

Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law

By *Mattias Kumm**

A. From the Total State to the Total Constitution?

In 1931 Carl Schmitt published an article titled “the turn to the total state.”¹ The total state that Schmitt describes is not yet a totalitarian state. Germany is still a liberal democracy and the Weimar Constitution is still the supreme law of the land. But the total state Schmitt describes is a state in which the traditional lines between the sphere in which the private law society governs itself and the sphere of state intervention, or the public domain, have been undermined. According to Schmitt, the pluralistic forces of civil society have captured the state and made it an instrument to serve their purposes. *Everything is up for grabs politically*. It is a state of political mobilization and deep ideological conflict, reflected in the plurality of deeply divided political parties in parliament. It is possible to distinguish between three features, which together illustrate the total prevalence of politics over law underlying “the turn to the total state.”

First, the idea of an autonomous domain of private law as an integral part of an apolitical state-free sphere had collapsed. The belief in a civil society that organizes itself by means of private law, the content of which is defined by apolitical legal experts, no longer resonated. Private law, too, had become the object of self-conscious, broad-based political struggle. Private law was wrested from the legal priesthood and became a mundane object of regulatory intervention. The 19th century ideas of scholarly mandarins, who conceived of private law in natural law, historicist, or conceptual terms or thought of the code as the authoritative embodiment of legal rationality, were replaced by ideas that private law, too, was subject to political choice. Correspondingly, the regulatory state, featuring a

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¹ CARL SCHMITT, *Die Wendung zum Totalen Staat*, in POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR, GENE, VERSAILLES 1923-1939, at 166-78 (3d ed. 1994).

“motorized legislator” and an increasingly powerful executive branch, flexibly responding to whatever the crisis of the moment happens to be, was in full swing. Governments had already enacted competition laws prohibiting cartels and trusts, laws limiting freedom of contract to legislatively determine minimum wages and maximum hours, and more generally legislatively shape the employer-employee relationship. More radical proposals concerning the transformation of the economy were on the table politically. All this occurs in the context of a severe economic crisis and heated ideological disagreement about the basic terms of social cooperation.

Second, like in most parliamentary democracies in the first half of the 20th century, the Weimar Constitution did not contain any judicially enforceable constitutional rights. The Constitution, for all practical purposes, established only the procedure that determines what is to count as judicially enforceable law. The long list of substantive constitutional rights that adorned the Weimar Constitution were not judicially enforceable. Courts were regarded as unsuitable institutions to make the political judgments necessary to give meaning to the abstract principles it contained (in the debates on the drafting of the Weimar Constitution the United States’ experience with the Supreme Court was cited as a reason *not* have constitutional rights judicially enforced, given that Court’s hostile attitude towards economic and social reforms in the late 19th and early 20th century).

Third, the Constitution and the parliamentary process itself was not protected by either an aura of reverence and legitimacy or unamendable provisions guaranteeing its basic democratic structure. Instead, Schmitt observes that the Weimar Constitution was widely thought of as a value-neutral technical procedural device. Its legitimacy was believed to lie in the very fact that it established a legal order and provided for legal procedures, not in the fact that it established a specific kind of order – a parliamentary democracy. By the early 1930s an increasing number of groups did not regard the parliamentary system as the institutional embodiment of a shared ideal of procedural fairness, but merely as a *modus vivendi*: Something to accept for so long as they lack the political clout to replace it with something more favorable, some form of nationalistically inspired monarchical or authoritarian government, perhaps, or a fascist or communist dictatorship. Since 1930, the parties in support of the Weimar Constitution (derided as “*Systemparteien*” – “parties of the system”) no longer held a parliamentary majority.

Not surprisingly the leading jurists writing during this time, Schmitt and Kelsen among them, in one way or another insisted that, to paraphrase Clausewitz, law is the continuation of politics with other means. Schmitt develops a constitutional

theory featuring the concept of the political at its core.² Kelsen, on the other hand, develops a theory of legal science committed to eliminating the political (empirical and moral) from its scope to rescue the idea of scholarly detachment.³ Yet, as Kelsen himself rightly points out,⁴ the *Pure Theory of Law*, in all its modernist abstraction and formality, reveals *legal practice* as political all the way down. It is exactly the formal structure and substantive emptiness of Kelsen's theory that makes it a potent weapon for exposing the prevalence of politics in legal practice and legal scholarship: If a pure theory of law can say nothing about how a law should be interpreted, then every act of legal interpretation is revealed to be a political act, not a requirement of law.

The relationship between law and politics in contemporary Germany is in important ways the mirror image of Weimar. Under the guardianship of the Federal Constitutional Court (hereinafter FCC) the German Basic Law had, over the course of the second half of the 20th century, developed to become what Schmitt might well have referred to as a total constitution.⁵ If a total state is a state in which everything is up for grabs politically, *a total constitution inverts the relationship between law and politics in important respects*. If in the total state law is conceived as the continuation of politics by other means, under the total constitution politics is conceived as the continuation of law by other means. The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question. The validity of any and every political decision is subject to potential challenge before a constitutional court that, under the guise of adjudicating constitutional rights provisions, will assess whether such an act is supported by good reasons. The legislative parliamentary state is transformed into a constitutional juristocracy.⁶

The defining features of the total constitution can be derived by inverting the features of the total state. First, if the politicization of the relationship between

² CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* (3d ed. 1963).

³ HANS KELSEN, *REINE RECHTSLEHRE* (2d ed. 1960).

⁴ *Id.*, 349.

⁵ Schmitt himself never used the term "total" in conjunction with the term "constitution." In Schmitt's jargon the term "total" was reserved to states, wars, and enemies, see CARL SCHMITT, *Totaler Feind, totaler Krieg, totaler Staat* (1937), in *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR – GENÈVE-VERSAILLES 1923-1939*, at 268 (3d ed. 1994).

⁶ The term "constitutional juristocracy" was introduced to contemporary debates by Schmitt's probably most brilliant late pupil, E.W. Böckenförde. See E.W. BÖCKENFÖRDE, *Grundrechte als Grundsatznormen*, in *STAAT, VERFASSUNG, DEMOKRATIE* 185 (1991). In the Anglo-American world the term has been popularized by R. Hirschl, *TOWARDS JURISTOCRACY* (2004).

private individuals is a feature of the total state, the constitutionalization of that relationship is a defining feature of the total constitution. In a total constitution, constitutional rights not only establish a comprehensive system of defenses of the individual against potential excesses of the state: Instead, a key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights-claimants in response to threats from third parties. These third parties can be terrorists threatening to kill a hostage,⁷ nuclear power plant operators imposing dangers on neighboring residents,⁸ creditor banks enforcing a contract against a debtor,⁹ employers firing an employee, or landlords threatening to evict a tenant. The public authorities to whom these claims are addressed can be the legislator (for not having enacted the appropriate protective legislation), the executive (for taking the appropriate protective measures), or the judiciary (for not interpreting the law in the appropriately protective way).

Second, if a total state provides no judicial enforcement of constitutional rights a total constitution provides the constitutional resources to constitutionalize all political and legal conflicts – it constrains and guides their resolution in the name of constitutional rights. By means of its constitutional rights provisions a total constitution provides the general normative standards – even if stated in terms of abstract principle – for the resolution of all legal and political conflicts that occur within its jurisdiction. It also gives a constitutional court the jurisdiction to pronounce itself on what constitutional justice requires, if called upon by persons whose interests are at stake. A total constitution functions as “*a juristisches Weltenei*,”¹⁰ as Ernst Forsthoff has untranslatableably called it: A kind of juridical genome that contains the DNA for the development of the whole legal system. It establishes a general normative program for choices to be made by public authorities *vis à vis* individuals. It commits public authorities to either intervene or abstain from intervention and guides public authorities with regard to the appropriate means of intervention. Democratic politics, executive decision-making,

⁷ BVerfGE 46, 160 (*Schleyer*). BVerfGE refers to the official collection of the judgments of the Federal Constitutional Court. The first number refers to the volume, the second refers to the page number on which the decision begins. A bracketed third number refers to the exact page on which a particular citation can be found. Particularly well-known cases are conventionally named either after the complainant or the core subject-matter addressed by the decision.

