Globalized Constitutionalism under Scrutiny

Total State, Total Constitution

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The 'total state' is a polemical concept used by constitutional theorists in the 1930s to characterise a decline of state authority: a state made to intervene into all areas of social life becomes, in their view, weak. This concept can be transferred, for heuristic purposes, to the authority of constitutional law. A total constitution is omnirelevant – no longer meant only to curb state action, but also to guide policymaking. Like the total state, the law of the total constitution risks becoming prey to the forces ruling the day. This weakness is exacerbated when adjudicating bodies embrace symbolic politics. The *KlimaSeniorinnen* decision of the European Court of Human Rights serves to elucidate this issue.

Liberal and total state

The concept of the total constitution presupposes the concept of the total state. The latter, it seems,[1] was first introduced to public law by Ernst Forsthoff and immediately usurped by Carl Schmitt, who deployed it frequently in his polemics of the early 1930s.[2] The notion reverted, however, into Forsthoff's

[1] *See* H. H. Klein, '"Der totale Staat": Betrachtungen zu Ernst Forsthoffs gleichnamiger Schrift von 1933', in W. Blümel at al. (eds.), *Ernst Forsthoff: Kolloquium aus Anlass des 100. Geburtstags von Prof. Dr. Dr. h.c. Ernst Forsthoff* (Duncker & Humblot 2003) p. 21 at p. 22.

[2] *See infra* n. 6.

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hands, who expounded it further in his ghastly eponymous book of 1933[3] (second edition 1934).[4]

Both Schmitt and Forsthoff[5] use the 'total state' to denote a situation they believe to be marked by the collapse of the liberal distinction between state and society.[6] No longer is there a state – parented by the wisdom of a monarchical public administration and buttressed by military prowess – situated above the antagonisms of civil society; rather, state power becomes an instrument for the 'self-organisation' of society[7] or, more precisely, of the effective pursuit of group interests.[8]

Before that devolution happened, so the story goes, the liberal state had been in a position to hold social forces at bay. It could credibly assert the public interest and unify society. This was the case because the state intentionally restricted its authority to administering justice, sustaining safety and facilitating moderately fair competition on markets.[9] In a sense, such a nightwatchman state was able to exercise authority that was strong owing to its narrow focus on proper and limited functions. Tranquility, order and safety were the ultimate aims of state activity. All other social activity was supposed to go on in the *staatsfreie Sphäre.*

The situation changes when the liberal state becomes democratic. Politics is then no longer the privileged ambit of a well-endowed elite casting their ballots for candidates of 'parties of opinion' who represent them in a deliberative assembly called 'parliament'.[10] Modern mass democracy is the place where bureaucratically organised parties compete for votes.[11] They have come to resemble religious denominations since their platforms concern every aspect of human life. Partisan politics extends to all spheres of social life, from pre-school education to *Schrebergarten* allotments. Everything becomes political; even issues concerning culture or aesthetics grow into matters involving siding with friends and fighting one's foes. At the same time, a whole variety of civil society

[3]*See* E. Forsthoff, *Der totale Staat* (Hanseatische Verlagsanstalt 1933).

[4]On the differences from the first edition, which concern amendments made to accommodate critique by leading National Socialist, *see* Klein, *supra* n. 1, p. 27-32. A very brief excerpt translated of it is in A.J. Jakobson and B. Schlink (eds.), *Weimar: A Constitution of Crisis*, (University of California Press 2000) p. 320-323.

[5]On H.O. Ziegler's 1932 book *Autoritärer oder totaler Staat?,* which clearly opted for the former and dismissed the latter, *see* Klein, *supra* n. 1, p. 24-26.

[6]*See*, of course, most eloquently, C. Schmitt, *Positionen und Begriff im Kampf mit Weimar – Genf – Versailles 1923-1939* (Duncker & Humblot 1988) p. 151-153, p. 187-189.

[7]*See* Schmitt, *supra* n. 6, p. 151.

[8]*See* Schmitt, *supra* n. 6, p. 144-145.

[9]*See* Schmitt, *supra* n. 6, p. 150-151.

[10]*See* Schmitt, *supra* n. 6, p. 187, p. 189.

[11]*See* J.A. Schumpeter, *Capitalism, Socialism and Democracy*, R. Swedberg ed. (Routledge 1994) p. 269-283.

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associations, ranging from trade unions to non-profit organisations, attempt to capture state power and use it to advance their own cause. Both developments – universal partisanship, on the one hand, and takeover of state power by a variety of social forces, on the other – in combination lead to a situation in which all aspects of social life are hotly contested and in which various groups make state power subservient to their own agenda. The distinction between state and society ceases to denote the line distinguishing the whole from the manifold. The state is constantly made to intervene in society. State authority is everywhere and becomes total.[12] It is thereby relegated to the sphere of the manifold.

In the course of becoming the vehicle for addressing all kinds of concerns, the state is, however, severely weakened. It is weakened in a twofold way. First, the state can longer claim to be the agent pursuing the public weal, for state policy lacks the requisite coherence. It behaves like a wanton agent[13,] since it is eaten alive by social forces that drain its budget and usurp its monopoly of coercion. Second, the state even ceases to be recognisable. Everyone perceives a party or an association standing behind the exercise of official authority. State power is a mask worn by particular interests. The state is demoted to a puppet on a string.

This is, in a nutshell, the story that Forsthoff and Schmitt tell about the emergence of the total state. Its first and foremost message is that a state of this type is weak – a state in the state of evisceration, as it were. Only in the second round do both contemplate the possibility that a strong version of the total state might or should emerge from restoring the dignity of neutral authority *vis-à-vis* partisan social forces. Since the weak total state represents – one would have to say, to this day – what social and political life is typically like in a liberal democracy, the strong total state, resulting from an attempt to rebuild its authority, would of necessity have to be illiberal and authoritarian. Clearly, for both Schmitt and Forsthoff some form of fascism would live up to this ideal.[14] With their writings in 1933, they meant to indicate strongly that the emerging Nazi regime could amount to this type of state.

