Der Proporz im Whalordunungsentwurf', *Neue Freie Presse* (1 December 1918), pp. 3–4; 'Das Proportionalwahlsystem', *Der Österreichische Volkswirt* (7 December 1918), pp. 115–18.

[81] Lagi, *Democracy in Its Essence*, pp. 30, 116.

[82] 'Compared to the first edition, compromise as a system-stabilising element that balances out political differences in a democracy based on the majority principle and the protection of minorities is significantly upgraded' (Jestaedt, in this volume, Chapter 3).

[83] Kelsen, 'Vom Wesen und Wert der Demokratie (1. Aufl. 1920)', in Matthias Jestaedt and Oliver Lepsius (eds.), *Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie* (Tübingen: Mohr Siebeck, [1920] 2006), p. 10 (our translation).

[84] For references to Steffen within Kelsen's work: Kelsen, 'Vom Wesen und Wert der Demokratie (1. Aufl. 1920), pp. 4, n. 3, 8, n. 10, 12, n. 15; Kelsen, 'Vom Wesen und Wert der Demokratie (2. Aufl. 1929)', in Matthias Jestaedt and Oliver Lepsius (eds.), *Verteidigung der Demokratie: Abhandlungen zur Demokratietheorie* (Tübingen: Mohr Siebeck, [1929] 2006), pp. 185, n. 27, 219, n. 42; Kelsen, *Essence and Value*, pp. 62, n. 1, 96, n. 6).

[85] This argument is the anti-relativist objection examined in Sandrine Baume and Yannis Papadopoulos, 'Against Compromise in Democracy? A Plea for a Fine-Grained Assessment', *Constellations*, 29 (2022), 475–91, 476–78.

[86] 'Principledness is extolled as the noblest virtue of a politician – and always rightly so, of course, when it involves adherence to principles through which the common good can truly be promoted. But in contemporary society, adherence to principle often means

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Kelsen also elaborates on another argument by Steffen, namely, the idea that any attack on compromise is, at its core, an attack on democracy. Devaluing compromise is fundamentally anti-democratic – or, more specifically, anti-pluralist – since it promotes one perspective exclusively and, by imposing it on the whole community, eventually suppresses democracy altogether.[87]

In the late 1920s, as representative governments across Europe gradually took an anti-pluralistic turn, Kelsen felt a greater sense of urgency to explore the principles and mechanisms for the aggregation of citizens' wills under pluralism. The paralysis of parliamentary deliberation in Weimar due to constant deadlocks by parties unable to come together as stable majorities[88] further prompted Kelsen to examine and defend compromises in the theory and practice of democratic representation.

In *La Dictature de Parti* (1935), Kelsen argued unambiguously that 'democracy is only possible as long as the interests of opposing groups can be reconciled to reach a compromise'.[89] Combining majority rule and minority rights, compromises maximise the scope of political freedom in democratic decision-making since they are possible 'only with the assent, and not against the will, of a qualified minority'.[90] The 'majority-minority

nothing more than adherence to the principles of whichever classes or groups within society believe they can best promote their special interests' (Gustaf Fredrik Steffen, *Das Problem der Demokratie* (Jena: E. Diederichs, 1912), p. 105, our translation).

[87] 'A judgment on political compromise such as the one just discussed is likely to stem from a (albeit unconsciously) purely undemocratic basic view. One wants the wishes of one or the other social class or party tendency to become the law, without being blunted by consideration for other parties or classes. What is wanted is class rule, party rule, majority rule, not democratism. It is therefore necessary to realize how political compromise relates to real democratism' (Steffen, *Das Problem der Demokratie*, p. 105, our translation).

[88] 'The paralysis of parliament was a central political problem of the Weimar Republic. From its inception, the Republic was besieged by radical opponents from both the right and left and never enjoyed widespread, wholehearted support. After the early breakdown of the Weimar Coalition that founded the Republic, it became difficult to build and maintain workable majorities in the national parliament, the Reichstag. This challenge persisted even during the Republic's so-called middle period from 1924 to 1929, when there was a reasonable degree of political stability. However, it presented acute problems in the first and second extended crises of the Republic (1918–1923 and 1930–1933), when the Reich government ruled by presidential emergency decrees under Article 48 and several enabling acts were passed by the Reichstag.' (J. Seitzer, 'Notes to Schmitt's Introduction', in C. Schmitt and J. Seitzer trans., *Legality and Legitimacy* (Durham, NC: Duke University Press, [1932] 2004), p. 115, n. 2).

[89] Kelsen, *La dictature de parti*, p. 23 (our translation).

[90] Kelsen, *Essence and Value*, p. 68.

