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ARTICLE

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Overcoming Democratic Short-termism through Constitutional Law?—The Difficulty of Making the Constitutional Veto Work in Climate Protection Cases

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Abstract

Democratic decision-making processes tend to take less account of future interests than of present ones, thereby jeopardizing not least the foundations of future democracy. Democratic short-termism causes considerable problems, especially when decisions made now have serious consequences for the future and can hardly be reversed. Thus, the current climate protection legislation, which is far too weak worldwide, threatens to impose unbearable and unjust burdens on people in the future and deprive them of any political leeway for shaping their own policies, thus also undermining the very basis of democracy. In general, it is one of the functions of constitutional law to help overcome such short-termism of decision-making processes. However, in the case of climate protection, this is difficult because the veto power of constitutional law and constitutional courts has comparatively little impact here—for reasons related to the factual characteristics of climate protection. Nevertheless, constitutional law and courts have their own potential in climate protection that needs to be further developed in order to overcome some of the democratic short-termism.

Keywords: Climate protection; intertemporal safeguard of freedom; democratic short-termism; future generations

A. Short-Termism in Climate Protection: Violations of Claims to Future Prospects

Democratic decision-making processes tend to take less account of future interests than of present ones. This causes considerable problems, especially when decisions made now have serious consequences for the future and can hardly be reversed. Thus, the current climate protection legislation, which is far too weak worldwide, threatens to impose unbearable and unjust burdens on people in the future and deprive them of any political leeway for shaping their own policies. This puts three crises of humanity on the agenda, which have been discussed here in honor of *Susanne Baer*[1]: Climate protection—equality—democracy.

[1]I have written this text for the birthday colloquium in February 2024 for my former colleague *Susanne Baer*, with whom I shared the privilege of constitutional judging in an environment sympathetic to legal constitutionalism and under much less pressure than many colleagues from apex courts in other countries. Finding the constitutional answer to short-termism in climate politics and an adequate role for the Federal Constitutional Court in climate change litigation was the Court's challenge in the climate change case of March 24, 2021. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], 1 BvR 2656/18 and others (Ger.) (hereafter BVerfG, Climate Decision). The decision is officially published in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 157 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 30-177 (Ger.). An official translation in English is available at http://www.bverfg.

The short-termism of democracies is a major dilemma of all democratic legislation: Democratic rule must always be rule for a limited time, otherwise it would not be democratic. Accordingly, a democratic government is a government for a limited time in the relatively short cycle of election periods. The chances of being elected and reelected depend on short-term promises and successes. Therefore, democracies tend to be resistant towards future interests: Those involved—including voters—are likely to pay only little attention to the—sometimes even irreversible[2]—long-term consequences of democratic decisions.[3] Future interests therefore receive little attention within this institutional framework, let alone are being addressed. This is the notorious obliviousness to the future.[4] Or, as the ECtHR recently put it:

> [H]aving regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores 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 [. . .].[5]

Climate protection is a prime example of democratic short-termism, future health of people, of the environment and of the climate are being neglected. Short-termism in climate protection is also a serious problem of equality and democracy: If a legal system ignores the future consequences of the climate change caused by humans today, it violates the *fundamental claim to equality* of people living in the future.[6] It denies legal recognition to their equal basic needs. It disregards the legitimate need of people alive in the future to find climatic conditions in which they can live in a humane way. It also leaves too much of the burden of halting global warming and climate change and of adapting to the irreversibly changed climate conditions to the people in the future. In this way, those alive in the future are deprived of freedom that those living now can still make use of.[7] It also denies the people alive in the future the political leeway they need to organize themselves democratically, because all political action will then have to focus on how to survive under the

de/e/rs20210324_1bvr265618en.html. The following is not intended as an explanation of the judgment, but the judgment forms one background of this article. For a more detailed description of this judgment, see, for example, Gabriele Britz, *Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts*, 41 Neue Zeitschrift für Verwaltungsrecht 825 (2022); Martin Eifert, *Verfassungsauftrag zum freiheitsschonenden Klimaschutz: Der Klimaschutz-Beschluss des BVerfG*, 43 Juristische Ausbildung 1085 (2022); in English: Martin Eifert, *The German Constitutional Court's KSG Judgement*, *in* Business Law and the Transition to a Net Zero Economy 75 (Andreas Engert, Luca Enriques, Wolf-Georg, Ringe Umakanth Varottil & Thom Wetzer eds., 2022); Martin Eifert and Michael von Landenberg-Roberg, *Climate Change Challenges Constitutional Law: Contextualising the German Federal Constitutional Courts Climate Jurisprudence Within Climate Constitutionalism*, 13 Euro. Yearbook of Int'l Econ. L. 3 (2022).

[2]For the important aspect of irreversibility, see Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, para 420 (Apr. 09, 2024), https://hudoc.echr.coe.int/eng/?i=001-233206; 157 BVerfGE 33, 129 para 181.

[3]Klimaseniorinnen Schweiz and Others, App. No. 53600/20, at para 420 ("[F]uture generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions [. . .], at the same time, they have no possibility of participating in the relevant current decision-making processes.").

[4]For intensive German debates see, for example, Hasso Hofmann, Rechtsfragen der atomaren Entsorgung, 258 (1981); Hasso Hofmann, *Nachweltschutz als Verfassungsaufgabe*, 19 Zeitschrift für Rechtspolitik 87 (1986); Dieter Grimm, *Interessenwahrung und Rechtsdurchsetzung in der Gesellschaft von morgen, in* Die Zukunft der Verfassung 176 (Dieter Grimm ed., 1991); Jörg Tremmel, Positivrechtliche Verankerung der Rechte nachrückender Generationen, in Handbuch Generationengerechtigkeit 349, 351 (Jörg Tremmel ed., 2nd ed. 2003); Ivo Appel, Staatliche Zukunfts- und Entwicklungsvorsorge 85 (2005); Nachhaltigkeit als Verbundbegriff (Wolfgang Kahl ed., 2008); Klaus Mathis, Nachhaltige Entwicklung und Generationengerechtigkeit 606 (2017).

