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ARTICLE

Special Issue: Constitutional Judging under Pressure

Constitutional Judging under Pressure: The Role of Judges in Safeguarding the Rule of Law, Equality, and Planetary Survival

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Abstract
Introducing the Special Issue on "Judging under Pressure," this Article sets out three interlinked challenges facing constitutional courts, broadly understood: persisting inequalities, the climate crisis, and rising autocratization. The Articles in this Special Issue identify, analyze, and prescribe a set of judicial responses and strategies when judging under pressure. Some reimagine and recalibrate the role of judges, while others respond with doctrinal and theoretical innovation; yet, throughout, there is a recognition of judicial constraints and institutional fragility.

Keywords: Inequality; democracy; autocracy; climate change; judging; constitutional courts

I. Introducing the Special Issue

Constitutional judges[1] are routinely called upon to adjudicate on concerns that the political process is leaving unresolved in one way or another, by ignoring minority interests or by failing to take into account urgent needs for action, or to step up when the democratic process itself is under attack.[2] Recently, these court functions have only gained in urgency, as politicians fail to meet the planetary existential challenge that is climate change and to deliver the sort of equality most citizens and residents envisage—equality of socioeconomic outcomes.[3] Responding to these political failures and structural limitations raises concerns about the constitutional boundaries of the judicial role.[4] On some accounts, responding robustly may breach those

[1]We use this term throughout to refer to judges with a "constitutional function," so evidently including those judges on formal constitutional and apex courts in national systems, but also judges in regional human rights and other courts that have a function to safeguard human rights, democracy and the rule of law.

[2]Dieter Grimm, *Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics, in* THE LAW/POLITICS DISTINCTION IN CONTEMPORARY PUBLIC LAW ADJUDICATION 21 (Bogdan Iancu ed., 2009); JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS (Christine Landfried ed., 2019).

[3]Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L. ENV'T. L. 37 (2017); WHITNEY K. TAYLOR, THE SOCIAL CONSTITUTION: EMBEDDING SOCIAL RIGHTS THROUGH LEGAL MOBILIZATION (2023).

[4]JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1982); Laura Burgers, *Should Judges Make Climate Change Law?*, 9 TRANSNAT'L. ENV'T. L. 55 (2020).

boundaries.[5] And yet, to fail to adapt to new challenges may also be an abdication of their ascribed function, and imperil the vitality of the rule of law and democracy.

The limits of the judicial role are inherently contested in theory and practice.[6] Some further view public contestation a central feature of good deliberative courts.[7] However, in the era of rising autocratization, where more people live under autocratic forms of government than liberal democracies,[8] judges face not only demand that they do more in order to deliver equality and preserve the planet, but also to safeguard the judicial function itself, its independence.[9] Contemporary forms of autocratic legalism demand new responses from judges.[10] As Scheppele has memorably put it, today's autocrats "mix and match perfectly reasonable elements from different democratic governments to create a 'Frankenstate,'" in which the individual elements may be found in normal democracies but their combination is monstrous.[11] However, responding to these demands may make courts even more vulnerable to attacks for overstepping the mark.[12]

This Special Issue explores these three interlinked challenges for legal constitutionalism: persistent inequality, the climate crisis, and rising autocratization. They are faced by courts globally, albeit in different constellations. Of course, there are longstanding academic debates on how constitutional courts should address deeply political questions, involving distribution of power and resources. Constitutional courts have frequently been criticized for either doing too little or doing too much[13] when they intervene into highly politicized questions. However, we felt that some debates about the limits of the judicial role had become blind alleys,[14] while the real challenges for judges and constitutionalism more generally required new thinking. Accordingly, the Special Issue aims to provide some new insights, by moving away from the more abstract level discussions on the relationship between legal constitutionalism and democracy to focus on the practice of constitutional judging and how judges actually respond under pressure.

Which strategies do constitutional courts deploy to address the mentioned challenges in their jurisprudence? How do they respond to the challenge of politicization and the expectation of deference in the face of calamity and deeply rooted problems, to an assault on their authority and legitimacy? Do they reshape their tools in the face of unprecedented changes or in order to bring corrosive structural harm within the purview of their jurisdiction, or do they make a point of sticking to well-known forms? Which doctrinal frameworks and which standard of review do they apply when addressing these challenges? Which registers do they use in their reasoning, how do they frame the issues, and what does this say about their way of managing their own legitimacy and authority? How do they communicate with the public and with the government outside of their pronouncements? How do they position themselves in relation to populist charges of aloofness or elitism? These questions extend well beyond the legal analysis proper and into the

[5]Richard Bellamy, Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy (2007).

[6]Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Colum. J. Transnat'l. L. 285 (2015).

[7]Conrado Hübner Mendes, Constitutional Courts and Deliberative Democracy (2013).

[8]*People Living Under Democracies and Autocracies*, Our World in Data, https://ourworldindata.org/grapher/people-living-in-democracies-autocracies (last visited Mar. 26, 2025).

[9]Łukasz Bojarski, *Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020*, 22 German L.J. 1334 (2021).

[10]Laura Gamboa, Benjamín García-Holgado & Ezequiel González-Ocantos, *Courts against Backsliding: Lessons from Latin America*, 46 L. & Pol'y 358 (2024).

[11]Kim Lane Scheppele, The *Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 Governance 559, 560 (2013).

[12]Julius Yam, *Judging Under Authoritarianism*, 87 Mod. L. Rev. 894 (2024).

[13]Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1346 (2006).