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principle' (as he suggests renaming it) enables conflicting social forces to coalesce into a popular will while also allowing minority group(s) to continue playing a role – albeit moderately – in the making of collectively binding decisions.[91] Compromises, as we read in the second edition of *The Essence and Value of Democracy*, favour 'that which binds over that which divides' and thus allow political antagonists to mutually 'get along (*vertragen*)'.[92] Nearly two decades later, in his monumental *General Theory of Law and State* (1945), Kelsen reiterated the connection between compromises and party democracy: 'Compromise means the solution of a conflict by a norm that neither entirely conforms with the interests of one party, nor entirely contradicts the interests of the other […] it is precisely because of this tendency towards compromise that democracy is an approximation of the ideal of complete self-determination'.[93]

Kelsen's vision of compromises also reverberates through his distinctive account of the majoritarian principle,[94] thereby underscoring the pivotal role they play in capturing the 'essence' – and not simply the mechanics or 'value' – of democracy itself.[95] In Kelsen's view, majority rule has little to offer to pluralist societies. As he puts it in *The Essence and Value of Democracy*, 'the majority principle only fully makes sense within a nationally homogenous body'.[96] He explicitly recalls Marx's argument that majority rule is not suited to heterogeneous societies, particularly in the context of class struggle; at best, it can resolve disagreements about

[91] In Chapter 4 (in this volume), Lagi points out that, for Kelsen, 'the so-called principle of the majority signified not so much that decisions (laws) were made and imposed unilaterally by the majority – if it were so […], the effective reconciliation between freedom and heteronomy would be irremediably undermined', p. 134.

[92] Ibid., p. 70. Already five years prior, in *General Theory of Norms* (*Allgemeine Theorie der Normen*, 1925), Kelsen had identified three politically relevant virtues of compromise: enabling connections rather than enhancing divisions, integrating different perspectives, and contributing to the formation of a majority will (see Lagi, *Democracy in Its Essence*, p. 34).

[93] Kelsen, *General Theory of Law and State*, p. 288.

[94] See Baume in this volume, Chapter 13.

[95] 'The rule of the majority, which is so characteristic of democracy, distinguishes itself from all other forms of rule in that it not only by its very nature presupposes, but actually recognizes and protects – by way of basic rights and freedoms and the principle of proportionality – an opposition, i.e., the minority. The stronger the minority, however, the more the politics in a democracy become politics of compromise. Similarly, there is nothing more characteristic of the relativistic worldview than the tendency to seek a balance between two opposing standpoints, neither of which can by itself be adopted fully, without reservation, and in complete negation of the other' (Kelsen, *Essence and Value*, p. 103).

[96] Ibid., p. 75.

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secondary issues, not 'vital' questions.[97] Therefore, as Vinx suitably reminds in this volume, Kelsen prefers the notion of 'majority – minority rule' to emphasise that '[a] truly democratic majority can exist only where it is challenged by legitimate opposition, a minority that is a legitimate government in waiting'.[98] In a similar vein, Urbinati (in this volume) emphasises that '[f]or Kelsen, the majority principle […] was not a pure show of strength' and thus 'sanctioned the end of any remnant of 'herd logic'. Distilling the majority principle from the idea of political freedom rather than of equality, Kelsen astutely 'positioned himself against a sovereignty-centred conception of democracy' (*à la* Schmitt), elaborating a democratic theory that seeks not to 'overcome disunion' but, on the contrary, to 'protect the equal right to express disagreement'.[99]

The idea of the minority as 'a legitimate governing in waiting' – in the eloquent phrasing of Vinx – makes Kelsen's democratic theory truly stand out among writings in the early twentieth century. He warns his readers that whenever democracy loses sight of its minorities and embraces unconstrained majoritarianism, it opens the door to plebiscitary temptations or calls for 'a redemptive "messianic presidency"' (as Scheuerman points out in this volume). Following this reinterpretation of majority rule is Kelsen's defence of decentralisation and federalism as vital for the pursuit of political autonomy and even as a 'democratic postulate', both in *The Essence and Value of Democracy*[100] and in *The General Theory of Law and the State*.[101]

[97] 'This is the same standpoint from which one must judge the Marxist view, which contends that the majority principle is only applicable to a society based upon a complete commonality of interest among its members, but not to one divided by class contradictions. The reason, it is argued, is that the majority principle may be suitable for resolving disagreements of a secondary – that is to say, merely technical – nature, but is incapable of resolving vital conflicts of interest' (Kelsen, *Essence and Value*, p. 75).

[98] See Vinx in this volume, Chapter 7, p. 214.

[99] See Urbinati in this volume, Chapter 5, p. 158.

[100] 'From this it follows that in supra- and international communities, and especially in nationally heterogeneous states (so-called *Nationalitätenstaaten*), decisions regarding national-cultural questions cannot be left to the central parliament. Instead, they must be left to the autonomy – that is, the representative bodies – of the [various] national communities (subgroups), which are organized according to the principle of personal status' (Kelsen, *Essence and Value*, p. 75).

