

Spinoza and the Paradox of Constitutionalism

Miguel Vatter

Abstract: This paper discusses the connection between the idea of constituent power and Spinoza's theory of nature as first formulated by Carl Schmitt in the context of the paradox of constitutionalism. The paper argues that Hans Kelsen also employs Spinoza in the confrontation with Schmitt and in order to address this paradox. The paper goes on to suggest a republican conception of constituent power that unites the autonomy of the law with the power of the people that is closer to Kelsen's than to Schmitt's conception of constituent power.

Keywords: constituent power, Schmitt, Spinoza, Kelsen, basic norm

Introduction

The relationship between might and right, power and law, is a perennial problem since at least Plato's polemic against the Sophists over natural right (*nomos phuseos*). Law is both an expression of power, for the powerful get to make laws, and what tempers the use of power, for "a prince who can do what he wishes is crazy" (Machiavelli, *Discourses on Livy* I, 58, 4). The proper way to understand the relationship between power and law was also at the heart of the polemic between Hans Kelsen and Carl Schmitt. As juridical minds, both agreed that "power proves nothing in law" (Schmitt 1988:17). But they drew entirely opposed conclusions from this insight. For Kelsen it meant that what is "law" can only be determined "legally" in and through an autonomous and autopoietic legal system. For Schmitt, instead, precisely because law has no inherent relationship to power, it receives its effectivity or applicability through an authority capable of establishing "the connection of actual power with the legally highest power"; and this authority is sovereignty (Schmitt 1988: 18). Sovereignty has the task of connecting an abstract complex of norms ("jurisprudence") to a concrete complex of power ("sociology"). This task defines, for Schmitt, the field of "political theology."²

Yet, the problem with sovereignty is that, *prima facie* at least, it unites legal authority (or: the "authority" to say what is "law") with the power (and person) of the state, not with the power of the people.³ It is for the sake of democracy that Kelsen sought to undermine the

.....
1 I have presented these ideas in several talks and in the international conference "Images of Sovereignty," KU Leuven, Belgium, June 7-9, 2017. A version of these arguments has appeared in Spanish in (Vatter 2018).

2 For a discussion of political theology in this jurisprudential sense I refer to (Vatter 2017b) from which I draw below in my discussion of the Kelsen/Schmitt debate.

3 The main counterexample would be Rousseau's conception of popular sovereignty. Yet, for Rousseau a people is constituted as such only through reference to a general law, not to a power complex. It is at least arguable that the autonomy of legal authority seems to be presupposed by Rousseau's idea of popular sovereignty. For the discussion of Rousseau and a democratic conception of constituent power see now (Colón-Ríos 2020).

distinction between state and law on which sovereignty depends. On his view, sovereignty is anti-democratic. Defining republicanism as the doctrine that the rule of law rests on the power of the people, Arendt would make the same point again: sovereignty disempowers the people and denies the autonomy of law all at once. On some readings, Schmitt was acutely aware of the democratic shortfall of his Hobbesian concept of sovereignty. That is why he argued that in a democratic age, the crucial concept capable of unifying the highest legal authority with the supreme power was that of “constituent power”.⁴ In so doing, Schmitt appealed to the political thought of Spinoza, rather than of Hobbes. By the early 20th century, scholarly consensus was beginning to form around the idea that Spinoza was to be considered the first modern theorist of democracy, if not liberal democracy, as the superior form of government.⁵

In this article I have two aims: the first one is to show that the connection of Spinoza with the idea of constituent power is not something that is discovered first by Schmitt, but is already formulated at the beginning of the 20th century by authors like Hermann Cohen and Harold Laski. Their recovery of Spinoza is taken up by Kelsen in the confrontation with Schmitt on sovereignty during the Weimar years. The second aim is more theoretical. The problem with Schmitt’s solution is that his “democratic” conception of constituent power is co-terminus with a conception of “dictatorship,” which is the opposite of what is normally understood by democracy (obviously Schmitt disagreed with this piece of common sense, and he thought that revolutionaries of the Left and Right would also side with his praise of dictatorship). In addition, Schmitt’s solution disregards the autonomy of law and ties legal authority to a supra-legal, sovereign “decision” on the “state of exception”. I am interested in examining how Spinoza’s thought may be employed to offer a republican conception of constituent power that unites the autonomy of the law with the power of the people in ways that are closer to Kelsen’s than to Schmitt’s insights.

The concept of constituent power is meant to resolve the “paradox of constitutionalism,” or what Arendt also calls “Sieyes’s circle.” The paradox is that the beginning of a new legal order is not itself law-bound, or, phrased in more political terms, that absolutism is a condition for the possibility (and, equally, for the impossibility) of limited, constitutional government.⁶ Schmitt used this paradox to reject the normativist

.....
4 See (Kalyvas 2005) and (Kalyvas 2009). But Kalyvas does not point out Spinoza as one of the sources for this democratic idea of constituent power; his genealogy passes more through Althusius and Lawson. On the history of term from Sieyes onwards, see now (Rubinelli 2020).

5 For a discussion, see (Smith 1994) to (Cooper 2017), and the collection of European scholarship on this question in (Montag and Stolze 1997), which I address below.

6 As Sieyes said: “a nation is independent of all forms and, however it may will, it is enough for its will to be made known for all positive law to fall silent in its presence, because it is the source and

definition of a constitution as a higher law for law-making. He sought to replace this definition of a constitution by a decisionist one, whereby a constitution is “the concrete, comprehensive *decision* [by a people or its representative/MV] over the type and form of its own political existence” (Schmitt 2008: sect.8, 125). Not surprisingly, the Schmittian definition of constituent power as the sovereign decision that a people makes about its legal form has captured the imagination of populists of the Left and of the Right.⁷

The contemporary scholarly debate on constituent power for the most part concedes that Schmitt had the better of Kelsen on this particular theme. As a consequence there is a widespread assumption, ranging across interpreters from Martin Loughlin to Andrew Arato, that normativism is a dead-end for thinking about constituent power.⁸ Ultimately these interpreters side with the Hobbesian belief that *auctoritas non veritas facit legem* and are thus led to fashion accounts of the “authority” of law that have markedly non-republican consequences. These accounts cast into doubt the possibility for the “power of the people,” based on the right of nature, to lay the ground of the legal order through a constitution or higher law that eliminates the absolutist claims made on behalf of state sovereignty. Put another way, these accounts of legal authority privilege the constituted *potestas* of the sovereign state over the constituent *potentia* of the people.⁹ I hope to show that my Spinozist interpretation of Kelsen avoids the defect of the Hobbesian strategy, whereby the people is introduced starting from the state and on the mode of the “as if”: as if the state emerges from the “consent of people” (where the pre-existence of the people is a retrospective projection from an already constituted power). In so doing I hope to show that it is possible to reconstruct a **republican** conception of constituent power out of Kelsen rather than Schmitt, and one in which, keeping to Spinozist principles, the “authority” of law has a **rational** rather than a decisionist foundation.

I do not here want to engage the longstanding question of the similarity or difference between Hobbes and Spinoza. As anyone who has read the 16th chapter of *Theologico-Political Treatise* knows, Spinoza can sound very close to Hobbes, for example when he affirms that “the

supreme master of all positive law” (Sieyes 2003: 138, emphasis mine). On this paradox, see the essays in (Loughlin 2008).

7 See (Colón-Ríos 2012) and (Arato 2016: ch.6 passim) for some early discussions.

8 See (Lindahl 2007); (Loughlin 2010); (Kalyvas 2009); (Arato 2016).

9 See (Loughlin 2014) and (Lindahl 2015) who argues that the formation of a “we” or a “people” is an unfindable decision or “initiative,” and thus constituent power cannot be the “cause” of a system of positive law, because it is in reality its retroactive “effect.” “An act succeeds as the exercise of constituent power only if, retrospectively, it appears to be the act of a constituted power” (168).

sovereign power is bound by no laws, and all must obey it in all matters.”¹⁰ My goal here is to shed new light on the key disagreement between Schmitt and Kelsen on sovereignty as a function of how each of them interprets crucial points of Spinozist philosophy. However, since this is not an article on Spinoza’s political and legal thought, I must rest content with mentioning Spinozist ideas and try to show how they are put to work in these early 20th century debates on constituent power and sovereignty.