[14]This debate is led most fervently in the U.S. *See* Ely, *supra* note 4; Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1986).

field of what can be called "judgecraft."[15] They seek to probe the many ways in which constitutional courts and judges respond to fundamental, even existential challenges for legal constitutionalism.

We first discussed these questions at a symposium on February 9, 2024, marking Judge Susanne Baer's return to academic life, after her twelve years on the German Constitutional Court, as well as her sixtieth birthday.[16] Seeking to look forward in light of her work as a judge and as a scholar,[17] we assembled both early-career and well-established scholars, including several former and sitting constitutional court judges, to share their insights into the challenges facing constitutional adjudication under pressure. The Articles in this Special Issue reflect that sharing of insights and the in-depth conversations that it engendered. They originate from a range of different constitutional systems and consider the practices in Canada, Germany—the central case for many of the contributors—India, Kenya, Mexico, Poland, the U.S., and South Africa. Regional courts also figure, predominantly the European Court of Human Rights, but also the Inter-American and African regional human rights courts. Several contributors engage with a range of judicial practices across many states. The keynote by Catharine MacKinnon provides a sweeping overview of the three challenges, and how judges should respond to them, entitled "Three Crises: Saving the World," drawing on her pioneering scholarship on substantive equality.[18] Susanne Baer has offered the English translation of her *Abschiedsrede* (farewell speech) as the concluding contribution of the Special Issue, "To Listen and to Belong: A Personal Take on Constitutionalism at Work Today."[19]

The resultant collection offers diverse approaches and insights. Rather than delivering overarching theories, these insights underscore the significance of context—political, legal, social, and economic—when making sense of constitutional judging under pressure. A variety of theories, prescriptions, and suggestions are offered, through the prism of how our contributors process the realities that the triple challenge of inequalities, climate change, and autocratization present to the judicial function in constitutional societies.

II. Three Challenges for Constitutional Judges

The Articles in this Special Issue address the three interlinked challenges we identified, challenges that significantly exacerbate the existing tensions within constitutional systems about the judicial role: Persistent inequalities, the climate crisis, and rising autocracy.

A. Persistent Inequalities

A foundational insight informing the development of equality scholarship and jurisprudence is that even when formally discriminatory practices are prohibited, the law needs to tackle indirect or disparate impact discrimination, and engage tools to proactively addresses inequality. Decades of scholarship on substantive inequality and critical race theory has developed these insights.[20] Yet,

[15] *See, e.g.,* Richard Moorhead & David Cowan, *Judgecraft: An Introduction*, 16 Soc. Legal Stud. 315 (2007).

[16] *See Constitutional Challenges: Judging under Pressure*, Hertie Sch. Ctr. Fund. Rts., https://www.hertie-school.org/en/fundamental-rights/events/constitutional-challenges (last visited Mar. 25, 2025). The symposium was co-hosted by Hertie School and the University of Münster, and it received generous funding from the Thyssen Foundation.

[17] *See, e.g.,* Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. Toronto L.J. 417 (2009); Susanne Baer, *Who Cares? A Defence of Judicial Review*, 8 J. Brit. Acad. 75 (2020); Susanne Baer, *The Rule of—and not by any—Law: On Constitutionalism*, 71 Current Legal Probs. 335 (2018).

[18] *See* Catharine MacKinnon, *Three Crises: Saving the World*, 26 German L.J. 360a (2025) (Addendum to this Special Issue), available via https://germanlawjournal.com/addendum-mackinnon/ (last visited Aug. 4, 2025).

[19] *See* Susanne Baer, *To Listen and to Belong: A Personal Take on Constitutionalism at Work Today*, 26 German L.J. 350 (2025) (in this same Special Issue).

[20] *See, e.g.,* Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1 (2011); Sandra Fredman, *Substantive Equality Revisited*, 14 I-CON 712 (2016); Catharine A. MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman*, 14 I-CON 739 (2016); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988).

inequality persists, including on the grounds that have long been the focus of legal reform, and of calls for more radical reforms—race and sex.

But the problem of inequality goes deeper. Socioeconomic inequality is arguably the main form of inequality that charaGcterizes sex and racial hierarchies. And yet, it is normalized within constitutional democracies, and constitutions rarely recognize poverty as a form or ground of discrimination.[21] Inequality persists through complex processes of social reproduction, which entail economic, spatial, and ideational dynamics.[22]

Interpretation of constitutional and human rights equality guarantees is a site of constitutional contestation, where judges are invited to address forms of inequality that fall outside of established non-discrimination categories. It is a battle ground for negotiating the societal and political pressures on constitutional courts and in turn what is required from constitutional judges, who have a professional commitment to ensuring non-discrimination. That raises sensitive questions. Should constitutional courts go small in addressing inequalities and risk to be irrelevant for the many, or should they go big and face attacks from the economically and politically wealthy political elites? Do the answers to these questions need to be spelled out within the constitutions or can they be discovered through doctrinal renovations or by stepping openly into the world of constitutional politics?

B. The Climate Crisis

Similarly, climate change has been a major challenge for governments around the world. As it continues to accelerate, avoiding a planetary catastrophe will require ever stricter regulation of economic and private activity; but the short-termism of democracies has led to governments postponing action again and again,[23] while authoritarian governments have either denied climate change or declared themselves not responsible for action.[24]

Courts globally have therefore been called upon by civil society organizations and communities—often as part of strategic litigation—to compel government into action, and to prevent major private polluters from continuing to emit carbon unchecked.[25] The Dutch Supreme Court and German Federal Constitutional Court adopted remarkable and constitutionally imaginative judgments following strategic litigation efforts, finding that neither of the governments took adequate action to mitigate their green house gas emissions.[26] The German Constitutional Court, in particular, foregrounded the rights of future generations in its way of

[21] *See* Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 381–84 (2018).