[12] *See* Schmitt, *supra* n. 6, p. 152.

[13] *See* H.G. Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988) p. 47-48.

[14] *See* Schmitt, *supra* n. 6, p. 114: 'Der faschistische Staat will mit antiker Ehrlichkeit wieder Staat sein, mit sichtbaren Machtträgern und Repräsentanten, nicht aber Fassade und Antichambre unsichtbarer und unverantwortlicher Machthaber und Geldgeber.' This reads in DeepL's translation: 'The fascist state wants to be the state with ancient honesty, with visible holders of power and representatives, but not a façade and ante-chamber of invisible and irresponsible rulers and financiers.'

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Liberal and total constitution

In an article written with sublime irony and the type of acumen which rewards readers with the brightest analytical clarity,[15] Mattias Kumm has argued that while the total state in both of its instantiations is indeed very troubling, the idea of total constitutional authority is not distressing at all. It is not, he argues, because the extension of constitutional authority to all domains of human activity marks the consummation of the rule of law and brings to a conclusion what faithfulness to human rights ultimately requires.[16]

What is at stake here? The equivalent of Schmitt's liberal state that restricts itself to accomplishing a few core tasks, is a constitutional law that is not relevant to all conceivable conflicts.[17] If entrepreneurs exploit the working class, this does not, from such a liberal perspective, raise a constitutional issue. It is a private affair. Such law may also regard relations among the state and its officials or relations between conscripted soldiers and their commanders as by their very nature exempt from fundamental rights discipline. Should the state fail to criminalise pornography, the question whether it has done enough to protect the dignity and integrity of women is a political one and of no constitutional significance. In a like manner, a liberal constitution may even wish to exempt certain controversies between and among the political branches from review by calling them 'political questions'.[18] Article 7 of the Treaty of the European Union may have given rise to such a doctrine, at any rate, before the European Court of Justice moved ahead and discovered expedients to give direct effect to the values listed in Article 2.[19]

The nonchalance with which authentic liberal constitutionalism focuses only on active interferences with life, liberty and property is not an attitude built into the total constitution. Rather, its two fundamental premises read as follows:

(1) Whatever happens in society is *prima facie* relevant to constitutional law, in particular to fundamental rights law.
(2) Whatever happens in society *prima facie* constitutes a justiciable issue.

[15]*See* M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006) p. 341.

[16]For a sketch of the relevant German mentality, *see* G. Romeo, 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition', 21 *German Law Journal* (2020) p. 904 at p. 905.

[17]On the following, *see* B. Schlink, 'Freiheit durch Eingriffsabwehr: Rekonstruktion der klassischen Grundrechtsfunktion', 11 *Europäische Grundrechtezeitschrift* (1984) p. 457.

[18]*See Baker* v *Carr*, 369 U.S. 186 (1962).

[19]*See* L.D. Spieker, *EU Values before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023).

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The second premise indicates that the total constitution vests all ultimate constitutional authority in courts, preferably a constitutional court.[20]

There are good arguments in favour of not worrying too much about the triumph of total constitutional law. The judiciary is very likely to determine the conditions under which its broad jurisdiction can be meaningfully exercised and to concede broad discretion to the legislature in most cases. It will do so especially when ruling on positive obligations of the state, for it is typically uncomfortable with taking the place of the legislature.

At the same time, however, it is to be expected that the weakness Schmitt and Forsthoff diagnosed for the total state could reemerge in the context of the total constitution, too. If that is indeed the case, the strengthening of constitutional authority by making it omnirelevant turns out to be at least potentially self-defeating. I cannot explore this matter fully here. All I can do is point to two consequences of total constitutionalism and add a third that is further removed from these. The first two are effects of the appropriation of the constitution by strong social currents. The third is a consequence of the administration of the constitution by legal experts – judges, that is.

A prominent example

As regards the first effect, if courts no longer restrict themselves to adjudicating interferences with the aim of determining whether refraining from such interferences is a duty owed by the state,[21] the constitution invites all kinds of claimants to allege that the state *has not done enough* to advance their interests. As is well known, positive obligations and, as their essential component, third-party effect, need to be calibrated with circumspection. Constitutional adjudication is negative legislation[22] and should not arrogate to itself a capacity of superior political insight.

The situation becomes troubling where positive obligations are developed by courts whose jurisprudence is driven by an ethos of 'progress'. Tribunals enamoured with the idea of incrementally, yet persistently, advancing the enjoyment of human rights are unlikely to tread with much caution, particularly when their rulings do not have direct effect and require a modicum of political backing in order to be given full effect. In their case, the adjudication of fundamental rights can easily bleed into the issuance of

[20] *See* M. Loughlin, *Against Constitutionalism* (Harvard University Press 2022) p. 135.

[21] *See* G.L. Wolff, *Grundrechte als Eingriffsabwehrrechte: Struktur und Reichweite der Eingriffsdogmatik im Bereich staatlicher Leistungen* (Nomos 1988).

[22] To borrow an idea of Hans Kelsen. *See* his 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in H. Klecatsky et al. (eds.), *Die Wiener Rechtstheoretische Schule* (Europaverlag 1968) p. 1913 at p. 1839.

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high-minded moral demands. The European Court of Human Rights seems to occupy such a position in which the aspiration to augment what its members take to be good is paired with a limited capacity to bring it about. Under these conditions, adjudication can easily slip into an exercise of sweeping moral admonishment.

It will not come as a surprise that under these auspices I regard the *KlimaSeniorinnen* decision[23] of the European Court[24] as a telling example of what can happen if the Court permits itself to be hijacked by ostensibly pressing political concerns.[25] *KlimaSeniorinnen* is a private association of more than 2,000 Swiss women with an average age of 73 years.[26] They first brought domestic complaints against the Swiss federal government for its failure to adapt existing climate legislation so that it no longer violated, as they alleged, the right to life and the right to respect for family life enshrined in the European Convention on Human Rights. Both rights were adversely affected by the risk to well-being and the quality of life arising from more frequent and increasingly intense heatwaves.[27] After exhausting domestic remedies, the case was brought before the European Court of Human Rights, which held that Switzerland violated the applicants' rights under Article 8 by failing to provide effective protection against the risks posed by climate change.