⁸ BVerfGE 49, 89 and BVerfGE 53, 30.

⁹ BVerfGE 89, 214.

¹⁰ E. FORSTHOFF, *DER STAAT DER INDUSTRIEGESELLSCHAFT* 144 (2d ed. 1971). Forsthoff was a leading public lawyer both under the National Socialists and in the federal republic, where he was able to take up teaching again in 1952. Forsthoff defended the leadership principle (*Fuehrerprinzip*) in one of his early major publications. See E. FORSTHOFF, *DER TOTALE STAATE* (1933).

and ordinary judicial decision-making becomes constitutional implementation, subject to the supervision of a constitutional court. The total constitution transforms a parliamentary legislative state into a juristocracy.

Third, if a total state is a state in which even constitutional essentials are potentially up for grabs, a total constitution immunizes itself against the possibilities of radical political change by entrenching its basic structural features – constitutional rights, democracy, and the rule of law among them – precluding their abolition by way of constitutional amendment.¹¹ The constitution furthermore clarifies that it is not a neutral procedural order, but one that is able to identify its enemies and authorize their effective political neutralization.¹² Political parties, for example, can be prohibited (Art. 21 II BL) and individuals' right to participate in the political process can be withdrawn by order of the FCC if used to fight the liberal democratic constitutional order (Art. 18 BL).

This article provides an analysis and critical assessment of the first two aspects of the total constitution. How is it that constitutional rights, traditionally conceived as a set of specific and enumerated constraints on political actors, have developed to become the instrument for the potential constitutionalization of all legal and political conflicts, including those concerning the relationships between individuals governed by private law? What were the interpretative choices that allowed a catalogue of basic rights to develop into a complete normative program to be implemented by the legislature, the executive, and the judiciary under the supervision of the FCC? How does the doctrine of "indirect effect" (*mittelbare Drittwirkung*) work to effectively constitutionalize even the relationship between private actors? And, finally, is it justified to lament the advent of the "total constitution" and the emergence of a significant role for the constitutional court as "juristocracy"? Or is it more appropriate to celebrate the emergence of a constitutional understanding that, more than any other, furthers the institutionalization of complete constitutional justice? What are the basic ideas that should guide the assessment of such a practice? And can Schmitt's critique of the total state help guide an assessment of the total constitution?

The following will consist of four sections. Drawing on the work of Robert Alexy,¹³ the first section will provide a brief account of the basic interpretative choices that have made constitutional rights the basic instrument for the constitutionalization of

¹¹ See Art. 79 Sect. 1 Basic Law referring to Art. 20 Sect. 1 Basic Law.

¹² For a comparative discussion of democratic constitutions that authorize militant actions towards the enemies of the constitution see A. SAJO ed., *MILITANT DEMOCRACY* (2005).

¹³ R. ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002).

politics in Germany. In the second section these choices will be specifically analyzed with regard to their implications for the constitutionalization of private law. Here the claim is that the doctrine of indirect effect (*mittelbare Drittwirkung*) achieves practically the same result as a constitutional provision that explicitly makes individual persons addressees of constitutional rights provisions. It leads to the constitutionalization of private law. The third section will provide a critical assessment of the constitutionalization of private law and conclude that there is no reason why private law should not be constitutionalized. It is only appropriate that if political and legal decisions are generally subject to constitutional review, that private law and the courts that interpret it are not excluded. Those who lament the constitutionalization of private law may be making the same mistake as Schmitt who lamented the politicization of private law. Finally, the conclusion will provide a brief argument that a constitution in which rights are conceived as principles that guide and constrain each and every act by public authorities reflects a conception of rights that is part of the revolutionary enlightenment tradition and reflects an attractive understanding of constitutional legitimacy. Those who lament the demise of democracy and the emergence of juristocracy may be guided by mistaken ideas both about the point of rights and the appropriate understanding of democracy. The loaded formula of a “total constitution” as well as the critiques of the constitution as a juridical genome (Forsthoff) and of “juristocracy” (Boeckenfoerde), developed by some of Schmitt’s most influential pupils to describe the constitutional practice of the Federal Republic of Germany, is as inappropriate as the formula of a “total state” was inappropriate to refer to the struggling Weimar Republic.

B. The Structure of Rights and the Domain of Constitutional Justice

I. The scope of negative rights: Liberty, equality, and proportionality

The German constitution, as interpreted by the FCC, not only guarantees rights to specific liberties, such as freedom of expression and freedom of religion, along with rights against certain forms of discrimination, such as that on grounds of sex or race. It also grants a general right to liberty and a general right to equality. This has radical implications for the understanding of constitutional rights and the role of constitutional courts in reviewing acts of public authorities. Every act of legislation that restricts an individual from doing what she pleases, as well as any legislative classification, requires constitutional justification of the sort described above. The domain of constitutional justice and, institutionally, the domain of judicial control of public authorities, are thus radically expanded. In the following section I will

briefly describe the choices the FCC has made focusing on the general right to liberty.¹⁴

Art. 2 Sect. 1 of Basic Law states:

“Every person has the right to the free development of their personality, to the extent that they do not infringe on the rights of others or offend against the constitutional order or public morals.”

Compare this to the text of the 5th and 14th Amendment of the U.S. Constitution, which in the relevant passage states:

“No person ... shall be deprived of liberty ... without due process of law.”

When confronted with texts of this kind two questions present themselves. The first focuses on the scope of the right. How narrowly or how broadly should it be conceived? What is meant by the free development of personality? What is meant by liberty? The second focuses on the broad or narrow understanding of the constitutional limitations of such a right. The texts mention “the rights of others, offenses against the constitutional order or public morals” and “due process of law” respectively. What does this mean for the purposes of articulating a judicially administrable test for acts by public authorities that is subject to constitutional litigation?

In constitutional practice there are two competing approaches to choices of this kind. The first is to define both the scope of the right and the limitations narrowly. This is generally the approach taken by the U.S. Supreme Court. The U.S. Supreme Court insists that only particularly qualified liberty interests, liberty interests that are deemed to be sufficiently fundamental, enjoy meaningful protection under the Due Process Clause. When an interest is deemed to be sufficiently fundamental, the limitations that apply are narrow too. They are narrow in the sense that the requirements that must be fulfilled to infringe a protected interest are demanding. Only “compelling interests” are sufficient to justify infringements of the right. The “compelling interest” test loads the dice in favor of the protected right and raises the bar for justifying infringements when compared to the requirements of proportionality. A measure may be proportional, but not meet the “compelling interest” test.

¹⁴ *Id.*, 223-59. Alexy deals with a general right to equality in chapter 8, at 260-87.

The FCC has taken a different approach. Both the scope and the limitations of constitutional rights have been given an expansive interpretation. First, the Court was quick to dismiss narrow conceptions of the “free development of personality” that limited the scope of the right to “expressions of true human nature as understood in western culture” as was suggested by influential commentaries.¹⁵ Instead the FCC opted for an interpretation that the right guaranteeing the free development of the personality should be read as guaranteeing general freedom of action understood as the right to do or not to do as one pleases.¹⁶ This means that the scope of a general right to liberty encompasses such mundane things as the *prima facie* right to ride horses in public woods¹⁷ or feed pigeons in public squares.¹⁸ If public authorities prohibit such actions they would infringe the general right to liberty.