[22] GLEN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2021).

[23] *See, e.g.,* Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶ 420 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206, (discussing "the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy making, rendering that risk particularly serious").

[24] The Argentinian ruler Javier Milei, the former Brazilian president Jair Bolsonaro, and U.S. President Donald Trump are recent examples; for a brief overview, see, for example, Satyajit Monahan, *The Betrayal: Why the Far Right Abandoned Action on Climate Change*, OXFORD POL. REV. (June 18, 2024), https://oxfordpoliticalreview.com/2024/06/18/the-betrayal-why-the-far-right-abandoned-action-on-climate-change/. There are numerous studies on value correlations among voters. *See, e.g.*, Samantha K. Stanley, Taciano L. Milfont, Marc S. Wilson & Chris G. Sibley, *The Influence of Social Dominance Orientation and Right-wing Authoritarianism on Environmentalism: A Five-year Cross-lagged Analysis*, 14(7) PLOS ONE e0219067 (2019). Irritatingly, some have suggested to "try a little authoritarianism" for more effective climate action. *But see* Jan-Werner Mueller, *The Siren Song of Climate Authoritarianism*, PROJECT SYNDICATE (Sep. 14, 2023), https://www.project-syndicate.org/commentary/authoritarianism-inferior-to-democracy-in-fighting-climate-change-by-jan-werner-mueller-2023-09.

[25] For a database of U.S. and global cases, see *Climate Change Litigation Databases*, COLUMBIA LAW SCHOOL, https://climatecasechart.com/ (last visited Mar. 28, 2025).

[26] Urgenda Foundation v. The Netherlands, Rechtbank Den Haag (District Court of the Hague), [2015] HAZA C/09/00456689 (2015) (Neth.), *aff'd* (The Hague Court of Appeal, 2018), *and aff'd* (Dutch Supreme Court, Dec. 20, 2019); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 157 ENTSCHEIDUNGEN DES

constitutionalizing the climate crisis and held that the lack of ambitious action today infringes the rights of future generations under the German Constitution.[27] The Grand Chamber of the European Court of Human Rights has just decided three major cases on lack of ambitious climate targets in France, Switzerland, and Portugal and thirty-two Council of Europe member states and found a violation of the Convention only in the Swiss case, whereas it declared all other cases inadmissible on procedural grounds.[28] In the U.S., climate cases of children were also rejected on procedural grounds by the U.S. Supreme Court.[29]

Courts have responded very differently to constitutional and rights-based climate litigation, raising profound questions about the role of judges between the demands of civil society and the impasse of politics and economic powers.[30] In addition, in cases where the constitutional courts have taken steps to read climate rights into the constitution, they have not received strong compliance from the political branches.[31]

C. Resisting and Repairing after Autocracy

Autocracy is intrinsically an existential threat to constitutionalism and the rule of law, in that autocratic systems by design are against the separation of powers and constitutional limits.[32] Inevitably, an independent judiciary is the autocrat's enemy.[33] However, the new autocratic legalism has a twist: It employs law and legal processes to undermine the rule of law and replace it with rule by law.[34] The insights into autocratic legalism and its workings globally are now well understood as a script that can be repeated in different regions of the world,[35] including in the U.S., most vividly since the re-election of President Trump—which postdates the finalization of these contributions. As Scheppele puts it in her Article, "Poland, Ecuador, South Africa, Brazil, Romania, Italy, Peru, Greece, Bolivia, France, the UK, the Philippines, and a growing number of others are all one bad election away from catastrophe or they are struggling to bounce back from an autocratic power grab."[36]

Autocratic decay includes many practices now broadly understood under the terms court-packing and court-curbing.[37] Against this backdrop, the question of how judges can and should

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BUNDESVERFASSUNGSGERICHTS [BVERFGE] 30 (English translation available at http://www.bverfg.de/e/rs20210324_1bvr265618en.html) [hereinafter *Climate Case*].

[27]*Climate Case*, 157 BVERFGE 30, at paras. 183–95.

[28]Verein KlimaSeniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206; Carême v. France, App. No. 7189/21 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174; Duarte Agostinho and Others v. Portugal and Others, App. No. 39371/20 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233261.

[29]The U.S. Supreme Court declined to hear a petition filed by young climate activists who argued that the federal government's role in climate change violated their constitutional rights on March 25, 2025, ending a decade-long legal mobilization effort by children before the Supreme Court. *See* Juliana v. United States, 2025 U.S. LEXIS 1138 (S.Ct. 2025), *cert. denied* __ S.Ct. __ (2025).

[30]Laura Davies & Laura Henderson, *Judging without Railings: An Ethic of Responsible Judicial Decision-making for Future Generations*, 26(1) LEGAL ETHICS 25 (2023).

[31]Juan Auz, *The Political Ecology of Climate Remedies in Latin America and the Caribbean: Comparing Compliance between National and Inter-American Litigation*, 16 J. HUM. RTS. PRAC. 182 (2024).

[32]Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What is New About it?*, 26 DEMOCRATIZATION 1095 (2019).

[33]FIONA FEIANG SHEN-BAYH, UNDUE PROCESS: PERSECUTION AND PUNISHMENT IN AUTOCRATIC COURTS (2022).