[5]Klimaseniorinnen Schweiz and Others, App. No. 53600/20, at para 420.

[6]On temporal dimensions of fundamental equality and on equality dimensions of intertemporal freedom in more detail, see *Gabriele Britz, Gleichheit in der Zeit 199, 210., in* Zukunftssicherndes Verfassungsrecht (Gregor Kirchhof & Daniel Wolff eds., 2024) (with further reference).

[7]157 BVerfGE 33, 130 – 171, paras 182–258 (Ger.).

conditions of an overheated planet. A legal system that ignores the fundamental needs of people living in the future thus deprives them of the prerequisites for *democracy*.[8]

Constitutional law can help to overcome such insensitivities, as discussed in Section B. The short-termism of democracies in climate protection and the attempt to mitigate it through constitutional law will be described in more detail in Section C, using the example of German law and the German climate change decision. Against the backdrop of climate change, more future-sensitivity in political decision-making is particularly important due to irreversible effects of climate change, which will burden future generations more intensely. Climate protection clauses and sustainability clauses in constitutions are specifically directed against the egocentricity of current decision-making processes. However, in the case of climate protection, the short-termism of decision-making processes is extremely persistent. And it is increasingly difficult to overcome through constitutional law because the veto power[9] of constitutional law and constitutional courts has comparatively little impact here, to be shown in Section D. That is neither due to restrictions on access to the courts, nor to the specific global nature of climate change and climate protection, nor is it essentially a consequence of judicial self-restraint. Rather, the weakness results from the specific mechanics of climate protection. These mechanisms cannot simply be enforced by a court declaring a measure null and void, as is possible, for example, with the constitutional limit on public credit raising, or"debt brake." Nevertheless, constitutional law and constitutional courts have their own potential in climate protection that needs to be further developed in order to overcome some of the democratic short-termism, as will be discussed in Section E. Another democratic curiosity, however, is that the burdens of climate change and adaptation also affect all those who currently have a voice and yet not enough action is being taken that would be necessary to save the imminent future of these people, as will be explored in Section F.

B. Short-termism as a Constitutional Challenge

More recent constitutional provisions oblige current legislation to take into account the concerns of people living in the future. Some, to use the German constitution as an example, refer explicitly to future generations—like Art. 20a of the German Basic Law—others do so implicitly—like Art. 109(3) and Article 115(2) of the German Basic Law.[10] By doing so constitutions address the dilemma of all democratic legislation: Its short-termism.

Constitutions can strengthen politically weak interests. This has long been recognized for the protection of minorities.[11] Meanwhile, constitutions have also discovered a similar vulnerability

[8]*See e.g.*, Klaus Günther, *Die Zeitlichkeit der Freiheit*, 76 MERKUR 18, 32 (2022).

[9]On the application of a veto-player model to the constitutional courts, see, for example, Christoph Hönnige, *Verfassungsgerichte. Neutral constitutional guardians or veto players?, in* REGIERUNGSSYSTEME IN MITTEL- UND OSTEUROPA. DIE NEUEN EU-STAATEN IM VERGLEICH 262 (Florian Grotz & Ferdinand Müller-Rommel eds., 2011); Benjamin G. Engst, *Die vierte Gesetzeslesung. Verfassungsgerichte des deutschösterreichischen Modells als Vetospieler, in* POLITIK UND RECHT. UMRISSE EINES POLITIKWISSENSCHAFTLICHEN FORSCHUNGSFELDES 281 (Roland Lhotta, Oliver Lembcke & Verena Frick eds., 2017); Angelika Nußberger, *Machtverschiebungen*, 81 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 25 (2022). *But see*, GEORGE TSEBELIS, VETO PLAYERS 226 (2002) (presenting the view in in his seminal work on veto players, constitutional courts are not veto players due to the lack of own political leeway).

[10]Grundgesetz [GG] [Basic Law], art. 20a (translation at https://www.gesetze-im-internet.de/) ("Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."). *See also id*., at art. 119(3) (requiring a balanced budget but allows for exceptional regimes with an amortization plan to account for natural disasters or "unusual emergency situations beyond governmental control"); *Id.* at art. 115(2) (including a similar clause for the requirement that the budget be balanced in principle without revenue from credits). The two latter articles relate to the "debt brake."

[11]*See* Susanne Baer, *Grund- und Menschenrechte Verteidigen: Mehr als Minderheiten, Mitleid und Moral, in* LAW IN A TIME OF CONSTITUTIONAL CRISIS – STUDIES OFFERED TO MIROSLAW WYRZYKOWSKI 35, 40 amd 42 (Jakub Urbanik & Adam Bodnar eds., 2021) (expressing the remarkable surprise that "we are all a minority" ("Realistisch Betrachtet: Wir Sind Alle Minderheit"));

of those who will, still or only, live in the future.[12] Article 20a was 1994 introduced in the German Basic Law with the intent of overcoming the democratic decision-making process's insensitivity to future interests in the area of environmental protection: Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.[13] Similarly in October 2023 the French Conseil constitutionnel[14] ruled that when the legislature adopts measures likely to cause serious and lasting damage to the environment, they must ensure that the choices made to meet current needs do not compromise the ability of future generations and other peoples to meet their own needs, while preserving their freedom of choice in this respect. In German constitutional law the so-called debt brake—Article 109(3) and Article 115(2) of the Basic Law—introduced in 2009, provided Article 20a with a complementary counterpart, which also imposes restrictions on the current legislator, here in order to preserve the financial basis for future democratic decision-making.[15]

