The book of judges: reoccupation, religion, and constitutional adjudication at the origins of the US Supreme Court (1789-1935) and the German Federal Constitutional Court (1951-1969)

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Chapter 1

Acts of Providence:

The religiously embedded semantics surrounding and shaping

*Marbury v. Madison* and the *Status-Denkschrift*

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# Introduction: Constitutions and Holy Scriptures, Constitutions as Holy Scriptures – three illustrations

Franklin D. Roosevelt recommended that “like the Bible, [the Constitution] ought to be read again and again.”[[1]](#footnote-1) Gustav Heinemann portrayed the *Grundgesetz* as a “great offering,” whose words must become flesh.[[2]](#footnote-2) It is difficult, I believe, to overstate how significant is the interplay between the two “good books” for the articulation of each legal and political order’s constitutional language. Nevertheless, does this have any bearing on constitutional adjudication? Although presidents didn’t shy about handling their respective constitutions as bibles, have justices and constitutional scholars proceeded otherwise? One could imagine common, liberal wisdom answering yes, they did, whether in US English or German. The aim of my study is to show that this is not quite the case. In order to both become and remain convincing and attractive enough to warrant pervasive endorsement, two prototypical constitutional courts in their daily practice and language appealed to words, images, and frames of thought that bear a clear relation to religion. Occasionally, such initially explicit and then enduringly implicit reliance may have affected the way they approach the ministration of constitutional justice.

While the plausibility of constitutional adjudication in liberal democracies hardly pivoted on semantics and media embedded with religious connotations, its evidence did. This is my research’s main hypothesis. “Plausibility” and “evidence” are two terms of art proposed by Niklas Luhmann in the course of his contribution to the sociology of knowledge.[[3]](#footnote-3) As I approach them, “plausibility” stands for the limits of possibility concerning the formation of social structures. For any transformation in the social milieu to take place, however conflictual and in variation with what is established, it must be “understandable,” hence, it must be “plausible.” Evidence, in its turn, concerns the semantic effect inherent to the fulfillment of social change. When something starts to appear as “evident,” this means it achieved “stabilization,” as its semantic embeddedness abridges the need for further argumentation. Something evident is as it is – enough said.

It is one thing to argue constitutional courts’ should have something to say about how power is exercised in a given polity, another that this is a derivation of adopting a written constitution. Between one and the other, we have the threshold separating plausibility and evidence. To go from plausibility to evidence, in face of how disruptive differentiation between law and politics was and is, political and social elites in 19th century United States and 20th century Germany frequently, if not invariably, relied – sometimes more, sometimes less stealthily – upon religious resources.

My hypothesis is the following: the evidence of constitutional adjudication for liberal democracies depended on the instrumentalization of religiously marked semantics and media by actors – judges, politicians, scholars – engaged in the articulation and implementation of law’s and politics’ respective “contingency formulas.” In order to test this hypothesis, I pursue it in reference to two, leading liberal democratic constitutional courts, the US Supreme Court and the German Federal Constitutional Court [*Bundesverfassungsgericht*].

Contingency formulas, again another term of art, indicate the set of fundamental semantic patterns and symbols circumscribing to a given social domain the right degree of internal consistency, on the one hand, and of indifference and sensibility regarding its environment, on the other. Think, for instance, of John Marshall’s famous admonition: “[w]e must never forget, that it is a *constitution* we are expounding.”[[4]](#footnote-4) Underlying this statement we find the framing of the Constitution as a “layman’s document, not a lawyer’s contract.”[[5]](#footnote-5) Both are iteractions, one coming from a judicial point of view, the other from a political one, of one ingredient feature of law’s contingency formula. As such, it commands the attention of judges toward public opinion and political practice while interpreting the constitutional document. Indeed, Marshall would often borrow from speeches delivered in both houses of Congress and circulated in the press as he drafted the Court’s opinions.[[6]](#footnote-6)

Yet, should such religious resources have been instrumentalized as suggested by my hypothesis, do they still impact how liberal democratic constitutional courts envision politics? Or rather, were judges, scholars and politicians involved able to “rationalize” the initial instrumentalization, in the long run, submitting the great questions and hopes attached to the reoccupied semantics and media to a sort of purification?

I test my hypothesis by attending to the chain of documents constitutive of and registering the vindication of constitutional adjudication in these two contexts. That notwithstanding, in order to capture the effects of those immanent rationalities ingredient to religious materials, I turn to carefully read the underlying rationale subtending both courts’ rules on political matters in its first years. As Constitutional Courts are called to decide on these issues, they cannot but face the question of “what politics is about.” Correspondingly, they cannot do so without also implicitly or explicitly stating what constitutional adjudication is about vis-à-vis politics. This is where the daily administration of constitutional justice and its semantic apparatus meet an essential parcel of law’s subtending contingency formula.

Why would there be a need for such religious resources in the first place? Because communication must fascinate. It must draw the attention of individual consciences and shape the behavior of bodies, organizing and distributing them in distinct social roles, therefore including (and excluding) individuals into social communication. Now, such drawing and shaping, the bulk of fascination, falls traditionally within the domain of religion.[[7]](#footnote-7) Even when religion is displaced, its materials may still retain some of its force. In such circumstances, one may speak of religious resources deployed in the communications of other social domains, by dint of their “consecration and familiarity.”[[8]](#footnote-8) In other words, these materials still attract and hold the gaze of individuals. Of course, consecration and familiarity are contingent, while they also offer important materials to deal with the threat of contingency. Regarding the circumstances of my two case studies, two “creatures of reason,” the US Supreme Court and the *Bundesverfassungsgericht*, these features pivot on the dynamics of confessionalization and secularization during the 19th and 20th centuries.[[9]](#footnote-9)

That being the case, we are before a particular instance of what Hans Blumenberg depicts as “reoccupations.” Social actors, working in different social domains – such as politics and law, but also science and the economy –, occasionally instrumentalize religious semantics and media. Think of the market’s invisible hand or Stephan Hawking’s popular science books. Both the invisible hand in 18th century in economic discourse and Hawking’s approach to the big ban can be seen as reoccupations, in the sense that each reoccupies positions made vacant by the demise of earlier (religious) answers, whose appendant questions and hopes, but also the terms, in the sense of the symbolics, semantics and media in which they are embedded, cannot be eliminated.[[10]](#footnote-10) In doing so, as suggested at the outset, social actors abridge the space for rejection of their novel proposals, moving towards the evidence of stabilization. As such, they enforce and endorse the dawning epoch.

If and when “constitutionalism” reoccupies the position of religion, I believe it is fair to speak of “constitutional worship.” The emergence of “constitutional worship” is undoubtfully contingent. In its wake, however, one may paraphrase Edward Corwin’s statement, and submit that it furnishes government “with its dignified, its ceremonial elements[,]” strengthening it “with the strength of religion.”[[11]](#footnote-11) Of course, constitutional worship is one ingredient feature of the rhetorical ensemble of many different constitutional forms, not only constitutional adjudication. A comprehensive take of this phenomenon, however, even if circumscribed to the USA and Germany, would demand to account for many other repertoires of performance beyond constitutional deliberation.

When and where constitutional worship – or say, *Verfassungspatriotismus*[[12]](#footnote-12) – takes shape, one can say that its history pivots on a chain of catachresis. Indeed, catachresis, as the deliberate deviating and rhetorical use of a word or expression, would be perhaps the rhetorical figure which best embodies the antinomy between the need for history and the experience of history, whose heart is, precisely, the phenomena of reoccupations. To borrow one of Hans Blumenberg’s most perspicuous dicta, what was once meant metaphorically can be understood literally, such historical misunderstandings being productive in their own way.[[13]](#footnote-13)

Regarding constitutional adjudication, these productive historical misunderstandings take place both – whether simultaneously, subsequently, or even retroactively, as past registers are dressed with new clothes – in the discursive field of constitutional hermeneutics and the medial constellation of constitutional ceremony. In any case, as constitutional adjudication manages to fascinate, it also becomes popular.