The decision is a paradigmatic example of how the total constitution cannot only degenerate into a relatively absurd spectacle but also become weak. This can be explained by examining briefly three of the decision's salient features.

First, the decision is puzzling, to say the least, in jurisdictional terms. While the Court denied individual applicants standing[28] owing to their failure to satisfy

[23]*See* ECtHR 9 April 2024, No. 53600/20, *Verein KlimaSenorinnen Schweiz and Others* v *Switzerland*.

[24]On reading the Convention system in constitutionalist terms, *see* A. Somek, 'Cosmopolitan Constitutionalism: The Case of the European Convention', 9 *Global Constitutionalism* (2020) p. 1.

[25]For a far more apologetic perspective on the Court, *see* C. Blattner, 'Separation of Powers and *KlimaSeniorinnen*', *Verfassungsblog*, 30 April 2024, https://verfassungsblog.de/separation-of-powers-and-klimaseniorinnen/, visited 26 July 2026.

[26]For the reconstruction of the context, I am drawing heavily on J. Reich, 'Klimaseniorinnen and the Choice Between Imperfect Options: Incorporating International Climate Change Law to Maintain the ECHR's Relevance Amid the Climate Crisis', in M. Bönnemann and M.A. Tigre (eds.), *The Transformation of European Climate Litigation* (Verfassungsbooks 2024) p. 41 at p. 43-44.

[27]*See also Verein KlimaSenorinnen Schweiz*, *supra* n. 23, at paras. 435, 470, 435.

[28]For commentaries, *see* V. Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and *Locus Standi*', 16 *European Journal of Risk Regulation* (2025) p. 814 at p. 819, according to whom the Court in this case even tightened standing requirements. *See also* K. Dzehtsiarou, '"*KlimaSeniorinnen* Revolution": The New Approach to Standing', 5 *European Convention of Human Rights Review* (2024) p. 423 at p. 425-426.

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the victim-status criteria under Article 34 of the Convention,[29] it declared actions by associations admissible, provided these fulfil a number of conditions, for example that such an association 'pursues a dedicated purpose in accordance with its statutory objectives in the defense of human rights of its members and other affected individuals within the jurisdiction concerned'.[30]

That presumably relatively well-off senior Swiss citizens were denied standing to claim that climate change constitutes for them a life-threatening danger or imminent risk is not unsound.[31] It is, however, highly questionable to admit associations through the backdoor.[32] As Judge Eicke pointed out in his dissenting Opinion, there is not only no basis whatsoever for taking this step in the Convention,[33] the Court introduced a basis for *actio popularis* complaints, a matter

[29]The first sentence of Art. 34 of the Convention reads as follows: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'. On the determination of individual victim status, which depends on showing that the applicant has been personally and directly harmed or exposed to a risk of harm by an alleged violation of the Convention, *see Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 465-472, 487. These rather general criteria were further specified, with an eye to climate change, as follows (*see* para. 487): the applicant must be subject to a high *intensity* of exposure to the adverse effects of climate change (or to the risks thereof). The severity of exposure must be 'significant'. In addition, there must be a *pressing need* to ensure the applicant's individual protection due to the absence or inadequacy of reasonable measures to mitigate those factors. *See further Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 535, 624-625 on the denial of the recognition of victim status to individuals, which is sound given that the mitigation of the effect of increasing temperatures can be managed by individuals themselves inasmuch as the matter concerns them personally. *See* Reich, *supra* n. 26, p. 47. In para. 533 the Court found the following: 'However, while it may be accepted that heatwaves affected the applicants' quality of life, it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection … It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country … It should also be reiterated that victim status in relation to future risk is only exceptionally admitted by the Court and the individual applicants have failed to demonstrate that such exceptional circumstances exist in their regard …'.

[30]*Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 502.

[31]*See* B. Wegener, 'Homeopathic Globules for Environmental Lawyers', *Verfassungsblog*, 16 April 2024, https://verfassungsblog.de/homeopathic-globules-for-environmental-lawyers/, visited 26 July 2026. *See also* Reich, *supra* n. 26, p. 47.

[32]On the history of the case law, *see* Dzehtsiarou, *supra* n. 28, p. 424. *See also* J. Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond', 5 *European Convention of Human Rights Law Review* (2024) p. 433 at p. 434-435.

[33]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, Partly Concurring and Partly Dissenting Opinion of Judge Eicke at paras. 45-49.

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that the Court at the same time purported to avoid.[34] An action by associations amounts to some form of 'abstract review' that has, highly exceptional circumstances notwithstanding,[35] been hitherto alien to the Convention.[36] The adjudicated issue becomes detached from actual interferences,[37] and surreptitiously the personal scope of protection of the Convention is extended to include future generations.[38] If there is any justification for this move, then according standing to future generations and the unborn is the only rationale that comes to mind.[39]

[34]*See* Judge Eicke, *supra* n. 33, paras. 44-45. *See also* M.L. Fremuth, 'Der Klimawandel vor dem EGMR und die Grenzen der Menschenrechtskonvention', *Europäische Zeitschrift für Wirtschaftsrecht* (2024) p. 697 at p. 702, who explains that hitherto organsations have had only standing to claim their own rights, but not those of their members. Now, however, the standing of organisations does not depend on the organisation's own victim status (*see* point 498 of the Opinion) or that of their members (*see* point 502 of the Opinion). Climate action by associations may go forward even if individuals have no standing (points 489, 497, 523, 614, 621-622; 503, 523 of the Opinion). *See also* L.F.M. Besselink, 'The Actio Popularis in "*Verein KlimaSeniorinnen Schweiz*" Climate Jurisprudence between Strasbourg and The Hague', *ACLPA*, 29 April 2024, https://aclpa.uva.nl/en/content/news/2024/04/blog-leonard-besselink.html?cb, visited 26 July 2026.