Article 20a of the Basic Law and the debt brake equally address the phenomena of incurring debt in the present, the bill for which must be paid in the future. Both aim to limit today's decision-making at the expense of the future. They put thus beyond dispute that a certain level of legal equality exists between present and future interests.[16] Still, it seems to be in vogue to play off climate protection on the one hand against democracy and freedom on the other: In populist debates, climate protection is said to be paternalistic; a project of elites who tyrannize us with their ideas of good life; the will of the people and individual freedom being ignored. However, it is none of that. It clearly is not paternalism when the state interferes with civil liberties today in favor of future interests. It is not a question of paternalistically protecting people from themselves, that is, from dangers that they voluntarily enter into. Rather, the state is preventing people—as it is required to do by Article 20a of the Basic Law—from exercising their freedom today in such a way that they damage the foundations of life of future generations. Nor is climate protection merely a question of "good life." Rather, it is about preventing us from destroying the basics of other persons' lives. It is therefore simply about not disproportionately harming others—an idea that is not reserved for moral arguments but is quite familiar within the system of law. And finally, the picture of a "climate dictatorship" misrepresents current debates. Constitutional climate debates consider democracy and the fundamental importance of freedom to be beyond discussion. In these debates, climate protection does not take absolute precedence over other interests.[17]

Susanne Baer, *Das Kategorienproblem und die Herausbildung eines postkategorialen Antidiskriminierungsrechts*, *in* HANDBUCH ANTIDISKRIMINIERUNGSRECHT § 5, paras. 78 - 79 (Anna Katharina Mangold & Mehrdad Payandeh eds., 2022).

[12]See RUDOLF STEINBERG, DER ÖKOLOGISCHE VERFASSUNGSSTAAT 342, 431 (1998); *Ivo Appel*, *supra* note 5, at 75; Martin Eifert, *Der Verfassungsauftrag zu ökologisch nachhaltiger Politik, in* VERFASSUNGSRECHT UND GESELLSCHAFTLICHE REALITÄT 211, 216 M.W.N. (Kritische Justiz ed., 2009); MICHAEL KLEIBER, DER GRUNDRECHTLICHE SCHUTZ KÜNFTIGER GENERATIONEN 5 (2014); Hanno Kube, *Nachhaltigkeit und parlamentarische Demokratie, in* NACHHALTIGKEIT DURCH ORGANISATION UND VERFAHREN 137 (Wolfgang Kahl ed., 2016); *Klaus Ferdinand Gärditz*, *in*: UMWELTRECHT ART. 20A GG PARA. 13. (Robert von Landmann & Gustav Rohmer eds., 2020).

[13]Grundgesetz [GG] [Basic Law], art. 20a, translation at https://www.gesetze-im-internet.de/.

[14]Conseil constitutionnel [CC] [Constitutional Court] decision no. 2023-1066 QPC, Apr. 24, 2024 (presenting a press release in English regarding the constitutional court's decision).

[15]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 7, 2011, 129 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 124, 170 (Ger.); BVerfG, 2 BvF 1/22, Nov. 15, 2023, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2023/11/fs20231115_2bvf000122.html, para. 140 (Ger.) (hereafter BVerfG, Debt brake Decision).

[16]See *Britz*, supra note 6, at 210.

[17]*See* BVerfG, Climate Decision, para. 198.

In terms of democracy, however, this is no small matter. The constitutional legislator by amending Art. 20a to the Basic Law restricted today's democratic options in favor of the concerns of future generations.[18] This trade-off is not only between current democracy and freedom on the one hand and the environment and future enjoyment of natural foundations of life on the other hand. 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. Therefore, the conflict is also about democracy and freedom today versus democracy and freedom tomorrow. In the case of credit raising, this trade-off between today's and future democratic self-determination has recently become apparent in the German Federal Constitutional Court's decision on the 2021 Second Supplementary Budget Act. The limits on credit raising are intended to secure space for democratic self-determination in the future, but in return they bind today's parliaments and significantly restrict their space for democratic self-determination in the present.[19] Obviously, solutions to the short-termism of democracies are not for free.

C. Addressing Short-termism in Climate Politics by Constitutional Law: German Climate Decision

When it comes to climate change, the incentive to ignore the concerns of future generations is particularly high. From this perspective, the fight against climate change is a textbook example of democratic short-termism: The transformations away from fossil processes towards climate-neutral life and economies, which are necessary to stop global warming in time, are certainly the greatest ecological challenge that humanity has ever faced. The transformations to non-fossil life and economies are costly, demand a lot from individuals and societies and therefore appear unattractive from a current individual benefit perspective.[20] This is the main reason why they tend to be difficult to implement in today's democratic decision-making process. Especially as global warming still seems to be quite manageable in many places today, while the benefits of the costly decarbonization can only be realized in the future.

At the same time the future returns on today's transformation efforts will be immense, as nothing less than the prevention of future disasters is at stake: If the transformation away from fossil processes towards a carbon-neutral way of life and a carbon-neutral economy were initiated quickly enough today, the further heating of the earth could be halted in time, and those alive in the future could be spared the potentially catastrophic consequences of progressive global warming. Specifically, it is about averting the dangers that threaten life, health, and property if global warming continues and climate change causes rising sea levels, drought, increasingly frequent floods, heat waves, or storms. Furthermore, the more global warming and climate change progress, the greater is the threat to individual freedom and to democratic decision-making options of people alive in the future. In order to lead tolerable lives, they will have to make ever greater efforts to take so-called adaptation measures. At the same time, the effort required to halt climate change and even reduce global warming to a tolerable level is becoming ever greater. This will require more and more restrictions and tie up more and more resources. As a result, the scope

[18] *Id.* at para. 206.