[101] 'In order to diminish the possible contradiction between the contents of the legal order and the will of the individuals subject to it, in order to approximate as far as possible the ideal of democracy, it may be necessary, under certain circumstances, that certain norms of the legal order be valid only for certain partial territories and be created only by majority vote of the individuals living in these territories. Under the condition that the population of the State has no uniform social structure, territorial division of the State territory into more or less

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Dyzenhaus[102] aptly points out that according to Kelsen, for a legal order to be stable and effective, it must be regarded as valid or legitimate not only by the group(s) whose interests are protected by that legal order but also by minority groups, even if they disapprove of the content of specific laws. Stability is possible when groups experiencing the 'torment of heteronomy' are not structurally – that is, permanently – relegated to the status of losers or 'second-class citizens'. Accordingly, the legal order 'must represent a 'compromise' between 'conflicting interest groups in their struggle […] to determine the content of the social order and so it must be the case that none of these groups is "wholly satisfied or dissatisfied"'.[103] Therefore, democracy must, in its decision-making mechanisms, mitigate the 'torment of heteronomy' by preserving 'the equal chance of participating in making such norms'. This preservation is both formal and substantive: formal in the sense that the political process is open to the participation of everyone in the political community; substantive in the sense that 'the maintenance of this openness recognises and preserves their status as free and equal subjects'.

I.4.4 Explaining Democratic Compromises: Institutional Constraints or Majorities' Self-Restraint?

A major question that Kelsen's democratic theory raises among readers concerns precisely the structural connection that he assumes between compromises and democracy – that is, whether and why compromises are intrinsic to and distinctive of democratic politics. In this volume, Adam Przeworski considers the mechanisms that encourage governing majorities to exercise self-restraint and Kelsen's notion that compromise offers an important means of self-limitation. Also, Joseph Schumpeter, the other leading theorist of a realist approach to representative democracy examined by Przeworski, places considerable emphasis on 'self-control'.[104] For Kelsen

autonomous provinces (and this means decentralization in a static sense) may be a democratic postulate' (Kelsen, *General Theory of Law and State*, p. 311).

[102] See Dyzenhaus in this volume, Chapter 9, p. 256.

[103] In developing this argument, Dyzenhaus draws on H. Kelsen, 'Natural Law Doctrine and Legal Positivism', in Hans Kelsen and Anders Wedberg trans., *General Theory of Law and State* (Clark, NJ: The Law Book Exchange, [1945] 2007), pp. 438–39.

[104] Schumpeter argues that 'democratic self-control' is one of the four necessary conditions for a democracy to be successful and requires both politicians and voters to 'be on an intellectual and moral level high enough to be proof against the offerings of the crook and the crank, or else men who are neither will be driven into the ways of both'. Politicians must 'resist the temptation to upset or embarrass the government each time they could do so',

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and Schumpeter, limitations on majority power are 'self-implementing';[105] that is, they do not stem from institutional constraints but are 'an equilibrium in which the current majority stops short of monopolizing power and the current minority accepts' majority decisions precisely because the majority does not abuse its power.[106] When Vinx, in his chapter, describes the mechanisms of moderation at work in Kelsen's democratic theory, he similarly points out a certain naturalness that, according to the Austrian jurist, underpins the practice of democratic compromises. Specifically, opposing groups 'recognize each other as legitimate contenders for legislative authority'. Accordingly, they 'accept outcomes of elections that favour the other side' and are willing 'to compromise with their opponents'.

One possible answer to a question that Kelsen seems to leave unanswered might be as follows. In liberal democracies, governing majorities have a natural tendency towards self-limitation because they are under the persistent, unspoken fear that minorities might withdraw from the game of politics altogether and thus nullify the very existence of the majority in the majority/minority dialectic. This 'shadow of withdrawal', as Przeworski eloquently calls it in his chapter, serves as a constant reminder of the contingency of any majority and thus provides a powerful antidote to their possible abuse of power or – even more radically – to their 'shadow holism' (in the words of Nancy Rosenblum).[107] However, according to Przeworski, this argument is articulated too succinctly by Kelsen (as well as Schumpeter) and, most importantly, lacks empirical evidence.[108] The centrality of compromise in Kelsen's theory of

while voters 'must not withdraw confidence too easily between elections and they must understand that, once they have elected an individual, political action is his business and not theirs'. Democratic self-control also requires 'large measure of tolerance for difference of opinion' and 'a willingness to subordinate one's own opinions' J. A. Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, [1942] 1994), pp. 290–95.

[105] '"Compromise" or "self-control" is what protects democracy from deteriorating into autocratic rule but limitations on majority rule must be self-implementing; they cannot be imposed independently of the will of the majority. The essence of democracy, for both Kelsen and Schumpeter, is self-limiting majoritarianism' (Przeworski, in this volume, Chapter 8, p. 230).

[106] Ibid.

[107] 'Unless the majority compromises or exercises self-control, the minority would withdraw their participation in democratic institutions. In turn, this shadow of the minority abandoning democratic institutions induces the majority to moderate' (Przeworski, in this volume, Chapter 8, p. 233).

[108] 'Contrary to centuries of writings that sought the solution in some exogenous devices, such as constitutions or "social contracts", we now understand that limitations on power must be self-enforcing' (Przeworski, in this volume, Chapter 8, p. 234).