More than 40 years after *Marbury*, the *New York Herald* gave the following description of the “great fun” the hearing ceremony was (and, apparently, still is):[[14]](#footnote-14)

Throughout the Court-room there is a great silence, save now and then when a bevy of ladies comes in. In fact, it looks more like a ballroom sometimes; and if old Lord Eldon and the defunct Judges of Westminster would walk in from their graves, each particular whalebone in their wigs would stand on end at this mixture of men and women, law and politeness, ogling and flirtation, bowing and curtesying, going on in the highest tribunal in America. […] There is a tremendous squeeze, you can scarcely get a case knife in edgeways… Hundreds and hundreds went away, unable to obtain admittance. There never were so many persons in the Court-room since it was built. Over 200 ladies were there; crowded, squeezed and almost jammed in that little room; in front of the Judges and behind the Judges; in front of Mr. Webster and behind him and on each side of him were rows and rows of beautiful women dressed ‘to the highest.’ Senators, Members of the House, Whigs and Locos, Foreign Ministers, Cabinet officers, old and young – all kinds of people were there.[[15]](#footnote-15)

Concerning the *Bundesverfassungsgericht*, unfortunately, I couldn’t find many lively descriptions of how its courtroom was put into use by the audience. Interestingly, available photographs prefer showing the sobriety of empty chairs. In the capitalized words of the Court’s 2021 Annual report, which quotes Art. 19, paragraph 4, proposition 1 of the German Constitution, “[a]s someone is hurt in his rights through public power [*öffentliche Gewalt*], then the access to the Court [*Rechtsweg*] stands open to him.”[[16]](#footnote-16) Yet, empirical research states and confirms the popularity of Karlsruhe[[17]](#footnote-17) – comparable polls and investigations being available on the US Supreme Court as well.[[18]](#footnote-18) They also note how radio, and then radio and television increasingly started to mediate the relationship between the court and its audience. Mass media in general, its semantic apparatus, and the corresponding attentiveness intertwined with the space of constitutional deliberation changed radically since then.

I cannot answer within current research constrains what precisely attracted the gaze of public opinion or what commanded its respectfulness in dealing with and transmitting the performances of these singular oracles of the law. That would be a completely different endeavor, concerning the intricate relationship between mass media and courtrooms, and certainly a highly relevant one. I strive to ascertain, however, how the godly ballrooms of two liberal democracies came into existence, that is, how constitutional courts assumed the pride of place in liberal democratic thought, becoming, therefore “creatures of reason.”

The main purpose of this chapter is to offer an illustration of the kind of phenomena, sources, and analysis thereof that will be addressed in my thesis. A thorough presentation of my conceptual tools will continue for the remaining of this thesis’ part one. In the meanwhile, the theoretical armature will remain in the background, informing the selection of sources, their intertwining, their interpretation, and the main conclusions I draw from them.

What I propose for the remainder, therefore, is to use the conceptual equipment herein suggested in reference to three constellations of phenomena related to the articulation of constitutional adjudication as a space of communication across the two “law-worlds”[[19]](#footnote-19) I already signed out. The idea is to first show what my theoretical armature allows me to do, before turning to its slow and detailed construction. I also wish to give the reader a chance to habituate to the kind of phenomena it underscores. And that ahead of facing the technical wiring of Hans Blumenberg and Niklas Luhmann, on the one hand, and the framing of constitutional adjudication as a space of communication, and constitutional deliberation as a ceremonial procedure, on the other.

This happens in three parts: (1) I will engage with court architecture, understood as a testimony to each institution’s articulation for self-justification and self-empowerment; (2) the semantic consecration of constitutional adjudication vis-à-vis politics, as it took place in the struggles over what was implied by the innovations pushed forward in the contexts of *Marbury v. Madison*, especially in the writings of former US Supreme Court Justice Joseph Story, on the one hand, and of the German Constitutional Court’s *Status-Denkschrift*, again with particular reference to the work of former constitutional judge Gerhard Leibholz, on the other; (3) and legal-methodological debates on the relationship between the Christian Bible and constitutional provisions that run in parallel and connection to these two landmark events, regarding which I highlight the controversy between Story and Thomas Jefferson on the maxim “Christianity is part of the common law,” and the disputes on the “super-positive” character of the fundamental rights of the *Grundgesetz* (with reference to the work of authors such as Leibholz, Maunz, Schneuer, Appelt and others). I will strive to show how different actors engaged with the establishment of the US Supreme Court and the *Bundesverfassungsgericht* proceeded to rhetorically instrumentalize religious (or religiously tainted) semantics and media, thereby endorsing but also qualifying Frankenberg’s striking observation that “constitutionalism” came to reoccupy the position of “religion” regarding political legitimacy.[[20]](#footnote-20)

# 1. About saints and subcutaneous influences: confessional ages, confessional peaks, and the historiographical literature on the relationship between constitutional adjudication and religion in the United States of America and Germany

My research concerns the emergence and consolidation of constitutional adjudication in the context of two prototypical “liberal-democratic,” geopolitically rather relevant “law-worlds.” I read the movement from the bootstrapping of constitutional adjudication towards its stabilization having religion as my main variable. I’m not arguing, however, that the social structures constitutive of constitutional adjudication, such as, say, the role of the constitutional judge or the program of judicial review are but the “transposition” of religious dogma – so that US constitutional judges are but Puritan visible saints, the “constitutional development” led by the Federal Constitutional Court nothing more than the secularization of providence. Avoiding such spurious argumentation is one of the main reasons I chose to compare two case studies. This demanded abandoning any typical-ideal notion I once entertained about the many iterations of Christianity – in the sense that “x” is clearly “protestant,” and “y” is of course “catholic” –, while reaching for concrete renditions of religion’s “treasures,” and tracing their connections and chain of transmission to legal actors directly engaged with the establishment and consecration of constitutional adjudication.

Originally, I imagined there would be a lot of religious traces embedding US constitutional adjudication. Yet, I thought the opposite would be the case for Germany. I expected, due to my previous knowledge of how Carl Schmitt and his “school” were first completely excluded of the circles of public law, and then later admitted only with grains of salt, and in reason of the different time span, that Germany’s *Verfassungsgerichtsbarkeit* would be almost absent of any religious traces. I was clearly wrong. In both cases, there is a lot of references to religion, whether explicitly or in more indirect and suggestive ways, following the patterns of secularization here understood, in Blumenberg’s terms, as an “intentional rhetorical style.” This was the first issue I faced, when it came to trying to make sense of my sources. Turning to the social history of religion, however, I started to entertain the following assumption, based on the argument and approach of the social historian Olaf Blaschke.[[21]](#footnote-21)

First, there is an intensification and realization of processes of disciplinarization, professionalization, and traditionalization within the domain of religious organizations in the 19th century, harkening back to initiatives first carried forth in the 16th and 17th centuries.[[22]](#footnote-22) These processes led to an expansion and diversification of confessions in the United States of America, something occasionally framed in the literature as the “democratization” of religion.[[23]](#footnote-23) Second, it also prompted the expansion and adaptation of religious organizations and practices to the novel surroundings of politics and the economy in Germany.[[24]](#footnote-24) In both, these threads took place amidst a remarkable increase of church attendance – the sources of which are themselves product of such process of disciplinarization, pivoting on the administration of strict techniques of discipline and their materialization in attendance registers. Hence, it may make sense to approach the 19th century in these two settings as a “second confessional age” – the first confessional age comprehending the 16-17th centuries. Further, when Germany is of concern, Blaschke and others occasionally suggest that the long 19th century is rather quite long.[[25]](#footnote-25) While in the United States of America it appears to be fair to describe what started to unfold more or less in parallel to the Constitutional Convention of 1787 in the field of religion as a “confessional peak” – the so-called religious revivals of the late 18th and early 19th century –, there seems to be another “confessional peak” in Germany, in the wake of the 2nd World War. I’m not suggesting here that these peaks were caused by these political events. Nevertheless, these peaks affected how these and other political events were shaped, experienced and communicated. Additionally, such “coincidence of contingencies,” as it were, supports the case selection and the time frame for both cases.