[19] 129 BVerfGE 124, 170; Bundesverfassungsgericht [BVerfG] [German Constitutional Court] Mar. 18, 2014, 135 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 317, 403–404 para. 169; BVerfG, Debt brake Decision, para 140. Obviously current limits on credit raising might turn out to create other future burdens if they do not allow enough current public long-term investment, for example, to maintain important infrastructure. *Id.*

[20] See Michael von Landenberg-Roberg, *Akzeptanzsicherung für die Transformation als Aufgabe des Klimarechts*, 114 Verwaltungsarchiv 399 (2023); Michael Fehling, *Rationalisierungsmodelle zwecks Klimaschutzes im demokratischen Verfassungsstaat. Möglichkeiten und Grenzen von Verzicht und Verboten*, 62 Der Staat 613 (2023).

for individual freedom will become ever narrower and the scope for democratic self-determination will continue to shrink as climate change progresses.

Still, today all of this could still be seen as a future problem that current democratic decision-making processes do not want to burden themselves with too much, and which politicians therefore are reluctant to address.[21] Certainly, democratic short-termism is not the only reason for such reluctance. To see the whole picture, the global dimension of climate protection must be taken into account as well, which creates obstacles that are very difficult to overcome.[22] But the tendency to kick the can down the road, as it were, describes precisely the democratic short-termism that the constitution seeks to counteract by obliging democratic decision-making processes to be more ecologically sensitive to the future.

How the constitution obliges democratic decision-making processes to be more ecologically sensitive to the future can be illustrated by the 2021 German climate decision.[23] As the Federal Constitutional Court pointed out in that case, the German Basic Law obliges the state to protect the climate in several ways: In the general environmental protection clause in Article 20a,[24] in the fundamental rights obligation to protect life, health and property,[25] and in fundamental rights as guarantees of individual freedom over time—"intertemporal safeguard of freedom"[26]—since future freedom is jeopardized by shifting too much of the burden of reducing greenhouse gas emissions to the future.[27] The latter can also be read as a fundamental statement of equality[28] and also corresponds to the need to safeguard future democratic self-determination.[29] In its decision on the German Climate Change Act, the Federal Constitutional Court therefore urged the German legislator to be future-sensitive when it comes to climate protection: Art. 20a GG places the state under an obligation to take climate action and aims at achieving climate neutrality. Climate action does not take absolute precedence over other interests; in cases of conflict, it must be balanced with other constitutional interests and principles. However, given that climate change is currently deemed to be almost entirely irreversible, any behavior that leads to the critical temperature threshold for achieving the constitutional climate goal being exceeded would only be justifiable under strict conditions. Within the balancing process, the obligation to take climate action is

[21]For an observation of current German politics, see Ekkehard Hofmann, *KSG-Novelle 2023- Verschleierungsversuch einer Verschleppungstaktik*, 56 Zeitschrift für Rechtspolitik 201 (2023).

[22]For constitutional perspectives, see BVerfG, Climate Decision, paras. 199–204.

[23]*See* BVerfG, Climate Decision. All references in that section apply to this decision.

[24]BVerfG, Climate Decision, para. 196. *See* Eifert & von Landenberg-Roberg, *supra* note 1, at 1; Britz, *supra* note 1, at 825.

[25]BVerfG, Climate Decision, para. 143. *See* Eifert & von Landenberg-Roberg, *supra* note 1, at 20–21; Britz, *supra* note 1, at 830–830.

[26]BVerfG, Climate Decision, para 102.

[27]BVerfG, Climate Decision, para. 182. *See* Eifert & von Landenberg-Roberg, *supra* note 1, at 22 -23; Britz, *supra* note 1, at 831. *See also* Klimaseniorinnen Schweiz and Others, App. No. 53600/20, at para. 549 (stating "... in order ... to avoid a disproportionate burden on future generations, immediate action needs to be taken...").

[28]There is a substantive debate about whether intertemporal protection, as demanded by the Federal Constitutional Court's climate protection decision, is more strongly and plausibly anchored in the idea of equality than in the idea of freedom. *See e.g.,* Alexander Kissler, «Ein Gleichheitsproblem wurde zum Freiheitsproblem umformuliert»: der Verfassungsrechtler Oliver Lepsius über die Fallstricke der deutschen Klimapolitik, Neue Züricher Zeitung (May 6, 2021), https://www.nzz.ch/international/klimapolitik-vor-gericht-und-die-politischen-folgen-eines-urteils-ld.1623605; Christoph Möllers & Nils Weinberg, *Die Klimaschutzentscheidung des Bundesverfassungsgerichts*, 76 Juristenzeitung 1069, 1073 (2021); Eva Lohse, *Umweltschutz, in* Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund § 26 para. 22 (Klaus Stern, Helge Sodan & Markus Möstl eds., 2022); Gerd Winter, 33 Zeitschrift für Umweltrecht 215, 220 (2022); Claudio Franzius, *Der Klimabeschluss des Bundesverfassungsgerichts – Eine verfassungsrechtliche Einordnung,* 1 Klima und Recht 102, 106 (2022); Matthias Hong, *Grundrecht auf Nachhaltigkeit – Das Recht auf intertemporale Freiheit nach dem Klimabeschluss des Bundesverfassungsgerichts, in* Nachhaltigkeit im Spiegel des Rechts para. 74 m.w.N. (Malte Kramme & Emmanuel Ponholzer eds., 2024). I have analyzed these proposals and discussed this possible interpretation of the decision and limits of an "equality approach" elsewhere. *See* Britz, *supra* note 6, at 217.