[34]Tamir Mustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014).

[35]Lee Morgenbesser, *The Menu of Autocratic Innovation* 27 DEMOCRATIZATION 1053 (2020).

[36]Kim Lane Scheppele, *Rights into Structures: Judging in a Time of Democratic Backsliding*, 26 GERMAN L.J. 255 (2025) (in this same Special Issue).

[37]On court packing, see, for example, David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 I-CON 80 (2023); Benjamin G. Holgado & Raul Sanchez-Urribarri, *Court-Packing and Democratic Decay: A Necessary Relationship?*, 12 GLOB. CONST. 350 (2023).

act when these autocratic practices emerge is a pressing one,[38] as is the question of how to repair after autocracy, a live issue in particular in contemporary Poland. This is a delicate one because, as one of the contributors notes, "the judicial branch has turned out to be surprisingly weak once the struggle became real."[39]

D. Interaction and Intersection between Challenges

These challenges not only intensify the ordinary tensions of constitutional judging; they intersect and potentially exacerbate each other. For example, recent research argues that high levels of income inequality is a major driver for the rise of populist parties.[40] Attacks on constitutional courts are often framed in populist terms—the elite judges are protecting unpopular minorities, such as queer people or migrants, and progressive views like those on sex equality, against "the people."[41] Populists and autocrats are also associated with various anti-science stances, including climate change denial.[42] But irrespective of these attacks, constitutional courts are called upon precisely due to perceived deficiencies of democratic decision, either to protect minorities or future generations, or even simply to inject long-term horizons into politics.

While the effects of climate change are global, they exacerbate existing inequalities both globally—in particular colonial legacies[43]—and locally. Some recent cases have sought to specifically address this phenomenon; for example, some cases brought before courts in the global North have involved plaintiffs from the global South[44] or vulnerable groups within societies.[45] However, addressing climate change may also be framed an elite cosmopolitan interest, pitting it against the economic interests of the poor.

The intersection and interactions between the three challenges are many and complex. Some contributors have explored them explicitly. Gabriel Britz's premise, which informs climate change adjudication, is that:

> In the long-term, democracy and freedom themselves will only continue to exist if climate protection becomes effective early enough. Otherwise, nothing would be left to decide in the future, and the sheer struggle for survival would dictate all political and individual decisions.[46]

Others offer an overarching prescription. For instance, Catharine MacKinnon posits that:

[38]Stephan Haggard & Robert Kaufman, Backsliding: Democratic Regress in the Contemporary World (2021).

[39]David Kosař, *Embedding Strategies of the European Apex Courts: Why Court Communication with All Segments of Society Matters*, 26 German L.J. 274 (2025) (in this same Special Issue). (citing Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union*, 51 Communist & Post-Communist Stud. 3, 189 (2018)).

[40]Sarah Engler & David Weisstanner, *The Threat of Social Decline: Income Inequality and Radical Right Support*, 28 J. Eur. Pub. Pol'y 153 (2021).

[41]James E. Moliterno & Peter Čuroš, *Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious*, 22 German L.J. 1159 (2021).

[42]*See, e.g.,* Monahan, *supra* note 24.

[43]Olúfémi O. Táíwò Reconsidering Reparations (2022); Harriet Mercer, *Colonialism: Why Leading Climate Scientists Have Finally Acknowledged its Link with Climate Change*, The Conversation (Apr. 22, 2022), https://theconversation.com/colonialism-why-leading-climate-scientists-have-finally-acknowledged-its-link-with-climate-change-181642.

[44]*Climate Case*, 157 BVerfGE 30, at paras. 78–84, 101, 173–81 (granting plaintiffs from Nepal and Bangladesh standing but denying a violation of a duty to protect); Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court Hamm], Luciano Lliuya v. RWE AG, Case No. 5 U 15/17 (pending) (involving a plaintiff from Peru and a German energy company).

[45]*Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20.

[46]Gabriele Britz, *Overcoming Democratic Short-termism through Constitutional Law?—The Difficulty of Making the Constitutional Veto Work in Climate Protection Cases*, 26 German L.J. 317 (2025) (in this same Special Issue).

> Substantive inequalities, meaning structural collective dynamic social hierarchies of domination and subordination, within and between polities, characterize inequality as such, have challenged and continue to undermine democracy within nations and the international order, and have supercharged climate change and made it difficult to impossible to stop or reverse.[47]

She understands substantive equality as a way for constitutional courts to "end social inequality and contribute powerfully to reversing democratic deficits, at least retarding democratic decay and climate catastrophes."[48]

III. Strategies for Constitutional Judging and Judicial Practice

The Articles in this Special Issue identify, analyze, and prescribe a set of judicial responses and strategies when judging under pressure. Some contributors reimagine and recalibrate the role of judges (A.), while others respond with doctrinal and theoretical innovation (B.). And yet, there is still a recognition of judicial constraints and institutional fragility (C.).