As a corollary to the wide scope of the right, the court has embraced a broad interpretation of the limits of the right. Any infringement of the right is justified if it follows appropriate legal procedures and is not disproportionate. The triad of requirements stipulated by Art. 2 Sect.1 (rights of others, constitutional order, public morals) in the jurisprudence of the Court translate into the requirements of legality and proportionality. This is a move that has been characteristic of the interpretative approach that courts have taken to limits of rights. The proportionality test is at the center of most of the human rights jurisprudence not just in Germany. The proportionality test generally consists of four subtests. A measure infringing a constitutionally protected interest has to: (1) be enacted for a legitimate purpose; (2) actually further that legitimate purpose; (3) be necessary (a measure is necessary if no equally effective but less intrusive measure is available); and (4) be proportional in a narrow sense (the benefits of infringing the protected interests must be greater than the loss incurred with regard to the infringed interest). It is important to point out that even though the substantive limit of proportionality is broad, it does have bite. It is not adequately compared to the analysis – or lack of it – that generally characterizes the application of the “rational basis” test in cases involving liberty interests that are not deemed fundamental by the U.S. Supreme Court.¹⁹

¹⁵ For further references see TCR, 224 n.5.

¹⁶ BVerfGE 6, 32 (*Elfen*).

¹⁷ BVerfGE 39, 1, BVerfGE 88, 203.

¹⁸ BVerfGE 54, 143 (147).

¹⁹ See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1362 (3d. ed. vol. 1, 2000).

There are three characteristic features of rights reasoning as practiced by the FCC. First, practically any action taken by the state is open to challenge on constitutional grounds. Any such action will distinguish between persons in some respect, therefore raising equality concerns. And most actions are likely to infringe on someone's liberty interest. Second, even though constitutional rights are practically always in play when the state acts, they do not function as trumps in any meaningful sense. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. Even without such priority, constitutional practice in Germany clearly illustrates how rights are formidable weapons. The third characteristic feature of rights reasoning is the flip side of the second. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the *reasons* that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure that functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshaled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the Constitution provides no specific further guidance, largely an exercise of general practical reasoning without many of the constraining features that otherwise characterizes legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.²⁰

II. From negative rights to positive rights: The idea of protective duties

The discussion so far has focused on constitutional rights in their classic liberal understanding as defensive rights against the state. An important question is whether and to what extent constitutional rights also establish rights to positive state action. In terms of text and legislative history, the Basic Law is primarily

²⁰ That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely with assessing whether the choices made by other institutional actors are justified. Second, they only assess the merit of these policy decisions in so far they affect the scope of a right. Third, specific constitutional rules concerning limits to constitutional rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the "margin of appreciation."

oriented towards defensive rights. Except for the right of mothers to the protection and support of society,²¹ the text of the Constitution does not contain references to any entitlements. There is a reference to the duty of all state power to protect human dignity,²² as well as a clause postulating that the Federal Republic of Germany is a social state,²³ but that is the extent of it. Yet there is a rich jurisprudence on various entitlements ranging from duties of the state to protect the individual from third parties, entitlements concerning the provision of certain procedures and organizations, as well as social rights. How is that possible?

The key lies in an early judgment of the FCC concerning a private law dispute between individuals. In *Lueth*,²⁴ the central issue was whether constitutional rights merely apply as defensive rights against the state or whether they also have horizontal effect and apply to the relationship between individuals.²⁵ In that judgment the Court held for the first time what would become a standard mantra: that “constitutional rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law ... and which provides guidelines and impulses for the legislature, administration and judiciary.”²⁶ Constitutional rights norms “radiate” into all areas of the legal system. Freedom of expression, for example, is not just a right of an individual against the state, but a value or principle that gives impulses and provides guidelines to all areas of the law to which it is relevant. As such, it has implications for such questions as whether an individual can recover civil damages against another for having been subjected to derogatory remarks²⁷ and other private law norms. The idea that constitutional principles radiate to affect the rights and duties of all actors within the jurisdiction is the basis not just for an expansion of the Court’s rights jurisprudence to private law cases. It is also the basis for establishing individual rights to positive actions by the state.

As far as the scope of constitutional rights is concerned, the consequences of the “radiation thesis” have been enormous. First, the Court insisted that constitutional rights required the institutionalization of certain procedures and forms of

²¹ Art. 6 Sect. 4 Basic Law.

²² Art. 1 Basic Law.

²³ Art. 20 Sect. 1 Basic Law.

²⁴ BVerfGE 7, 198 (*Lueth*).

²⁵ For Alexy’s discussion of horizontal effect see, *supra*, note 13, 351-65.

²⁶ BVerfGE 39, 1 (41).

²⁷ BVerfGE 86, 1.

organization. These ranged from specific court and administrative procedures to complex statutory intervention to secure freedom of broadcasting and establish a television broadcasting system that is free from state control and is pluralistic. Second, the door was opened to claims that the state is required to take specific action to protect individuals adequately from acts of third parties.²⁸ Cases the Court has had to address range from claims that the state is required to tighten up the standards of nuclear reactor safety to adequately protect the rights holder from dangers of a nuclear power plant²⁹ to claims that the state is under a constitutional duty to comply with terrorist kidnappers demands and free certain prisoners in order to protect the life of the kidnapped victim threatened by the terrorist kidnappers.³⁰ But the best-known and most consequential case concerning protective rights involves the issue of abortion. Under the Basic Law the issue did not come to the Court as a challenge to criminal sanctions by a woman invoking a right to choose. Instead the minority faction brought the case after the parliamentary majority enacted a law that decriminalized certain kinds of abortions. The partly successful claim made by the minority faction was that the state was under a constitutional duty to criminalize abortion to a greater extent in order to effectively protect the right to life of the unborn.³¹ Finally, the radiation thesis also provided the grounds for the development of a jurisprudence concerning social rights.³² These rights are all linked to help sustain the necessary preconditions for the meaningful realization of liberties. The court has in fact recognized a right to minimal subsistence. It has even come close to recognizing the right to choose a profession as a basis for the duty of the state to create a sufficient number of university spaces at universities for anyone qualified to study her subject of choice.³³

²⁸ See Alexy, *supra* note 13, 300-14.

²⁹ BVerfGE 30, 59 and BVerfGE 49, 89.

³⁰ BVerfGE 46, 160. In that case the court held that even though the German government was under a constitutional duty to protect the kidnapped victim, it had wide discretion with regard to the means it chooses to do so. There are some limits to that discretion, however. In a recent decision concerning the constitutionality of a law that allowed for a civilian airliner to be shot down by the German Air Force in 11 September 2001 type scenarios was deemed to be unconstitutional. See 1 BvR 357/05.

³¹ BVerfGE 39, 1 and BVerfGE 88, 203.

³² TCR 334-348.

³³ TCR 292.

C. Constitutionalizing Private Law: How “Indirect Effect” is like “Direct Effect”

But does any of this support the claim that the German Constitution in effect constitutionalizes the relationship between private individuals? After all, the German Basic Law provides that “basic rights shall be binding for the legislative, executive and judicial powers.”³⁴ Generally, the constitutional rights guaranteed by the Basic Law are not addressed to individuals. Individuals may not rely on them against one another in private litigation directly. Constitutional rights are in play in private litigation only *indirectly* as duties of the respective public authorities, and in particular the civil courts, to respect constitutional rights in the legislation and interpretation of private law. This is the core point of the doctrine of “*mittelbare Drittwirkung*.”