[29]See Günther, *supra* note 8, at 32.

accorded increasing weight as climate change intensifies.[30] Furthermore, the Court found that, also from a constitutional point of view, the currently relevant temperature target is well below 2°C and preferably at 1.5°C above pre-industrial levels—the "Paris target." Because, in explicitly declaring that the Climate Change Act is based on the Paris target, the legislator had exercised its mandate and prerogative to specify the constitutional requirements by formulating the climate goal of Art. 20a GG in a permissible manner.[31]

The decision does not go very far in terms of specific legal consequences. The Court could not find that the Climate Change Act violated Art. 20a of the Basic Law. However, it held that the provisions of the Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights as intertemporal guarantees of freedom insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards. It had become clear that, in order to comply with the Paris Agreement's temperature target, after 2030 very strong efforts would have to be made to reduce greenhouse gases due to the emission quantities allowed by the Climate Change Act until 2030. These efforts required in the future would then sharply reduce freedom and democratic self-determination. Because the available data on the development of global warming and the remaining emission budget explicitly contained uncertainties, the Court was not able to find that the legislator had violated the requirement of intertemporal freedom in absolute terms.[32] But it criticized as an insufficient safeguarding of future freedom the fact that the legislator had not combined the quantities permitted until 2030 with a regulation on how to proceed after 2030 and so did not show the necessary planning and innovation perspective.[33]

Remarkably, in its implementation of the decision, the German parliament went beyond what the Federal Constitutional Court had demanded. It not only issued rules on the further reduction path after 2030—as requested by the court—but also set stricter reduction targets until 2030—not requested by the court. Therefore, the ruling appears to have been rather successful. However, in order to correctly assess the power of the constitution to overcome egocentricities of current decision-making processes, this must be considered parliament's own, political decision on further climate legislation. The Federal Constitutional Court's ruling had not imposed any specific obligations on the legislature; it was the parliament itself that tightened the climate targets and, after the change of government in late 2021, began to strengthen and expand transformation instruments. However, even such ambitious legislation on emissions reduction as the 2021 amendment to the Climate Change Act does not in itself avoid a single greenhouse gas emission. Transformation to climate neutrality rather requires numerous other complex measures and regulations, which again will always meet with political resistance due to burdens being currently imposed—the well-known short-termism of democracies. But even with the help of the constitution and constitutional courts, the resistance to the future of democratic decision-making processes in climate protection law is not easy to overcome.

D. Weak Constitutional Veto-Power in Climate Protection

As will be shown, the veto-power of constitutional courts is limited, as a constitutional court can declare decisions of the legislature null and void, but cannot itself take positive regulatory action, whereby the veto-power is generally less effective in climate protection maters than in other policy areas. Even stricter constitutional court control and easier access to courts are not suitable for overcoming their weak veto position.

[30]BVerfG, Climate Decision, para. 198.
[31]*Id.* at para. 208.
[32]*Id.* at para. 246.
[33]*Id.* at para. 248.

This is not a question of *judicial self-restraint* in the sense of a "political question doctrine." The whole discussion here is not about judicial activism and judicial self-restraint—although there is of course much discussion elsewhere about alleged judicial activism in climate cases.[34] Rather, the problem we are discussing here lies in the type of requirements that are necessary in highly industrialized, and thus carbonized, societies to pave their way to climate neutrality. In these societies climate protection is a particularly demanding regulatory task.

> Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such 'green transitions' necessarily require a very complex and wide–ranging set of coordinated actions, policies and investments involving both the public and the private sectors.[35]

The actual reduction of greenhouse gas emissions thus requires more than targets and reduction paths; it demands complex measures and regulations that would set the transformation to climate neutrality in motion. This has recently also been emphasized by the ECtHR: "The resolution of the climate crisis requires, and depends on, a comprehensive and complex set of transformative policies involving legislative, regulatory, fiscal, financial and administrative measures as well as both public and private investment."[36] The transformation required to halt climate change by reducing greenhouse emissions to climate neutrality must be actively steered, which is a task of comprehensive, creative regulatory design. Setting the right regulations, signals, and incentives for this transformation is the genuine competence of governments and legislators, not of courts. A constitutional court can declare legislation unconstitutional and can thus overturn political decisions and projects. In this respect, it has a veto position. However, it cannot proactively take over the regulatory management of comprehensive transformation processes in the place of the legislator.[37] Mere veto power of a constitutional court is not sufficient to enforce the constitutional climate protection requirement, because that requires positive regulatory action. Constitutional courts can and may thus declare inadequate regulatory action unconstitutional and void. But that alone does nothing to avoid greenhouse gas emissions.

A comparison with the German constitutional debt brake is instructive. Violations of the debt brake can simply be nullified by the Constitutional Court. The annulment immediately removes the credit authorization provided for by law.[38] The Federal Constitutional Court has just set razor-sharp limits on credit raising and thus has put the constitution and itself in a powerful veto position.[39] Here, the mere veto is a simply manageable, effective instrument of execution, because no positive government action is needed to comply with the debt brake. Compared to this, the courts' veto position has less effect in climate cases. And this is despite the fact that the consequences of current political decisions on fossil energy and climate protection are much more difficult to reverse than debt caused by credit raising. Compared to credit raising, the democracy-time problem is therefore even more acute in the case of climate change.

To be clear, the constitution's weakness in climate protection is also not a consequence of *political decision-making prerogatives*, nor is it a consequence of the *global nature of climate*

[34]Paradigmatic the ongoing controversary between District Court and Court of Appeals in the Juliana Case. *See Juliana v. United States*, Case No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 231191 (D. Or. Dec. 29, 2023).

[35]Klimaseniorinnen Schweiz and Others, App. No. 53600/20 at para. 419.

[36]*Id.* at para. 479.

[37]*Id.* at para. 481 (stating "the Court's judicial function … is by definition reactive rather than proactive").

[38]BVerfG, Debt brake Decision, paras. 230–231 (stating explicitly states that the Court's decision means that the volume of the Climate and Transformation Fund is reduced by EUR 60 billion; insofar as the state has entered into obligations that it can no longer service as a result of this reduction, the legislator must compensate for this through other means).