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democracy – acknowledged and appreciated by a substantial number of influential democratic theorists over the past three decades, from Manin and Urbinati to Rosenblum, Ypi, and White, among others – goes hand in hand with the challenge of explaining the grounds on which such compromises happen on the battlefield of democratic politics. Przeworski voices a widespread frustration with Kelsen's silence over the allegedly natural occurrences of compromises in democracy when he writes, '[…] neither [Kelsen and Schumpeter] has much to say about the mechanisms that induce majorities to exercise self-restraint, and this is the fundamental problem for any understanding of democracy'.[109]

Jan-Werner Müller[110] also acknowledges the 'ambiguities' and the seemingly 'undetermined' considerations supporting Kelsen's 'imperative to compromise', despite its unquestionable appeal in times of vitriolic and polarised partisanship such as his – and ours. 'Intriguing' as much as it is 'downright puzzling', his account of the majority – minority principle is a powerful antidote to the possibility of hypermajoritarian inebriations; however, it also makes his work somewhat unpalatable to majoritarian theorists of democracy who fear the illegitimate empowerment of minorities and thus the subversion of the cardinal rule of democratic politics – that is, majority rule under conditions of legitimate pluralism and disagreement.

Although Przeworski and Müller similarly point to Kelsen's insufficiently clear explanation of why ruling majorities compromise with minorities and thereby willingly limit their own power, they do so in somewhat different ways. For Przeworski,[111] Kelsen and Schumpeter understand 'self-enforcing' compromise as an 'equilibrium [that] maximises the best interest of both parties', that is, the rulers and their opponents.[112] For Müller, the self-interest or prudential explanation of compromises in

[109] See Przeworski in this volume, Chapter 8. Bernard Manin, in his influential *The Principles of Representative Government*, had already expressed similar puzzlement about how 'Kelsen makes the principle of compromise the keystone of his theory of democracy' but 'fails to explain what motivates protagonists to reach compromises', leaving the reader with 'the impression that compromise results from the goodwill of the representatives' (see Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997), p. 213).

[110] See Müller in this volume, Chapter 12, p. 327.

[111] See Przeworski in this volume, Chapter 8, p. 234.

[112] 'It must be in the best interest of the rulers to stop increasing its by their power beyond some limit and it must be in the best interest of the opponents to obey democratic norms if the rulers stop increasing their power beyond this limit. Limited government must constitute an equilibrium' (Ibid.).

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liberal democracy is acceptable: self-limiting majorities acknowledge that it is in their best interest not to abuse the contingent asymmetry of power favouring them today, given that it might disfavour them tomorrow, when new elections will define a new majority and, in turn, a new minority. However, this pragmatic or prudential incentive does not, in his view, exhaust the reasons for an imperative to compromise or explain why the 'majority and minority have to compromise'.[113] With respect to pragmatic considerations, Müller adds the maximisation of self-determination: the primary function of compromise is to 'lessen the experience of heteronomy'. '[I]nvolving as many actors in rule as possible', in the words of Müller, entails an approach to democratic politics that finds in freedom, more than equality, its driving impetus and that owes extensively to Rousseau's work (as Lagi and Urbinati also emphasise in their respective chapters).[114] This approach also has a Madisonian flavour, given how it seeks to offer a realistic solution to the problem of factions (a vigorous threat to political self-determination): the most effective way to avoid a majority faction, as *Federalist No. 10* famously argues, is to have as many factions as possible, so that none becomes numerically strong enough to impose its will on the remaining community.[115]

While Kelsen's rationale for democratic compromises seems insufficiently clear to some interpreters (and their thorough criticism is worth taking seriously), others read his emphasis on compromises as a powerful and timely resource to foster a democratic ethos both inside and outside representative institutions. 'We should read moderation', Urbinati suggests in a Kelsenian fashion, 'as a condition of the politics of compromise'. Moderation, in fact, entails that both the majority and the minority disagree, clash, and play their respective roles without burning to the ground the system that houses and orchestrates their legitimate conflict

[113] See Müller in this volume, Chapter 12, p. 324.

[114] Interestingly, both Schmitt and Kelsen turn to *Social Contract* as a key source for their respective democratic theories but offer radically divergent readings of it. While Schmitt weaponises Rousseau's emphasis on the identity between the rulers and the ruled, marking him as a theorist of homogeneity (equality as sameness), Kelsen privileges Rousseau's quest for autonomy in the law-making process and thus reads him as a theorist of moral and civil freedom. On this point, see S. Papa, *Il dispotismo della libertà: Schmitt e Kelsen interpreti di Rousseau* (Giappichelli, 2022).

[115] Rousseau, in Book 2, chapter 3 of *Social Contract* ('Whether the General Will Can Err'), had already clarified that, while the complete absence of 'partial societies' in the state is the ideal scenario, they nonetheless often arise in real-world politics. In this case, 'their number must be multiplied and inequality among them prevented' (J. J. Rousseau, *The Basic Political Writings*, D. Wootton (ed.) (Hackett, 2011), p. 173).