As I understand this first Spinoza reception, Cohen, Laski, and Kelsen all employ Spinozist principles and postulates in order to offer critiques of state sovereignty or, more specifically, in order to reject the dualistic theory of sovereignty that splits state from law. Schmitt’s considerable effort, of course, is directed at saving this dualism: after all, his fundamental insight is that when “law recedes, the state remains” (in the form of the state of exception). Ultimately, Schmitt sides with Hobbes’s construction of sovereignty and opposes Hobbes to Spinoza.¹¹

I suggest that this early 20th century reception of Spinoza puts to work the famous equivalences of right (*jus*) and power (*potentia*) stated in chapter 2 of the *Political Treatise*¹² in ways that strengthen the internal connection between constitutionalism and democracy, or the rule of law and the power of the people, perhaps more so than the later neo-Marxist reception of Spinoza. This article therefore begins with a quick review of this post-Marxist reception of Spinoza on the question of constituent power. It then moves to a discussion of the connection between constituent power and *natura naturans* that Schmitt pointed out and shows its problematic character. The central part of the article reconsiders Kelsen’s challenge to Schmitt on constituent power in light of the Spinozist assumptions behind his denial of the difference between state and law. I suggest that Kelsen’s arguments can be used to articulate an entirely immanent conception of constituent power within constituted power.

In the final part of the article, I turn my attention to a second Spinozist motif, namely, the problem of obedience and how it relates to his belief that “it is to men’s advantage to live in accordance with laws and *sure dictates of our reason* which aims only at the *true good* of men” (TTP 16, emphasis mine). I show that Cohen and Laski both start out from this motif in rejecting the Hobbesian maxim that *auctoritas non veritas facit legem* and instead approaching the problem of obedience to

10 Spinoza, *Theologico-Political Treatise* (TTP henceforth), chapter 16. The *Political Treatise* (PT henceforth) is also cited from the edition (Spinoza 2002).

11 See (Vatter 2004) and now (Koekkoek 2014).

12 “The natural right of every individual [*individui naturale ius*] is coextensive with its power [*potentia*]. Consequently, whatever each man does from the laws of his own nature, he does by sovereign right of Nature, and he has as much right over Nature as his power extends... their natural power or right [*potentia sive jus*] must be defined not by reason but by any appetite by which they may be determined to act and by which they try to preserve themselves.” (TP 2/4-5)

law as a matter of the public use of reason on the part of those affected by norms. However, I argue that this use of reason is related to truth not in a cognitive sense, but in a sense tied to the reflective judgment or opinions of citizens living in a constitutional government.¹³

Spinoza and constituent power in the 20th century: the post-Marxist reception

In *Dictatorship* (1921), Carl Schmitt first advanced the claim that Spinoza's metaphysics of *natura naturans* lies behind the subsequent development of the idea of *pouvoir constituant* or "constituent power." Antonio Negri renewed the discussion of this concept by developing an interpretation of Spinoza, which belongs within the long-standing effort by French and Italian post-Marxist theory in the second-half of the 20th century to tell the story of Spinoza's recovery for radical democratic political thought. Althusser, Deleuze, Matheron, Balibar (and more recently Del Lucchese) are some of the names that come to mind in this context. To justify my proposal to shift attention from the second to the first 20th century reception of Spinoza, I shall briefly indicate how the Schmitt-Kelsen debates frame the background of both Negri's, Balibar's and Del Lucchese's reflections.

In *Insurrections* Negri credits Schmitt with identifying Spinoza as "father" of constituent power.¹⁴ In "*Reliqua Desiderantur: A Conjecture for a Definition of the Concept of Democracy in the Final Spinoza*" Negri mentions *en passant* the first reception of Spinoza in the early 20th century under the rubric of a "liberal" reading, which he contrasts with Leo Strauss's intervention. But his focus is on the second reception centred on the French interpretation.¹⁵ Balibar does not mention either Schmitt or Kelsen in his equally famous treatment in "*Jus-pactum-lex: On the Constitution of the Subject in the Theologico-Political Treatise*", but there are evident intimations that it is precisely the Schmitt/Kelsen debate that lies at the background of both interventions. Negri and Balibar

.....
13 See (Vardoulakis 2019) for an attempt to formulate Spinoza's jurisprudence in terms of an Epicurean conception of law. Vardoulakis argues that this interpretation of the conception of law in TTP 4 as *ratio vivendi* (which he translates as "logic of living" and relates to judgments of utility) can overcome the opposition between Kelsen's normativism and Schmitt's decisionism. Although I do not have the space to offer a reading of TTP 4 here, and in particular of the strange duplicity of "divine law" which, on the one hand stands for a synonym to natural laws, and on the other for an ethics (or form of life) whose ultimate aim is knowledge of God *sive Natura*, I share Vardoulakis' conviction that Spinoza sees reason (and hence also truth) rather than authority (and hence command) as the ground of law. This is equally Kelsen's view on my reading.

14 "Carl Schmitt, who, notwithstanding the folly of the results, has posed this question ["the originary radicalness of constituent power"] with extraordinary intensity, refers us to Spinoza. I, too, am convinced that Spinoza's philosophy allows us to construct a first schema of the concept of constituent power and to guard it from misunderstandings and mystifications" (Negri 1999: 24), referred to also in Koekkoek, 337.

15 (Negri 1998: n.4).

share an interest in giving a reading of Spinoza's theory of law and, perhaps even more centrally, in engaging the motif "God and State" that propels Schmitt's political theology of sovereignty as much as it features centrally in Spinoza's *Tractatus* if, as seems to be the case, there is no longer much doubt about the centrality of theocracy in his discourse on democracy.¹⁶

More specifically, Negri's intention is to read "Deus sive Natura"¹⁷ as a republican formula: "deepening the study of the extent to which Spinoza belongs to the republican tradition" (Negri 1998: 223, *emphasis mine*). Negri even suggests that his interpretation of the figure of the *multitudo* (as opposed to Hobbes's contractually constituted idea of "people" as support for monarchic sovereignty) presupposes a republican theory of freedom as *aequus ius* or *sui iuris* status as "the very condition of democratic politics": "a republican right [in the *multitudo*/MV].... An equal right for all" (Negri 1998: 234, *emphasis mine*). In addition, Negri breaks with Schmitt's decisionism by seeking a new account of Spinozist "legalism," which he parses in terms of the *autonomy of law*: "an absolute conception of democratic power realizes the unity of the formal legality and material efficacy of juridical organization and demonstrates its *autonomous productive force*" (Negri 1998: 226, *emphasis mine*).

Similarly, the Schmitt/Kelsen debate casts its shadow on Balibar's reading of *lex* in Spinoza's *Tractatus theologico-politicus*. Balibar begins in a Kelsenian fashion: why is it that, despite "the fact of power alone establishes a juridical order," does Spinoza nevertheless argue that "it is *necessary to define in general the fundamental law* that is in force in a given state as a *divine law*? Why is it inevitable that obedience appear as a divine commandment?" (Balibar 1998: 188, *emphasis mine*). Balibar's reference to the figure of a "fundamental law" (*viz.* Kelsen's *Grundnorm*) is striking, especially given that the expression does not have any clear or direct equivalents in Spinoza's text as far as I can tell (but see below my discussion of Del Lucchese). Indeed, Balibar's answer to his own question turns on what he calls "the very *formalism* of law" (Balibar 1998: 188, *emphasis mine*). However, in marked distinction from Negri, Balibar reconstructs this legal "formalism" in Spinoza through the latter's analysis of the foundation of the Hebrew Republic on the basis of divinely revealed law: "this name [of God/MV] would designate quite simply the voices (*vox illa, quam Israelitae audiverent*) that establish a relation of direct interpellation between the I, subject of obedience (*subditus*) and the He, universal of the Law. This is why every political power (every sovereignty) at the same time that it establishes a relation

.....
16 See the already cited Cooper and (Fraenkel 2017). Balibar himself argues that "theocracy is the imaginary institution of society as democracy" (Balibar 1998: 184).

17 Or, more precisely, the formulation found in TP 2: "from the fact that the power of things in Nature to exist and operate is really the power of God, we can easily see what the right of nature is."

of forces, from the fact alone that it absolutely states its right to be obeyed, must be presented as the interpreter of a superior commandment. Every legislator refers by its very form to an anonymous Legislator, whose only name is God, Person, the one who is" (Balibar 1998: 190-191). Irrespective of whether this is the correct reading of Spinoza, there is no doubt that Balibar is trying to address the question of sovereignty (as a *legal* concept meaning the "highest legal power") in the form that Schmitt poses it, viz., the problem is how factual power joins with supreme right, and the role played by the analogy between God and sovereign in this synthesis. Balibar's answer is that "Spinoza had precisely drawn out from the totality of all narratives a *fundamental norm* (*fundamentum universale, lex divina naturalis, dictamen rationis*) capable at the same time of being completely interiorized by individuals (whether, rationally, they understand that *summum legis divinae praemium esse ipsam legem*) or whether they find in diverse theological opinions the motive of love for the neighbor) and of being referred to a God" (Balibar 1998: 191). Again, irrespective of whether Balibar's use of Spinoza's conception of *vera religio* as civil religion is really the place where one should go to address the juridical problem of political theology (noting that neither Schmitt nor Kelsen refer to this topic in their answers), it remains clear that Balibar's answer rests on a conception of divine law as *synonym* of a Kelsenian fundamental norm. As I show below, this path was already disclosed by Hermann Cohen.