[39]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 15, 2023, 2 BvF 1/22, Judgment of the Second Senate of 15 November 2023 (Ger.).

change and climate protection.[40] It is true that courts allow the legislator and government a great deal of leeway in climate protection issues.[41] Overly restrained judicial review indeed could be problematic in climate protection: In general, stricter control of the lawmaker by the constitutional court is a suitable and appropriate method to better protect rights that are politically weak and underrepresented. This idea is particularly prominent for the protection of minorities.[42] In German constitutional law, for the same reasons, there have been calls for stricter constitutional court review for the protection of ecological interests: When interpreting the constitution, a constitutional court should pay special attention to the rights of those who are only weakly involved and represented in the political process and in actual constitutional practice. If, then, a lower level of de facto participation shall lead to a higher level of constitutional court review. this can also apply when it comes to climate protection in the interests of future generations, because they are not involved in today's decision-making processes.[43] This was indeed argued in the above mentioned Juliana case. Here, the district court of Oregon affirmed that strict scrutiny is triggered by an allegation that the government discriminated on the basis of a suspect classification. However, because it concluded that the plaintiffs themselves had alleged a violation of their constitutional rights, it did not need to address whether future generations are suspect classifications for purposes of equal protection.[44] But the fact remains that even strict scrutiny would not overcome the basic problem that greenhouse gas neutrality is not achieved by exercising a veto position.

Finally, the problem also cannot be solved by a more generous *access to the courts*. Lack of effective access to the courts may of course add to the problem here—albeit less so in German constitutional law.[45] If that obstacle were overcome, however, the difficulties just mentioned would continue to exist. Even a constitutional action by associations or the establishment of nature's own constitutional rights would not remedy the structural weakness of a constitutional veto in climate law.

E. Judicial Perspectives

However, this is not to say that courts may treat constitutional climate protection requirements as dead law. In German constitutional law, Article 20a, constitutional duties to protect fundamental rights, and the constitutionally required respect for the freedom and self-determination of future generations are legally binding for all state branches and constitutional courts. There are good reasons for this. Global warming can only be halted by achieving climate neutrality. It will become increasingly difficult for future generations to adapt to climate change and bend the global warming curve back to an acceptable level. This is why constitutional climate protection requirements already bind states today.

[40]For consequences in German Constitutional Law, see BVerfG, Climate Decision, para. 200.

[41]*See e.g.*, Høyesteretten [Supreme Court], 2020-12-22, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy HR-2020-2472-P, case no. 20-051052SIV-HRET, paras. 141. (Nor.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf. *See e.g.,* BVerfG, Climate Decision, paras. 152, 172, 205, 207, 215, 249.

[42]*See* John Hart Ely, Democracy and Distrust. A Theory of Judicial Review (1980). The U.S. Supreme Court had stated in famous Footnote 4 in U.S. Supreme Court, U.S. v. Carolene Products, 308 U. S. 144 (1938), that a stricter test may be required because prejudice against minorities tends to seriously impair their opportunities in the political process. *See* U.S. v. Carolene Products, 308 U.S. 144, n.4 (1938).

[43]Peter Häberle, *Die offene Gesellschaft der Verfassungsinterpreten*, 30 Juristenzeitung 297, 303–304 (1975).

[44]*See Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or., 2016). The United States Court of Appeals for the Ninth Circuit did not agree. *See Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

[45]*See* BVerfG, Climate Decision, paras. 108, 129.

I. Traditional Approaches to Judicial Review

It is not as if apex courts had no options here: Although, when legislators fail to take sufficient measures to limit global warming to the required extent, the lacking measures cannot be supplied by a constitutional court judgment, courts can at least identify and criticize the failure in accordance with the standards of the constitution. This alone can have an effect, as the German example demonstrates. Furthermore, courts have even dealt with the question of whether individual CO_2-intensive projects could be declared unconstitutional or illegal for climate protection reasons. This is possible when courts do not do more than ruling that the state's *failure to consider* climate change and climate protection duties when approving fossil fuel projects was unconstitutional.[46] If a court thus identifies a failure to consider climate protection duties, this could also have an effect in itself. Another, particularly strong, constitutional instrument arises when nature herself is given a legal personality and is equipped with her own rights based on indigenous concepts.[47] Indigenous groups can then legally enforce the preservation of these pieces of nature. If these pieces of nature have the ecological function of CO_2 sinks, the enforcement of these special rights indirectly serves climate protection. In this case, however, the object of protection is not selected according to the criterion of climate protection, but according to the criterion of human rights of indigenous people. Climate protection is more of a side effect.

Otherwise, however, it has proved difficult for courts to go beyond procedural criticism of "non-consideration." As long as the requirement of climate neutrality does not yet forbid any further CO_2 quantity to be released into the atmosphere, it is not easy to show that and why one specific project should be inadmissible. For example, when assessing the approval of the northern extension of the A 14 highway, the German Federal Administrative Court accepted the assumption that the climate protection requirement did not per se exclude planning approvals for not climate-neutral road projects because it was up to the legislator to decide how to achieve the climate targets within the time available.[48] In Austria, an attempt to prevent the construction of the third runway for Vienna-Schwechat Airport was unsuccessful in the constitutional court.[49] In Norway, environmental associations were unsuccessful in their application for a court ruling that Norway's Ministry of Petroleum and Energy had violated the Norwegian constitution by issuing a number of oil and gas licenses for deep-sea extraction from sites in the Barents Sea, thus enabling access to as yet untapped fossil fuel deposits.[50] Objecting to a project solely on the

[46] *See* Bundesverwaltungsgericht [BVerwG] [German Federal Administrative Court] May. 4, 2022, 175 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 312, 325, para. 70; *Held v. Montana*, Civil Action CDV-2020-307, 2023 Mont. Dist. LEXIS 2, *1, 100 (Mont. First Jud. D. Ct. Lewis and Clark County, Aug. 14, 2023) (available at https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf). Climate activists have successfully challenged the approval of three oil and gas fields in the North Sea. The Oslo District Court declared the approvals for the Breidablikk, Yggdrasil and Tyrving fields invalid. The state had violated the conditions formulated by the country's Supreme Court because the climate impact had not been investigated when the fields were approved. *See* Oslo tingrett [District Court of Oslo], 2024-01-18, No. 23-099330TVI-TOSL/05 (Nor.), https://www.greenpeace.org/static/planet4-sweden-stateless/2024/01/daf4fe59-oslo-tingretts-dom-og-kjennelse-18.01.2024-deepl-en.pdf.