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and without contesting the rules of democratic game whenever they do not play in their favour. This mutual humbling of majority and opposition in Kelsen's democratic theory comes with a crucial reminder: any democratic majority is temporary, that is, '[i]f victory were permanent, it would erase the majority-minority dialectics, and so erase democracy itself'.[116] Relatedly, minorities' acceptance of majority decisions is a distinctive quality of democracy as a process (rather than an act) of never-ending recreation of the will and of constant interaction between the electoral expression of the will and the fluid realm of public opinion.

I.4.5 Inclusivity, Accountability, and Moderation

Given the importance Kelsen ascribed to self-limiting mechanisms and, in particular, to democratic compromises, Kelsen can be understood as a pioneer of 'consensus democracy',[117] which Arend Lijphart would later famously conceptualise as a more encompassing version of 'consociational democracy'.[118] Unlike the majoritarian system (exemplified by the Westminster model), which assumes that democratic majorities should simply govern and minorities should simply oppose, control, and expect the alternation of power (in ways that sometimes resemble elective dictatorships), the consensus model 'promotes the idea that democracy should represent as many people as possible and provide for multiple checks and balances – thereby limiting the power of the central government while providing for the representation of a broader array of interests'.[119]

[116] N. Urbinati, *Me the People: How Populism Transforms Democracy* (Harvard University Press, 2019), p. 73.

[117] 'Consensus democracy' does not presuppose unanimity and homogeneity but rather the consideration of diverse interests and checks and balances.

[118] In his influential article 'Consociational Democracy'; Lijphart revisited Gabriel Almond's threefold typology of Western democratic systems: the Anglo-American type (Britain and the US), the Continental European type (France, Italy, and Germany), and a third hybrid category, which Lijphart labels 'consociational', that combines elements of both (Scandinavia and the Low Countries). (A. Lijphart, 'Consociational Democracy', *World Politics*, 21 (1969), 207–25; G. A. Almond, 'Comparative Political Systems', *The Journal of Politics*, 18 (1956), 391–401)

[119] A. Vatter, 'Lijphart Expanded: Three Dimensions of Democracy in Advanced OECD Countries?' *European Political Science Review*, 1 (2009), 125–54. Lijphart's work draws on the ideas of Nobel Prize-winning economist Sir Arthur Lewis, who raised the possible tension between inclusivity and majority rule in the definition and practice of democracy. The consensus model shares, disperses, and restrains power through ten strategies: executive power-sharing in broad coalition cabinets (which also include minority parties); the legislative-executive balance of power; multiparty system; proportional representation;

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As Ferrín and Hernandez[120] have shown through a comparative analysis of citizens' attitudes in twenty-four European countries, public opinion believes that a consensus system is better for democracy, especially in regard to respecting the rights and preferences of minorities, thus confirming Lijphart's inclination – in the famous final chapter of his *Patterns of Democracy* (1999) – towards 'kinder and gentler'[121] consensus regimes.

Based on these premises, we may wonder whether and how two cardinal notions at the heart of democratic life are as compatible as Kelsen assumes – namely, inclusivity (especially through compromises) and accountability. In *The Essence and Value of Democracy*, he insists on the dangers of the 'lack of accountability of the representative to his constituents [that] is undoubtedly one of the central causes of the ill-feeling which exists today towards the institution of parliament'.[122] However, inclusivity – as promoted by Kelsen – might be interpreted as an obstacle to accountability.[123] A broad inclusion of preferences can, in fact, jeopardise a cardinal virtue of our democracies, namely, that of being able to 'sanction governmental disregard of the [voters'] will'.[124]

interest group corporatism; a federal and decentralised government; strong bicameralism; constitutional rigidity; judicial review; and central bank independence (chapter 3 of *Patterns of Democracy*).

[120] M. Ferrín and E. Hernandez, 'Preferences for Consensus and Majoritarian Democracy: Long- and Short-Term Influences', *European Political Science Review*, 13 (2021), 222, 209–25.

[121] A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 2012), p. 300.

[122] Kelsen, *Essence and Value*, p. 58.

[123] Kelsen acknowledges this risk when he notes that proportional systems can prevent the alternation of power: 'It should be mentioned, however, that proportional representation does pose a certain danger. Once political parties have achieved a certain permanence among those possessing political rights, so that significant shifts in the power relations among political groups are no longer to be expected in the foreseeable future […] then proportional representation threatens to lead to a certain rigidity of the political system' (Kelsen, *Essence and Value*, p. 77, n. 6).