I readily admit that there is a lot of theoretical wiring underlying this work. Let me defend why this reliance is necessary, given how this issue – the deployment of religious resources by constitutional justices and scholars regarding especially, but not only, the imagination constitutional adjudication – has been addressed by the literature, and how I approach it in this text. If we turn to the historiographical literature, there is clear acknowledgement of such reliance on religious materials. Yet, apparently, scholarship always stop short of investigating how, why, and that this reliance took place, when it is not hostage to the later effects of these very instrumentalizations.

Consider first Robert McCloskey’s seminal *The American Constitutional Court*. A widely read textbook on the history of the US Constitutional Court, current in its sixth edition, under the care of the famous US constitutional scholar Sanford Levinson, McCloskey is happy, despite his background on political science, to attribute the endurance and evidence of the innovations introduced during the Marshall era to the legendary Chief Justice’s charming personality. McCloskey goes further, arguing that while such personality was crucial during Marshall’s lifetime to secure the evidence for judicial supremacy, his death was even more important, because, for starters, and in his own words, Marshall became a “saint.”[[26]](#footnote-26) That Marshall became a saint, for the sake of securing the pride of place to constitutional adjudication, and how this took place doesn’t fall inside McCloskey’s scope. And while it is completely reasonable that this remains outside the purview of a textbook, to the best of my knowledge, despite innumerous biographies, monographs and articles dedicated whether to Marshall or to the Court during his leadership,[[27]](#footnote-27) the best depiction of how his sanctification came to be still remains one of the bronze panels on the door at the main entrance of the US Supreme Court’s building, as discussed below.

Consider now the fourth volume of Michael Stolleis’ *Geschichte des öffentlichen Rechts in Deutschland*. As Stolleis glosses some of the key concepts setting the stage for the early and middle years of the Bundesverfassungsgericht’s judicature, such as “integration” or “practical concordance,” he underscores how their widespread acceptance should be explained both by the “fundamental mood” prevailing in the Federal Republic at the time, but also and just as importantly, on the “subcutaneous influence” of ecclesiastical traditions of thought.[[28]](#footnote-28) Notwithstanding the obvious quality of Stolleis’ work, one can easily admit “subcutaneous influence” does not lead us much further, regarding which sources should one interrogate, so as to get underneath the skin of legal practice, to keep with the metaphor.

Once again, one could argue this is way beyond the scope of Stolleis’ magnum opus. Yet, should we turn to the two monographs dedicated to the history of the Bundesverfassungsgericht, authored respectively by Uwe Wesel and Justin Collings,[[29]](#footnote-29) there is no reference at all to religion, although when one turn to the discussions of the Vereinigung der Deutschen Staatsrechtslehrer, the main doctrinal contributions, and even some of the main decisions of the early Bundesverfassungsgericht, all of them overflow with religious references, whether if they frame positivism as the “greatest sin” of modernity, or highlight how the constitutional concept of personality is a “secularized, Christian concept,” referring then to Catholic and Evangelical ethical treatises, or even remissions to the “Christian-Western tradition” within the scope of judicial rulings, some of which are duly discussed below.

Of course, should one consider the works of Schmittian scholars, such as Böckenförde, Isensee, and others, one sees the exact opposite. Religion is everywhere. Isensee, for instance, goes as far as portraying the judicial decisions of the Bundesverfassungsgericht as akin to papal encyclicals – Karlsruhe locuta, causa finita.[[30]](#footnote-30) Again, however, these are not so much investigations which have religion as a variable, but actually an instance of the deployment of religion in order to rhetorically enforce and endorse one’s positions.

# 2. Stopping before the gates: what does architecture tell us?

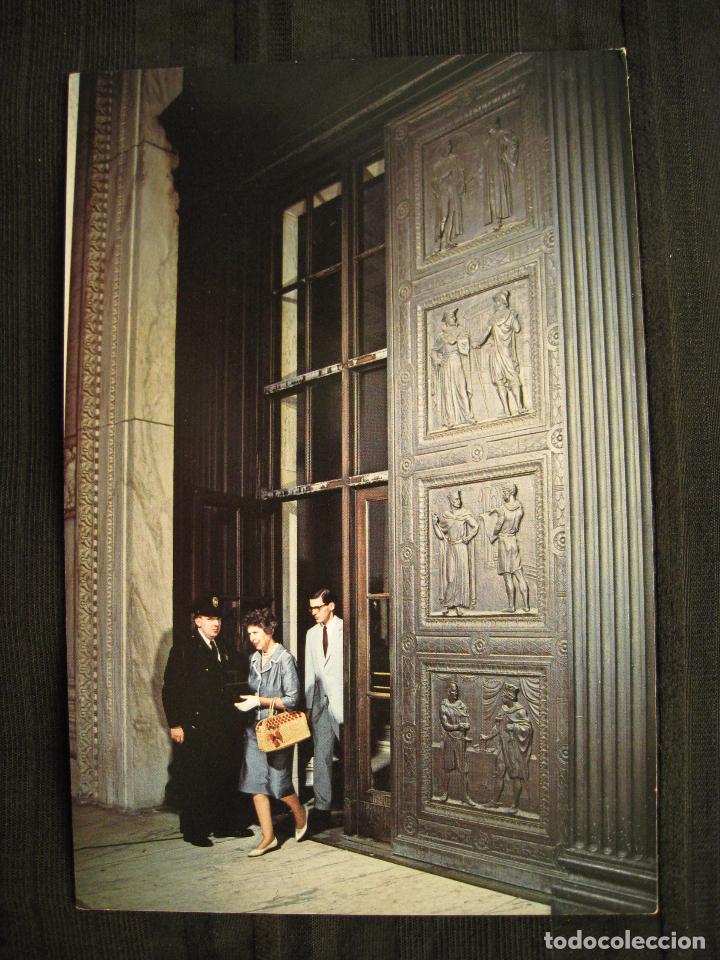
In the endeavor of enrolling individuals to partake in at times highly codified and technical communication, buildings, their façade, and their internal organization have a crucial role.[[31]](#footnote-31) As one enters a courthouse, either as one of its performers, its supporting staff or as a part of the audience, one should have more than enough to realize she crossed the gates of the law, behaving accordingly so that the chain of operations and the administration of justice may run providentially as possible – Justice is *seen* done.

As fascination warrants the enrollment of individuals’ consciences and bodies for the sake of social communication, it also distributes those consciences and bodies, in terms of different roles. Relying on Rudolf Stichweh’s development of this part of Luhmann’s conceptual equipment,[[32]](#footnote-32) it makes sense to distinguish between performance-roles, which organize the array of professions devoted to an organization’s tasks, such as judges, lawyers, and clerks, and those who are the subject of such performances, in the sense of audience-roles, which may range from very determinate positions, such as those of the parties to a given legal dispute, to more indeterminate roles, going from politicians, for instance, to “the people” themselves. Each role corresponds to a more or less cultivated figure of inclusion and a corresponding network of schemes, scripts, and semantic patterns, whose development cut across the material, temporal, and social dimensions of meaning. There is, however, borderline cases, in which individuals who otherwise belong to the indeterminate audience of an organization partake into the production and preservation of its communicative conditions, that is, communication’s fascination. Architects, engineers, and construction workers, but also cleaning and kitchen staff are great examples thereof. From my perspective, this is what makes buildings and their architecture a very relevant source, alongside any kind of register on how individuals pertaining to the audience behaved in such spaces – both offer a glimpse of how legal communications and their identity are seen by those immersed in their surroundings and corners.

The present headquarters of the US Supreme Court and the German Federal Constitutional Court both followed their institutions’ bootstrap. As architects, engineers, sculptors, construction workers and many others worked to bring whether Washington’s Marble Palace (1935) or Karlsruhe’s Walls of Glass (1969) to completion, they had before them volumes of paperwork comprehending the imaginary space of each organization to translate into the material dimension of entrances, corridors, rooms, and walls. To the extent that the dynamics of reoccupations engender a constellation of truly elusive phenomena – metaphors, latent identities, prefigurations, mirrorings and so forth, – maybe we do well to get started by letting the stones themselves testify about what was written upon them.