A. Reimagining and Recalibrating the Judicial Role

One way of reimagining the judicial role is putting the defense of the constitution against authoritarian aggrandizement at the center of judicial function. *Kim Lane Scheppele*, in her contribution, for example, suggests that judges should interpret individual rights to enable "democratic self-defense" against authoritarian encroachments.[49] Her contribution, entitled "Rights into Structures: Judging in a Time of Democratic Backsliding," identifies how judges, in democratic self-defense mode, may transform rights intro structural guarantees, so that the individual litigant and individualized remedy translate into institutional commitments.[50] As she identifies, the European and Inter-American human rights courts have adopted this strategy in caselaw on judicial independence, neutral election administration, and term limits.[51] This can relieve members of disadvantaged groups from the burden of having to go to court individually as well, something that all too often depends on financial and other resources, especially in contexts of structural inequality. When it comes to judging *after* backsliding, as in Poland, Scheppele proposes the concept of "rule of law writ large" to enable the undoing of autocratic institutionalization to bring structures back in line with international standards, even when this undoing conflicts with domestic legality requirements (the "rule of law writ small").[52]

In matters of responding to climate change, courts have lately become a beacon of hope to those in despair at decades of democratic delay in the face of the imminent tipping point in the climate crisis.[53] As *Gabriele Britz* puts it in her contribution entitled "Overcoming Democratic Short-termism through Constitutional Law?—The Difficulty of Making the Constitutional Veto Work in Climate Protection Cases," constitutional courts' action is often premised on the acknowledgement that without climate action, democracy and freedom themselves will be imperiled.[54] Britz examines the potential and limits of climate judgments, demonstrating how constitutional courts can and should remedy the democratic short-termism that underlies political climate

[47]MacKinnon, *supra* note 18.
[48]*Id.*
[49]Scheppele, *supra* note 36.
[50]*Id.*
[51]*Id.*
[52]*Id.*
[53]*See* Sam Bookman, *Uncertainty and Tension in Constitutional Adjudication of Climate Mitigation*, 26 GERMAN L.J. 331 (2025) (in this same Special Issue). (providing a brief account of the "hopes of 'climate constitutionalism'").
[54]*See* Britz, *supra* note 46.

inaction.[55] Unlike the legislator, courts are by design insulated from the electoral cycle, and can adopt longer time perspectives.[56] In the best case, this can then be a catalyst for democratic action and help to overcome short-termist lethargy. Surveying developments in Germany, the European Court of Human Rights (ECtHR), the U.S., Norway, and Colombia, she urges that courts demand and review the political organs' "comprehensive" approach to climate change, going beyond traditional approaches to judicial review.[57]

Sarah Ganty's "Poverty in Judgecraft: New Narratives through the Language of Equality" focuses on the role of judges as "metanarrators,"[58] and their attendant power to challenge myths and develop new empirically grounded "demosprudential"[59] narratives about poverty, through the language of non-discrimination and equality.[60] In particular, surveying case law from the U.S., India, Germany, and Canada and regional human rights courts and committees, she identifies the threads of a new narrative where the true nature of poverty—as multidimensional, historical, and structural—informs and improves adjudication. She argues that changing the narrative could open the way for judges to redress certain troubling situations of misrecognition, social exclusion, and inequality.[61] Ultimately, as long as myths about poverty prevail in law, especially in the courts, any attempt to tackle the issue of socioeconomic exclusion judicially is destined to fail.

Judges routinely calibrate their actions to preserve their perceived authority and legitimacy.[62] This poses a particular challenge when populists and autocrats accuse them of undermining the true "will of the people," in particular when they are framed as being an unelected globalist elite.[63] We now have ample evidence that this strategy may undermine public trust in the judiciary.[64] David Kosař reviews this empirical evidence, seeking ways for courts to strengthen their "social embeddedness" in order to bolster their resilience against court-curbing efforts.[65] Mindful of the limited evidence base, and drawing on examples from across Europe, but also Canada and Colombia, he identifies a range of practices that appear to enable judges to maintain their integrity, whilst also making the rule of law more accessible and comprehensible: Developing the media and communication strategy of apex courts; proactive engagement with the precariat via "reaching out" activities such as social events and holding hearings outside the courts' seats; avoiding controversial off-the-bench activities of judges in order to maintain the appearance of judicial integrity; and self-awareness and avoidance of structural judicial bias.[66] As he acknowledges, these strategies come with their own risks and limitations, not least because the answer to authoritarian populism surely does not lie in "populist judges."[67]

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See* Sarah Ganty, *Poverty in Judgecraft: New Narratives through the Language of Equality*, in this special issue.

[59] Drawing on Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13 (2008); Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 63 DUKE L.J. 1473, 1507–20 (2020).

[60] *See* Ganty, *supra* note 58.

[61] *Id.*

[62] Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making, in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Gregory A. Caldeira, R. Daniel Kelemen & Keith E. Whittington eds., online ed., 2009), https://doi.org/10.1093/oxfordhb/9780199208425.003.0003.

[63] *See* Kosař, *supra* note 39.

[64] Pedro C. Magalhães & Nuno Garoupa, *Populist Governments, Judicial Independence, and Public Trust in the Courts*, 31 J. EUR. PUB. POL'Y 2748 (2023).

[65] Kosař, *supra* note 39.

[66] *Id.*

[67] *Id.*

B. Doctrinal Innovation and Invigoration

In responding to the new challenges, courts may also need to innovate doctrinally.

Kim Lane Scheppele's analysis of how human rights courts have been "converting the protection of rights into the requirements for constitutional structures" is a case in point.[68] This interpretative strategy may not only reinforce basic constitutional structures, but also protect the substantive rights autocrats often target, notably sex equality and protections for LGBTI people.[69] But of course, the usefulness of such approaches is limited once autocrats are ready to defy international judgments altogether.

