The Mob

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It has been three days since, on the orders of the sitting President, the Capitol was stormed in Washington. Many of the images from Wednesday will become icons with which January 2021 and its place in history will still be illustrated in a hundred years. From a close-up view, one of the things that disturbed me the most while following these pictures was the matter-of-factness with which these people showed themselves in what they were doing. For hours they allowed themselves to be seen breaking into one of the most heavily secured buildings in the world (one would think), in full view, in broad daylight and apparently completely unconcerned about their safety and liability. This was not a looting mob doing something forbidden and hoping to get away with it under the protection of the masses. This was not even an anonymous mass that sweeps away all attributable individual responsibility, and of which afterwards everyone wonders perplexedly "what actually happened," as Manzoni described popular uprisings of earlier times. No, these people filmed and photographed themselves and each other the whole time, obviously very conscious of their own individual presence as actors in this particular place at this particular time and endeavoring to document all of it in the most thorough manner by means of social media for the world and for posterity.

Under the shock of this event, America must now find its way back to itself, say many, and above all President and People-Reconciler Elect Joe Biden. The unity of the nation must be restored, they say, and the rift that divides it closed for the sake of democracy. That sounds all very great and sensible and calming, but it's hokum. Democracy is not at all about unity. It is, on the contrary, about diversity. It allows for the division of the imagined "unity" into coexisting different interests, preferences and identities, which can form majorities together or remain minorities apart. Unity is precisely not what is demanded of them: They do not have to agree. All they have to do is accept being, if they are, outvoted.

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Application: Summer Research Fellowship 2021



The Legal Priorities Project, an organization founded by researchers from Harvard University, is receiving applications for its Summer Research Fellowship 2021.

Up to 15 graduate law students, PhD candidates, postdocs, and final-year students of 5-year undergraduate law degrees will be invited to carry out legal priorities research for 10 weeks. Fellows will receive USD 7,000 including travel expenses for a 2-week stay at ITAM in Mexico City. The application **deadline is January 16th**.

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That is, of course, by itself a fairly improbable assumption, which is easily forgotten when it has been confirmed often and for a long time. For a concession like that to be actually expected, requires trusted democratic procedures and institutions and on top of that substantive rights to limit the whims of the majority, guarded by an independent judiciary. It is a great temptation for a bad government to use its

powers to maltreat some minority to make or keep them angry enough so the majority will be afraid and in need of protection, thus assuring itself of their consent which it would otherwise have lost long ago. No democracy remains one for long without robust fundamental rights and a stable rule of law.

This is what Wednesday's riot on Capitol Hill was about. It was not about any matter of democratic politics. It was about the condition of the possibility of democratic politics itself. The storming of the Capitol was not just a protest rally that got out of hand, not just the voice of some political faction making itself heard. While outside the glass panes were shattering, inside Congress was about to formally certify that Joe Biden's voters had outnumbered those of Donald Trump. To delay, if not to prevent, this resolution, and to force the appointed elected officials into hiding as they were doing that – that was what the rioters actually achieved. Think about that. These people had penetrated not just symbolically, but literally into the very heart of democracy.

Many of the rioters, on their way to and from the scene, appeared happy to readily oblige anyone who asked them about their motives and intentions, cheerfully revealing in perfect candour that they regarded the Capitol their property. This is our house! Those guys work for us! We just take back what has been stolen from us! They had been outvoted according to the rules of the constitution, they had lost all court cases, there was no longer even the flimsiest semblance of justification for their claim to power. Only violence, of which the violence on Capitol Hill was just the most visible expression. The legal title they invoked for their claim was not a constitutional one, not even in disguise. The supposed ownership of the center of power that these people claim for themselves is not based on the constitution, but in sharpest opposition to it. Its basis is the notion that an electoral outcome in which "folks like us" (male, white, Christian) end up in the position of the minority cannot inherently be a legitimate one. This notion is categorically incompatible with democratic politics. No president, however benevolent, will be able to reconcile and achieve unity with this as a matter of democratic politics.

Of course, Biden's task will ultimately have to be to try to return to a state where it will be possible again to engage in democratic politics with with 74 million Trump voters and nearly 50% of them readily supporting the insurrection. But right now, the conflict at hand is constitutional, not political. That task is not to compromise and "heal" and "unite" but to find and open a way to return to constitutionally ordered politics, in order to fight one another for what each, as opposed to the other, finds right as fiercely as they can.