The practical difference between indirect and direct effect, however, is negligible. It concerns merely the formal construction of the legal issue and has no implications whatsoever for questions relating to substantive outcomes or institutional competence. Not only is private law in Germany already fully constitutionalized. If, in a surprise move, the constitutional legislator were to amend the Constitution and explicitly determine that constitutional rights are also applicable to the relationship between individuals, *it would change practically nothing*. There would be a difference in the way complaints could be framed: instead of naming the public authorities, which are currently the addressees of the complaints, the complainant could simply name the other private party as the defendant in the case. And the challenged act would be the act of the private individual rather than that of the public authorities. But this change in the construction of the issue would have no implications whatsoever either substantively with regard to outcomes or institutionally with regard to the jurisdiction of the FCC. This means that even under a doctrine of “indirect effect” constitutional principles are already the basis for both private and public law. The following serves to illustrate this point.

A hypothetical to begin with: A, a consumer in dire financial straits, contracts with C, a credit card company. The card A signs up for is advertised as offering high credit limits, no questions asked, and 10% interest for the first 6 months. The standard contract then establishes that after six months interest goes up to 35% per annum. After running up the maximum amount of debt possible, A over a number of years pays back the original amount borrowed but refuses to pay the interest claimed by C on the grounds that it is ridiculously high. After having verified that A is actually able to pay, C decides to sue A for the remaining interest.

³⁴ Art. 1 para. 3 Basic Law.

The question to be focused on here is not who would prevail or the details of the existing consumer protection law, but how the issue would be framed and how constitutional rights could enter the dispute. To begin with this seems to be a straightforward private law contracts case that does not involve constitutional rights at all. Substantively what is at issue is the freedom of contract on the one hand, and the protection of the weak contractual party against usurious interest rates on the other. The standard justifications for holding someone to a contract – promise, legitimate expectations, and general considerations of economic efficiency – goes only so far and allows for some degree of protection of the weak contractual party. According to received wisdom, there is a line to be drawn somewhere. This line-drawing exercise can be legally structured in different ways. The German Code contains a general clause that invalidates contracts that “violate the good customs of the community.”³⁵ One of the purposes of this clause has traditionally been to provide some degree of protection of the weak party in certain cases.³⁶ In the United States the doctrine of unconscionability that has been developed as part of the common law by courts³⁷ has a comparable function. In both cases the line drawing exercise is effectively managed by ordinary courts balancing the relevant concerns and, over time, articulating more specific rules that determine the conditions under which a contract will not be judicially enforced. Today it is just as likely that this balance will have been struck by the legislator. Beyond the general code or the common law some consumer protection legislation exists in most jurisdictions. In Europe, national consumer protection legislation, complemented by EU directives, address such issues as standard contracts, installment sales contracts, or consumer credit contracts.³⁸ To the extent this legislation consists of specific and clear easily administrable rules, the line-drawing exercises between freedom of contract and consumer protection are no longer undertaken by the respective courts, but by legislators.

How then could constitutional rights come into the picture?

³⁵ See sec. 138 para. 1 BGB: “*Ein Rechtsgeschäft, dass gegen die guten Sitten verstösst ist nichtig.*”

³⁶ For a discussion of usury see PALANDT (62d ed. 2003), HEINRICHS para. 242, recital 65-76.

³⁷ See *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948). See also Section 2-302 UCC: “If the courts as a matter of law finds a contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clauses as to avoid any unconscionable result.”

³⁸ See e.g. EC Directive 13/93 addressing consumer protection against unfair practices. See also the Swedish “Act on the Prohibition of Unconscionable Contractual Terms” of 1971.

Imagine first, counterfactually, that constitutional rights were directly horizontally effective in Germany and could be enforced by ordinary courts. The newly amended Constitution now states: Constitutional rights are addressed to all public authorities and, where applicable, individuals. Everything else, let's assume, would remain the same. In Germany both C and A would be able to plausibly invoke constitutional rights to support their claims. The German Constitution, as interpreted by the FCC, recognizes an all-encompassing right to liberty understood as the freedom of a person to do or to abstain from doing whatever he pleases.³⁹ The violation of any liberty interest potentially raises constitutional questions and requires constitutional justification.⁴⁰ C could file a constitutional tort action claiming that A, by refusing to recognize the validity of the contract, was challenging C's freedom to enter into legally binding contracts, guaranteed under the German Constitution as an instantiation of a general right to liberty.⁴¹ But C's constitutional rights would not be the only constitutional right in play. A could also invoke a general right to liberty as a defense against C. C effectively wants to force A to part with his money against his will, only because A, under dire financial circumstances, happened to have accepted an unfavorable contract. With two competing liberty interests at stake, both of them enjoying constitutional protection *prima facie*, the conflict would be resolved by balancing the respective reasons that can be marshaled in support of each of these liberty interests against one another. Proportionality analysis is at the center of the Court's jurisprudence not just when the issue is a conflict between an individual right and some collective good, but also when rights collide. Such a balance would require the assessment of a rich set of considerations including, but not limited to, the degree of hardship A was under and the effect this had on his making a promise, the reliance interests of C in circumstances where he's charging interest rates spectacularly above market rates, whether ex-post relief provided by the Court actually improves the position of the weak party as well as general efficiency considerations. Whatever the right way of thinking about these kinds of conflicts of interests in a contractual setting may be is also the right way to resolve the constitutional issue. Of course it is generally the

³⁹ Art. 2 I Basic Law states: "Everyone has the right to freely develop their personality." The FCC has interpreted this right expansively to mean that everyone is free to do or to abstain from doing whatever they like. See BVerfGE 6, 32 (*Elfes*).

⁴⁰ This has propelled the FCC into the role of assessing, for example, the constitutionality of restrictions on feeding pigeons in public squares (see BVerfGE 54, 263) or riding horses through public woods (BVerfGE 80, 137).

⁴¹ In Ireland such constitutional tort actions are recognized. See Walsh, J. in the 1973 case of *Meskeil v. Coras Iompair Eireann*: "If a person has suffered damage by virtue of a breach of a constitutional right ... that person has the right to seek redress against the person or persons who infringed that rights." I.R. 121, 133 (1973). Art. 40.3.1. of the Irish Constitution states that "the state guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate the personal rights of citizens."

function of ordinary private law legislation, precedence and doctrine to strike the right balance between the relevant concerns. No doubt the court would engage and give some degree of deference to ordinary legislation, precedence, and doctrine that exist on these kinds of matters. But constitutional law as the supreme law of the land would supplant ordinary legislation, precedent, or doctrine as the ultimate point of reference for the resolution of private law disputes. Existing private law would only be applicable, if and to the extent it could be shown to strike a reasonable balance between competing constitutional rights as assessed by the relevant court charged with the adjudication of constitutional rights issues applying proportionality analysis.

Why waste all this time on the counterfactual hypothetical that constitutional rights have horizontal effect? In the real world any German civil court would immediately dismiss the idea of A violating C's constitutional rights or vice versa. The constitutional rights of the German Constitution are generally addressed to public authorities, and not individuals.⁴² Individuals, the civil judge would claim, citing well established doctrine, are not the addressees of constitutional rights norms, public authorities are. Constitutional rights are the rights of individuals against the state and not the rights of individuals against one another. Constitutional rights do not have direct horizontal effect.

But this does not mean that constitutional rights are out of the picture. Of course constitutional rights are rights only against public authorities, but ever since the *Lüth* case⁴³ it is generally accepted that the civil courts, as the interpreters of private law, are a public authority that is bound by constitutional rights. C may not have a constitutional right of freedom of contract that he can invoke against A directly, nor can A invoke a liberty right against C directly. Instead of a constitutional tort, C's or A's cause of action for a claim against the other must always be grounded in private law, an action for specific performance or damages, for example, grounded in the law of contracts or torts. But in the course of private litigation C and A can invoke constitutional rights *against the court*.