Lastly, one of the most recent approaches to Spinoza within the problem area of political theology is found in Filippo Del Lucchese's article on "Spinoza and constituent power." Del Lucchese also tries to employ Spinoza's monism in order to counter Schmitt's reading of constituent power. However, in his perfunctory rejection of Kelsen's standpoint, Del Lucchese does not mention that the debate on the Spinozist origins of constituent power precedes Schmitt.¹⁸ It is Kelsen who first uses Spinoza's monism to argue against Schmitt's claim with regard to the "transcendence" of constituent power over constituted power, viz., in rejecting Schmitt's assumption that a people can "freely decide" on its constitution. Del Lucchese's suggestion that Spinoza would reject this freedom on the basis of the argument that God's necessity is also His freedom (*Ethics* I, 17, c2) is correct. Equally useful is his claim that, with respect to the identity Spinoza establishes between *jus* and *potentia*, "power cannot be considered ontologically prior or superior to law" (Lucchese 2018b: 32). However, the discussion leaves open many complex issues, *inter alia* related to the relation between divine necessity and divine compacts, in Spinoza's account of constituent power. In the end, Del Lucchese suggests that Spinoza's viewpoint on

.....
¹⁸ Although in (Lucchese 2018a: 193) he does point out to the importance of Adolf Menzel's readings of Spinoza. Menzel habilitated Kelsen.

constituent power can be most productively compared with Constantino Mortati's definition of constituent power as a historical "normative fact" that is both a force yet has "in itself its own law."¹⁹ When one inquires what is this "law" that is "internal" to power, Del Lucchese refers generically to Spinoza's phrase "*jura sunt anima imperii*" (*Tractatus Politicus* 10.9) and the term *jura fundamentalia*, which he glosses as "constituent principles."²⁰ It would seem that such principles are closer to what Kelsen calls a "basic norm," but since no examples are provided, one is left in the dark of what these "constituent principles" are. I discuss the question of how to understand such principles of constituent power below.

As I hope to show in what follows, all of the above strategies, whether consciously or not, follow Hermann Cohen's earlier development of political theology *within* the question of the autonomy of law and the grounding norm. Kelsen's own idea of a "basic norm" and its relation to constituent power is a development from Cohen's original insights. With regard to the question of "obedience" and its relationship to sovereignty, the fundamental role of religion is precisely what Harold Laski employs to show that the state has no "sovereign" right to demand obedience to its citizens, not more than any other church. These indications motivate the need to move back from the post-Marxist to the first, Weimar reception of Spinoza in legal thought.

Schmitt on Spinoza and constituent power

The *explicit* connection between Spinoza's thought and the concept of "constituent power" seems to have first been made by Schmitt. For Schmitt, there are only two subjects of constituent power: the prince or the people. It is in the context of arguing how the people can be the subject of constituent power that Schmitt refers to Spinoza's metaphysics (or "political theology") of *natura naturans*. Renato Cristi has argued that Schmitt's development of the idea of constituent power in *Constitutional Theory* was his belated attempt to "democratize" his conception of sovereign dictatorship, or the sovereign as decision on state of exception, found in *Dictatorship* and *Political Theology*. More recently, Andreas Kalyvas has followed Schmitt's indication by arguing that popular sovereignty should be understood in terms of a democratic

.....
19 (Lucchese 2016: 194). Mortati has recently become a popular choice as a source for an alternative solution to the problem that gives rise to political theology, namely, the connection of power to right. See now (Rubinelli 2019) and Colón-Ríos previously cited.

20 It is unclear whether Del Lucchese thinks these *jura fundamentalia* are what Schmitt calls "constitutional principles" internal to a constitution or whether it refers to a supra-legal constituent "principle" of any constitution. In (Lucchese 2018b) he gives a useful list of translations for the key phrase *jura sunt anima imperii*, among which Shirley's "the constitution is the soul of the state", Curley's "the laws are the soul of the state", and Bove's "le Droit est l'âme de l'État". These formulations, at least in spirit, can be seen to match Kelsen's denial of a distinction between state and law.

constituent power and opposed to any idea of dictatorship, although without exploring the Spinozist derivation but instead focusing on a reconstruction of Althusius's federalism.²¹

Schmitt refers to Spinoza the first time in *Dictatorship* when he is proposing his idea of a “sovereign dictatorship” and claiming that it is identical to the idea of constituent power developed by Sieyes. The argument starts from a deconstruction of Rousseau's *Social Contract* which, according to Schmitt, ends up *separating* right from power, legislator from dictator. To resolve this impasse, Schmitt says that the legislator must be given “the power of a dictator.... This relationship will come about through an idea that is, in its substance, a consequence of Rousseau's *Contrat social*, although he does not name it as a separate power: *le pouvoir constituant* [the constituting power]” (Schmitt 2014: 111). The sovereign dictatorship of constituent power “does not suspend an existing constitution through a law based on the constitution – a constitutional law; rather it seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible. Therefore dictatorship does not appeal to an existing constitution, but to one that is still to come. One should think that such an enterprise evades all legal considerations, because the state can be conceived of in legal terms only in its constitution, and the total negation of the existing constitution should normally relinquish any legal justification – since, by definition, a constitution that is to come does not yet exist. Consequently we would be dealing with sheer power.” There is no solution to the paradox of constitutionalism if law-making is simply collapsed onto power. Here Schmitt simply rephrases Sieyes's circle as Arendt calls it. But the idea of a “constituent power” resolves the paradox when “the power assumed is one that, *without being itself constitutionally established, nevertheless is associated with any existing constitution in such a way that it appears to be foundational to it* – even if it is never itself subsumed by the constitution, so that it can never be negated either (insofar as the existing constitution negates it). This is the meaning of *pouvoir constituant* [constituent power].” (emphasis mine). But how is this possible? How can a constituent power exist both within an established constitution yet outside of it? Isn't Schmitt solution to the paradox of constitutionalism simply rephrasing the problem as a postulate: “there exists the state, whose power is simultaneously legal and above the law, and thus constituent”?

In the famous “Appendix” of *Dictatorship* dedicated to the interpretation of Article 48 of the Weimar constitution, Schmitt explains that the idea of constituent power is particularly “democratic”: “The idea of a constituent power that is up to the people – that is, the idea of a

.....
21 See the works cited; Del Lucchese contests Kalyvas's reconstruction of constituent power as “democratic.”

pouvoir constituant – arose from democratic thought as well. This is the source of all constitutionally constituted and therefore circumscribed power – and yet it differs from it by being unlimited and unlimitable. The possibility of a legally unlimited power – such as is up to a constituent assembly after a revolution – is based on some basically democratic reasoning of this sort” (Schmitt 2014: 204). Schmitt will subsequently attempt to determine sovereignty as both within and without the sphere of law in *Political Theology* and its theory of the state of exception.²² But the addition of the phrase “in such a way that it *appears* to be foundational” suggests that constituent power may in actuality *not be* “foundational”. This is the window that has led Lindahl and Loughlin to argue that the constituent power is always an *ex post facto* retrojection by a constituted power that in this way seeks to legitimate itself.

It is at this point that Schmitt refers to Spinoza in order to resolve the problems of the idea of a sovereign dictator as source of legitimacy of a legal order over which it stands in an extra-legal relationship. The passage is famous and, given its importance, worth citing in full. “Sieyès’ theory can only be understood as the expression of an attempt to find the principle that may organise the unorganisable. The idea of the relationship between *pouvoir constituant* [constituent power] and *pouvoir constitué* [constituted power] finds its complete analogy, systematic and methodological, in the idea of a relation between *natura naturans* [nature nurturing/creating] and *natura naturata* [nature natured/created]. And even if this idea has been integrated into Spinoza’s rationalistic system, this demonstrates even more that this system is not exclusively rationalistic. The theory of the *pouvoir constituant* is incomprehensible simply as a form of mechanistic rationalism. The people, the nation, the primordial force of any state – these always constitute new organs. From the infinite, incomprehensible abyss of the force [*Macht*] of the *pouvoir constituant*, new forms emerge incessantly, which it can destroy at any time and in which its power is never limited for good. It can will arbitrarily. The content of its willing has always the same legal value like the content of a constitutional definition. Therefore it can intervene arbitrarily – through legislation, through the administration of justice, or simply through concrete acts. It becomes the unlimited and illimitable bearer of the *iura dominationis* [rights/legal prerogatives of rulership], which do not even have to be restricted to cases of emergency” (Schmitt 2014: 124).