More radically, concerning persistent inequalities, Shreya Atrey argues for a "radical reimagination" of equality law, in the form of a "Structural Turn."[70] She starts from the insight that it can be the structure of equality law itself, with its focus on "grounds," that can lead courts to miss "the core of racism or sexism—which is about structural injustice."[71] Assessing caselaw from India, South Africa, and the U.S. demonstrates the failure of courts to grasp the structural harm underlying inequalities.[72] But she also identifies some dissenting opinions, even the odd majority decision, that point a way to recognizing the structural nature and historical roots of caste-based, race-based, and sex-based disadvantage and the way that affirmative action can help to redress this structural injustice.[73]

Writing on "Practices of Social Constitutionalism" in the German context, Cara Röhner also argues for judges to reinterpret the constitutional guarantees of equality and dignity, informed by a "relational approach" along the lines of Nancy Fraser and Jennifer Nedelsky,[74] to strengthen the social dimension of constitutionalism.[75] Her contribution examines the German Federal Constitutional Court's caselaw on the "existential minimum" for job-seekers, the working poor, and asylum-seekers; and family benefits for refugee parents.[76] She notes in particular the Court's recognition of the group-based risks engaged when assessing the rights of asylum-seekers and refugees.[77] She argues for a further strengthening of these social rights, by focusing even more on the "social reality" of "socio-economic inequality, and its intersections with legal residence status and gender."[78]

Victoria Miyandazi examines "The Role of Kenyan Courts in Tackling Persistent Inequalities" when interpreting the equality clauses in the 2010 Kenyan Constitution, in a context she characterizes as a "hybrid," with both democratic and autocratic elements.[79] She notes that in Kenya, the judiciary enjoy fairly high public legitimacy, in comparison with the political branches, but that this legitimacy depends on the public perception of judges as "fair, impartial, and apolitical defenders of democracy" and thus on "the way courts interpret their role as guardians of the Constitution and hold duty-bearers accountable for ensuring its proper implementation."[80] At the same time, she acknowledges the constraints on courts, in particular institutional deference due to representative bodies, especially on polycentric issues.[81] Drawing on the work of James

[68]Scheppele, *supra* note 36.
[69]*Id.*
[70]Shreya Atrey, *Equality Law: A Structural Turn*, 26 German L.J. 153 (2025) (in this same Special Issue).
[71]*Id.*
[72]*Id.*
[73]*Id.*
[74]Jennifer Nedelsky, Law's Relations: A Relational Theory of Self, Autonomy, and Law (2011).
[75]Cara Röhner, *Practices of Social Constitutionalism: Poverty, Socio-economic Status, and Social Exclusion in the Jurisprudence of the German Federal Constitutional Court*, 26 German L.J. 213 (2025) (in this same Special Issue).
[76]*Id.*
[77]*Id.*
[78]*Id.*
[79]Victoria Miyandazi, *The Role of Kenyan Courts in Tackling Persistent Inequalities: Navigating Deference and Accountability*, 26 German L.J. 234 (2025) (in this same Special Issue).
[80]*Id.*
[81]*Id.*

Gathii,[82] and Aileen Kavanagh's vision of "collaborative constitutionalism,"[83] she provides a contextual critique of the caselaw and identifies additional strategies courts could use to advance equality within constitutional limits.[84]

Doctrinal innovation is most prominent in the new field of climate litigation, where even courts themselves call out for "novel and creative remedies."[85] In her keynote Article, Catharine MacKinnon proposes a right to "intergenerational equity" for children and future generations as one of the most promising constitutional litigation approaches,[86] citing the German *Climate Decision* and the Colombian case *Demanda Generaciones Futuras* as examples.[87] She cautions that shoehorning children into U.S.-style equal protection categories runs into lots of problems, not least the fact that "the more widespread an injury is, the less the Constitution can do about it."[88] But she also does not see the principle of equity as a helpful, as it is "unmoored from most constitutional rubrics."[89] Instead, she suggests that substantive equality—being "concrete, comparative, evidence-based"—offers everything that plaintiffs are looking for, along with the constitutional basis that equity is missing.[90] In that sense, it is not so much doctrinal innovation that constitutional courts need but a full understanding and principled application of the doctrinal tools that they already dispose of.[91] If this comes to fruition, MacKinnon outlines how substantive equality can help address not only climate change, but the interconnected nature of all three challenges, which her Article describes in vivid terms:

> Our three topics, seen intersectionally, present the most urgent interconnected crises of our time. We know what we are facing and, from history and science, we know what acting to stop it requires. With substantive equality in constitutional adjudication, we have a tool for a chance—now, not later—to save people and peoples, who are already disastrously and painfully unequal; to save rule by the people, which is under widespread attack; and to save our precious planet—for itself, for ourselves, and for our children.[92]

C. Judicial Constraints and Institutional Fragility

The limited capacity of litigation to achieve social change at the local, national, or global levels are explored throughout the Special Issue. Perhaps unsurprisingly, two of the contributors who are former judges focus on the challenges in rendering equality and climate justice effective.

Catherine O'Regan's contribution "The Long Legacy of Apartheid Geography and the Reach of the South African Constitution's Equality Clause" offers an insightful account of the failures of equality jurisprudence to tackle the persistent inequality of racial residential segregation, an apartheid legacy today "maintained by a complex intersection of social and economic factors" with severe consequences for inequality across in education, employment, income, health and life expectancy.[93] She examines the development of constitutional equality jurisprudence, and a case

[82] James Thuo Gathii, The Contested Empowerment of Kenya's Judiciary, 2010–2015: A Historical Institutional Analysis 61–77 (2016).

[83] Aileen Kavanagh, The Collaborative Constitution (2024).

[84] *See* Miyandazi, *supra* note 79.