C could insist that the court, within its jurisdiction, is required to do what is in its power to ensure that freedom of contract, as guaranteed as an instantiation of the general constitutional right to liberty, is adequately protected. In that sense the basic value commitments underlying constitutional rights "radiate" throughout the legal order to also establish requirements for the *interpretation* of private law by

⁴² An exception is Art. 9 Sect. 2 GG, which provides that private agreements restricting the right of workers to organize collectively are unconstitutional and thus invalid.

⁴³ BVErfGE 7, 198 (*Lüth*).

civil courts. The court must therefore interpret private law, including the general clauses of the code, in a way that conforms to the basic value commitments expressed in the Constitution. This means that private law is to be interpreted so as to reflect an adequate balance between the respective constitutional interests at stake.⁴⁴ In this case it means interpreting the “good customs” exception of the code narrowly because of the centrality of freedom of contract as an instantiation of the general right to liberty.

A could claim that, though C is right to insist that the courts are under a constitutional duty to interpret private law so as to reflect an adequate balance of the respective constitutional interests in play, he is wrong about what that entails. In light of A’s constitutional right to liberty, and the undue burden it would inflict on him, were A held to the unfair terms of this contract, the court would have no choice but to interpret the “good customs” clause as invalidating the contract. Failure to interpret the law in such a way would result in A appealing the decision and, if ultimately necessary, filing a complaint with the FCC claiming that his constitutional rights has been violated by the judgment of this court and any other civil court inclined to affirm it.

It turns out, then, that under the guise of interpreting the general clause the judge is required to make *exactly* the kind of determination that he would have been required to make were he to directly adjudicate competing constitutional rights claims. As the court interprets the general clauses of the code it has to strike a balance between the relevant competing considerations. And just as would be the case if a doctrine of horizontal direct effect were recognized, the door is opened to the involvement of the FCC as the final arbiter of private law claims: When a party feels that a civil court has failed to take constitutional rights adequately into account while interpreting civil law, a complaint can be filed with the FCC.

But what if the law is clear and there is nothing to interpret? Does the practical difference between direct and indirect horizontal effect not lie in civil courts having to worry about constitutional concerns only when making *interpretative* choices? Can civil courts ignore constitutional concerns when provisions of private law are clear? Imagine the civil judge discovers that he is not required to interpret a highly abstract clause in the code, in light of highly indeterminate constitutional principles, to dispose of the case. Instead, let’s assume that the legislator has made a clear decision to address cases of this kind. It turns out, let’s say, that national parliament has enacted special legislation establishing a safe harbor provision determining that no credit card contract charging 35% interest or less could be

⁴⁴ See BVerfGE 30, 173 (*Mephisto*).

challenged as in violation of good customs or as otherwise unfair. The judge breathes a sigh of relief, glad that the difficult task of striking the balance between the competing concerns has been assumed by the legislator, leaving no textual ambiguity, no difficult task of interpretation, and, it seems, no constitutional issue to be resolved.

But of course the judge has no reason to breath a sigh of relief. If the constitutional interests of one party can't appropriately be taken into account by anything plausibly deemed an interpretation of the law, given its clarity and specificity, this does not settle all constitutional issues. Instead the question is whether the legislation – here the safe harbor clause for credit card contracts charging 35% or less – is unconstitutional because it does not adequately take into account one side's constitutional liberty interests, by holding him to unfair burdensome contracts.

Even though constitutional rights are not directly horizontally effective, constitutional liberty interests are not just relevant for the *interpretation* of the law by courts. They need also to be taken into account by *legislatures* enacting private law. Legislative acts, including legislative acts on issues of private law, are undisputedly acts by public authorities and thus subject to constitutional rights constraints. A civil court judge would be violating a constitutional right to liberty if he enforces a law that unduly infringes on the constitutional right to liberty. It may well be that the civil court has no authority to simply set aside legislation on the grounds that it is unconstitutional, if it was enacted after the Constitution. That can only be done by the FCC.⁴⁵ But if the law does not meet constitutional standards, the civil court is required to make a reference to the FCC to have it make the relevant determination and declare the law to be unconstitutional. If it refuses to do so, the party who's rights have been violated may file a constitutional complaint with the FCC on the grounds that both the ruling and the legislative act underlying it violate its constitutional right to liberty.

A doctrine of indirect horizontal effect, then, seems to have much the same consequences, substantively and institutionally, as the embrace of a doctrine of direct horizontal effect. In both cases civil courts are required to interpret existing private law so that it is compatible with constitutional requirements. Where that is impossible because of a clear legislative rule, the court must make a reference to the FCC to determine the constitutional issue and, if necessary, declare private law legislation to be invalid. Furthermore, in both cases a party to a private dispute could file a constitutional complaint claiming that his constitutional rights were

⁴⁵ Germany follows the Kelsenian model and establishes a constitutional court that has the monopoly for setting aside legislation on constitutional grounds.

violated and requiring the FCC to review either the constitutionality of private law legislation or of the interpretation provided by civil courts.

It is true that the FCC in fact accords a significant degree of deference to legislatures and civil courts.⁴⁶ Only when civil courts have either failed completely to address relevant constitutional concerns or seriously misassessed their significance, will the FCC determine that a civil court has violated a party's constitutional right.⁴⁷ The private law legislator too enjoys considerable discretion in balancing the relevant policy considerations.⁴⁸ But that does not mean that constitutional review of civil court's decisions and legislatures enacting private law has no bite. In Germany, contracts in the area of creditor/debtor law,⁴⁹ landlord/tenant law,⁵⁰ and prenuptials⁵¹ have been reshaped by the jurisprudence of the FCC, and not just the law of defamation⁵² or labor law.⁵³ But more importantly, *the degree of discretion accorded to various constitutional actors has nothing to do with the distinction between direct and indirect horizontal effect*. The Court accords discretion for reasons relating to the division of labor between various institutions and perhaps pragmatic considerations relating to docket management. There is nothing inherent in the doctrine of indirect horizontal effect that requires discretion to be granted and there is nothing inherent in the doctrine of direct horizontal effect that prohibits it.

⁴⁶ For a general theory of deference see MARIUS RAABE, *GRUNDRECHTE UND ERKENNTNIS* (1998).

⁴⁷ For an account of the relationship between the FCC and the branches of the judiciary see Christian Starck, *Verfassungsgerichtsbarkeit und Fachgerichte*, 51 *JURISTENZEITUNG* 1033 (1996).

⁴⁸ See Johannes Hager, *Grundrechte im Privatrecht*, 49 *JURISTENZEITUNG* 374 (1994).

⁴⁹ See BVerfGE 89, 214 (holding unconstitutional a civil court decision that failed to interpret the general clauses of the code as invalidating a contract between a bank and income- and asset-less relatives of bank debtors to assume high liability risks in case the debtor defaults on the grounds that it failed to take into account the parties' constitutional liberty interests).

⁵⁰ See BVerfGE 89, 1 (holding that both the interests of both the landlord and the tenant in a property are deemed property rights under the Constitution that need to be taken into account in the interpretation of landlord-tenant law).

⁵¹ BVerfGE 103, 89 (limiting the kind of prenuptials that can be enforced against the structurally weaker party).

⁵² BVerfGE 7, 198 (*Lueth*). It is certainly not an accurate description of the German case law at this point that the FCC's forays into private law disputes is mainly focused on freedom of speech issues as they relate to defamation law. For such a claim see Basil M. Merkesinis, *Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 *L.Q.R.* 47, 64 (1999).

⁵³ BAG 47 (1984), 363 (Employer fired employee who, as a press operator, refused on grounds of conscience to print books he believed glorified war. The BAG interprets labor law requirement that decisions laying off workers have to be "socially justified" as requiring that weight has to be given to freedom of conscience. Under the circumstances of the case the BAG held in favor of employee).