Schmitt’s incandescent rhetoric is indicative of a slippage in his argument. While he begins from a reference to Spinoza, he quickly veers into theologemes of arbitrary volition and right to command that are clearly distant from Spinozist themes and match up better with medieval ideas of *plenitudo potestatis*, and in general with an omnipotent and radically transcendent personality of God. It would seem as if the

.....
22 See the discussion in (Agamben 1998).

Hobbesian understanding of the person of the sovereign makes its way back into Schmitt's discussion of Spinoza's God or Nature. In any case, we are far from the identity of necessity and divine action, the denial of freedom of the will, and, last but not least, the idea of *jura fundamentalia* associated with the "*anima imperii*."

This suspicion is strengthened when Schmitt proceeds to assert that constituent power *is* a "sovereign dictatorship" in that it "has not yet been bound to constituted limits; and the constituent assembly can therefore exercise *plenitudo potestatis* at its own discretion.... on the one hand we find here an unlimited legal power that is completely at the discretion of the empowering body (as long as the word 'sovereign' can be used), while on the other hand the constituent assembly is only commissioned, just like a dictator; it is not sovereign like a monarch in an absolute monarchy or in a monarchy based upon the monarchical principle." Schmitt goes on to explain that "the legal plenitude of power of a constituent assembly rests upon its exercise of the *pouvoir constituant*; therefore omnipotence lasts only until the constituting of powers through the constitution's coming into force. The very moment the assembly has accomplished its work and the constitution has become established law, every sovereign dictatorship comes to an end. Moreover, the constitutional possibility of a sovereign dictatorship comes itself to an end. A sovereign dictatorship is irreconcilable with a constitutional form of government.... Either sovereign dictatorship or constitution; the one excludes the other." How is one to read this claim of an either/or between constituent power and constitution?

In light of Schmitt's subsequent texts, and in so far as the concept of constituent power operates under the "democratic principle," it would appear that Schmitt's either/or seeks to establish a permanent dualism between constituent and constituted powers, *as if they could not be given a univocal reading* because, on the analogy with *natura naturans*, constituent power is "absolute" and broaches no legal limits.²³ We shall see below that here Schmitt's "romantic" reading of *natura naturans* as "infinite, incomprehensible abyss of the force [*Macht*]," that "can will arbitrarily" and "can intervene arbitrarily", radically departs from Spinoza's understanding of the divinity of nature. Schmitt's "romantic" reading of Spinoza is used by him to deploy the concept of constituent power as a way to set democracy against constitutionalism and place it entirely within the sphere of dictatorship.

It is true that, in this text, Schmitt opens another option of harmonizing constituent with constituted power by appealing to the principle of representation. Schmitt claims Sieyès took this option. In *Constitutional Theory* he seems to adopt it himself in so far as he argues

.....
²³This is the aspect of Schmitt's argument that Negri values most. It reflects the problem that a constitution always "blocks" or puts an end to a "revolutionary movement".

there that no existing constitution can avoid both the monarchical principle and the idea of representation.²⁴ Koekkoek has claimed that Schmitt may have adopted Spinoza in the 1920s to counter Kelsen (however he fails to recognize Kelsen's own Spinozism). Above all, Schmitt goes to Spinoza in order to justify “an anti-liberal form of dictatorial democracy that he deliberately put in opposition to liberal (or parliamentary) democracy.... The mystical character of Spinoza's pantheism was attractive and useful to Schmitt because it enabled him to bestow upon his conception of (dictatorial) democracy a certain theological vitality and boldness so that it might be able to compete with other “political theories of myth” that did not suffer from the indecisiveness of either political romanticism or parliamentarism. In doing so, Schmitt impudently mobilized Spinoza's mystical pantheism for constructing a mythical nationalism that resembled anarcho-syndicalism and Bolshevism in their critique of liberalism and parliamentary democracy” (Koekkoek 2014: 357) This claim of course begs the question of whether Spinoza's democratic thought lends itself as material for a “democratic political theology” or whether it is not rather a way of escaping the grip of this discourse. The debate is a complicated one that I cannot fully engage in at this point. I would however want to say that, if there is a politico-theological moment that Schmitt projects onto the question of constituent power and its democratic basis, this moment is not tied up per se with Spinoza but rather with Schmitt's reading of *plenitudo potestatis*. But, and this is my point, the construction of a “democratic political theology” is a failed one because the idea of such *plenitudo* is *incompatible* with Spinoza's notion of *natura naturans*.

The key issue that Schmitt's discussion raises is the following: can Spinoza's idea of *natura naturans* be used to describe popular sovereignty or constituent power as an “unlimited legal power” and “legal plenitude of power”? This is *prima facie* problematic since if the idea of *natura naturans* is associated with radical immanence, it is difficult to understand how it could also have the transcendent attributes of the sovereign. On the other hand, the connection is not entirely arbitrary given that Spinoza does speak of God's power as absolute, and he does define democracy as a function of “absolute” government. Schmitt does not hesitate to attribute the medieval idea of *plenitudo potestatis* to the sovereign dictator and thus to constituent power and *natura naturans* as its metaphysical analogue. But is this correct? To answer this question one needs to engage a bit more the medieval genealogy of sovereignty and its relation to ideas of *potentia absoluta*.

Here I follow Francis Oakley's reconstruction of the career of the

.....
24 For further discussion I refer to (Vatter 2020a).

distinction between absolute and ordained power.²⁵ The premise of this distinction is that nature is a creation of God and is thus not eternal and necessary: order is contingent and emerges *ex nihilo*. From here there are two possible ways to understand the distinction. The first one is generally of Thomist derivation, and Oakley claims its background comes from Maimonides. On this model, although the omnipotent God “cannot be said to be bound by the natural, moral or salvational order he himself has established, he is certainly capable by his own free decision of committing himself by covenant and promise to follow a certain pattern in his dealings with his creation” (Oakley 1998b: 445). Absolute power of God is here considered in abstracto, that is, prior to God’s choice of the order of creation, to which God remains faithful afterwards by expressly promising His subjects to do so. According to the second understanding, which begins with Hostiensis and climaxes with Duns Scotus, theologians apply to God the distinction between legal and supra-legal powers that were established in royal sovereigns but especially in the Pope’s *plenitudo potestatis* so that absolute power is understood “as a presently-active power of potential interposition in the established order” (Oakley 1998a: 670). God is said to act *de jure* according to ordained power but *de facto* “he can act apart from and against the law” (Oakley 1998b: 447). In other words, the absolute power of God becomes “a *presently active and extraordinary power* capable of operating apart from the order established *de potentia ordinate* and prevailing in the ordinary course of things” (Oakley 1998b: 447, emphasis mine). With Duns Scotus, God’s absolute power comes to have the characters of what Schmitt will call a “sovereign dictator” or constituent power.²⁶

For my purposes, the most important points to be drawn from Oakley’s genealogy of *potentia absoluta* are three. The first one is that

.....
25 The distinction plays an important role in various narratives of modernity and the rise of secularism, from (Taylor 2007) to (Agamben 2011).

26 Mika Ojakangas argues that Schmitt misconstrues the theological traditions associated with the *potentia absoluta* of God by applying them to sovereignty in accordance with the secularization model. In reality, as noted by Oakley, “the point is, however, that it was the juristic notion of *potentia absoluta* applied first to describe papal power that became a theological notion, not vice versa: God can act outside of the order of nature and grace he has already established, like the pope can act outside his own laws” (Ojakangas 2012: 514). This is true, but it does not affect the general point that Schmitt is making. For in these theologemes, Schmitt is looking for a justification for an idea of power that is both entirely legal and yet transcendent with respect to the legal order. Like Cristi before him, Ojakangas also agrees that the concept of representation is ultimately the key to Schmitt’s idea of constituent power, and that, for this reason, its link with democracy is suspect: “Therefore, the Schmittian people whose power appeared to surpass the power of God is ultimately reduced to a mere imaginary product of an act of representation, a fabrication of those who rule—as if the Christian God was a mere invention of the Church by means of which it is able to govern and rule the Christians. Thus, the Schmittian theory of constitution has nothing to do with theological ideas and has no roots in medieval doctrines of God’s absolute power. His theory of constitution is a late modern innovation.” (516) However, Ojakangas here does not consider the theological basis of the idea of representation in Schmitt. He also does not mention the Spinozist background to these questions.

the distinction between absolute and ordained power, with its roots in the notion of Papal *plenitudo potestatis*, cannot fit with Spinoza's idea of *natura naturans* for the simple reason that Spinoza rules out the contingency of the natural order and so also denies the reality of Creation. As Oakley notes, in his commentary on Descartes Spinoza puts into doubt the idea of God's "extraordinary power when he acts beyond Nature's orders" because, following a Maimonidean intuition, "for God to govern the world with one and same fixed and immutable order seems a greater miracle than if, because of the folly of mankind, he were to abrogate laws that he himself has sanctioned in Nature in the best way and from pure freedom" (Oakley 1998a: 679).