[85] La Rose v. His Majesty the King, [2023] F.C.A. 241, ¶ 56 (Can.).

[86] MacKinnon, *supra* note 18.

[87] *Climate Case*, 157 BVerfGE 30; Tutela, Demanda Generaciones Futuras v. Minambiente [2018] Supreme Court 11001-22-03-000-2018-00319-01 (Colom.).

[88] MacKinnon, *supra* note 18.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Catherine O'Regan, *The Long Legacy of Apartheid Geography and the Reach of the South African Constitution's Equality Clause*, 26 German L.J. 198 (2025) (in this same Special Issue).

study of a decision of one of South Africa's dedicated equality courts concerning allocation of policing resources to a poor and racially segregated neighborhood in Cape Town, Khayelitsha.[94] The litigation came after a committee of inquiry reported on the matter, a committee which O'Regan chaired.[95] Her sobering analysis explores the challenges to make equality effective, from gathering evidence on policing resources, to establishing discrimination when the context makes policing challenging, to fashioning effective remedies—which was not yet done in the particular case—to implementation.[96] Her conclusion is that these four difficulties render constitutional equality elusive, particularly when government policies or practices are embedded in long-established *apartheid* geography.[97]

Gabriele Britz, in her contribution entitled "Overcoming Democratic Short-termism through Constitutional Law?", points out these limits of their potential in a systematic manner.[98] Constitutional courts are most effective when exercising a veto, by striking down—or declaring incompatible with constitutional or human rights standards—government or legislative action.[99] They are much less able to effectively address government *inaction*. In the case of the German Federal Constitutional Court's climate decision,[100] in which Britz participated as reporting judge, declaring unconstitutional a Climate Protection Act for making grossly insufficient provisions for future rights exercises that imply carbon emissions did not provide a better law, it continues to fall upon the legislator to decide how and where to impose decarbonization measures. And precisely because this is a political decision, constitutional rights will usually not be able to prevent individual carbon-intensive projects on the basis that those further contribute to climate change, because almost any human activity does, and it is for the political branches to determine how to distribute emission rights between different societal interests and groups.[101]

In his contribution "Uncertainty and Tension in Constitutional Adjudication of Climate Mitigation," Sam Bookman additionally cautions that "climate constitutionalism ... finds itself jostling in a crowded space, competing with many other values, objectives, and priorities."[102] The German context is a case in point, as the implementation of sufficiently ambitious climate targets will require significant government expenditure for things like retrofitting buildings, investment into rail infrastructure, or subsidizing green technologies, while the German constitution also significantly constrains such expenditure through the "debt brake," to protect future generations form suffocating debt.[103] In the Canadian context, the vertical division of powers is a constitutional concern that can restrict a climate-ambitious central government, but also end up leaving important powers to the provinces in constellations where the central government may be less ambitious than the decentralized units.[104] In Mexico, where the Constitution contains an environmental right, judges have cited countervailing socio-economic rights and the government's economic development to uphold an energy sector reform that undermined a green transition, before the reform was later struck down.[105] In light of the "polyvocality" of constitutions, he recommends that judges adopt a principled, context-sensitive approach to

[94] *Id. See* Social Justice Coalition and Others v. Minister of Police and Others 2019 (4) SA 82 (WCC) (S. Afr.).
[95] *See* O'Regan, *supra* note 93.
[96] *Id.*
[97] *Id.*
[98] Britz, *supra* note 46.
[99] *Id.*
[100] *Climate Case*, 157 BVerfGE 30.
[101] *See* Britz, *supra* note 46.
[102] Bookman, *supra* note 53.
[103] *Id.*
[104] *Id.*
[105] *Id.*

constitutional climate adjudication, balancing the urgency of climate action with the complexities of state capacity and constitutional structures.[106]

Mariana Velasco-Rivera develops Steven Levitsky and Daniel Ziblatt's work on the unwritten norms that undergird democracy, namely mutual toleration among political parties and institutional forbearance,[107] in her contribution "The Soft Guardrails of Legal Constitutionalism."[108] She highlights that courts are especially vulnerable in constitutional democracies because their legitimacy and stability depends on the willingness of other actors to acknowledge their authority, both by bringing cases to courts and abiding by their decisions.[109] She offers three illustrative case studies of the norm institutional forbearance towards courts in action, an idealized account of forbearance to the judiciary displayed in the early years of post-apartheid South Africa; a more ambivalent example from the U.S.; and finally her central case of Mexico, where she charts the rapid demise of legal constitutionalism in recent years.[110] Her concluding reflections characterize the erosion of the soft guardrails as a crisis of public ethics, highlighting the shared public responsibility to come to the defense of the judiciary when attacked in a systemic misinformation campaign.[111] Without defenders amongst the citizenry in public life, the judiciary was defenseless.