One of such phenomena brings together the US Supreme Court building, the Marble Palace, and the famous *Calvin’s case*. Approaching this constellation chronologically, let me begin with the latter. One can hardly ascertain whatever Edward Coke had in mind when reporting the notorious *Calvin’s Case*. This is especially the case as he turns to gloss the “law of nature” under which the “ligeance or obedience of the subject to the Sovereign is due.” “[B]y this law, written with the finger of God in the heart of man,” Coke expounds, “were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world.”[[33]](#footnote-33) On the other side of this historical chain, one must notice how what could have been only a pompous metaphor became literal as stone and metal. Moses figures shoulder to shoulder with Confucius and Solon on the east pediment of the US Supreme Court’s Marble Palace,[[34]](#footnote-34) while its thirteen tons’ bronze doors at the front depict eight historic scenes on “the development of the law.” They range from the Shield of Achilles to the Magna Charta, depicting rightly after the confrontation between Coke and James I in *Calvin*, to conclude with Chief Justice John Marshall handing the Marbury v. Madison decision to Justice Joseph Story.[[35]](#footnote-35)

Interestingly, on July 5, 1936, historians were quick to point out the apparent historical inadequacy of portraying Marshall giving the decision to Story, who was appointed to the court only 8 years later. The fact made its way to the first page of The New York Times.[[36]](#footnote-36) Nevertheless, as different sculptors gathered together Moses, Coke, Marshall and Story, this first speaks to the need for history in contrast to the experience of history. Second, it also show *pace* contemporary historiographic wisdom how Story was of crucial significance for the reception and consecration of what *Marbury v. Madison* came to mean, making room for the mirroring constitutive of the bronze doors.[[37]](#footnote-37)





In comparison to the somehow kitsch amalgam of legal-theological relics, the “walls of glass” of the *Bundesverfassungsgericht* strike as a rather stern, iconoclast edifice. If the claim that constitutional deliberation should be seen as a kind of ceremony holds some water,[[38]](#footnote-38) especially as one notices that like the US Supreme Court, justice’s administration preceded its setting,[[39]](#footnote-39) one could even advance a doctrinal correspondence for its obvious choice for “transparency.” A correspondence, therefore, between the “material” and “social dimensions” of meaning, the “medial substrate” and the “semantic apparatus” of constitutional adjudication.

In contrast to the windowless, baroque buildings of imperial courts,[[40]](#footnote-40) prone to secrecy as even Hegel thought necessary to underscore,[[41]](#footnote-41) the choice for glass could be felt as embodying the rupture that constitutional scholarship tirelessly emphasized “constitutional adjudication” represented to “the German constitutional tradition.”[[42]](#footnote-42) Correspondingly, the choice for transparency could perfectly speak to the development of post-war “Bonn” constitutional jurisprudence, as Karlsruhe counterposed the natural law inclinations of the court across the street, with the laicity of an “objective order of values.”

The tone of rupture has been highlighted by one leading German constitutional scholar, Stephan Korioth. In contrast to the “renaissance of natural law” and its confessional, religious thrust, which was at its peak across German legal circles, the “order of values” case law on fundamental rights that marked the first decades of the German constitutional court would have “immunized constitutional law vis-à-vis confessional influences. The thought of an order of values was a counter-project to natural law thinking, which certainly and opportunely impregnated the case law of the *Bundesgerichtshof* in the post-war era[.]”[[43]](#footnote-43)

Although properly discussed in part two of this work, I partially agree with Korioth. The cultivation of semantic patterns such as those organized around the notion of an “order of values” worked as a sort of “rationalization,” following the initial reoccupation and instrumentalization of Christian embedded positions. Yet, to what extent this rationalization actually “immunized” constitutional law against confessional influences appears to my foreign eyes facing more or less the same sources as rather doubtful.

Therefore, at the same time, in a certain sense, continuity enforces itself. Here as well one may notice what Horst Bredekamp has pointed out about the celebration embodying the signature of the German fundamental law.[[44]](#footnote-44) The German federal constitutional court’s building may be approached as a great illustration of this effort to dress rupture as the reenactment of continuity with the past in face of a momentaneous interruption. As the title of the book dedicated to the anniversary of the Court’s institutional seat suggests,[[45]](#footnote-45) transparency and dignity hint at traces of enormous religious incisiveness, which, importantly, cuts through confessional lines.[[46]](#footnote-46) While dignity and its “Menschenbild” will concern the most of my attention when I turn to close analysis of *Luth* and other famous decisions of the *Bundesverfassungsgericht*’s early *Judikatur*, let me focus now on transparency.

Glass and transparency were a popular material and a prevailing architectonic value in the post-war Federal Republic of Germany.[[47]](#footnote-47) Following Daniel Damler’s interpretation, one should also see here the entanglement of glass, transparency, and ordoliberalism, across politics and the economy.[[48]](#footnote-48) Of course, transparency and glass were already at the center of the *Neues Bauen*, the architectural branch of the artistic movement *Neuen Sachlichkeit*, to which the building’s architect, Paul Baumgarten, belonged, and that encompassed much of German artistic scene immediately after the end of the First World War until the end of the Weimar Republic.[[49]](#footnote-49) With its emphasis on rationalization, typification, and the economy, along with the reliance on novel materials, such as glass, there would be apparently no room at all to religious references – and this despite its clear ascetic character.[[50]](#footnote-50) Yet, here one can harvest the clear gains of Blumenberg’s methodological insights: reoccupations don’t concern the origin of the materials assembled to articulate novel social structures, only the consecration they receive so as to appear as evident.[[51]](#footnote-51) Just as *Bauhaus*, perhaps the most well-known derivation of the *Neues Bauen* approach, reached for cathedrals and their work of light and glass to ornate the cover of its launching manifesto and program,[[52]](#footnote-52) one must have in mind the confessional background of ordoliberal authors such as Walter Eucken,[[53]](#footnote-53) as well as his connections with equally pious leading legal scholars, such as Helmut Coing,[[54]](#footnote-54) to bring to the fore the religious undertones surrounding the appeal of transparency to lawyers, economists, and politicians.

One could think of at least two traditional instances of how Christian religion values transparency. On the one hand, think of the huge problem Thomas Aquinas faces in the Supplements to the *Summa Theologica*, whether the souls of the redeemed can be seen by the eyes of the damned. Aquinas answers positively. The souls of the blessed are transparent as glass. More precisely, they dwell in a medium of glass and gold, something that rests upon the authority of none other than Gregory the Great: “*Gregorius comparat corpora gloriosa auro et vitro; auro propter claritatem & vitro propter hoc quod translucebunt*.”[[55]](#footnote-55) “Gregory compares the glorious bodies to gold and glass; gold in reason of its clarity and glass due to its transparency.” On the other, consider Luther’s stance on the relationship between the soul of the “Christian man” and the word of God. Glossing Matthew 4, 4, Luther concludes that all things besides the word of God are inessential.[[56]](#footnote-56) Accordingly, we should abandon the whole splendor of visible things, such “as chasubles, embellishments, chants, prayers, organs, [and] lights,” setting our eyes and minds “on nothing else but the words of Christ.”[[57]](#footnote-57) Although I don’t have the space to follow the chain of transmission, iteration and catachresis binding Thomas’ ode for the transparency of the blessed souls to Luther’s rendition of it into a liturgical principle,[[58]](#footnote-58) nor how such evaluation ingredient to Lutheranism was transposed to German nationalism, demanding, therefore, an adequate response from the side of German Catholicism,[[59]](#footnote-59) whether one focuses on the blessed, especially as they are dressed in velvet red, or the offering of the Constitution, the words of promise that judges concord and declare, walls of glass fit perfectly well to compose the view.[[60]](#footnote-60)



Court architecture testifies to the dynamics of reoccupations, the clash between the need for history and the experience of history. It registers the endeavors of a manifold of actors – among constitutional judges and scholars, sculptors and architects – for self-assertion, as they strive to circumscribe the space-index of constitutional adjudication, and, therefore, articulate and implement law’s contingency formula, in its mutual indifference and sensibility for politics. Arguably, both monuments draw our attention to two questions: In what sense did Story receive the law from Marshall’s hands – who, perhaps, inherited it from Coke, who, in his turn, got it from Moses? And who are the damned who gaze the souls of justice in Karlsruhe?

To answer them, I shift to documentary sources on the semantic struggles untwining each organization’s foundations.