The second point that this genealogy shows is that the distinction between absolute and ordained powers was strictly speaking politico-theological and strategic: it was meant to "deflect" the threat to Christianity coming from the Arab-Aristotelian philosophy of necessity, i.e., from Averroism. Oakley does not specify what is the "threat" posed by Averroism, but it is not difficult to surmise. If divine providence is understood only as operation through secondary causes, as "natural" government, then this means that the political body is a purely "natural" body to be governed in view of affections of its members, that is, ultimately in Spinoza's view, of maximizing joyful passions and minimizing sad ones. The leader of this naturalized body politic can be modelled after the prophet as charismatic ruler (which does away with the Christian notion of vicariate and representation, indeed, with the legal edifice of the Church as such), and will also take up a messianic form, either in a Protestant shape of a nation of saints, or in a Islamic and Jewish sense of the holy people without Church. In both cases, one has a rejection of the Church as spiritual leadership of the world, and its being replaced by the philosopher as king and judge. Recent scholarship indicates that Spinoza may be carrying forward such an Averroistic program.²⁷

The third point of interest is that Oakley suggests the absolutist use of the dualism of divine powers, such as was made by James I, did not intend to make a claim about political order resting on "the notion of the great chain of being but rather the rival version that was grounded in will, promise and covenant. This vision... though it did vindicate in both its theological and legal variants the ultimate freedom of sovereign choosing and willing, also affirmed the reliably self-binding nature of that sovereign willing and emphasized the degree to which confidence could safely be reposed in its stability" (Oakley 1998a: 686). In short, and apart from all appearances, the distinction between absolute and ordained powers was meant to give to royal absolutism the veneer of an Old Testament

.....
²⁷This Averroistic reading of Spinoza can be found in Fraenkel (Fraenkel 2012); it was anticipated by (Strauss 1997) and developed in an entirely different direction by (Bloch 1970).

covenant theology, and, by the same token, break with the Hellenistic, pagan or imperial derivation of princely sovereignty. In this way, for Oakley the Christian, theological construal of an “unlimited legal power” was part and parcel of the development of modern constitutionalism and not its radical antithesis. At the same time, this understanding of *potentia absoluta* maintains the Schmittian dualisms of ordinary versus extraordinary circumstances and in general the contingency of the establishment of political order as dependent on will not reason. On the one hand, then, Oakley’s argument is anti-Schmittian in the sense that for him the idea of God’s absolute power does not necessarily contrast with constitutionalism, as long as constitutionalism is seen as a reflection of God’s agreement with human beings to be bound by their mutual pact, as shown in the history of the Hebrew Republic. Divine *absoluta potentia* can be self-binding in a way that fits together with a constitutional government. On the other hand, Oakley’s argument is further proof that Kelsen was correct in thinking that western constitutionalism was saturated with politico-theological conceptions ultimately derivative of a distinction between God and Nature and whose ultimate purpose are always anti-democratic.

At this point in the discussion, I can move forward to consider Kelsen’s anti-dualistic reading of Spinoza’s *natura naturans*, and how Kelsen’s Spinozist conception of constituent power may solve the paradox of constitutionalism (viz., that absolutism is at the heart of constitutionalism).²⁸

Kelsen’s Spinozist Critique of Schmitt’s Decisionism

Schmitt’s *Political Theology* was principally a rear-guard defence of the absoluteness of sovereignty that was attacked a few years before by Hans Kelsen and Harold Laski.²⁹ I claim that both attacks on absolute sovereignty are based on Spinozist premises. Kelsen’s critique of sovereignty climaxed in his 1921 article “God and State.” In this text, Kelsen denies the existence of the Person of the Sovereign because he rejects root and branch the theological distinction between a transcendent God and an immanent Nature on which it is constructed. For Kelsen such dualism, and such an idea of legal personhood, was literally anti-scientific; it blocked the path to a scientific approach to law, a “pure theory” of law. To believe in such a Person is the same as if one believed that behind the phenomenon of lightning there stood a bearded Zeus who cast down his rays to earth. The idea that there exists a power that can “decide” either to express itself in a necessary chain of cause and effect, or to express itself by breaking this chain, is entirely absurd,

.....
28 I do not have the space here to develop a reading of the function of Spinoza’s interpretation of the Hebrew Republic in light of his metaphysics of nature.

29 My discussion here draws from (Vatter 2017b).

a contradiction in terms. In reality, there only exists one Nature as a system of laws, “according to which each individual thing... act in one and the same fixed and determinate manner, this manner depending... on Nature’s necessity”.³⁰ In taking up this standpoint, Kelsen explicitly refers to Spinoza and his principle *Deus sive Natura*.³¹ Whereas for Schmitt Spinoza’s God is “part of the theory of political theology,” for Kelsen *Deus sive Natura* spells the end of political theology.

That Kelsen may have been a Spinozist is a hypothesis that has not been often discussed in the specialized literature, as far as I can tell. The suggestion was raised by Negri himself, though he never pursued it. In discussing Spinoza’s definition of democracy as *omnino absolutum imperium* [“the completely absolute power”] (TP 11/1), Negri says that “such an absolute conception of democratic power realizes the unity of the formal legality and material efficacy of juridical organization and demonstrates its autonomous productive force.”³² In a footnote he adds: “It is strange that Hans Kelsen, the most important and most coherent theorist of the problems of validity and efficacy in the unity of juridical organization, did not (to my knowledge) see a precursor in Spinoza. This is probably due to the weight exerted by neo-Kantian reductionism (of phenomenalism and formalism) in the evaluation of Spinoza’s thought.... In the final phase of his thought, Kelsen adheres in particular to a juridical realism that is extremely fascinating.... Here the unity of validity and of the juridical efficacy, the formative force of executive acts, refers back to a metaphysics of constitution, whose possible Spinozan references it would be interesting to study” (Negri 1998: 245, n.17). *Pace* Negri, I think that Kelsen *did* adhere to Spinozism, as visible in his article *God and State*. Furthermore, as I show below, the “neo-Kantian” approach that Kelsen inherits from Hermann Cohen turns out to be much closer to Spinozism than previously assumed.

How does Kelsen’s use of Spinoza’s *Deus sive Natura* help to articulate a republican and constitutional understanding of absolute power? Spinoza argues that Nature can be understood from two perspectives: as *natura naturata* and as *natura naturans*, as passive and as active. Considered passively, Nature is the necessary concatenation of effect and cause, where every effect is both condition of another effect (i.e., is its cause) and is in turn conditioned by another effect (i.e., is also its effect). Kelsen’s idea of the authorization of a legal norm by another

.....
30 TTP, 4; see also TTP, 4: “the actual co-ordination and interconnection of things”.

31 In the formulation of the identity given in TP, chapter 2: “Since God has right over all things, and God’s right is nothing other than God’s power insofar as that is considered as absolutely free, it follows that every natural thing has as much right from Nature as it has power to exist and to act. For the power of every natural thing by which it exists and acts is nothing other than the power of God, which is absolutely free.”

32 (Negri 1998: 227).

legal norm in and through the hierarchy of legal norms is structurally analogous to *natura naturata*. The point, however, is that Kelsen's idea of legal autonomy is not merely passive but also dynamic: it should be read not only as *natura naturata* but also as *natura naturans*. For what happens if Kelsen's construal of the "beginning" of a legal order is modelled on Spinoza's *natura naturans*, on his active idea of nature? When Nature is considered actively, then every effect must not be understood merely as the **conditioned condition** of another effect, but as being itself "**unconditioned**" because it is the *direct expression* of one and the same, eternal cause, of Nature as *causa sui*.³³ Thus, everything in Nature is both entirely necessary (because it is caused) and entirely free (because this chain of causation is self-generative or caused by itself). This is ultimately the meaning of the doctrine of *conatus*, but I cannot here explain this further. Thus, to act according to the right of nature as a system of laws is to be free because it means to be subject to a law that, in a sense, one has contributed to make oneself. It is no coincidence that such a conception of the rule of law as condition of freedom also happens to be a fundamental principle of republican theory. I believe it is also the origin of Kelsen's idea of legal autonomy as a system of laws that is self-generative.

What happens when one applies this model of *natura naturans* to the problem posed by the "absolute" character of constituent power? The result is that constituent power is neither "transcendent" to a constitutional order, as its state of exception, nor is it a retroactive projection of a state institution, a constituted power, but rather constituent power is the *immanent* cause of the legal order. Constituent power corresponds here to the *causa sui*, which is necessarily expressed by and through the constitutional order itself when this order is seen as being active or self-creative or, in terms of Kelsen, when the legal system is understood as a dynamic system.