[124] A. Kaiser, M. Lehnert, B. Miller and U. Sieberer, 'The Democratic Quality of Institutional Regimes: A Conceptual Framework', *Political Studies*, 50 (2002), 314, 313–31. 'A recent comparative analysis with data from 400 parliamentary elections [C. Kam, A. M. Bertelli and A. Held, 'The Electoral System, the Party System and Accountability in Parliamentary Government', *American Political Science Review*, 114 (2020), 744–60] revealed that electoral gains and losses are more clearly mirrored in the gains and losses of ministerial portfolios in strongly bipolar party systems, while multiparty systems increase the risk of unstable majorities, with the consequence that losers in elections may remain in office', Y. Papadopoulos, *Understanding Accountability in Democratic Governance* (Cambridge University Press, 2023), p. 12. The tensions between inclusivity and responsibility could be mitigated by noting, as Bormann does, that ultimately 'the goal of accountability is

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Furthermore, Kelsen does not seem to believe that an extensive practice of compromise requires room for discretion on the part of representatives, which sits uneasily with his calls for stronger ties between voters and their elected officials. Once again, a tension can emerge between inclusivity (at the horizontal level, that is, among parties inside representative institutions) and accountability (at the vertical level, that is, between the represented and the representatives). Aligning the will of elected officials with that of electing citizens might contradict Kelsen's conception of democracy as a space for negotiation and compromise.

Notwithstanding these possible tensions, we must do justice to Kelsen's pioneering contribution to subsequent formulations of 'consensus democracy', championing the representation of a wide range of interests, notably through the mechanism of compromise, and to the vital connection between democracy and accountability.[125]

I.4.6 Kelsenian Democratic Theory as a Deterrent to Populism

The various features of Kelsen's democratic theory – notably, the predominant role of parties, elected leaders and representatives held accountable by political and judicial oversight, and the value of negotiated decisions in legislative assemblies – suggest that they offer a deterrent to the threat posed today by the global proliferation of populism, in both its left wing and right wing forms. In an article published in the mid 2000s, Koen Abts and Stefan Rummens developed a comparative conceptual analysis of the competing logics of populism and constitutional, liberal democracy. When the attributes of populist politics are considered through the lens of the ideational approach[126] and enumerated by

to keep the government close to the voters' preferences'. N. C. Bormann, 'Patterns of Democracy and Its Critics', *Living Reviews in Democracy*, 2 (2010), 9, 1–14. Indeed, 'in consensus democracies governments are actually closer to the median voter than in their majoritarian counterpart despite the latter's higher theoretical accountability': G. B. Powell, *Elections as Instruments of Democracy – Majoritarian and Proportional Visions* (Yale University Press, 2000), quoted by Bormann, 'Patterns of democracy and its critics', p. 9.

[125] 'The accountability of leaders constitutes a specific feature of real democracy': Kelsen, *Essence and Value*, p. 93.

[126] The ideational approach to populism considers 'populism to be, first and foremost, about ideas in general, and ideas about "the people" and "the elite" in particular', C. Mudde, 'Populism: An Ideational Approach', in C. R. Kaltwasser, P. Taggart, P. O. Espejo and P. Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press, 2017), pp. 27–47. Among the authors who rely on an ideational approach to populism, we include, in

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the two scholars, we can argue that there is indeed something decidedly anti-populist about Kelsen's theory (even if he never uses this term in his extensive body of work). In particular, Abts and Rummens identified three characteristics of populism that conflict with a Kelsenian model of constitutional democracy.[127] First, populism champions an '*antagonistic relationship between "the people" and "the elite"* (emphasis in the original)',[128] appealing to the former against the latter. Second, it tries to 'give power back to the people and restore *popular sovereignty* (emphasis in the original)'.[129] Third, it conceives of the People as 'a *homogeneous entity* (emphasis in the original)'[130] with a unitarian will. Taken one by one, these three characteristics collide head-on with the foundational tenets of Kelsen's democratic theory.

The antagonistic dimension – the first characteristic of populism according to Abts and Rummens – is absent in Kelsen. There is no anti-elitist rhetoric. Elites, especially parliamentary ones, result from a logic[131] that he does not oppose: he repeatedly insists that parliamentarism represents an acceptable and justifiable 'compromise between the democratic demand for freedom and the division of labour which is the

addition to Abts and Rummens and Mudde, the following: M. Canovan, 'Taking Politics to the People: Populism as the Ideology of Democracy', in Y. Mény and Y. Surel (eds.), *Democracies and the Populist Challenge* (Palgrave Macmillan, 2002), pp. 34, 25–44; N. Urbinati, 'The Populist Phenomenon', *Raisons Politiques*, 51 (2013), 146, 137–54; N. Urbinati, 'Populism and the Principle of Majority', in C. R. Kaltwasser, P. Taggart, P. O. Espejo and P. Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press, 2017), pp. 571–89; T. S. Pappas, *Populism and Liberal Democracy: A Comparative and Theoretical Analysis* (Oxford University Press, 2019), p. 213.

[127] 'Populism thus challenges constitutional democracy from within, in the name of democracy itself. It claims to embody a counteracting democratic promise by insisting on the need for a more pure or undiluted democracy' (K. Abts and S. Rummens, 'Populism versus Democracy', *Political Studies*, 55 (2007), 410, 405–24).

[128] Abts and Rummens, 'Populism versus Democracy', p. 408. See also: M. Canovan, *Populism* (Harcourt Brace Jovanovich, 1981); M. Canovan, 'Trust the People! Populism and the Two Faces of Democracy', *Political Studies*, 47 (1999), 2–16; C. Mudde, 'The Populist Zeitgeist', *Government and Opposition*, 39 (2004), 541–63.