[47] *See, e.g.*, Constitución Política de la República del Ecuador, art. 71. This article lays out the rights of nature (Pachamama) by stating that:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

Id.

[48] 175 BVerwGE 312, 335–336 para. 97.

[49] Verfassungsgerichtshof [VfGH] [Austrian Constitutional Court], June 29, 2017 - E 875/2017-32, E 886/2017-31 (Austria).

[50] Høyesteretten [Supreme Court], 2020-12-22, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy HR-2020-2472-P, case no. 20-051052SIV-HRET, paras. 141. (Nor.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf

grounds that it leads to further CO_2 emissions remains difficult overall as long as there are no technical or constitutional reasons to prevent precisely this particular project.[51]

II. Comprehensive Approaches

It can be concluded that a comprehensive basis is required for the judicial enforcement of constitutional climate protection clauses, including comprehensive steps, plans, and concepts of decarbonization. Although one could hardly say which particular individual projects contributing to the CO_2 balance may no longer be allowed, it is equally unacceptable to keep opening up new sources of CO_2 emissions or destroying CO_2 sinks without any limits. What is needed here is a conceptual legislative approach against which individual projects can be measured more specifically.

The ECtHR recently made very clear statements in this regard. In order for the substantial and progressive reduction of GHG emission levels "to be genuinely feasible," it required that:

> [A]dequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures.[52]

Accordingly, the Court announced that it would:

> [E]xamine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to: (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments; (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies; (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets; (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[53]

Still, the constitutional question for jurisdictions is whether an obligation of the legislator to ensure transparent transformation schemes, that is, comprehensive steps, plans and concepts of decarbonization, can be derived from legal or even constitutional climate protection requirements.

[51]For interesting and very far going discussion, see Conseil constitutionnel [CC] [French Constitutional Court] decision No. 2022-843 DC, Aug. 12, 2022 Rec (Fr.) (comprising an emergency purchasing power bill: Regarding electricity production, the bill allowed an increase of greenhouse gas emissions limits on some power plants. The CC recognized that such measures harmed the environment. The decision found that these measures were compatible with the French Charter for the Environment on the condition that they would only [!] apply in case of severe threats to the security of electricity supply. Moreover, the Court ordered the regulatory authority to define compensation measures to make up for the rise in greenhouse gas emissions in order to respect its objectives. *Id.*

[52]Klimaseniorinnen Schweiz and Others, App. No. 53600/20 at para. 549.

[53]*Id.* at para. 550.

In the long pending US American Juliana case, this is one of the most controversial questions.[54] The Supreme Court of Colombia[55] has ruled clearly in this direction. It found that the current situation of deforestation in the Amazon rainforest and the obvious dangers associated with it violated the fundamental rights to life, health, the minimum subsistence level, freedom, and human dignity, including of future generations. The national government and local authorities were obliged to formulate and implement an intergenerational agreement for the Amazon region within five months, with the participation of the plaintiffs and research institutions, as well as action plans against deforestation in the Amazon region within four months.[56]

The German Federal Constitutional Court has also sympathized with a procedural comprehensive approach. The constitutional background for this were the fundamental rights as "intertemporal safeguard of freedom."[57] As future freedom is jeopardized by shifting too much of the burden of reducing greenhouse gas emissions to the future:[58]

> [R]especting future freedom requires that the transition to climate neutrality be initiated in good time. In all areas of life – production, services, infrastructure, administration, culture, consumption, basically all activities that are currently still CO_2-relevant – developments need to be set in motion to ensure that in the future, meaningful use can still be made of freedom protected by fundamental rights, but then based on CO_2-free alternatives. [. . .] Constitutional law [. . .] obliges the legislator to create the underlying conditions and incentives that would allow these developments to occur.[59]

Therefore, the Federal Constitutional Court required that transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty.[60]

However, even apex courts that demand such comprehensive procedural concepts for decarbonization will not solve the problem without further ado. This is because merely procedural overall legal concepts also require further implementation through concrete legal measures, which are difficult to realize for the reasons mentioned above. And yet, in the case of climate protection, constitutionally compelled comprehensive regulatory measures can lead to a productive division of labor. It might be easier to pass the legislative process with conceptualized climate protection targets than with concrete climate protection measures. Concepts, and thus targets, are more abstract. Therefore, their potential for mobilization, scandalization, and demonization by fundamentalist opponents of climate protection is lower. Still, they can increase the effectiveness

[54]In that case Experts had opined that the required emissions reductions can be achieved only through a comprehensive plan for nearly complete decarbonization that includes both an unprecedently rapid build out of renewable energy and a sustained commitment to infrastructure transformation over decades. *Contra Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (finding that it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan). *But see Juliana v. United States*, Case No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 231191 (D. Or. Dec. 29, 2023), (insisting just recently that such judicial review could be possible).

[55]Corte Suprema de Justicia [C.S.J.] [Columbian Supreme Court], Apr. 5, 2018, STC4360-2018, 11001-22-03-000-2018-00319-01 (Colom.) (unofficial english translation available at, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf).