# 3. “And they shall render just decisions for the people:” The consecration of constitutional adjudication

Occasionally, therefore, the net effects of reoccupations are monumental. In these two liberal democracies, constitutional adjudication underwent a transubstantiation. Constitutional adjudication goes from being something strange, contestable, and even unprecedented to the status of a simple deduction: to adopt a “written constitution” necessarily implies establishing constitutional adjudication. And, if duly interpreted, one may realize that the novel practice enjoys antecedent prefigurations deeply carved into tradition. Coke against James, Marshall versus Jackson, isn’t it obvious that Calvin’s case prefigures *Marbury v. Madison*?[[61]](#footnote-61) All the while, apparently, notwithstanding its novelty, constitutional complaints [*Verfassungsbeschwerde*] were already imagined in 1849.[[62]](#footnote-62)

These two usages resonate with a crucial methodological caveat Hans Blumenberg insisted upon, briefly mentioned above. Reoccupations don’t say much about the origin of the new materials that the actors across an epochal threshold come to assemble, “only which consecration [*Weihen*] [they] receiv[e].”[[63]](#footnote-63) Pushing towards conceptual clarity, this implies that the deployment of religious resources mostly relate not to the plausibility of selected variations, but their stabilization in terms of evidence (and, as suggested at the outstart, fascination). In Blumenberg’s somewhat cryptical words, as an act of selection comes to be repeated, “through ‘repetition’ the ‘repeated,’ whose contingency is to be repressed, becomes a mythical program.”[[64]](#footnote-64)

What Blumenberg wrote on prefigurations, a specific instrument for generating meaningfulness, may probably apply to other rhetoric means. In his case, Blumenberg had in mind Jesus and Friederich II, Der Staufer, and then Friederich and Napoleon and Friederich and Hitler. In ours, we can think of Marshall as Coke, Coke as Moses, a chain of Visible Saints. And also, as I explore below, *Verfassungsrichter* as *Schöffen* In his words, prefigurations are particularly useful to anoint “weakly justifiable situations of action,” pivoting on the “incisiveness” of the figure of reference. The weight therein – always a contingent issue – renders it impossible “to let [the figure] remain unusable,” especially as such a figure is “always potentially available to be deployed by others.”[[65]](#footnote-65)

Now, “the nuisance of contingency” which every new institution invites, “as soon as they see themselves under the coercion to legitimation, potentiates myth.” Myth (but also dogma), according to Blumenberg, grounds the refusal to give justifications at every instance of hindrance, as myth anoints the institution with evidence.[[66]](#footnote-66) “Instances of hindrance” always follow variations, as conflicts over what is possible within a given domain of practice. What Blumenberg indicates openly as a “myth,” and that we may also grasp as “religious resources,” abbreviates the transition from selection to stabilization. I argue that this is precisely what took place around the establishment of constitutional adjudication regarding the US Supreme Court and the *Bundesvefassungsgericht*.

## 3.1. On constitutional personality: Justices as Visible Saints

The state of the debate on the origins of “judicial review” in US legal-historical literature, doubtless an obsession,[[67]](#footnote-67) arguably betrays how it may fashion as an exemplar of “working on myth.” Despite the best of efforts to shape a chronology, which is every anew pushed into the past – but then, if from Marshall it returns to Coke, it goes down to Moses –, to foreign eyes the historiographical discussion remains inconclusive, while the aura of meaningfulness endures. From the theoretical standpoint here advocated, much of its findings would concern the materials first-generation Justices ensembled together – one could almost say “naturally” – to bootstrap the Court’s operations in terms of its semantic apparatus.

Of particular interest is the practice of rendering unanimous (and after some years, also majoritarian, with concurrences and dissents) Opinions of the Court. As especially Mary Sarah Bilder has convincingly argued, both judicial review and the unanimous opinion had an essential precedent in the colonial law practice of “repugnancy.” This practice was epitomized in the requirement that lawmaking authority should be pursued “as neere as conveniently may, agreeable to the forme of the lawes & policy of England.” Hierarchically speaking, the highest venue for discussions of “repugnancy” between colonial law and the “laws of England” was the King’s Privy Council. In contrast to the King’s Bench, the King’s Privy Council delivered not seriatim, but unanimous opinions. Such practice stood on the reasoning that as the King himself, its Privy Council should have just one voice. As Bilder summarizes her findings, “the colonial American practice of bounded legislation under a repugnancy standard is causally responsible for the existence of American judicial review.”[[68]](#footnote-68)

Yet, the practice and its script only came together as the Court “coalesced,” under the leadership of John Marshall. In the words of legal historian Katherine Fischer, the Court then attained the character of a “dignified, corporate and cohesive” institution. Marshall persuaded his associates “to board together [to Washington] without their families, creating a hothouse climate of negotiation.” In Fischer’s opinion, such an atmosphere paved the way for the “new custom of largely unanimous decisions, replacing the seriatim [ones],”[[69]](#footnote-69) like the ones of the King’s Privy Council, and in contrast to the practice of the King’s bench, in which each “lordship” drafted and delivered an individual judicial opinion – hence, “seriatim,” one after the other.[[70]](#footnote-70)

This variation, however, inspired as it could have been in the recent past, as it was directly motivated by the political opportunities in the middle of the clash between Federalists and Republicans as the presidency transited from John Adams to Thomas Jefferson,[[71]](#footnote-71) prompted stark contestation. The terms of the debate introduce much of the materials understood under the rubrics of “judicial supremacy” and “departmentalism,” both of which continue to stir controversy until today.[[72]](#footnote-72)

Attacking the new custom heads on, Thomas Jefferson argued that “ultimately” what “must […] sustain the court in public confidence is the character and independence of the judges.” Henceforth, why should “they sculk from responsibility to public opinion, the only remaining hold on them, under a practice first introduced into England by Lord Mansfield?” Why not let every judge give “the only evidence they can give of fidelity to his constitution and integrity in the administration of its laws; that is to say, by every one giving his opinion seriatim and publicly on the cases he decides[?]” “Let him prove by his reasoning[,]” Jefferson underscored, “that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor. Thrown himself in every case on God and his country; both will excuse him for error and value him for his honesty.”[[73]](#footnote-73)

Jefferson found in Joseph Story’s *Commentaries* one fierce rebuke,[[74]](#footnote-74) just as Marshall was submitted to a process of ascension. Of course, Marshall’s reputation underwent oscillations across the years.[[75]](#footnote-75) Yet, as the correspondent of the *American Law Register* described, during the term of 1853-1854, as the US Supreme Court was established in the Capitol’s basement, “[i]n an alcove back of the seat of the Chief Justice and nearly up to the ceiling is a small portrait of Chief Justice Marshall – the only ornament… except a representation of the scales of justice worked in marble, on the opposite side of the room.”[[76]](#footnote-76)

Story’s *Commentaries* opens consecrating Marshall’s birth as an act of providence. More importantly, it mobilized much of the same resources hinted in Jefferson’s frivolous remissions to personality and God. It does so, however, in the complete opposite direction. Independently on how one assesses the sources concerning the relationship of the founding generation to religion, or how religiously or irreligiously they conceived of “the character of the Constitution and American republican government[,]”[[77]](#footnote-77) it appears to be certain that in the middle of the nineteenth century leading interpreters managed to paint the American Revolution, Constitution, and republican government in godly colors. Story is, arguably, one of its most prominent representatives, as he deploys a manifold of rhetoric instruments – what Blumenberg calls *Wirkungsmitteln[[78]](#footnote-78)* – to promote “constitutional adjudication” as a mirroring of the convention of 1787, something which contributed to the stabilization of the court’s proceedings, centered on the ceremonial artifact of “constitutional personality,” and the applicability of stare decisis in the realm of constitutional adjudication.[[79]](#footnote-79)

Of the many instances composing Story’s book, I would like to focus on two. A comprehensive analysis of his work takes place in the second part of this thesis.