[35]*See* Judge Eicke, *supra* n. 33, points 27, 42. Fremuth, *supra* n. 34, p. 699 seems to perceive an inconsistency in the relation between the wide conception of protected goods ('well-being' or 'quality of life') and denying individual applications standing. Indeed, if the effective guarantee of these goods is to be reviewed abstractly, the Court would have to arrive at a general standard for the quality of life. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 435 and 514.

[36]According to Reich, the matter is procedurally likened to 'supervisory complaints' (*Aufsichtsbeschwerden*) in administrative law. *See* Reich, *supra* n. 26, p. 48.

[37]For a scathing and perceptive critique, *see* Wegener, *supra* n. 31.

[38]This matter is highlighted by G. Letsas, 'The European Court's Legitimacy after *Klimaseniorinnen*', 5 *European Convention of Human Rights Law Review* (2024) p. 444 at p. 450 and Fremuth, *supra* n. 34, p. 702. It raises the question why the interests of future generations receive special solicitude while the interests of living individual persons seem not to be worthy of receiving that attention which translates into the recognition of victim status. Fremuth notes, ibid., p. 703, that the introduction of a collective popular action would have required the consent of the contracting parties. Undoubtedly, the extension of the Convention's scope of application by judicial fiat reflects the urgency that the Court attributes to addressing climate change. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 413, 436, 542. The facts underlying this urgency are buttressed with references to scientific evidence. *See also* paras. 425, 427, 429, 434, 510, 542. This bespeaks a rather technocratic perspective on policy making. *See* Fremuth, ibid., p. 705. Fremuth, ibid., p. 700, also raises the question whether taking the interest of future generations into account may be restricted to climate change, or whether it could also be extended to questions of financial and social sustainability.

[39]According to Letsas, the Court must have been confronted with the 'initial paradox' that – in the face of having to deny standing to the individuals and the unavailability of an *actio popularis* on mere public interest grounds – viewing association as representatives of future generations presented the only viable option. This point is forcefully argued in Letsas, *supra* n. 38, p. 450, p. 452-453. *See also* Sefkow-Werner, *supra* n. 28, p. 821 and C. Eckes, '"It's the Democracy, Stupid!" In Defence of *KlimaSeniorinnen*', 25 *ERA Forum* (2025) p. 451 at p. 463. In a similar vein, with an eye to the 'systemic challenge' of climate protection, *see* C. Heri, 'The ECtHR's *Klimaseniorinnen* Judgment:

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The references made by the Court in this context to recent developments in conventional international law,[40] notably in the so-called Aarhus Convention,[41] are not only questionable as arguments about the meaning of the Convention;[42] even assuming that such developments were relevant for its interpretation, the Court's reasoning also rests on a doubtful comparison. A cluster of international agreements, not least if they are endorsed by a variety of different states, does not amount to a body of legislation stemming from a single legislature.[43] 'Incorporation' of elements of other international agreements into the European Convention on Human Rights rests on shaky foundations.[44] As regards the Aarhus Convention,[45] it should be obvious that granting standing to initiate review within a legal framework that commits the contracting parties to develop environmental policy is different from granting standing for the protection of fundamental rights.[46] The standing to initiate review concerns the proper functioning of a process of policy making, which is, in any event, a far cry from granting a right to instigate the equivalent of a constitutional review of legislation on fundamental rights grounds.[47]

A Cautious Model for Climate Litigation', 28 *Spanish Yearbook of International Law* (2025) p. 311 at p. 318-319.

[40]Reich, *supra* n. 26, p. 46-47 characterises what the Court has done with its 'tailored approach' (para. 422) as a partial 'incorporation' the Paris Agreement. *See also* J. Reich et al., 'Climate Change Litigation before the ECtHR: How Senior Women from Switzerland Might Advance Human Rights Law', *Verfassungsblog*, 16 May 2022, https://verfassungsblog.de/climate-change-litigation-before-the-ecthr/, visited 26 July 2026, for a critique of 'incorporation'.

[41]*See* United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, United Nations, Treaty Series, vol. 2161, p. 447. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 491-494.

[42]*See* A. Gamper, 'EGMR: Evolution oder Revolution? Anmerkungen zur evolutiven Auslegung des EGMR im *KlimaSeniorinnen*-Urteil', 34 *Pratique Juridique Actuelle* (2025) p. 109 at p. 111.

[43]Of course, the 'evolution' of national laws is something that the court can always easily muster in its support. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 497.

[44]For a similar critique, *see* Reich, *supra* n. 26, p. 48-49.

[45]*See* Art. 9 of Regulation 1367/2006 of the European Parliament on of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, fleshes out the participation rights in the policy making process.

[46]Art. 10 of the said Regulation governs request for review of administrative acts. For a critique of the analogy, *see also* Fremuth, *supra* n. 34, p. 703.

[47]*See also* B. Wegener, 'Risks and Side-Effects of the Climate Jurisdiction as Defended by Manuela Niehaus', *Verfassungsblog*, 3 May 2024, https://verfassungsblog.de/a-human-right-to-climate-protection-as-life-saving-treatment/, visited 26 July 2026: '. . . [T]he Aarhus Convention only authorizes actions to enforce environmental protection provisions under ordinary law. The

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Second, the Court 'derived' from Article 8 of the Convention, which on its face basically deals with the protection of private and family life against interferences, 'a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their lives, health, well-being and quality of life'.[48] The Court cites as precedents cases dealing with environmental nuisances, thereby pointing out explicitly that these cases required proof of actual interferences and that a general deterioration of the environment is insufficient to constitute such proof.[49] The right to effective protection against climate change is then introduced by fiat, even though a careful interpretation of the case law might have warranted the opposite conclusion, particularly in light of the tenuous link between 'climate change' and its still limited adverse effect on human well-being.[50] How is climate change different from a general deterioration of the environment? This style of reasoning indicates that evolutive interpretation has turned into a cover-up for judicial alchemy.[51] In fact, the phrase 'drawing on the above considerations', with which paragraph 519 introduces the right to effective protection, reads like a cynical demonstration of the might a judicial body possesses to make previous cases mean what later judges say it means.[52] It is an exercise of

introduction of a new type of representative action to enforce highly undefined and potentially all-encompassing human rights provisions is something completely different'.