The Special Issue concludes with Susanne Baer's "To Listen and to Belong. A Personal Take on Constitutionalism at Work Today," a wide-ranging personal reflection on the value of collegiality, mutual understanding, and the vital role of judging in constitutional democracies.[112] She emphasizes the importance of the German Federal Constitutional Court's culture of deliberation, where all of the eight Justices in each of the two senates are committed to finding as much consensus as possible, and to explaining as much as possible their decisions to a wide and diverse audience.[113] In a compellingly personal reflection, she also stresses the essential value of a feeling of belonging to such an institution, as an outspoken lesbian feminist who had plenty of experience with being stigmatized, and who was questioned about her bias during the nomination procedure.[114] The two concepts, listening and belonging, are essential to each other, because courts "must be able to listen to all kinds of people, and this is much easier with many differently trained ears."[115] This is why diversity on the bench, while often disparaged as a "woke" agenda, matters so much. Reversing the burden of proof, Baer ask "what difference it makes to an apex court if there are only people who have always seen themselves as 'normal,' or if there are also people who are seen as, or see themselves, as 'the other.'"[116] If justice is also to be seen to be done, the diversity of society must be reflected also by its courts. Finally, she warns of the insidious potential of court-bashing in times of authoritarian backsliding.[117]

IV. Conclusions

Judging is an old art; do we need to think about it radically or pragmatically? This Special Issue captures diverse voices and perspectives. For MacKinnon, the only way for constitutions to

[106] *See* Bookman, *supra* note 53.
[107] Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018).
[108] Mariana Velasco-Rivera, *The Soft Guardrails of Legal Constitutionalism*, 26 German L.J. 299 (2025) (in this same Special Issue).
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *See* Baer, *supra* note 19.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

counter authoritarianism is to "come to grips with poverty, with concomitant social and economic class as a virulent form of inequality produced by the very economic democracy that capitalism purports to promote."[118] For her, unless constitutional democracies "face economic inequality in all its gendered and racialized dimensions, democracy contains the seeds of its own destruction in this respect as well as others."[119] Others are more mindful of the limits of judicial capacity and impact, the intractable nature of some inequalities, and the need to respect constitutional limits in order to ensure respect for the judiciary.

The Special Issue opens up a range of judicial practices for scrutiny, both on the bench and beyond. All of the contributions assume that judges should act on, and indeed further develop, empirically well-grounded accounts of the nature of structural and climate injustice. There are myths, lies, and misinformation that judges need to resist and root out. However, the normative resources of judges must also be deep. Many of the contributions defend a transformative role for the judiciary, especially in light of democratic shortcomings, such as short-termism. Relatedly, many of the equality cases surveyed concern the rights of asylum-seekers, refugees, and other migrants. In this context, the populist move to vilify the "other" and the structural exclusion of the non-citizen begets a toxic politics, a further constitutional challenge.[120] The content of constitutional jurisprudence—doctrine—emerges across the contributions as the epiphenomenon of legal contestation, argumentation, empirical evidence, and constitutional values and theory. This vision of judging is a challenge for legal educators, and suggests an approach to legal education that needs a much deeper foundation in the social sciences than traditional legal-doctrinal approaches provide, and much deeper philosophical engagement to understand the normative commitments of constitutionalism.

The Special Issue raises many issues for future scholarship. The question of access to justice emerges throughout, in need of further exploration. Recent empirical studies suggest it is key to public support for constitutionalism.[121] The question of remedies and implementation also recurs throughout, the ultimate fragility of judicial pronouncements. The need to tailor remedies that will catalyze the desired course of political action informs many of the contributions, and suggests further avenues for inquiry. The developments in the wake of the *Klimaseniorinnen* litigation offer a pathway to effective implementation, even when it depends on collective political action across states.[122]

The Articles were finalized in late 2024, before the outcome of the November 2024 U.S. election was clear. We are finalizing this introduction in Spring 2025, when President Trump, only fifty days into his second term, already wielded Presidential power in a lawless and arbitrary fashion, far beyond anything seen previously in that context.[123] In Germany, the 2025 election saw the far-right Alternative for Germany (AfD) doubling its electoral share, its best result in nation-wide German elections yet.[124] The contributions generally acknowledge the courts can cajole and catalyze political change, but they cannot coerce it. Those who value the rule of law, democracy,

[118]MacKinnon, *supra* note 18.

[119]*Id.*

[120]Migrants Rights, Populism and Resilience in Europe (Vladislava Stoyanova & Stijn Smet eds., 2022).

[121]*Id.*

[122]*See also*, Başak Çalı, *Watch this Space, Take 2: Execution of Strasbourg's Landmark Climate Mitigation Judgment Verein KlimaSeniorinnen v. Switzerland*, EJIL Talk! (Mar. 12, 2025), https://www.ejiltalk.org/watch-this-space-take-2-execution-of-strasbourgs-landmark-climate-mitigation-judgment-verein-klimaseniorinnen-v-switzerland.

[123]*See, e.g., Trump's Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. Times (Feb. 12, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html; Defiance and Threats in Deportation Case Renew Fear of Constitutional Crisis, N.Y. Times (Mar. 19, 2025), https://www.nytimes.com/2025/03/19/us/politics/trump-deportations-constitutional-crisis-impeachment.html.

[124]*See* Kristin Zeier & Gianna-Carina Grün, *German Election Results Explained in Graphics*, Deutsche Welle (Feb. 27, 2025), https://www.dw.com/en/german-election-results-explained-in-graphics/a-71724186.

their own citizens privileges, need to defend the constitutional values and institutions. As Susanne Baer reminds us:

> If fundamental human rights are no longer effectively protected, some will suffer sooner, some later, but ultimately, we will all lose out. Constitutionalism is not only about 'these minorities'; in a democracy that deserves the name, it is about everyone. The minority of constitutional law is the individual. You are included. That is why thousands took to the streets in Poland when the Constitutional Court was dismantled, just as tens of thousands took to the streets in Israel against an attempt to dismantle the Supreme Court there. I very much hope that you will also stand up for independent courts, and constitutionalism, against autocratic populists, and against resentment.[125]

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[125]Baer, *supra* note 19.

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