First, Story quotes Marshall’s *McCulloch v. Maryland* (1819)[[80]](#footnote-80) recurrently, in support of most of the semantic incisions he is developing. He does so openly not only when discussing technical questions, such as the implied powers doctrine laid in McCulloch, but also indirectly when engaging the question of the nature of the Constitution as an instrument, and, consequently, what is its “object,” or “design,” which should be the “constant reference” for its interpretation. Not surprisingly, then, *McCulloch v. Maryland* is framed as one “solemn occasion,” the kind of occasion that calls for expressive language.[[81]](#footnote-81) The Constitution, Story contends, is a fundamental law, “as the people have named and called it, truly a constitution; and they properly said, ‘We, the people of the United States, do ordain and establish this constitution,’ and not, we, the people of each state.’ And this exposition has been sustained by the opinions of some of our most eminent statesmen and judges.”[[82]](#footnote-82) Although the people’s opinion was properly said, there is a second form of opinion we must attend to, the opinion of the Constitution’s visible saints.

Consider an exemplar of an editorial genre whose popularity is beyond doubt, namely, books written by consolidated legal scholars who account for a Supreme Court’s performance in a time span of more or less fifteen years, having as their loadstar each Justice’s “personality’s” contribution to constitutional law. The famous US constitutional scholar Lawrence Tribe alongside then Supreme Court clerk Joshua Matz wrote one of those books. It comprehends right past the cover three pages of “additional praise” with excerpts stemming from different readerships. At a certain point, Tribe and Matz state apropos of the First Amendment how certain Justices forged its values into “constitutional dogma” from “fragments of text and history, their own experiences, and some bold ideals.”[[83]](#footnote-83) I approach this way of framing the outcome of the relationship between constitutional text and constitutional adjudication as having in a judge’s personality its main semantic artifact, which centers the attention of Court observers and organizes their interpretive efforts. I show that this can be traced[[84]](#footnote-84) to the reoccupation masterfully enforced and endorsed by Joseph Story of the singular Puritan view on how the human domain and the divine realm stood vis-à-vis each other.

As US historian Edmund S. Morgan tells us, the Puritans broke with Calvinist doctrine on the separation between the two cities. The exercise of religion in New England’s shores prompted the emergence of the belief on how certain members of a godly community presented to their brethren a touch of saving faith, of the coming of the Kingdom of God. They did so through their life-long strive for justification, the subject of a ritual later named the “conversion narrative.”[[85]](#footnote-85) Of crucial importance for the narrative, to the point of attaining the status of a liturgical morphology, was the emphasis on one’s sins, failures, and imperfection, the acknowledgment of which provided the testimony of one’s deep belief in God’s providence.[[86]](#footnote-86)

That Story was well-versed in these semantic patterns can be easily verified in many of his publications, among which *History and Influence of the Puritans*, a discourse pronounced in 1828 to the Essex Historical Society. The text is particularly interesting by dint of how Story manages to transform the history of New England, the records of which “li[e] far within the reach of the authentic annals of mankind,”[[87]](#footnote-87) into a foundational myth by way of framing it precisely as a conversion narrative. The Puritans, Story underlies, are “frail, fallible men” who left “behind solid claims upon the reverence and admiration of mankind[,]” in reason of how “they acted up to their principles, and followed them out with an unfaltering firmness. […] Amidst the temptations of human grandeur, they stood unmoved, unshaken, unseduced.” Because of their “moral courage,” “present dangers” looked “as though they were distant or doubtful[.]”[[88]](#footnote-88)

Accordingly, as Story had before him the strife between Andrew Jackson and John Marshall,[[89]](#footnote-89) the significance of consecrating the difference between the figures of the politician and the judge while advancing the latter’s importance for politics was beyond doubt. If not for the good works of the righteous, the “moral courage” judges inherited from the Puritan founders, those bulwarks of rights and liberties, who deserve the title of guardians of the Constitution, “the pestilential breath of faction may poison the fountains of justice.”[[90]](#footnote-90)

Now, Joseph Story was perfectly aware of the doctrinal precedents concerning this simile. Some pages after, he quotes one of the most respectful testimonies, William Blackstone. According to Blackstone, the king “is as the fountain of justice and general conservator of the peace of the kingdom.” Blackstone moves quickly into unfolding the metaphor he just introduced to legally frame one of the king’s capacities.

By the fountain of justice the law does not mean the author or original, but only the distributor. Justice is not derived from the king, as from his free gift; but he is the steward of the public, to dispense it to whom it is due. He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complains; and in England this authority has immemorially ben exercised by the king or his substitutes.[[91]](#footnote-91)

That Joseph Story is dressing the judge in royal robes is, I believe, beyond doubt. However, what is perhaps most interesting comes into view when we consider one most probable antecedent to this semantic pattern, the organization of the relationship between fountain and spring, king and society, judges and “We, the people.” We read in the English of John Allen’s 1813 American translation of John Calvin’s *Institutio Christianae Religionis*, apropos of the sacrament of the Lord’s supper, the following:

For, as the water of a fountain is sometimes drunk, sometimes drawn, and sometimes conveyed in furrows for the irrigation of lands; yet the fountain does not derive such an abundance for so many uses from itself, but from the spring which is perpetually flowing to furnish it with fresh supplies: so the flesh of Christ is like a rich and inexhaustible fountain, which receives the life flowing from the Divinity, and conveys it to us.[[92]](#footnote-92)

Furthermore, there is sufficient ground, I believe, to propose Story envisioned the Constitution and its exposition in the kinds and ways of the two protestant sacraments, baptism and the Lord’s supper. What other most solemn occasions he would have literally at hand, after all, being the son of a religious, but liberal man, “an Arminian in principle,” and the nephew of the minister of his church, “a warm, and, indeed, over-zealous Calvinist”?[[93]](#footnote-93) Just as baptism has as its design the redemption of sin, the framing of the Constitution has its intent in superseding the old confederation. The Lord’s supper testifies, through the flesh and blood of Christ the promise of immortality, our participation in the kingdom to come.[[94]](#footnote-94) The exposition of the Constitution, through the flesh and blood of the Court and its visible saints, preserves the people’s rights, property, and liberty.[[95]](#footnote-95) Indeed, it would be on this account “that our law is justly deemed certain, and founded in permanent principles.”[[96]](#footnote-96) As such, it accords with the Constitution’s rephrased intention: “to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.”[[97]](#footnote-97)

Here, the material, temporal, and social dimensions of the semantics of constitutional adjudication overlap, intertwist, and convolute into rather tight knots. In other words, constitutional adjudication becomes evident. As the same visual element to two distinct sacraments, the Constitution has a double design, connecting its framing to its construction. The metonymical relationship between one and the other appears substantial to ensure the effect of evidence on what the judicial opinion came to be in its appliance. It was also crucial to consolidate the scripts and schemes of action delineating how the judicial opinion should be uttered, that is, performed, and its referentiality, and how it frames and explains information when communicating it.

What happens, as a Justice delivers the opinion for the Court, is to make us aspire “to that unity which [the People] enjoins upon us in [its]Supper; and as it makes us all be one in [it]self, so it should be our desire that we may all have one mind, one heat, and one tongue.”[[98]](#footnote-98) What Story does in his *Commentary* is to cut across this metonymical

condensation, confirming it by the way of typology, in the sense this word attains in the

tradition of scriptural exegesis, where typology means the method for establishing historical connections between certain events, persons, or things in the Old and the New Testaments, or, in our case, the constitutional moment and the Constitution’s exposition.