The FCC plausibly insists that constitutional rights do not apply directly to individuals, but only to state actors. And it is right to do so, given a constitutional text that suggests legal problems should be constructed by focusing on the relevant action by public authorities.⁵⁴ But the Court recognizes that there is always action by public authorities when the state legislates the rules that govern the relationship between individuals and when a court interprets and enforces these rules in litigation. If the state action requirement is always met, the question arises whether there is a difference between construing an indirect horizontal effect grounded in a “radiating effect” of constitutional rights norms and simply acknowledging that constitutional rights bind individuals. The counterfactual example used here illustrates that nothing would change outcome-wise or even institutionally if the FCC simply acknowledged that constitutional rights bind private individuals. Indirect horizontal effect and direct horizontal effect are merely alternative, but in all relevant respects equivalent constructions of a legal problem.⁵⁵

A constitutional amendment explicitly establishing that constitutional rights have direct horizontal effect in Germany would neither impede the liberty of economic actors, nor would it provide additional protection for weaker economic parties. As a matter of substantive law and institutional division of labor, it would simply leave things as they are. With the comprehensive scope of constitutionally protected interests in Germany, private law in Germany is already applied constitutional law.

D. Who’s Afraid of the Total Constitution?

Conceptually then, private law, like any law in Germany, qualifies as a branch of applied constitutional law. If, like in Germany, the constitutional court recognizes a general constitutional right to liberty and private law is about determining the limits of the respective spheres of liberty in the interest of all, then private law is in effect applied constitutional law. It implements the constitution with regard to the concerns it addresses. It works out the implications of a general commitment to a constitutional right to liberty that citizens enjoy equally in their relationship with each other. As the hypothetical illustrates, civil litigation could always be conceived as litigation about competing constitutional rights, the specific contours of which private law attempts to define.

This may be a conclusion that even many constitutional lawyers find unfamiliar and are hesitant to embrace, even when they embrace the doctrine of “*mittelbare*

⁵⁴ See Art. 1 Sect. 3 Basic Law.

⁵⁵ See TCR, 351.

Drittiwirkung” and support the generally expansive understanding of rights that informs the FCC’s jurisprudence. But for private law jurists the challenge is greater still. Such an understanding of private law goes against some deeply engrained ideas that still resonate in the intellectual universe that German jurists inhabit. Is the German Civil Code (BGB), originally thought of as the crowning glory of the legal system and the work product of centuries of civil law scholarship, merely an implementing device for constitutional commitments? The idea that private law is merely worked out constitutional law is deeply insulting to private law jurists, who, since the heyday of 19th century codification debates have suffered a comparative status loss in the academy as public law increasingly took center stage in the 20th century. It also seems incompatible with the idea that there is a deep significance to the distinction between public and private law. In Germany you are either a public lawyer or a private lawyer. A constitutional lawyer may also teach administrative law or even municipal law. He will never teach contracts or torts. Conversely, a private lawyer will never teach constitutional law. The idea that a public lawyer, using concepts and categories of a public law discipline, could intrude on the domain of civilian expertise, borders on the preposterous. The conceptual issue is therefore deeply linked to turf battles over traditional disciplinary boundaries and prestige.

But besides habits of thought, disciplinary turf wars, and loss of prestige, are there not also good reasons for the resistance by the private law establishment to the constitutionalization of private law? Are there serious concerns that need to be addressed? Beyond inevitable complaints about the court having decided one or the other case in the wrong way, is there anything deeply problematic about current practice?

There are at least two levels on which the basic structure of current practice can be challenged. The first, more general question concerns the expansive scope of rights under the German Constitution generally⁵⁶ and questions the wisdom of an understanding of rights that is so expansive that it effectively constitutionalizes every political and legal issue. On this level some have questioned whether the FCC should recognize a general right to liberty or only more restrictive, specifically defined liberty rights.⁵⁷ Others question the use of a balancing test and propose that the Court should restrict itself to the assessment of the legitimate purposes,

⁵⁶ For a more general discussion see M. Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 584 (2004).

⁵⁷ See the dissent by Grimm, J. in BVerfGE 6, 32 (*Equestrian Case*).

suitability and necessity of a measure.⁵⁸ Others again have questioned the wisdom of the idea of protective duties and advocate the return to a conception of negative rights.⁵⁹ Restrictions of this kind would significantly limit the role of the FCC, both concerning its supervision of private law and its supervision of public authorities more generally. These questions can't be addressed here.

The discussion here will focus on a second, more specific critique. It insists that, whatever the right general conception of rights may be, *private law is special* and should be exempted from constitutional scrutiny. There are two main arguments against using constitutional rights as a standard to assess private law, one substantive and the other one institutional.

Substantively, the claim is that there is something important about the distinction between private and public law that is directly connected to the question whether constitutional rights should also be addressed to individuals or applied to private law through the doctrine of indirect effect. Private law addresses the relationship between individuals, whereas public law addresses the relationship between the individual and the state. Constitutional rights ought to be conceived primarily as rights of the individual against the state, whereas private law addresses the relationship between individuals.⁶⁰ Not recognizing that difference will tend to undermine private autonomy. To illustrate the point: Freedom of speech paradigmatically protects against legal sanctioning of speech because of its content. If a professor aggressively advocates tax reforms aimed at establishing a flat tax, he may well be advocating a position that is unjust and harmful to the weaker segments of society. But any legal sanctions against someone advocating such reforms would be clearly unconstitutional and in violation of his right to freedom of speech. He could not, for example, be forced to give up his chair at a public university. But even if public authorities may not legally discriminate against or sanction a person based on his political views, individuals, to some extent, may. Private law in a liberal society rightly allows individuals to discriminate against and sanction those whose political views they dislike in many social contexts. No

⁵⁸ B. Schlink, *Der Grundsatz der Verhältnismässigkeit*, in Festschrift 50 Jahre Bundesverfassungsgericht Vol. 2, 445 (P. Badura & H. Dreier eds., 2001).

⁵⁹ See E.W. Böckenförde, *supra*, note 6.

⁶⁰ The debates about what the defining features of private law really are and what makes a dispute a dispute of private law is a significant practical issue in Germany, because it determines whether the administrative courts or the civil courts have jurisdiction to hear the case. Although there are a number of practical rules that are used in practice, a standard treatise describes the issue thus: "The dogmatic attempts to define the distinction between private law and public law have endured now for over a century, without any of the offered theories having gained general acceptance." See Pitzner/Ronellenfitsch, *Das Assessorexamen im Öffentlichen Recht* 51 (9th ed. 1996).

freedom of expression claim ought to be successful against a person who invites only those who share his political views to a private dinner party and excludes the advocate of a flat tax. The general point is that in liberal societies individuals may often do things and act on reasons that public authorities may not act upon. The idea of private autonomy, the central organizing principle of private law, expresses this idea. When individuals are effectively constrained by constitutional rights in the same way as public authorities, this undermines the idea of private autonomy. The total constitution, it seems, is a twin of the total state. Both of them fail to appropriately respect the idea of private autonomy.