How can one distinguish when a given legal order is "passive" and when it is "active"? Contemporary constitutionalism distinguishes between a "negative" and a "positive" or "affirmative" constitutionalism. Most jurists who employ this terminology are unaware of the Spinozist roots of this distinction. Negative constitutionalism understands every legal constitution passively: as a device to separate the constituted powers of the state, and to establish and safeguard individual natural rights against government interference. However, when viewed from its constituent aspect, its creative aspect, every single moment of a legal constitution, every single link of the legal order, can become expressive or constitutive of the "power of the people." Every part of a constitution becomes "active" or "constituent" not when it safeguards individuals from undue interference, but when it combines their powers [*potentia*],

.....
33 Deleuze's reading of Spinoza has emphasized this univocity of being.

when it *empowers citizens*, in order to constitute the power of the people, or democracy.³⁴ Thus, any constitution that is interpreted merely as a safeguard for individual rights *without at the same time establishing mechanisms that can empower its citizens* is falling short of the idea of a constitution, or, said in terms of Kelsen, of the “basic norm” that underpins any factual constitutional document.

The Basic Norm as Hypothesis of Constituent Power

Kelsen’s “pure theory” of law stands or falls with the idea of a “basic norm” that “lays the foundation” (*Grundlegung*) of the hierarchy of norms. Additionally, Kelsen’s principle of the autonomy of law states that “law” is only what is legally produced, thereby distinguishing the “ought” of legal validity from the “ought” of morality or justice. Kelsen connects the idea of a “basic norm” and the conception of legal autonomy in the following definition: “The basic norm... is nothing but the fundamental rule according to which the various norms of the order are to be created” (Kelsen 1945: 114). Both topics have given rise to an enormous amount of commentary. Here I merely want to sketch an argument in which a Spinozist reading of Kelsen can explain how the idea of a basic norm is a solution to the paradox of constitutionalism and offers a republican conception of constituent power.

That there is a close correlation between basic norm and constituent power is obvious from the function of the basic norm: “The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act”(Kelsen 1945: 116, 436).³⁵ For Kalyvas the basic norm is Kelsen’s answer to the paradox of constitutionalism because “only an external, hypothetical norm confers objective validity on extra-legal constitutional innovations that otherwise, as revolutionary, arbitrary manifestations of force, are not prescribed or sanctioned by any positive juridical order.”³⁶ Yet, precisely because Kalyvas thinks that the basic norm is merely “external and hypothetical” he charges Kelsen with replicating “classical foundational myths that endow the extra-legal origins of a political order with legality and cover up its factual, arbitrary beginnings” (Kalyvas 2006: 579). But is this a correct reading of the basic norm? Kelsen describes the

.....
34 This is somewhat similar to Hauke Brunkhorst’s reading of Kelsen’s monism: “The implicit political message of the critique of the dualism of state and law consisted in the practical idea of a complete juridification of politics. That does not mean that politics withers away as Schmitt and Heller argued concurrently. It only means that in a constitutional regime there is no longer any political action that is not either legal or illegal and... that there is no legal rule that cannot be changed politically” (Brunkhorst 2011: 502).

35 Or in another formulation: “This Basic Norm empowers the individual or individuals who posited the historically first constitution to posit the norms which represent the historically first constitution” (Kelsen 1991: 255).

36 (Kalyvas 2006: 578)

Grundnorm as a “hypothetical foundation.” Therefore, it stands to reason that one should examine the conception of the “hypothesis” with which Kelsen is working. This point is made by Geert Edelman in a famous essay,³⁷ even though in my opinion even he misses the political and legal meaning for constituent power of this theory of the hypothesis.

Edelman shows without a shadow of a doubt that Kelsen understood his pure theory of law to derive from Hermann Cohen’s revision of Kantianism, particularly in his late *Ethik des reinen Willens*.³⁸ This is particularly interesting for my genealogy because in this work Cohen emphasizes the Platonic and the Spinozist elements of Kantianism. For example, Cohen argues that the activity of the state is captured by a Platonic, dialectical interpretation of the idea of **auto-nomy**. The first meaning of Cohen’s conception of autonomy is that the state can only designate a process through which state law makes itself through law. Only a legal process can produce state law. Next, Cohen interprets the meaning of autonomy starting from the self (**to auto**): he shows that the demand that only law, and not another person, make the law follows from the principle that each “self” is in themselves the “bearer and maker” of what is right for them, that is, each member of the legal state is by nature *sui iuris*.³⁹ It is only because the self (**auto**) is a bearer of law as natural right (**nomos**) that they cannot accept to be ruled by a person whose commands are law but only by a positive law (**nomos**) that makes itself (**auto**). “In this way legislation becomes the monopoly of society [So wird die Gesetzgebung zum Monopol der Sittlichkeit]. No God can replace it; no nature, no power of history.... Self and legislation form a necessary correlation.” (Cohen 1904: 322). I hope this brief aperçu into Cohen makes it evident why his practical philosophy played such a crucial role for Kelsen’s understanding of the autonomy of the law.

Kelsen admits to borrowing Cohen’s interpretation of the Platonic Idea as hypothesis to develop his conception of the “basic norm” as the “idea” of law itself. As he writes in a famous 1933 letter to Renato Treves: “What is essential is that the theory of the basic norm arises completely from the Method of Hypothesis developed by Cohen. The basic norm is the answer to the question: what is the presupposition underlying the very possibility of interpreting material facts that are qualified as legal acts,

.....
37 (Edelman 2007).

38 For a reading of this text in light of Cohen’s engagement with Spinozism, see (Vatter 2017a). For another interpretation of the Kelsen-Cohen relation, see (Batnitsky 2015). Batnitsky also extrapolates from Edelman’s discussion of Kelsen’s debt to Cohen but she links Kelsen’s fundamental norm to Cohen’s conception of God, then argues that Cohen turns from law to theology after his *Ethik des reinen Willens*, and this means that Kelsen’s dependency on Cohen should have led him towards a different political theology but not to its negation. There is no discussion of Cohen’s and Kelsen’s affirmative readings of Spinoza in Batnitsky.

39 On this republican principle of natural right, see (Skinner 1997) and my more recent discussion (Vatter 2019).

that is, those acts by means of which norms are issued or applied?" (Edel 2007: 200). The basic norm explains how an act of a factual power, such as the acts of a first legislator, can become "constituent," that is, qualified as a "legal act" which results in a constitution in accordance to which positive laws are then legally or self-referentially produced. Kelsen's idea is that a factual power can only become constituent in virtue of a hypothesis, the basic norm, that asks of every public coercive act that it justify itself legally before those who are to obey it. The first conclusion to draw is that, for Kelsen, far from being "repressed" as Schmitt charged, the hypothesis of constituent power is literally that in reference to which law is to be made and applied by law. Such a hypothesis explains why a dynamic legal system is not possible in the absence of a legal science.

Clearly, a lot is riding on understanding Cohen's conception of the hypothesis, and, to be frank, Edel does not do a great job in explaining it. Edel's best shot is to say that the basic norm is hypothesis because "qua norm [it] cannot be existent and hidden somewhere in nature, and cannot have fallen from the heavens in some mysterious way either" (Edel 2007: 217). But what Kelsen means is that the "basic norm" is not "basic" in the sense of being a foundation or "first cause" (*Grundlage*) of law (that is why it is not found in nature or in God understood as first causes). Instead, the meaning of "basic" in the "basic norm" is that of "laying of a foundation (*Grundlegung*)" which demands of any factual arrangement of things that it give an account of itself in terms of a system of laws. Cohen employed the distinction between *Grundlage* and *Grundlegung* to illustrate the conception of hypothesis. The "laying of the foundation" signals literally the *absence of ground or first cause* understood as an external cause or reason of something.⁴⁰ Cohen interpreted the Platonic notion of the idea as hypothesis in terms of a demand that every concept and judgment not be accepted as "true a priori and in itself, still less is it the final truth; [but] on the contrary, it must undergo the test of its own truth to be decided by this test alone."⁴¹ In other words, the hypothesis is what permits the validity of a concept to be tested; it is the assumption of the fallibility and thus of the changeability of all our knowledge, what makes our empirical knowledge ultimately "scientific".

As hypothesis, the basic norm means that the system of law has no (external) cause, but rather is cause of itself. In Kelsen, constituent power is nothing like a cause or ground that is somehow "external" to the legal order that it gives rise to, on the model of a Creator/Sovereign

.....
40 Edel cites a quote from Cohen's *Ethik des reinen Willens*, 85 which is crucial: "the ultimate foundations [Grundlagen] of cognition are, rather, the laying of foundations [Grundlegungen]" (Edel 2007: 209).

41 "That is why, in order to designate this method of the idea, Plato used another expression: that of rendering account [Rechenschaftsablegung] *logon didonai*" (Cohen 1915: 8). "The idea is so far from being synonymous with the concept [eidos=logos] that it is only thanks to it and to the account it renders that the concept (logos) itself may be verified" (Cohen 1915: 8).