[48]*Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 519. It should be noted, however, that the Court also entertained the idea that climate change would have, or is about to have, 'serious and potentially irreversible adverse effects on the enjoyment of human rights'. *See also* para. 431 of the decision and also its para. 436. This suggests that, in the long term, inaction by the community of states may result in a violation of the Convention as a whole. On the relevant positive obligations, *see* M. Wewerinke-Singh, 'Climate Protection Obligations under the European Convention on Human Rights', 21 *EuConst* (2025) p. 356 at p. 363.

[49]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 514-515.

[50]*See* Judge Eicke, *supra* n. 33, p. 19-21. Reich has observed that the environmental case law addresses situations in which the harm inflicted on applicants can be traced directly to a source located within the jurisdiction of the respondent state. Owing to the direct link between the source and the harm inflicted it was possible to specify the positive obligation on the part of the state. *See* Reich, *supra* n. 26, p. 47. *See also* Reich, et al., *supra* n. 40. Interestingly, in his highly insightful and critical observations on this decision, Fremuth, *supra* n. 34, p. 704-705, grants the Court a pass on its exercise of 'evolutive interpretation' and even claims that the Court has not created a new right.

[51]For a powerful critique, *see* Judge Eicke, *supra* n. 33, paras. 64-66. *See also* Reich, *supra* n. 26. For a more muted critical perspective *see* A. Hösli and M. Rehmann, '*Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*: The European Court of Human Rights' Answer to Climate Change', 14 *Climate Change* (2024) p. 263 at p. 273-274. A similar charge has been made, albeit in less drastic terms by Gamper, *supra* n. 42, p. 112, p. 114.

[52]To quote the memorable phrase by Jerome Frank. See J. Frank, *Law and the Modern Mind* (Brentano's 1930) p. 159 (footnote).

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mastery,[53] that is, an arrogation of authority to say what things are like without accepting any responsibility for one's claims. The awareness that something is fundamentally amiss here may be one of the reasons explaining why the dissenting Judge Eicke stated at the outset of his Opinion that his disagreement with the decision is of a more fundamental nature and concerned the 'very heart of the role of the Court within the convention system'.[54]

Third, the articulation of the positive obligations that follow for the states participating in the system resides at a level of sublime generality.[55] The Court seeks to define them by obtaining guidance from the obligations that states have already incurred as parties to other international agreements. This amounts to the usual concession that nothing would 'follow' from Article 8 or, for that matter, the 'enjoyment of convention rights' in general[56] if the Court were not provided with already existing regulatory models, in particular the Paris Agreement.[57] All that the Court can do is adopt these for the purpose of human rights protection. The states are told that they need to honour international commitments, develop a binding regulatory framework and implement it adequately.[58] They are also told, for example, that they must keep

[53]*See* R. Brandom, *A Spirit of Trust: A Reading of Hegel's* Phenomenology (Harvard University Press 2019) p. 314-315.

[54]*See* Judge Eicke, *supra* n. 33, para. 2. It is also highly unfortunate that the Court – ostensibly deliberately – conflates ('merges') the standing issue ('victimhood') with the question on the merits as to whether Art. 8 has been interfered with. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 437, 520. In the context of its further 'evolutive' elaboration of its jurisprudence on whether environmental nuisances can amount to a violation of Art. 8 the Court requires a certain 'seriousness' of interference, which is to be manifest in the 'intensity and duration of the nuisance and its physical and mental impact on the applicant's health or quality of life' (para. 516). The Court thereby introduces a proportionality component into the determination of Art. 8's scope of protection. Since intensity of exposure is, however, also relevant for the purpose of standing (*see* para. 514), it is, therefore, next to impossible to disentangle standing from actual interferences. In the case in question, this gives rise to the remarkable consequence that Art. 8 has been interfered with, even if this interference was ostensibly not severe enough, owing to mitigating factors, to trigger victim status for individual applicants. The Court has thereby recognised an interference that needs to be borne by individuals, but not by associations. One might wonder whether this is a mark of progress in the context of human rights protection. Alternatively, the matter can also be seen as follows: unless there is a severity of exposure to governmental action or risks, there is no interference. The implication of this would be that 'abstract review' based on an application by an association is possible without an interference. The question before the Court would then be whether a fundamental right could be held to have been violated without having been actually or potentially interfered with. This consequence would be just as remarkable as the first.

[55]On the question of the appropriate margin of appreciation, *see* Eckes, *supra* n. 39, p. 464-466.

[56]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 545.

[57]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 546-548.

[58]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 546, 550.

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the relevant greenhouse gas reduction targets updated with 'due diligence', based on the 'best available evidence', and 'act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures'.[59] Despite restraining – as if with a stern expression on their judicial faces – the margin of appreciation in the definition of the major targets,[60] the margin remains wide when it comes to choosing means.[61] The Court even promises that the assessment of whether the requirements it imposes on the states have been met will, 'in principle, be of an overall nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its overall margin of appreciation'.[62]

It might be argued that a positive obligation to protect a fundamental right must be derivative of the right itself and does not require any piggybacking on contingent and haphazard regulatory arrangements. Such an objection to the Court's sketch of what states are supposed to do, given their international commitments, must, of course, invite the rebuttal that fundamental rights often require elaboration by legislation or, in this case, international agreements.[63]

[59]The language is taken from *Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 550 lit. d and e.

[60]Fremuth, *supra* n. 34, p. 700, rightly observes that the margin of appreciation appears to have disappeared for the states as regards the necessity to participate in international efforts to combat global warming. There is leeway in the choice of means, however; even this leeway should become more circumscribed the closer we approach the relevant deadline. In this light, Fremuth (ibid.) concludes that protection against climate change has become non-negotiable and is backed up by an 'absolute right'.