The way to reach that goal, and I admit that this might be a very European or even German way of looking at things, leads across a field that will take much longer to traverse than Biden's time in office: re-establishing a distinction between what is political and what is constitutional. That electoral districting, judicial elections, and parliamentary procedural rules are constitutional, not political. That gun control and campaign contribution caps are political, not constitutional. That the constitution is not a scripture revealing the will of some semi-mythical 18th-century founder figures to be revered on one's knees, but has a very much this-worldly function under which it can be interpreted, namely to make democratic politics possible by means of procedures, institutions and fundamental rights. And not only interpreted, but also criticized and corrected. Among the greatest faults of the U.S. Constitution is that it is virtually unamendable, just as one of the greatest faults of the British Constitution is that it is too easily amended. Both faults have the same effect of fatally blurring the distinction between the political and the constitutional.

For the time being, this may be the one glimmer of hope that broke through the inky January sky over Washington on this dark Wednesday afternoon: Those GOP functionaries who now, at the very last moment under the pressure of the unfolding events, seem to have finally deserted the sinking Trumpist ship can now to some extent be expected to paddle away from it as fast as they can. To restore confidence, they will have to make clear that they respect the conditions of the possibility of democratic politics and are willing to

let go of the racist and anti-constitutional notion that anyone can have a qua natura claim to power over others at all. Finally. And why shouldn't that be politically attractive after all, especially when measured against the alternatives? They could leave it to the Trumpists to appeal to bigots, alt-rights and white supremacists and pick up those who find that company despicable despite being white, not in possession of a college degree and living in a rural area, and the votes of socially conservative African and Latinx Americans on top of it. They could leave it to the Democrats to keep the metropolitan tech and hedge-fund billionaires on both coasts rich and happy, and start addressing the concerns of those who have not profited from their prosperity. In a European context, this agenda would be called christian-social, I guess. Not something I would ever vote for, to be sure, but undoubtedly a legitimate and overdue politicization of a dramatically underpoliticized conflict. A conflict of the sort democratic politics under a functional constitution should be perfectly able to process.

Internal memo

Just before the turn of the year, I had written to you asking for your support. The response has been overwhelming, I must say, and my worries about whether we will be able to get through this year with our meager resources have diminished quite a bit. Some 200 new supporting members have responded to my appeal. That's fantastic. Thank you very much for that!

Some personnel news at the turn of the year: We had the misfortune to lose two of our best editors, ANNA VON NOTZ and TOBIAS GAFUS, to other career paths, in both cases with bright prospects, Anna in a judicial, Tobi in a legal direction. Thankfully, both will remain with us as associate editors, Anna for her core area of parliamentary, electoral and party law and Tobi for criminal law and procedure. Three of our associate editors have also decided to terminate their engagement, for whom we have found great replacements: Instead of BENJAMIN RUSTEBERG, TRISTAN BARCZAK will provide us with his expert advice in the area of police, anti-terror, security law and intelligence services, CHRISTIAN NEUMEIER will do the same for parliamentary, party and election law in succession to FLORIAN MEINEL, and NIKOLAUS MARSCH will make room for JOHANNES EICHENHOFER in the area of data protection and digitalization. A big thank-you to Benjamin, Florian and Nikolaus for countless invaluable input and a great time, and to Christian, Tristan and Johannes my welcome and anticipation for what I hope will be no less great times.

In other news: We are looking for fellow tenants who enjoy our company and we theirs and wish to share our office space. Next to our rooms in Großbeerenstraße in Berlin-Kreuzberg a very large and nice room of 59 sqm is to be let. If you are interested in becoming our new neighbor or know someone who might be: DM, please.

This week on Verfassungsblog.

This week, the incomparable KIM LANE SCHEPPELE provided us with no less than three analyses of **Trump's sinister plans** as topical and sharp as anyone could wish for: on Sunday, on the certification in Congress and his schemes for January 6; on Monday, on the tremendous further damage that Trump could still do between now and inauguration day; and in the night from Wednesday to Thursday, under the fresh impression of the events on Capitol Hill, on the possibility and necessity of not leaving Trump in office for a minute longer.