[129] Ibid. See also: N. Urbinati, 'Democracy and Populism', *Constellations*, 5 (1998), 116–18, 110–24; Canovan, 'Taking Politics to the People'.

[130] Ibid. See also: Canovan, 'Trust the People!'; P. A. Taggart, *Populism* (Open University Press, 2000).

[131] 'Differentiation of social conditions leads to a division of labor not only in economic production but within the domain of the creation of law as well. The function of government is transferred from the citizens organized in a popular assembly to special organs. The democratic principle of self-determination is limited to the procedure by which these organs are nominated' (Kelsen, *General Theory of Law and State*, p. 289).

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necessary basis for all progress in social technique'.[132] Notably, the term 'elite' never appears in *The Essence and Value of Democracy*, nor does Kelsen insist on how elites often capture the general interest for their own benefit (as Schmitt does in a strongly protopopulist fashion).[133]

However, Kelsen is far from naïve about the dynamics of political power (as mentioned above, his whole democratic theory is underpinned by a strong realist perspective), and he does not place blind trust in political personnel. His proposals for the implementation of accountability mechanisms, which are the responsibility of both the judiciary and politicians and whose importance he consistently emphasises,[134] prove the opposite. They are part of a rationalised and relativist approach to the circulation of political power in liberal democracy.

Regarding the second characteristic of populism highlighted by Abts and Rummens,[135] Kelsen does not juxtapose the will of the people as sacred and unstained and that of their representatives as tainted and impure. While he advocates for the inclusion of certain procedures of direct democracy in the life of modern democratic states (notably, the initiative and the referendum),[136] he never belittles or devalues the negotiations, compromises, and agreements at the heart of the parliamentary machinery, unlike what routinely happens in populist rhetoric that rejects compromise as a defeat, a sign of weakness, or a collusion with the political establishment that is so viscerally despised.[137] In contrast, Kelsen calls for a compenetration of representative and direct democracy, particularly for ensuring a constant connection between the institutional and the extrainstitutional dimensions of democratic life and for enhancing the accountability of the contingent majority and the inclusivity of the political process of will formation. Moreover, Kelsen's defence of judicial review as a bulwark against unconstrained majoritarianism – whether in the form of represented or direct popular will – and

[132] Kelsen, *Essence and Value*, p. 49.

[133] S. Baume, 'Carl Schmitt's Multifaceted Rejection of Political Compromises', *The Review of Politics*, 86 (2024), 197–217.

[134] Kelsen, *Essence and Value*, p. 80: 'Admittedly, the democratic election of the highest executive organs by parliament and their accountability to parliament provide a certain, though by no means the only possible, guarantee for the legal operation of these organs, i.e., for the fact that the will of the People is carried out'.

[135] Abts and Rummens, 'Populism versus Democracy'.

[136] Kelsen, *General Theory of Law and the State*, p. 298.

[137] Mudde, 'Populism', pp. 34–35. On the 'antiestablishmentarianism' of the populist logic, see also Urbinati, *Me the People*.

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his overarching account of constitutional democracy are completely at odds with the populist spirit.[138]

Third, nothing is further from Kelsen's position than a homogenising conception of the People. 'Practical politics' are 'defined by conflicts of interest'[139] that are 'experiential' and 'unavoidable'.[140] Kelsen ingeniously recalls that Rousseau, a philosopher of the general will, 'requires unanimity only for the original contract that initially creates the state'. The People, as the repository of a single unified will, do not exist for Kelsen. As a collective political agent, the People is never assumed a priori but created through the dynamic work of political parties, which are 'communities of interest'[141] and create the conditions for majorities through the process of compromise. As scholars of populism have pointed out,[142] populist parties in power construe party democracy as simultaneously anti-party and hyperparty, presenting themselves as a 'pars pro toto' that acts against the other parts and thus stretches the boundaries of its partyism to the limit. In contrast, compromises for Kelsen are intrinsic to a theory and practice of party democracy that both renounces the virtual aspiration to holism typical of populist politics (that is, populists' tendency to turn their party, from a part of the whole, into the whole itself) and promotes moderation on the battleground of political conflict.

In light of all the above, Kelsen's theory of constitutional, liberal democracy can be read as a timely and compelling antidote to present-day populist representations of power and peoplehood, sacrificing nothing to the fiction of a homogeneous *demos* and fighting revamped illiberal projects with its signature emphasis on pluralism, relativism, rationalism, and intermediary bodies.

I.5 Architecture of the Volume

Inspired by the 100th anniversary of the first edition of Kelsen's most famous book on the topic (*Vom Wesen und Wert der Demokratie*, 1920), this volume indeed offers a centennial, wide-ranging, and unprecedented assessment of Kelsen's democratic theory. It does so by

[138] Abts and Rummens, 'Populism versus Democracy', p. 408.
[139] Kelsen, *Essence and Value*, p. 29.
[140] Ibid., p. 40.
[141] Ibid., p. 45.
[142] For example, Urbinati, *Me the People*, pp. 147–49; A. Arato and J. L. Cohen, *Populism and Civil Society: The Challenge to Constitutional Democracy* (Oxford University Press, 2022), pp. 90–93.