[61]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 543: 'As regards [the necessity of combatting climate change and its adverse effects], the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States. As regards [the setting of adequate aims and objectives], namely their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources, the States should be accorded a wide margin of appreciation'.

[62]*Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 551.

[63]It should be born in mind that the following defence of the Court's approach is not of the Court's making. On the contrary, the Court's reasons for considering relevant the developments in conventional international law is rather simplistic. The Court simply posits that the Convention is a 'living instrument' that must be interpreted in light of present-day conditions. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 434 and 546. It is as though the meaning of the Convention can be recreated by law that exists in its vicinity. One most wonder whether Max Weber would have classified this type of reasoning as magical thinking.

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Once the legislative or conventional elaboration is in place, its existence is, provided it serves the interests of right-holders, protected by the right itself. This is clearly the case for negative rights, such as the right to private property. What this right means would remain indeterminate if it were not articulated by ordinary laws or a body of precedents spelling out what property ownership entails normatively in practice. Whoever benefits materially from such a legal regime receives fundamental rights protection in cases in which the executive branch interferes with it or the legislature amends laws to the detriment of the persons affected. In a like manner, it can be argued that international agreements, such as the Paris Agreement, are giving flesh to the bones of the alleged fundamental right to climate protection by imposing on states the obligation to determine climate protection targets. Fulfilling these obligations is in the interest of those holding such a right and is therefore, pending potentially more effective regulations, for the time being required by the fundamental right. The references made by the Court to the Paris Agreement are, thus understood, not unsound. Nevertheless, the rebuttal must in turn invite the objection that the Court has, by plucking the fundamental right to climate protection out of thin air, retroactively transformed obligations that the contracting parties had concluded among themselves into duties that states now owe individuals – or even to appropriately organised advocates of future generations.[64] The contracting states may have deliberately wanted to avoid this, but they now end up in a trap that the European Court of Human Rights prepared for them *post factum*.

The judges nevertheless seem to have remained at a loss as to what their demands truly entail. When it would have been time to spell out concretely what the positive obligations of the respondent state amount to,[65] the Court backed off and said that it was unable to point to detailed prescriptive measures and left the matter to be determined by the state and the supervising Committee of Ministers.[66] Again, Judge Eicke pointed to the adverse consequence of the game that is to be played in the future between legislatures and constitutional courts.[67]

[64]It is, ostensibly, part of the agenda of human rights scholarship to regard such 'subjectivisation' as a mark of moral progress. *See* M.L. Fremuth, 'When the House is on Fire… Grund- und Menschenrechte als Instrumente des Klimaschutzes?', in R. Hofmann et al (eds.), *Festschrift Franz Merli* (Nomos 2023) p. 149 at p. 164-165.

[65]There is, however, a lecture in very general terms about what states should do. *See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, paras. 548-554.

[66]*See Verein KlimaSenorinnen Schweiz*, *supra* n. 23, para. 657. The reluctance to arrive at concrete prescriptions is also noted by Reich, *supra* n. 26, p. 47.

[67]The Swiss Federal Supreme Court correctly pointed out to the claimants that the Swiss Constitution recognises instruments of direct democracy, such as popular initiative, to bring about government action. *See* Reich et al., *supra* n. 40.

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While the judiciary establishes highly general and abstract demands, the legislature and regulatory bodies may end up being inhibited in their work by having to respond to litigants and to potentially ill-informed criticism issued by some national court.[68] The latter observation shows how the takeover of the Court, *qua* organ of a group of states, by a powerful social current not only *de facto* hands over the interpretation of the Convention to advocates of a pressing political agenda, but also indicates that the action to be taken by the states can thereby be impeded.

The total constitution is weak. It is weak, above all, because constitutional reasoning becomes haphazard. It is weak in that it admonishes respondent states to do better in the future and retreats to a high level of generality, speaking of 'diligent' or 'well-informed' policymaking. Alternatively, more concretely formulated tasks often impose only mild burdens. The Federal Constitutional Court decision concerning climate planning did not achieve spectacular results.[69] After a long-winded explanation as to why the court ought to grant the political process ample leeway on tricky technical issues, it signalled, lest it be seen as abdicating all authority,[70] judicial aptitude by claiming that the path towards the reduction of greenhouse gases had to be more specific, indeed, with respect to the concrete periods during which adjustments have to be made. While the reasoning underpinning the minor tweak that had to be added to existing legislation was pompous and appealed to intergenerational burden-sharing as regards interferences with freedom, the result was relatively symbolic and required only a minor adjustment.[71]

What the weak total constitution can accomplish, nevertheless, is to reassure activist claimants in their sense of moral righteousness. They may, if money does not matter to them, pat themselves on their shoulder and tell one another that they have done their bit to save the planet while in fact nothing or very little has happened to mitigate the situation.[72] Sadly or luckily, depending on how one looks at it, the only material beneficiaries of climate litigation are the members of the legal profession.

[68] *See* Judge Eicke, *supra* n. 33, para. 69.

[69] *See* 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

[70] This is a major point of the analysis by Reich, *supra* n. 26.

[71] *See* Wegener, *supra* n. 31.

[72] *See* B. Wegener, 'Risks and Side-Effects of the Climate Jurisdiction as Defended by Manuela Niehaus', V*erfassungsblog*, 3 May 2024, https://verfassungsblog.de/a-human-right-to-climate-protection-as-life-saving-treatment/, visited 26 July 2026.

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Body snatchers[73]

I now turn to the second effect and will be brief. A total constitution with its normative features such as the 'radiating effect'[74] and 'positive obligations' is not in and of itself only ancillary to what contemporary liberals regard as right. It can also serve as a highly useful tool for those whom contemporary liberals regard as belonging to the right-wing of the political spectrum.