Story lays the ground for the role of typology in the fulfillment of the constitutional metonym as follows: “Let it not, however, be supposed, that a constitution, which is now looked upon with such general favor and affection by the people, had no difficulties to encounter at its birth. The history of those times is full of melancholy instruction on this subject, at once to admonish us of past dangers, and to awaken us to a lively sense of the necessity of future vigilance.”[[99]](#footnote-99) To interpret the Constitution, one must delve into the difficulties the founding generation faced, from the turmoil of the Confederation to the clash between Federalists and Anti-Federalists, which Story reframes as the Friends and the Enemies of the Constitution. Suddenly, it is as if the Constitution’s emergence configured a “conversion narrative” in itself. As Story admits, however, it is not easy to reduce all past dangers “into general heads; but the most material will here be enumerated, not only to admonish us of the difficulties of the task of framing a general government; but to prepare us the better to understand, and expound the constitution itself.”[[100]](#footnote-100)

I would like to suggest that such a way of organizing one’s arguments, in remission to the positions and matters at stake in a constitutional case, is still very much in practice in the US constitutional landscape. It is common place to mirror in a clear typological fashion – or rather, in an anachronistic way, as you adopt either an internal or external perspective – either the majority or the minority’s opinion, depending on whether you joined, concurred, or dissented, to some past decision considered to be anathema. Think of *Dredd Scott v. Sandford*, (1857) *Plessy v. Ferguson*, (1896) or *Lochner v. New York*, (1905) decisions that, in reason of their “opinion,” went “very deep into the foundations of the government itself, and expose[d] it, if not to utter destruction, at least to evils, which threaten[ed] its existences, and disturb[ed] the just operation of its powers.”[[101]](#footnote-101)

Hence, the contemporary semantic apparatus of which the judicial opinion is an important instantiation still appears to rely on the religious resources Story employed to bind and build the evidence of constitutional adjudication. Likewise, if opinions should be staged in kinds and ways similar to the Eucharist, it hardly makes any sense to have them seriatim. Instead, they should be one, whole, fixed, uniform, and permanent. Dissents may be allowed, but as prophecy,[[102]](#footnote-102) in resemblance to the practice of the same name first favored by the Separatists, and then by the New England puritans “of supplementing (or, in the absence of a minister, replacing) the sermon with speeches by members of the congregation.”[[103]](#footnote-103) In the words of Saint Paul as rendered by the English of the King James Bible: “And he gave some, apostles; and some, prophets; and some, evangelists; and some pastors and teachers; for the perfecting of the saints, for the work of the ministry, for the edifying of the body of Christ.”[[104]](#footnote-104)

## 3.2. The Redemption of *Verfassungswirklichkeit*

If rupture and continuity can be written in and built as glass, what to say of the organization whose architecture is made thereof? Putting aside the avidness for similitude animating the gaze of the constitutional comparatist,[[105]](#footnote-105) the circumstances which shaped the political opportunity for the establishment of constitutional adjudication in post-war Germany are strikingly different from those prevailing in 19th century United States of America. Interestingly, the very difference was often a theme of constituent discourse,[[106]](#footnote-106) answering to the pressure stemming from the Occupying Powers, that Germany of all places should forfeit its “authoritarian, eastern inclinations,” embracing instead the “Western tradition” of right, property and liberty.[[107]](#footnote-107)

As the offspring of the semantic struggle briefly addressed in the last section, it has already become a matter of tradition – whether Western, British, or US American is an issue of geopolitics – that right, property and freedom have their champion in the constitutional judge. Conversely, up to this day scholarship underscores how the moral building of *Verfassungsgerichtbarkeit* was erected in strange soil.[[108]](#footnote-108) And this is despite the contentious plausibility of constitutional adjudication during the Weimar era, whose epitome is, of course, the clash between Hans Kelsen and Carl Schmitt on who should be the guardian of the Constitution. But that should also be considered alongside the earlier controversy over the judicial review of administrative acts.[[109]](#footnote-109) This emphasis on rupture may well speak to how attractive was to entertain the notion of a lack of precedents to those involved in the German’s *Stunde Null*.[[110]](#footnote-110) Its persistence, in its turn, suggests a sort of work on myth, pulling along those who later handled the early generation’s words, actions, and works.

Paradoxically, however, shoulder to shoulder with the emphasis on the novelty of the Constitution’s great offering, constitutional actors often plead for a return to the Christian, European, and Western tradition which Germany once was a proud representative of.[[111]](#footnote-111) Unprecedented as it was, Nazism should be seen as an exception and a departure from German-Christian traditions. A deviation that could be ascribed as being prepared, insofar as the legal profession – and the “legal tradition” – is concerned, to the (Jewish?) rootlessness of the Weimar Constitution and legal positivism.[[112]](#footnote-112) Those actors regularly painted the *Grundgesetz* with godly and traditional colors, its preamble being a shred of forceful evidence thereof[[113]](#footnote-113) – while occasionally and notoriously even printing it with the typography evocative of the German Empire.[[114]](#footnote-114) Accordingly, notwithstanding their novelty, constitutional justices would be modern-day *Schöffen*. In its turn, their milieu, an authentic constitutional court should be considered as the touching stone which enables the words of the Constitution to remain one with its spirit.[[115]](#footnote-115)

Illustratively, even as Gerhard Leibholz feels the need to reach for English and American-English figments as he conceives constitutional judges as “lords” wise in the ways of “statesmanship,”[[116]](#footnote-116) the materialization thereof takes its cue from one rather curious mythical overlapping. Namely, between the early modern Italian judicial attire,[[117]](#footnote-117) inspiring the garment of the German constitutional judge, and the office of the *Schöffen*,[[118]](#footnote-118) the communal judge who didn’t wear any special clothes beyond those related to his belonging to the upper strata of the commune’s citizens.[[119]](#footnote-119) The *Schöffen*’s representative, integrative force, in contrast to Bourgeoise judgeship, was highlighted in Leibholz’ Weimar-era monograph.[[120]](#footnote-120) Hence, in order to weave into fabric what Leibniz was arguing for in the fabric of his texts so that constitutional justices could appear as the modern-day *Schöffen* they are, one had to invent the clothes a *Shöffe* would wear, so that the present and the past could be bridged above the abyss of National Socialism.

Just as 200 years later 1787 still was the year of the *Miracle at Philadelphia*,[[121]](#footnote-121) the divine aura of the *Grundgesetz* didn’t wane over time. Consider the notorious example of Paul Kirchhof. Former constitutional justice, whose brother became later the Vice-president of the same court, and whose father was before a judge of the *Bundesgerichtshof*, Kirchhof is also the co-editor of the very influential, multi-volume handbook on *Staatsrecht*. Amidst his endeavors to attach the dogmatic image of “constitutional identity” to art. 79, paragraph 3 of the German Constitution, in order to subtend the expansion of its reach from constitutional amendments to “constitutional shifts” [*Verfassungswandlungen*],[[122]](#footnote-122) Kirchhof faces the issue of what endows a constitution with its validity.

For Kirchhof, the validity of a Constitution is a threefold phenomenon. The “realization and forms of the constitution in the sources of knowledge of the constitutional document are based on the constitution-giving authority.” Its enforcement, upon “the majoritarian agreement over a reliable constitution.” And “the function of the constitution as a stabilizer of the state and as a measure of control” would rather rely “on its rationality and righteousness.” What speaks for the evidence of this threefold sustenance? In Kirchhof’s words, the fact that “[t]he ten commandments came into validity because they were spoken with the authority of the Lord, written in the reliability of stone tablets, and their contents were evidently righteous.”[[123]](#footnote-123)

Is it difficult to hear in such instrumentalization an echo of Rudolf Smend’s portrait of the *Verfassungsrichter* as akin to the judges of the Old Testament? For Smend, the Court’s praxis of “politically educating the German citizens” “adds stone after stone to the fundament of the basic law.”[[124]](#footnote-124) While Kirchhof’s contribution dates from 1987 and Smend’s from 1962, the fact is that more than 30 years before Smend would insist that a Court shouldn’t and couldn’t have anything to do with the bulwarks of constitutional law, even a Court that signs its rulings “in the name of the People.”[[125]](#footnote-125) Between one and the other stands the *Statusdenkschrift*. In contrast to *Marbury v. Madison*, in line with a comparison occasionally pursued by German constitutional scholarship,[[126]](#footnote-126) the *Bundesverfassungsgericht*’s exertion towards self-empowerment is rarely the subject of celebration, scholarly or otherwise, while what it made possible, Karlsruhe as we know it, obviously is. One of its first steps in this direction was in the form of a report submitted to his judicial peers, written by the exiled constitutional scholar, and now constitutional judge Gerhard Leibholz.