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connecting three major axes that, taken together, enable Anglophone scholars and readers to realise the breadth and depth of Kelsen's work on constitutional democracy, comprehend its nuances and (dis) continuities, and appreciate its enduring relevance in the current pandemic of populist assaults on liberal democratic institutions and politics. Each of these axes corresponds to one of the three sections that constitute the volume.

The first section ('History': four chapters) explores the genesis and development of Kelsen's political thought across the decades – from the early 1900s to the mid 1950s – through a contextual and comparative reading of his texts (and those of some prominent interlocutors). It starts with Kelsen's first monograph, namely, on Dante Alighieri's political treatise *De Monarchia*, to disclose how Dante's vision of a pacified global order, capable of bringing political pluralism to legal unity, influenced ideas that Kelsen would systematically develop throughout the 1940s and early 1950s in his influential publications on legal cosmopolitanism, pacifism, and international law (David Ragazzoni). The section proceeds by examining the various stages of Kelsen's political thought and the ways in which specific elements of his account of procedural democracy changed accordingly (Matthias Jestaedt). It also shows how the political and institutional vicissitudes of interwar Europe and the rise of competing alternatives to both liberal parliamentarism and multipartyism shaped Kelsen's vision of democracy over the years (Peter Langford). It examines and clarifies Kelsen's borrowings from Rousseau in the distinction between ideal and reality – a seminal dualism at the core of his democratic theory (Sara Lagi). Accordingly, the first section of our volume provides a nuanced account of the making and multiple remakings of Kelsen's theory of democracy in the *longue durée* that is quite unprecedented in the Anglophone literature on Kelsen.

The second section ('Theory': five chapters) critically explores the conceptual foundations of Kelsen's democratic theory. It examines the vital role of political parties in the formation of political will, against the backdrop of Kelsen's unwavering opposition to monoparty dictatorships and his resolute commitment to party pluralism in liberal democracy (Nadia Urbinati). It studies Kelsen's account of how democratic leaders are appointed, replaced, and held accountable and frames it within the broader context of his political thought and its signature commitment to philosophical relativism, reclaiming a vision of democratic leadership that is normative yet realist (Carlo Invernizzi Accetti

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and Nicole Peisajovich). It revisits Kelsen's proposals to subject party organisations to constitutional regulation and thus ensure that they internally conform to democratic principles – a pioneering and bold idea at a time when constitutions had little to say about the status of parties, and even the normative desirability of the party form was contested (Fabio Wolkenstein). It scrutinises the ambivalent relationship between majority rule and constitutional adjudication in Kelsen's democratic theory, showing how his influential defence of constitutional review focuses on the conditions of the proper functioning of electoral democracy rather than on the protection of liberal rights (Lars Vinx). It ends with a detailed analysis of Kelsen's arguments about international law in the constitution of the legal order of the modern state, his understanding of state recognition in the post-Westphalian system, and their connections to his democratic theory (David Dyzenhaus). By disassembling and examining the building blocks of Kelsen's architectonics of constitutional democracy, the second section of our volume pursues three major goals. It provides a detailed account of its internal articulation and core principles. It enables a nuanced understanding of the institutions and procedures that, according to Kelsen, best serve such principles. Additionally, it reconnects his democratic theory to his extensive and notorious work in legal philosophy and constitutional theory. Accordingly, it resists one-dimensional interpretations of the two major halves of his work (the political and the legal).

Finally, the third section ('Legacy': four chapters) highlights the afterlives of Kelsen's democracy theory and its timely contributions to academic and public debates on the present and future of constitutional, liberal democracies. It offers a comparative study of Kelsen's and Schumpeter's theories of democracy – united by their realistic approach – in order to assess today the plausibility and resilience of the self-implementing mechanisms of majority restraint (Adam Przeworski). It revisits Leo Strauss' complicated theoretical dialogue with Kelsen to better understand present-day intellectual tendencies supportive of autocratic threats to American democracy (William Scheuerman). It returns to Kelsen's defence of compromise in party democracy – a cornerstone of his democratic theory – to consider whether, and how, it sits with common sense understandings of having a democratically elected majority (Jan-Werner Müller). Chapter 13 offers a fresh perspective on Kelsen's concept of militant democracy, critically analysing its strengths, weaknesses, and influence in contemporary scholarly debates (Sandrine Baume).

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The concern with the preservation of peace in the domestic and international arenas, driving Kelsen's exegesis of Dante in his first monograph and, most powerfully, his later democratic theory, centred upon the principle of self-determination under conditions of disagreement and conflict, becomes the theme that connects the beginning and the end of our volume and, ultimately, the two sides – the legal and the political – of Kelsen's lifelong theorising about constitutional, liberal democracy.

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