This argument is unpersuasive. It is true that the liberal commitment to private autonomy implies that individuals may often do things that public authorities may not. The dinner host who excludes flat tax adherents does not violate their right to freedom of expression. But it does not follow that constitutional rights are not appropriately applied to private law and the relationships between private individuals. It merely follows that when applying constitutional rights to the private context the autonomy interests of the other party need to be taken into account when determining the limits of the rights. The fact that A has a right to freedom of speech may imply that the state may not discriminate against him on the basis of the content of his political beliefs, but it does not follow that another individual may not discriminate against him on that basis. In the latter context the right to freedom of speech needs to be balanced against the right of the inviting dinner host to determine freely whom he invites into his house for dinner. Within the context of proportionality analysis the relevant difference in the context of application can be taken into account. Constitutional rights guarantees, as applied to conflicts between private individuals, take into account the principle of private autonomy as a countervailing concern. The task of the FCC engaged in constitutional rights adjudication is to assess whether the decision of a civil law court or by the private law legislator concerning the relationship between individuals did in fact take into account the competing constitutional principles at stake and strike a reasonable balance between them.

Finally, the application of constitutional rights to the private context does not undermine an important point of rights, which is to provide individuals with a private sphere within which they need not be concerned with being held publically accountable.⁶¹ When determining whether an individual has a right to exclude someone from a dinner party because of his political views, the question is *not* whether his behavior deserves public approval or criticism. The question is not whether he behaved reasonably when excluding people from his dinner party

⁶¹ For such an understanding of rights, see J. HABERMAS, BETWEEN FACTS AND NORMS 109 (1996).

because of their political views. The question asked when balancing competing rights between private individuals is one that concerns the *delimitation* of respective spheres of autonomy. It is about determining the proper limits of the sphere in which the rights-holder is not accountable to others for what he says or does. An individual does not need to have good reasons not to invite people to his dinner part. In this regard, striking an appropriate balance between competing rights claims leads to the result that he is free to do whatever he likes, and may exclude dinner guests because he is bigotted and intolerant. But in the domain of employment, for example, the competing autonomy interests balance out very differently. An employer can't generally choose not to employ people whose political views he dislikes.⁶² Employment decisions require justifications of a different sort. The rights of the employer are limited by the competing rights of the applicant not to be discriminated against for his political views. This is generally recognized by rules of labor law, which can be reconstructed as having balanced the various competing concerns. The point of constitutional rights is merely to provide the FCC with the possibility to review whether the competing autonomy interests were appropriately taken into account.

Substantively, then, the application of constitutional rights to private law and the relationship between individuals does not prejudice any particular outcome about where the relevant lines ought to be drawn. It neither implies a libertarian nor a social-democratic bias and is certainly not totalitarian in that it abolishes the private/public distinction. Constitutional rights provide a way of structuring legal debates about private law. The structure provided – and the open-ended proportionality requirement in particular – is open to the whole range of considerations that legal actors deem relevant for the design and interpretation of good, just, and efficient private law rules that give the right weight to the principle of private autonomy. If existing private law strikes the right balance between the relevant concerns, then existing private law rules can be justified within the constitutional rights paradigm. If certain parts of contract law are either too libertarian or too paternalistically focused on consumer protection, then constitutional rights provide a structure within which this criticism can be legally articulated in a reasoned form. The only bias inherent in such a construction of the legal issue is that it requires *reasoned reconstruction* of any tradition-gilded baselines and conceptual and doctrinal structures that lawyers are socialized into as part of becoming a part of a private law culture. Either such a reconstruction succeeds. Then the tradition can proudly claim to stand on more solid grounds than mere

⁶² See for example BVerfGE 86, 122 (taking a particular political view in a student journal is insufficient to justify a decision not to employ someone). According to BAG, NJW 84, 828, on the other hand, a doctor at a hospital run by the Catholic Church can be required to abstain from publicly advocating the right to abortion.

habit of thought. Or such a reconstruction fails and reveals the traditional lines to have been arbitrary. Then their revision deserves to be celebrated as progress.

But perhaps the problem of applying constitutional rights to private law is not primarily substantial, but *institutional*. If private law at its heart is about balancing competing constitutional rights, the FCC – whose jurisdiction is limited to constitutional questions – has general jurisdiction to review decisions by civil courts, to assess whether civil courts or legislators have struck the balance between the respective liberty interests correctly. The FCC would have the jurisdiction to effectively review all civil court decisions and all private law legislation on the grounds that civil courts or private law legislators may have struck the balance between the competing liberty interests in the wrong way and thus violated the plaintiff's or the defendant's constitutional rights.

This is significant because civil law courts and administrative courts are still organized as different branches of the judiciary in Germany. Whereas no-one disputes that decisions by public law courts can be reviewed by the FCC on constitutional rights grounds, the role of the Court as a supervisory institution over the civil courts depends on how constitutional rights effect civil litigation in civil court. As was demonstrated above, the doctrine of indirect horizontal effect effectively subjects civil courts to the same constitutional discipline as public law courts. Under the current jurisprudence of the FCC the proud civil courts are mere equals of public law courts, with both of them equally subject to supervision by the Court.

The institutional question is whether it is adequate for the FCC to review the decisions reached by the civil courts. What reasons are there to assume that a review by a non-specialized court, which is not attuned to the finer doctrinal points of private law doctrine and private law culture, is likely to lead to better decisions? What is wrong with leaving private law questions to be decided by private law courts supervised by the private law professorial establishment and their critical commentary?

Here there are two answers. The first turns the question around. What grounds are there to assume that it is appropriate for the FCC to review the decisions reached by *other* specialized courts, specialized administrative agencies or legislators, generally aided by capable research services, but not the decisions of the civil courts? Finance courts with the jurisdiction to decide tax cases, administrative law courts with the jurisdiction to adjudicate administrative law cases, all of these institutions have special expertise, and yet their decisions are susceptible to constitutional review by the FCC. If there is a reason to have a constitutional court review these decisions, then what reasons are there to exclude decisions by civil courts or a legislator legislating private law? What exactly is so special about the

expertise of private law courts and lawyers to justify exemption from constitutional scrutiny?

Of course, the FCC respects the idea of the special expertise and comparative institutional advantage of other institutional actors and a division of labor between itself and other courts. But respecting an adequate division of labor does not amount to an abdication of jurisdiction to review legal issues on constitutional grounds. Such abdication would undermine the very clear and explicit commitment of the German Basic Law to constitutional rights review by a constitutional court. Instead the FCC tends to accord some degree of *deference* to other institutional actors when it reviews their decisions. In private law cases, for example, it intervenes only when civil courts or private law legislatures have either failed completely to address relevant constitutional concerns or seriously misassessed their significance.⁶³ The Court insists that it is not a general super court of final appeals (*Superrevisionsinstanz*) that will review the finer points of private law. It will only review cases that raise serious constitutional issues.

It is true, of course, that if the development of the civil law is subject to the guardianship of the FCC, different elites, socialized into different sets of assumptions and sensibilities, will determine what the content of private law should be. A shift from the civil to the constitutional courts as final arbiters of private law claims may also effect outcomes. But to the extent that there is such a shift, it need not necessarily reflect the lack of expertise of a public law jurists and institutions relating to the specific requirements of private law. Such a shift could also reflect that the private law discipline – occupied with its internally generated occupations and distinctions – has failed to be responsive to legitimate concerns and societal shifts that a more generally focused constitutional court is more responsive to.

E. The Total Constitution or Complete Constitutional Justice?

When Carl Schmitt described “the total state” he was not describing the totalitarian state that he would later enthusiastically endorse. He was critically describing a struggling liberal republic in which the domain of private law became a domain of political disagreement and legislative intervention. This was a republic in which the traditional baselines that had informed the thinking and writing of mainstream private law jurists during much of the Wilhelmine era were subjected to political challenges and were redefined as a result of legislative intervention. The point of

⁶³ This is the generally accepted doctrine used by the FCC. See *e.g.* BVerfGE 43, 130 (137), BVerfGE 61, 1 (7).

this intervention was *not* to deny that there is a line to be drawn between the public and the private sphere, between “the state” and “society.” That would occur only later. The point was to challenge the way that line was drawn by the Civil Code as it was interpreted by the civil courts and to draw that line differently, in order, for example, to strike a more appropriate balance between the interests of employers and employees in their contractual relationship in an industrialized society. These line-drawing exercises were no longer thought of as appropriately within the jurisdiction of a professional elite of private law experts, but the task of a responsive and socially aware democratic legislator. The delimitation of spheres of liberty between equally ranked persons was reconceived as a political question, rather than a conceptual craft expertly performed by those schooled in the doctrines and history of private law.