Staunch conservatives may be morally obnoxious, but they are definitely not stupid. The uproar caused by citations from an article by Andreas Hauer while he was still a candidate for a position on the Austrian Constitutional Court[75] indicates what is at stake. In a text on public safety and the European Convention,[76] Hauer not only criticised the European Court for declaring unlawful the deportations of convicted felons,[77] he also pointed out that the provision of public safety by the state is essential for the effective enjoyment of a number of the rights listed in the Convention (one is inclined to add that it is no less essential than the reduction of greenhouse gases). While contemporary liberals invoke, for example, Articles 2 or 8 against deportations, it is at least equally plausible to invoke a number of other articles of the Convention to underpin what the state arguably is obligated to do in order to protect the resident population against crimes likely to be perpetrated by illegal aliens or asylum seekers. Hauer concludes that in cases of '... serious crimes (such as robbery, commercial burglary, habitual drug trafficking, but also breach of the peace, etc.), however, the deportation of the criminal foreigner is indicated for reasons of human rights'.[78] This is what the total constitution demands in the eyes of the political right. The demands are, however, at least where deportations are concerned, similarly toothless as in the case of climate litigation. One cannot deport without cooperation by the state receiving the deported person. Evidently, however, the total constitution is not only the darling of one political persuasion

[73]The 1978 movie 'The Invasion of the Body Snatchers' figures prominently as a reference in a discussion between Peter Gabel and Duncan Kennedy concerning the danger that conservatives might appropriate the progressive agenda of critical legal studies. *See* P. Gabel and D. Kennedy, 'Roll over Beethoven', 36 *Stanford Law Review* (1984) p. 1 at p. 7, 16.

[74]*See* the *Lüth* case, BVerfGE 7, 198, partly translated in D.P. Kommers and R.A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd edn. (Duke University Press 2012) p. 442-448.

[75]As of 2018, Hauer has become a member. *See* https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/andreas_hauer.de.html, visited 26 July 2026.

[76]*See* A. Hauer, 'Sicherheitsverwaltung und die EMRK', in M. Vogl and G. Wenda (eds.), *Sicherheitsverwaltung und EMRK*: *Grundrechte – Rechtsschutz – Datenschutz* (Neuer Wissenschaftlicher Verlag 2012) p. 67.

[77]*See* Hauer, *supra* n. 76, p. 71-72.

[78]*See* Hauer, *supra* n. 76, p. 81 (author's translation).

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but attracts appropriation from various ideologies. What may at the end of the day lend unity to the overall system of fundamental rights protection remains an open question.

Constitutionalisation

My third point concerns 'constitutionalisation'. The total constitution emerges from a process of this type. It bears emphasis that the concept has two distinct meanings. It is, nonetheless, the case that both meanings have left an imprint on how we conceive of European Union law.

The first signifies the fact that some field of law becomes submitted to constitutional discipline which had for some reason been so far exempt from it. The *Solange* jurisprudence of the Federal Constitutional Court is an example of this type of constitutionalisation.[79] EU law suddenly became relevant to German fundamental rights law. But we have seen, aside from this, in domestic contexts also the 'constitutionalisation' of criminal law, administrative procedure or even private law.

The second meaning is manifest in how the European Court of Justice replied to the *Solange* challenge.[80] It accepted the first type of constitutionalisation; however, it also altered the source of constitutional law. It had to be found in European – and not German – law. Since such law had not been laid down in the fundamental rights context, the relevant 'higher law' had to be developed from 'lower law'.[81] The Court pulled out the magnifying glass, looked more closely into the context of European Union law, discovered constitutional traditions common to the member states and invested them with primacy and direct effect. Turning lower law – ordinarily Treaty law – into higher law is the type of 'constitutionalisation' that we associate with EU law.[82]

The example demonstrates that constitutionalisation can be a twofold process, without necessarily having to be so: first, it means submitting a field of law to constitutional rigor and, second, the 'discovery' of higher law in lower law. The

[79] *See Internationale Handels-Gesellschaft mBH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Solange I*) [1974] 2 Common Market Law Reports 540. For a historical overview, *see* B. Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (Cambridge University Press 2012) p. 78-90.

[80] *See* Case C-4/79, *Liselotte Hauer* v *Rheinland Pfalz* [1979] ECR 3727.

[81] *See* S. Cassese, 'Ruling from Below: Common Constitutional Traditions and Their Role', 29 *New York University Environmental Law Journal* (2021) p. 591 at p. 593.

[82] *See* E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) p. 1; J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999).

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beginning of the fundamental rights jurisprudence of the European Court of Justice involved both.

This second strand of 'constitutionalisation' has already been strong within the Convention system, not least owing to the Court's strategy to foreclose or circumscribe a margin of appreciation in the face of consensus.[83] Now the Court has added – I am not sure whether this happened for the first time – the transformation of conventional international law into a standard that is protected by a right of the Convention. The international conventions were first, the right appeared a little later.

Extracting higher law from lower law, however, is a well-known manoeuvre in the civil law tradition. Any systematisation of fields of law invariably requires identifying a number of principles that lend coherence to abody of law. Once this has been accomplished, disturbing amendments made by either the legislature or by the judiciary can be regarded as 'anomalies' from the vantage point of the coherent system. Private law traditionalists have in this respect treated consumer protection legislation with suspicion on the ground of its 'inconsistency with the system', for it suspends in several instances the principle of private autonomy and the relevance of the consent of the contracting parties.

Higher law and, borrowing Schmitt's felicitous expression, 'superlegality'[84] are not the preserve of constitutional law. The question is only how one accords them effect. I add in passing that the 'outlier precedent' in a case law system is the equivalent phenomenon to how traditional private law looks at legislation that is at variance with fundamental principles.

The total constitution involves constitutionalisation in both respects. More social activity than ever before is subject to judicial solicitude in constitutional terms. The total constitution, however, is not limited to saying 'this far and no further'; it also formulates goals and open-textured guidelines. As a result, the leeway of legislatures becomes much more narrowly circumscribed. In the relevant processes of adjudication, constitutional courts, in order to draw out the meaning of fundamental rights, have to elaborate a number of distinctions and identify principles that are of particular relevance to its subject matter.[85] The courts are working, within the ambit of a fundamental right, from two sides, namely, from the

[83]Obviously, the ECtHR's appeal to consensus and trends is another way of extracting higher law from lower law. For a comprehensive analysis, *see now* V. Martenet, 'Shaping Rights through European Consensus or Trend', 25(9) *German Law Journal* (2024) p. 1436.