God deciding on its Creation. Instead, constituent power is permanently operative within the legal order as the “hypothesis” that justifies the legal “ought” itself, that is, “the imputation of the legal consequence (the consequence of an unlawful act) to the legal condition. Imputation means that a conditioning material fact (a delict) is necessarily linked to the legal consequence (the sanction), more precisely, ought to be linked” (Edel 2007: 215). The basic norm as hypothesis preserves the idea that a law is both obligatory and necessary, in so far as it is synthetically linked to an act of coercion, and yet is also constitutive of freedom because every law “rests” on the immanent cause of a dynamic legal system that can withdraw the validity of positive law, or change it, or render it null. It in this sense that the hypothesis of the basic norm functions as a constituent power, like *natura naturans*, rather than *natura naturata*.

Kelsen’s idea of the basic norm has often been interpreted as a piece of sophistry, as the reiteration of the principle that might makes right.⁴² Even Edel falls into this misinterpretation when he claims that the basic norm connects “the idea of the law with the idea of a highest authority, for purposes of creating law” so that the positive law “is valid only if its claim to validity can also be enforced” (Edel 2007: 219). In point of fact, such reading assumes that Schmitt’s critique of Kelsen is correct, viz., that Kelsen is unable to account for the applicability of valid law because his system has eliminated the “person” who decides of this ascription.

However, Kelsen’s explicit debt to Cohen suggests giving a much more Platonic reading of the basic norm: its function is not to dignify a given *potestas* by granting it law-making attributes, but, on the contrary, it is to establish the principle that only the self-justification of law, its rendering an account of itself, is what “lays the foundations” for the exercise of power. This intuition is both Platonic, in the sense that for Plato knowledge of what is right (viz., a true legal science) is the only thing that gives legitimate access to the exercise of power, but it is also deeply Spinozist, if it is true that the “commonwealth whose laws are based on sound reason is the most free, for there everybody can be free as he wills, that is, he can live whole-heartedly under the guidance of reason.” (TTP 16). Thus, the basic norm as hypothesis shows that the necessarily coercive character of positive law is only the passive side of law which has as its active side, the increase of *potentia* of those who

.....
42When Kelsen states that “the basic norm confines itself to delegating power to a norm-issuing authority – that is, it sets out a rule – according to which the norms of the legal system are to be created” (Edel, p.218, citing from Second Edition of *Reine Rechtslehre*). Edel cites Kelsen to the effect that: “the basic norm confers on the act of the first legislator... the sense of ‘ought’ that specific sense in which legal condition is linked with legal consequence in the legal norm” (Edel, p. 218 citing from First Edition of *Reine Rechtslehre*); “the idea of lawfulness itself is set down with the Hypothesis. This is the idea that a certain consequence is attached to a certain condition.... The basic norm says that under certain conditions... a certain consequence... is set down as obligatory.” Kelsen cited in (Edel 2007: 219).

subject themselves to the law. That is why the basic norm as hypothesis is what compels the *potestas* or law-making authority itself to change and make new laws whenever the justification of the old laws has given way in the minds of those affected by them – this is the dynamic viz. democratic character of the autonomy of law in Kelsen.

Constituent Power and the Power of Opinion or the Faculty of Judgment

If, as I have tried to show, Kelsen leveraged the Spinozist conception of *natura naturans* to think about sovereignty and constituent power, then one can say that Laski's critique of sovereignty leveraged Spinoza's intuition that one never relinquishes the natural right or power to judge of one's right (*sui iuris*) as stated in TTP, chapter 17: "nobody can so completely transfer to another all his right, and consequently his power, as to cease to be a human being, nor will there ever be a sovereign power that can do all it pleases". I think this intuition gives us another approach to the idea of constituent power which is best captured by the principle expressed by Arendt that "all government rests on opinion." Arendt, however, never mentions that this formulation of constituent power is Spinozist, and that the first one to recover it in the 20th century was Harold Laski in his 1917 book, *Studies in the Problem of Sovereignty*. Laski's radical thesis is that there is no such thing as "sovereignty" if by this one understands an attribute of a state that automatically elicits "obedience" in its subjects: such an idea of sovereignty is a fiction which has never existed historically, and which gives the lie to the Hobbesian (later Austinian and Schmittian) conceit that law is the "command" of an authority. Instead, Laski tries to show that the law depends on the "opinion of the members of the State, and they belong to other groups" (Laski 1968:12). Laski here is taking up Spinoza's notion, against Hobbes, that the effectiveness of all law depends on the judgment of the individual who follows it, not on the person who decides its application: "there is no sanction for law other than the consent of the human mind" (Laski 1968:14). The obedience secured by any government ultimately "depends simply on what measure of resistance the command inspires" (Laski 1968:270).⁴³

I think that it is possible to relate this principle that all government rests on opinion to the Spinozist idea of *natura naturans*, namely, the idea that every finite and temporal singular mode is **equally the expression** of the one eternal and infinite substance. Spelled out politically, this means that "the power of the people" is expressed by the equal status of every individual's opinion, no matter how much force they individually exert or how different their interests are. This Spinozist

.....
43 I do not have space here to explain these claims in relation to Spinoza's complex reading of the Hebrew Republic in TTP 17-19.

idea of constituent power entails that the legitimacy of a law depends on considering every citizen as a thinking individual capable of forming their own opinion by weighing reasons and arguments.⁴⁴

The systematic importance of Laski's Spinozist critique of sovereignty is that it opens another avenue for arguing that the idea of constituent power of a people ought to be allied with a **rationalist** rather than a **decisionist** conception of law (that is, a conception of law based on principles of law, not on decisions of authorities). A republican conception of constitutionalism should reject the Hobbesian formula at the heart of Schmitt's jurisprudence, namely, *auctoritas non veritas facit legem*. But this raises the large and complicated question: what can "truth" mean for such a rationalist conception of constituent power? In conclusion, I can only make a few quick suggestions of the steps to be taken.

The deepest reason why a democracy requires a constitution and a constituent politics is because the constitution (if understood to rest on the basic norm as hypothesis) necessarily opens the question: *what is law?* Given a constitution, this question can no longer be answered as follows: "to know what law is, see what the sovereign (or its representatives) says is law". As Dworkin has argued, the answer to "what is law?" leads to a search for the *principles* that lie "hidden" behind the constitutional laws (Dworkin 1986). I have argued elsewhere that these are principles of what Kant calls **reflective judgment** through which reason seeks to re-order particular laws into a system of freedom, that is, a political order in which the people are free and powerful.⁴⁵ They are distinguished from principles of determinative judgment, whereby reason begins from a specific law and applies it to a particular case. For me, the "opinions" on which all government is said to "rest" must take the form of **reflective judgments**, which, since they pertain to the question of "what is law?" can be said to make up the people's constituent power. In this sense, what a constitution "says" is law is never merely determined by those who have the legal competences (*potestas*) to determine law – what Schmitt calls the *auctoritas interpositio* – but also by all those who are affected by the application of law and those who may be excluded from the political process of legislation and yet retain the natural right to reflect publically on the constitution from principles of right.

Several contemporary republican theorists, ranging from Negri to Pettit and McCormick, have followed Machiavelli and Spinoza in arguing that the process of constituent power is one animated by contestation and resistance. But they have understood this contestation

.....
44 For a recent attempt to work this idea out in relation to Spinoza's *libertas philosophandi*, see (Skeaff 2018).

45 (Vatter 2011) and now (Vatter 2020b).

of constituted power as originating somehow outside of the system of law established by a legal constitution. However, if we follow the Spinozist idea of constituent power as immanent cause of the constituted system of law, then we can see this contestation and resistance at the level of popular opinion and reflective judgment as essential, not merely accidental, contribution to the autonomy of law. Indeed, contestation and resistance go hand in hand with a conception of law as based on truth, not authority, if the reference to “truth” is understood in the sense of the basic norm as hypothesis, in accordance with which every positive law stands open to a process of “testing” that requires that it be able to garner enough of the “settled convictions” of citizens behind it in some sort of “reflective equilibrium,” which in turn depends on the contestability, but not falsifiability, of the convictions at stake. It is in this way that the republican formula that “government rests on opinion” may be understood not simply as a formula whose meaning is cashed out in electoral politics, but first and foremost as a formula for constituent power itself.