Meanwhile in Europe, the EU Commission has published its draft **Digital Services Act** – the key digital policy legislative project in this EU legislature – and positioned itself as the central regulator for "big tech." This decision is directly based on the failure of some national authorities in the GDPR. BEN WAGNER and HELEEN JANSSEN weigh the pros and cons of the Commission's proposed self-empowerment.

Brexit is indeed a reality, and it's time for the EU to stop lamenting and start thinking about how to mitigate the consequences. ALBERTO ALEMANNO and DIMITRY KOCHENOV have an idea: bilateral free movement arrangements between certain member states. The fact that Eastern and Southern Europeans will arguably profit less of that than the Dutch, Spanish and Danes is not a sufficient reason not to allow at

least citizens of those countries to move freely back and forth with the UK again.

On December 30, 2020, the EU Commission announced that the negotiations on the **investment agreement with China** are "in principle" concluded. However, human rights violations in China in recent weeks in particular raise questions about the extent to which the agreement meets EU constitutional standards. MARKUS KRAJEWSKI has doubts that the agreement will meet the EU Parliament's requirements. (On the crackdown in Hong Kong and its connection with the agreement, we expect another text next week).

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In December, **Brazil's** Supreme Court banned the re-election of the Speaker of the House of Representatives, which, despite clearly violating the Constitution, had been the practice for decades. KENJI KANEGAE explains why Brazilian President Bolsonaro is interested in replacing the position right now, and why the ruling's dissents are an example of abusive judicial review.

The draft bill on the implementation of the European **Whistleblowing** Directive by the German Federal Ministry of Justice, published in the press on December 12, provides for a blanket exclusion from the scope of the Directive of whistleblowers' tips regarding classified information. In practice, this would massively undermine the effectiveness of whistleblower protection in state authorities, find ROBERT BROCKHAUS, SIMON GERDEMANN and CHRISTIAN THÖNNES who think a bolder path is possible.

After long negotiations, the EU adopted the **conditionality regulation** to protect the Union's budget on Dec. 16. Although the regulation is to apply from Jan. 1, 2021, it will first be scrutinized by the ECJ – Poland and Hungary have already announced intentions to initiate a lawsuit. PEKKA POHJANKOSKI ventures three predictions on how this court case will play out.

Prompted by the Covid-19 crisis, a clear majority of the members of the Schleswig-Holstein state parliament want to anchor regulations on an **emergency parliament** in the state constitution. But the draft contains inconsistencies, quite apart from the question of whether the issue of the state parliament's inability to act cannot be solved differently. CHRISTOFER LENZ and LOUISA KUNKEL comment.

The pandemic is pushing forward the **digitization of court procedures**. This development is good, finds KATRIN BECKER, except that discussions often ignore fundamental questions about the nature of our legal system, which are inextricably linked to issues of presence in courtrooms.

In July, **Israel** passed a new coronavirus law, the legality of which will be heard by the Supreme Court on Tuesday. The goal of the law was to limit the government's powers and subject its actions to parliamentary scrutiny. AEYAL GROSS and NIR KOSTI explain why that failed.

Shortly before the turn of the year, the Second Senate of the BVerfG decided in a landmark decision to follow the case law of the First Senate and adopt the EU Charter of Fundamental Rights as the standard of review. Specifically, the case concerned the **European Arrest Warrant**, which KLAUS FERDINAND GÄRDITZ, in response to the previous article by MATTIAS WENDEL, takes as an opportunity to critically analyze the case law of the European Court of Justice in this regard.

That's all for this week, I guess. Over the holidays, we also had a lot of very noteworthy contributions, more than I can list here now. Perhaps two of my personal highlights: LAMIA AMHAOUACH and STEFAN HUSTER as well as JOSEF FRANZ LINDNER say everything that is necessary to say from a fundamental rights point of view about the so-called **"privileges" of the Covid vaccinated** and their so-called

"solidarity obligations" towards the non-vaccinated. And the above-mentioned KLAUS FERDINAND GÄRDITZ fills a constitutional law research gap on the occasion of the interview activities of Felix Klein, the Federal anti-Semitism commissioner of the German government, with an analysis of the question of what the increasingly numerous commissioners ("*Beauftragte*") of the federal government are actually allowed or not allowed to do.

All the best and a successful and healthy 2021 to you!

Max Steinbeis

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