[56]*See also* the Friends of the Irish Environment CLG v. Ireland & the Att'y Gen. [2020] Appeal No: 205/19, no. 5.44, 6.48, 9.1 (SC) (Ir.) (available at, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf).

[57]BVerfGE Climate Decision, para. 122.

[58]BVerfG, Climate Decision, paras. 182; *see* Eifert & von Landenberg-Roberg, *supra* note 1, at 22; Britz, *supra* note 1, at 831. *See also* Klimaseniorinnen Schweiz and Others, App. No. 53600/20 at para. 549 (stating "... in order ... to avoid a disproportionate burden on future generations, immediate action needs to be taken...").

[59]BVerfG, Climate Decision, para. 248.

[60]BVerfG, Climate Decision, paras. 249, 252–253.

of climate protection requirements, because courts can then review compliance with these concepts. In case of breach the courts do not have to do anything other than pass negative judgements or vetoes—as they are accustomed to doing. They can review whether concrete measures taken fulfil the conceptual path laid down by legislation, and thus judicial review comes closer to the concrete climate protection measures.[61] Of course, such mere finding of incompatibility with the conceptual requirements returns the task of positive, concrete climate protection measures again to the government and the legislator. For the well-known reasons, they will find it difficult to implement conceptual duties by concrete measures.[62] Nonetheless, it is possible that in the interplay between the judiciary—both constitutional and administrative—and legislation, the courts' demand for and their review of comprehensive climate protection measures will help their implementation through more concrete measures to gain acceptance and thus facilitate them.

F. The Elephant in the Room

To be realistic, in the end, courts will not avert the climate catastrophe. They can help if there is a basic willingness to do so. But they will not force climate protection against massive resistance from the people. For German constitutional law, it can be argued that Article 20a of the Basic Law also contains a responsibility of the state to ensure acceptance of climate protection among the population.[63] In reality, however, politicians in Germany and the EU currently tend to outdo each other in promising to reduce climate protection efforts or ignoring the issue altogether – people just don't like climate protection at the moment. And politicians have understood this.

It has not gone unnoticed: There is a pale, stumbling, unheartened looking elephant in the room. Its name is democracy. What is currently going wrong in democracies? Given the widespread aversion to anything to do with climate protection, we have become used to asking whether people's concerns about being overwhelmed by the increasing efforts to protect the climate have not been taken seriously enough. The question was raised as to whether the *demos* had not been heard enough, so that democracy was sacrificed too much for climate protection. However, we should also ask the other way around why democracies, currently, are so bad at taking good care of their citizens and themselves. Democracies are certainly no worse than autocracies when it comes to climate protection, or otherwise. But even in democracies, which were actually created to enable people to live in pursuit of their own happiness, it does not work to use the opportunities that still exist to prevent or mitigate the man-made catastrophe that will prevent any happiness.

[61]One example of this is the decision of the Brandenburg Higher Administrative Court of November 30, 2023. It concerned sector-related reduction paths of the German Climate Protection Act and their procedural safeguarding through further program obligations of the executive in the event that the sector targets are missed. The court treated this as justiciable and actionable measures and declared the measures taken by the federal government to be inadequate. *See* Oberverwaltungsgericht [OVG] [Higher Administrative Court] Nov. 30, 2023, Berlin-Brandenburg, 11 A 11/22; 11 A 27/22; 11 A 1/23 (Ger.).

[62]Probably, that is why recent amendments to the German Climate Change Act reduced the sectoral rigor of the reduction targets, a conceptual strategy which has been important for successful judicial control. *See e.g.,* Bundes-Klimaschutzgesetz [Federal Climate Change Act] Dec., 2019, as amended by Deutscher Bundestag Drucksache 20/11183, Apr. 24, 2024, p.9. The second law to amend the German Climate Protection Act still needs to be finalized, but has already been passed. With this amendment law, previous provisions stating that the sectoral annual emission amounts can trigger a corrective action and that the federal ministry predominantly responsible for a sector, must submit an immediate sectoral program in case of exceeding the annual emission amount of the previous year, are repealed. A possible constitutional consequence would then be to demand once again justiciable comprehensive regulation in the name of constitutional climate protection requirements. This returns climate litigation back to its initial starting point. *Id.*

[63]I have elsewhere called this a responsibility to create acceptance ("Akzeptanzverschaffungsverantwortung"). Gabriele Britz, *Verfassungsrechtliches Klimaschutzgebot in den Kommunen*, 114 NIEDERSÄCHSISCHE VERWALTUNGSBLÄTTER 65, 69 (2023); for this recently discussed in more detail Landenberg-Roberg, *supra* note 19, at 399.

Why are democracies currently failing to—both internally and externally—pursue fundamentally important interests of practically everyone who lives there? Climate change is not just a problem for future generations. It is also by no means just a problem of the poor, those who have not received an adequate education, the discriminated, the colonized, the marginalized, that is, all those who are already disadvantaged. The consequences of climate change, the rising costs of climate protection and, above all, the costs of climate adaptation are already beginning to affect everyone more and more. The individual and the—not always directly visible—public costs of climate adaptation measures will soon consume so much of everything that is needed for an adequate life with a wide range of options of free individual and democratic decision making that nobody can really want this for themselves. And yet it is happening. This is not quite understandable. Is it an expression or part of a more general democratic decline? Is something in the mechanisms of democracy no longer working well? Has it never worked properly in this respect? Are its mechanisms being manipulated? Do people around the world not get the appropriate information to make decisions that serve their own interests better than what we are currently facing? Is there too much disinformation? Who might have an interest in this? These are difficult questions. Page-filling debates about perceived climate activism of courts should not distract from these fundamental issues.

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