In an important sense modern liberal constitutional democracies remain very much the “total state” that Schmitt polemically describes. Private law remains subject to political debate and regulation and any idea of a concrete “natural” baseline remains discredited, even if highly abstract principles, such as private autonomy, enjoy general recognition. The “motorized legislator” continues his work. As Habermas puts it, the scope and limits of private autonomy need to be determined by citizens exercising their public autonomy in a democratic process.⁶⁴ Politically contested rules relating to topics as diverse as the rules relating to the work place, consumer protection laws, and product liability rules continue to redefine the scope and limits of private autonomy. One central feature of what Schmitt describes as the “total state” is simply the demise of a very particular and historically contingent understanding of a self-governing private law society.

But if the politicization of private law within liberal constitutional democracies is one defining feature of 20th century private law, the constitutional assessment of political choices by a constitutional court is a central feature of law in liberal constitutional democracies at the end of the 20th century. If the generation of private law rules, either by the legislator or by courts interpreting abstract, ambiguous or indeterminate provisions of private law involves a political choice, and political choices are subject to constitutional rights review using proportionality analysis, why should decisions relating to private law be excluded from constitutional rights scrutiny? In a world where the generation of private law rules is conceived as a political question and the political process is constitutionally guided and constrained by constitutional rights, private law is necessarily constitutionalized. In Schmittian parlance one might say that the total state is complemented by the total constitution.

⁶⁴ J. HABERMAS, *Popular Sovereignty as Procedure*, in BETWEEN FACTS AND NORMS 600 (1996).

But a Schmittian vocabulary, which still tends to find resonance among constitutional lawyers today, should not bias the assessment of such an expansive conception of constitutional rights. When the government acts in a way that detrimentally affects the interests of an individual, it is not outrageous to require that those acts be justifiable in terms that take that individual seriously. The language of constitutional rights provides the vocabulary to assess whether that burden of justification can be met in a particular case. All you need in order to make a rights claim is an interest that is sufficient to establish a duty in public institutions to take account of it.⁶⁵ Constitutional rights and their judicial review serve to institutionalize the idea that the legitimacy of a political or legal decision depends in part on whether it can reasonably be understood as a good faith effort to take into account and give respect to the interests of all, including those being burdened by the decision. The FCC, applying a conception of rights as principles that Alexy describes helps assess whether the commitment to take individuals seriously was honored by public institutions in a particular case.

There is nothing new in understanding rights in this expansive way. In the French revolutionary tradition rights were understood in just this way. The French Declaration of the Rights of Man establishes that everyone has an equal right to liberty. The task of the political process in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest. In this respect there is no difference between private law and public law. Courts, of course, had no role to play whatsoever in the exercise of determining the specific content of what it means to be free and equal in specific circumstances. Courts, discredited as part of the *ancien regime* – the *noblesse de robe* – were to function as the mouthpiece of the law as enacted by the legislature and nothing more. Even today, France is something of an outlier in the institutions it chooses to protect rights. In France, the *Conseil Constitutionnel*, an institution that engages in rights analysis not very different from that described above,⁶⁶ is not referred to as a court. Though it is a veto player in that it can preclude legislation from entering into force by holding it to be in violation of rights, it remains a “council” to the legislature and individuals may not bring cases before it.

⁶⁵ This understanding of the purpose of rights is very similar to that proposed by J. RAZ, *THE MORALITY OF FREEDOM* 180-92 (1986).

⁶⁶ The reasons published by the *Conseil Constitutionnel* are, however, famously cryptic. For a discussion of this phenomenon see MITCH LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 25-35 (2004).

But in the second half of the 20th century the vast majority of countries that have gone through the experience of either national-socialist, fascist-authoritarian, communist, or simply racist rule, and made the transition to a reasonably inclusive liberal constitutional democracy, have made a different institutional choice: To establish a constitutional court and constitutionalize rights that generally authorize those whose non-trivial interests are affected by the actions of public authorities to challenge them in court. The court would then assess whether, under the circumstances, the acts of public authorities, even of elected legislatures, can reasonably be justified. Of course the primary task of delimitating the respective spheres of liberty is left to the legislatures. Legislatures remain the authors of the laws in liberal constitutional democracies. But courts have assumed an important editorial function⁶⁷ as veto players. Courts, as guardians and subsidiary enforcers of human and constitutional rights, serve as institutions that provide a forum in which legislatures can be held accountable at the behest of affected individuals claiming that their legitimate interests have not been taken seriously. The point of human and constitutional rights is to focus and structure the court's assessment of whether the actions of public institutions are reasonable under the circumstances. The language of rights has provided the authorization for courts to play a role in protecting the legitimate interests of individuals, thereby helping to hold public institutions to standards of good government in liberal constitutional democracies worldwide.

There are good reasons to mistrust Schmitt's vocabulary and the not so subtle normative biases it reflects. After all, Schmitt's concept of the "total state" was unable to distinguish the Weimar Republic from the National Socialist state.⁶⁸ The idea of a total constitution is similarly unhelpful. The constitutional practice described here does not undermine the distinction between a private and a public sphere, but simply introduces constitutional courts as actors that have a subsidiary role to play in determining where the respective lines between the public and the private are to be drawn. Nor is it appropriate to denigrate the practice described here as an undemocratic juristocracy, merely because constitutional courts assume a subsidiary role of editors of the laws. Of course much more would need to be said both to gain a deeper understanding of the moral significance of having courts play

⁶⁷ PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 230 (1997).

⁶⁸ When Schmitt first wrote "total state" he meant to criticize the absorption and capture of the state by the pluralistic forces of civil society. When the vocabulary of the total state was affirmatively embraced by anti-liberals who advocated a totalitarian state, Schmitt distinguished between the total state out of weakness (Weimar) and the authentic total state out of strength, which he would later associate with the National Socialist movement. See C. Schmitt, *Weiterentwicklung des totalen Staates in Deutschland*, *EUROPÄISCHE REVUE* 65 (1933) and C. SCHMITT, *Totaler Feind, totaler Krieg, totaler Staate*, in *POSITIONEN UND BEGRIFFE IM KAMPF UM WEIMAR* 268 (3d ed. 1994).

the role that they do in constitutional democracies such as Germany. This is not the place to rehash debates about the legitimacy of constitutional courts reviewing democratically enacted legislation⁶⁹ or to discuss the various doctrines of deference courts use to respond to and mitigate these concerns.⁷⁰ But what Schmitt might have called a total constitution, what Forsthof has called a conception of the constitution as a juridical genome (*juristisches Weltenei*), and what Böckenförde has called a juristocracy may turn out to be nothing more than a constitution that institutionalizes more successfully than any constitution in German history a commitment to complete constitutional justice.

⁶⁹ The debate about the appropriateness of endowing courts with the authority to strike down acts of the legislature remains alive. See R. DWORKIN, *The Constitutional Conception of Democracy*, in FREEDOM'S LAWS (1996), on the one hand, and J. WALDRON, *The Constitutional Conception of Democracy*, in LAW AND DISAGREEMENT (1999), on the other.

⁷⁰ See e.g. Alexy, *supra*, note 13, 394-25; D. DYZENHAUS, THE UNITY OF PUBLIC LAW 6-19 (2004), in the Canadian context. See also Y. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002).