- Agamben, Giorgio. 1998. *Homo sacer. Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford: Stanford University Press.
- Agamben, Giorgio. 2011. *The Kingdom and the Glory. For a Theological Genealogy of Economy and Government*. Stanford: Stanford University Press.
- Arato, Andrew. 2016. *Post Sovereign Constitution Making*. Oxford: Oxford University Press.
- Balibar, Etienne. 1998. "Jus-Pactum-Lex: On the Constitution of the Subject in the *Theologico-Political Treatise*." In *The New Spinoza*, edited by Warren Montag and Ted Stolze, 171-205. Minneapolis: University of Minnesota Press.
- Batnitsky, Leora. 2015. "Hans Kelsen and Hermann Cohen. From theology to law and back." In *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber*, edited by Ian Bryan, Peter Langford and John McGarry, 40-60. London: Routledge.
- Bloch, Ernst. 1970. *Man on His Own: Essays in the Philosophy of Religion*. New York: Herder and Herder.
- Brunkhorst, Hauke. 2011. "Critique of Dualism: Hans Kelsen and the Twentieth Century Revolution in International Law." *Constellations* 18 (4):496-512.
- Cohen, Hermann. 1904. *Ethik des Reinen Willens*. Berlin: Bruno Cassirer.
- Cohen, Hermann. 1915. *Deutschtum und Judentum*. Giessen: Verlag Alfred Töpelmann.
- Colón-Ríos, Joel. 2012. *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power* London: Routledge.
- Colón-Ríos, Joel. 2020. *Constituent Power and the Law*. New York: Oxford University Press.
- Cooper, Julie. 2017. "Reevaluating Spinoza's Jewish Legacy for Jewish Political Thought." *The Journal of Politics* 79 (2).
- Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.
- Edel, Geert. 2007. "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen." In *Normativity and Norms*, edited by Stanley Paulson and Bonnie Litschewski Paulson, 195-219. Oxford: Oxford University Press.
- Fraenkel, Carlos. 2012. *Philosophical Religions from Plato to Spinoza. Reason, Religion, and Autonomy*. Cambridge: Cambridge University Press.
- Fraenkel, Carlos. 2017. "Spinoza's Philosophy of Religion." In *The Oxford Handbook of Spinoza*, edited by Michael della Rocca, 377-407. New York: Oxford University Press.
- Kalyvas, Andreas. 2005. "Popular Sovereignty, Democracy, Constituent Power." *Constellations* 12 (2):223-244.
- Kalyvas, Andreas. 2006. "The basic norm and democracy in Hans Kelsen's legal and political theory." *Philosophy & Social Criticism* 32 (5):573-599.
- Kalyvas, Andreas. 2009. *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt*. New York: Cambridge University Press.
- Kelsen, Hans. 1945. *General Theory of Law and State*. Cambridge, MA: Harvard University Press.
- Kelsen, Hans. 1991. *General Theory of Norms*. Oxford: Clarendon Press.
- Koekkoek, Rene. 2014. "Carl Schmitt and the Challenge of Spinoza's Pantheism Between the World Wars." *Modern Intellectual History* 11 (2):333-357.
- Laski, Harold. 1968. *Studies in the Problem of Sovereignty*. London: George Allen & Unwin.
- Lindahl, Hans. 2007. "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood." In *The Paradox of Constitutionalism*, edited by Martin Loughlin and Neil Walker, 9-24. New York: Oxford University Press.
- Lindahl, Hans. 2015. "Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change." *Constellations* 22 (2):163-174.
- Loughlin, Martin. 2010. *Foundations of Public Law*. New York: Oxford University Press.
- Loughlin, Martin. 2014. "The concept of constituent power." *European Journal of Political Theory* 13 (2):218-237.
- Loughlin, Martin; Walker, Neil. 2008. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. New York: Oxford University Press.
- Lucchese, Filippo del. 2016. "Spinoza and constituent power." *Contemporary Political Theory* (15):182-204.
- Lucchese, Filippo Del. 2018a. "The Revolutionary Foundation of Political Modernity: Machiavelli, Spinoza and Constituent Power." In *Spinoza's Political Treatise. A Critical Guide*, edited by Yitzhak Y. Melamed and Hasana Sharp, 190-203. New York: Cambridge University Press.
- Lucchese, Filippo del. 2018b. "The Symptomatic Relationship between Law and Conflict in Spinoza: *juria comunia* as *anima imperii*." In *Spinoza's Authority volume II. Resistance and Power in the Political Treatises*, edited by A. Kiarina Kordela and Dimitris Vardoulakis, 27-44. London: Bloomsbury.

- Montag, Warren, and Ted Stolze, eds. 1997. *The New Spinoza*. Minneapolis: University of Minnesota Press.
- Negri, Antonio. 1998. "Reliqua Desiderantur: A Conjecture for a Definition of the Concept of Democracy in the Final Spinoza" In *The New Spinoza*, edited by Warren Montag and Ted Stolze, 218-246. Minneapolis: University of Minnesota Press.
- Negri, Antonio. 1999. *Insurgencias: Constituent Power and the Modern State*. Minneapolis: University of Minnesota Press.
- Oakley, Francis. 1998a. "The Absolute and Ordained Power of God and King in the 16th and 17th Centuries: Philosophy, Science, Politics and Law." *Journal of the History of Ideas* 59 (4):669-690.
- Oakley, Francis. 1998b. "The Absolute and Ordained Power of God in 16th and 17th century Theology." *Journal of the History of Ideas* 59 (3):437-461.
- Ojakangas, Mika. 2012. "Potentia absoluta et potentia ordinata Dei: on the theological origins of Carl Schmitt's theory of constitution." *Continental Philosophy Review* 45:505-517.
- Rubinelli, Lucia. 2019. "Mortati and the Idea of Material Constitution." *History of Political Thought* 40 (3):515-546.
- Rubinelli, Lucia. 2020. *Constituent Power. A History*. New York: Cambridge University Press.
- Schmitt, Carl. 1988. *Political Theology. Four Chapters on the Concept of Sovereignty*. Cambridge: MIT Press.
- Schmitt, Carl. 2008. *Constitutional Theory*. Translated by Jeffrey Seitzer. Durham, NC: Duke University Press.
- Schmitt, Carl. 2014. *Dictatorship. From the origin of modern concept of sovereignty to proletarian class struggle*. Translated by Michael Hoelzl and Graham Ward. London: Polity.
- Sieyes, Emmanuel Joseph. 2003. "What is the Third Estate?" In *Political Writings*, edited by Michael Sonenscher. Indianapolis: Hackett.
- Skeaff, Christopher. 2018. *Becoming Political. Spinoza's Vital Republicanism and the Democratic Power of Judgment*. Chicago, IL: University of Chicago Press.
- Skinner, Quentin. 1997. *Liberty before Liberalism*. Cambridge: Cambridge University Press.
- Smith, Stephen. 1994. "Spinoza's Democratic Turn. Chapter 16 of the "Theologico-Political Treatise"." *Review of Metaphysics* 48 (2):359-388.
- Spinoza, Baruch. 2002. *The Complete Works*. Translated by Samuel Shirley. Indianapolis: Hackett Publishing Company.
- Strauss, Leo. 1997. *Spinoza's Critique of Religion*. Chicago: University of Chicago Press.
- Taylor, Charles. 2007. *A Secular Age*. Cambridge, Mass.: Harvard University Press.
- Vardoulakis, Dimitris. 2019. "Spinoza's Law. The epicurean definition of the law in the *Theological Political Treatise*." *Radical Philosophy* 2 (5):23-33.
- Vatter, Miguel. 2004. "Strauss and Schmitt as Readers of Hobbes and Spinoza. On the Relation between Liberalism and Political Theology." *The New Centennial Review* 4 (3):161-214.
- Vatter, Miguel. 2011. "The People Shall be Judge. Reflective Judgment and Constituent Power in Kant's Philosophy of Law." *Political Theory* 39 (6):749-776.
- Vatter, Miguel. 2017a. "Nationality, State and Global Constitutionalism in Herman Cohen's Wartime Writings." In *Crisis and reconfigurations: 100 Years of European Thinking Since 1914*, edited by Matthew Sharpe and Rory Jeffs. New York: Springer.
- Vatter, Miguel. 2017b. The Political Theology of Carl Schmitt. In *The Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons: Oxford University Press.
- Vatter, Miguel. 2018. "Poder constituyente, autoridad de la constitución y nuevos inicios." *Pléyade. Revista de Humanidades y Ciencias Sociales* (20):137-161.
- Vatter, Miguel. 2019. "Dignity and the Foundation of Human Rights. Toward an Averroist Genealogy." *Religion and Politics*. doi: 10.1017/S1755048319000336.
- Vatter, Miguel. 2020a. *Divine Democracy. Political Theology After Carl Schmitt*. New York: Oxford University Press.
- Vatter, Miguel. 2020b. "Principles and Power: Constituent Power and the Paradox of Democracy." In *Almanacco di Filosofia e Politica II, Istituzione. Filosofia, politica, storia*, edited by M. Di Pierro, F. Marchesi and E. Zaru, 83-106. Macerata: Quodlibet.