[84]C. Schmitt, *Legality and Legitimacy* (trans. J. Seitzer, Duke University Press 2004); C. Schmitt, 'Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität', 17 *Der Staat* (1978) p. 321.

[85]One of the best-known examples is the distinction between subjective and objective obstacles for the exercise of the freedom to pursue a profession. *See* the German Pharmacy Case, BVerfGE 7, 377, partly translated in Kommers and Miller, *supra* n. 74, p. 666-668.

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side of protecting against interferences, on the one hand, and from the side of sketching guidelines against omissions. What results from the ever-growing body of case law is a rich texture of principles, on the other. As Oliver Lepsius in Germany perceptively observed, what the courts in fact engage in is constitutional 'benchmark setting'.[86] The courts develop a tightly-knit framework with which they expect the legislature to comply. The result is a massive shift of authority from democratic legislation to constitutional adjudication: the republic of Karlsruhe.

What is most interesting about this development is that nobody seems to care. Except for a few recalcitrant Brits[87] and American lefties,[88] we scarcely encounter any objections, and everyone appears to be content with the total constitution.[89]

The self-interest of members of the legal profession aside, I would like to speculate, in conclusion, why there is so little resistance and, on the contrary, so much acquiescence. I sense that the success of right-wing parties in electoral contests has reinvigorated a deep-seated liberal distrust of democracy. Liberals of all stripes are more than ever before happy to rest their faith on the judiciary and to turn their backs on political processes from which right-wing parties are ever more likely to emerge as victorious. Democracy is beginning to fail the liberal persuasion. Its proponents view liberty and equality as better served by elite institutions, such as courts. Moreover, nobody seems to care because, of all the things that we have unlearned since 1989, the most salient is the sense that the world can be changed for the better through common action. It would be of no avail and all in vain.[90] Today, the idea of change by political means is at best regarded as dangerously naïve. Grand politics, the politics that promises to instigate structural transformations of society, has retreated to the symbolic and

[86] *See* O. Lepsius, 'Die maßstabsetzende Gewalt', in M. Jestaedt et al., *Das entgrenzte Gericht*, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2011) p. 159 at p. 168-169, p. 191.

[87] *See* Loughlin, *supra* n. 20; D. Nicole, *The Constitutional Protection of Capitalism* (Hart Publishing 2010).

[88] *See* R.D. Doerfler and S. Moyn, 'The Constitution is Broken and Should not be Reclaimed', *New York Times*, 19 August 2022, https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html, visited 29 July 2026.

[89] The problem as such is, however, recognised by Letsas, *supra* n. 38, p. 446 conceding that '. . . a bill of rights should not aim at tackling all the ways in which a government may fare badly'.

[90] Interestingly, 'cold-war liberalism' and what Hirschman called the 'rhetoric of reaction' converge on this point. *See* A.O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Harvard University Press 1991); S. Moyn, *Liberalism against Itself: Cold-War Intellectuals and the Making of Our Times* (Yale University Press 2023). The revulsion with which we experience the return of President Trump confirms this attitude.

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aesthetic sphere.[91] We are tinkering with all kinds of designators to signal to the world that the excluded are, despite experience to the contrary, included, and celebrating progressive causes with much ado and titillating spectacles on stages. That's all there is. The rest is cumbersome crisis-management that sees the executive branch firmly in the driver's seat. If 'change' can be attained, then it is only at the symbolic level. Against this backdrop, the total constitution with its allegorical victories is a perfect expression of the spirit of our age.

Lex naturalis rediviva

All that legal scholars can do is to attempt to describe what we see in adequate terms. A good way of beginning is to come to grips with what the total constitution entails from a methodological perspective. I surmise that theories of constitutional interpretation are a non-starter, for they fail to reflect that the process of constitutional standard-setting is an exercise of practical reason involving a great deal of balancing.[92] Our total constitutional law is the revenant of what the ancients – Stoics, in particular – believed to be natural law.[93] We often expect, possibly due to the influence of medieval Christian conceptions and also to Pufendorf's imposing example, natural law to be manifest in rules derivative of human nature or ordained by the creator. According to the original Stoic doctrine, however, the law of nature was supposed to be articulated – 'made explicit', in Brandomian parlance[94] – in the process of establishing relations of precedence between and among conflicting values with reference to situations of different salience.[95] This matches the process of adjudication within a constitutional system in which the leeway of the legislature becomes increasingly narrowly circumscribed between the limits marked by 'too much' and 'too little' – proportionality and reverse proportionality, that is.[96] At the end of the day, the higher law of the constitution amounts to a collaborative web of precedents in which what judges take to be natural reason is transformed into higher law.[97]

[91]This is, of course, not emphasised by apologists of the Court. *See* Eckes, *supra* n. 39, p. 468-469, taking at face value what the Court announces to be its methodological and institutional commitments.

[92]*See*, for that matter, R. Alexy, *A Theory of Constitutional Rights* (trans. J. Rivers, Oxford University Press 2002).

[93]K.M. Vogt, *Law, Reason, and the Cosmic City* (Oxford University Press 2008).

[94]*See* R. Brandom, *Making it Explicit: Reasoning, Representing, and Discoursive Commitment* (Harvard Universtiy Press 1994).

[95]*See* Vogt, *supra* n. 93, p. 199-200, p. 204-205, p. 210.

[96]*See* A. Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) p. 17, p. 111-112.

[97]*See* Romeo, *supra* n. 16, p. 918-922.

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If democratic constitutionalism was a revolt against the pretentious appeals to natural reason on the part of some elect few, we have now returned to the place from which our ancestors took great pains to depart.

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