Often described as the “last of the constitutional organs,” by dint of the fact the statutory regulation of its structure and procedure was the subject of strong controversy, its establishment taking place only on September 1951,[[127]](#footnote-127) it didn’t take long for the full implications of its status as such to become once again the matter of dispute. The manifold organizational consequences, ranging from procedural rules to administrative law, Gerhard Leibholz managed to connect and frame as direct implications of the status of the *Bundesverfassungsgericht* as a constitutional organ is rather impressive. Interestingly, this very feature would also be the subject of contention, as the majority of the Court’s justices, following Leibholz’s reasoning, collide with Konrad Adenauer’s ministry of justice, especially as the latter claimed to exert some control on the Constitutional court’s administrative and financial affairs,[[128]](#footnote-128) having on its side none other than the Weimar democrat Richard Thoma.

As carefully scrutinized by Oliver Lembcke, out of the documents composing the controversy on the status of the Federal Constitutional Court, notwithstanding Thoma’s challenge mentioned above, fellow justice Willi Geiger’s and the Court’s president Hermann Höpker-Aschoff’s stances should be considered as alternative “takes” to the significance and organizational outline of constitutional adjudication. Of interest is precisely why they were pretermined vis-à-vis Leibholz’s proposal.[[129]](#footnote-129) Notwithstanding the quality of Lembcke’s well-known analysis, to portrait the force of Leibholz’s argument as an upshot from its “middle ground” misses much. It overlooks the rhetoric of reoccupation fully operative as Dietrich Bonhoeffer’s[[130]](#footnote-130) brother-in-law pursues to anoint the Court as a kind of *sanctorum communio*,[[131]](#footnote-131) while here and there already submitting such efforts to rationalizations. In contrast, neither Höpker-Aschoff nor Geiger ventured into such enterprise.[[132]](#footnote-132) And even though Leibholz’s attempt to paint the Court as a *sanctorum communio* was highlighted and heavily criticized by Thoma, in hindsight one can hardly dispute his critique was to no avail.[[133]](#footnote-133) What speaks to the pregnancy of Leibholz’s vision of the Constitution Court as the main player in the process of political integration, with full autonomy in terms of administrative and financial matters? Once again, a comprehensive analysis must wait, as I turn now to just two instances of Leibholz’s rhetoric ensemble.

Amidst his engagement in the resistance to the Nazi regime, while writing his unfinished masterpiece *Ethik*, Bonhoeffer came to one bold conclusion. Both Christ and recent events – who and which, the theologist asserted, are always intertwined as history[[134]](#footnote-134) – demanded a confrontation with what he portraited as the “colossus” of a “great part of the traditional Christian-ethical thinking.”[[135]](#footnote-135) After the epoch of the New Testament, Bonhoeffer argues, the fundamental idea of Christian ethics pivoted on the collision of two spaces, “one godly, holy, supernatural and Christian, the other worldly, profane, natural and unchristian.”

As one of the major consequences of the “Two-Realms Doctrine,” which Bonhoeffer saw manifested in the stance advocated by the Lutheran Church after 1933, the Church should refuse itself to take responsibility for wrongs perpetrated in the political realm.[[136]](#footnote-136) This line of reasoning was denounced by Bonhoeffer as supporting the position that God’s will would bind his flock to the “natural order,” namely, “family, people, race (that means, a context of blood).”[[137]](#footnote-137) To him, this would reduce God’s reality [*Wirklichkeit*] to one among others. Therefore, as Christianity renounces the world, “it decays into the unnatural, the unreasonable, devilment and despotism.”[[138]](#footnote-138)

For Bonhoeffer there were two realms, but not as two static, untouchable spaces. The challenge is how to think of this difference without falling back into its spatial, static representation.[[139]](#footnote-139) In Christ was posited “the unity between the reality of God and the reality of the World,” whose actualization “time after time” takes place in humans.[[140]](#footnote-140) “It belongs to the revelation of God in Jesus Christ the seizure of space in the world.” As God “in Jesus Christ claims space in the world,” “he envisages this narrow space alongside the whole reality of the world together, revealing their ultimate foundations.”[[141]](#footnote-141) And, due to how Christ and the Church are essentially bounded – as his body was transferred to and continued as the *sanctorum communio* – “hence the Church is the place – that means the space – of Jesus Christ in the world, whose sovereignty of Jesus Christ over the whole world is testified and pronounced.”[[142]](#footnote-142)

The resonance of Bonhoeffer’s theological writings within the sphere of the law go beyond his family connections to Gerhard Leibholz.[[143]](#footnote-143) According to the political theorist Wilhelm Hennis, the pair *Verfassung* and *Verfassungswirklichkeit* would speak to an essential “passion.” This passion would be a constitutive part of German’s soil “since the reformation, the only German revolution.” It pivots on the centrality of the distinction between “faith and sins, salvation and depravation, light and darkness.”[[144]](#footnote-144)

Hence, in Leibholz the connection between this passion and constitutional doctrine finds one stark articulation. As one reads Bonhoeffer’s ethical reflections in comparison to Leibholz’s report on the status of the *Bundesverfassungsgericht*, it is difficult to overstate their resonance. Leibholz affirms that the conflict between “the irrational dynamics” of politics and the “static-rational essence” of law, the collision between existentiality and normativity, nature and ethical reason would have in constitutional law and constitutional adjudication its “essential imprint.”[[145]](#footnote-145) In doing so, Leibholz questions the validity of a principle enunciated by Weimar’s *Staatsgerichtshof*. Following this principle, due to the Court’s concern with the application of objective law, adjudication shouldn’t have into consideration “the political consequences of its verdicts.”[[146]](#footnote-146) For Leibholz, the complete opposite is the case. And that is in reason of both Bonn’s *Grundgesetz* and the experience of the Weimar Republic.

Following both, one must conclude it is the constitutional judge’s “duty” – one could say his *Mandat Gottes*[[147]](#footnote-147) – to have within his attention the political consequences and effects of his decisions. The Constitutional Court as a “Creature of the Constitution”[[148]](#footnote-148) is the Constitution’s place within the political realm, seizing it as a whole and laying down its ultimate foundations.[[149]](#footnote-149)

Thoroughly operative therein, I would suggest, is the latent identity between the two ministries of Church and Justice, whose counterfeit absence from worldly, political affairs during the Weimar Republic led judges and priests into the madness of National Socialism. As Leibholz mobilizes “Weimar” as an argument, in line with what the scholarship has identified as the singular historical signature of this generation to its recent past,[[150]](#footnote-150) he suggests that what could be once obscured due to the ambivalences of the Weimar constitution cannot be anymore. Namely, how the *Bundesverfassungsgericht*, although a judicial body, is equally an institution with its feet in the political domain, wherein it assumes its role of “the guardian of the Constitution.” As the Court intervenes into the “natural political process of integration,”[[151]](#footnote-151) it does so that although “[*w*]*ir sehen jetzt durch einen Spiegel in einem dunklen Wort, dann aber von Angesicht zu Angesichte. Jetzt erkenne ich’s stückweise; dann aber werde ich erkennen, gleichwie ich erkannt bin.*“[[152]](#footnote-152)

# 4. “The Lord wraps himself in light as with a garment:” the Bible after precedent and constitutional doctrine

Hans Blumenberg’s approach to the dynamics of reoccupations guides our gaze out of the great questions and hopes inherited from the vanishing epoch towards considering the possibility of whether such heterogenous materials could shape and influence the value of the novel answers. These great questions and hopes are transmitted as a mortgage of problems requiring the work of rhetoric and instrumentalization in the absence of which one could not begin anything. Communication ceases without fascination. Yet, could eventually fascination affect and transform the nature of communication? Of course, the emergence of Constitutions, constitutional adjudication, and Constitutional Courts pivot on extremely complex context of effects, religion being just one variable among many others. Yet, as Constitutions are consecrated as Holy Scriptures, Justices as Visible Saints, and Constitutional Courts as the *sanctorum communio* in which a Constitution seizes the domain of politics, whether, how, and when these religious resources affect the formation of Constitutional Courts’ communicative structures is of great importance.

Interestingly, in parallel to – but also in direct contact with – both Courts’ undertake for self-empowerment, respectively, in 19th century United States and 20th century Germany, various scholars quarreled on what could be framed across law-worlds as the “judicial-methodological” relationship between the Bible and the Constitution. This speaks once more to the force of the religious spheres in both settings, despite the temporal and spatial distances separating each circumstance. In other words, is the (Christian) Bible a valid source of law, especially insofar as the expounding or application of the Constitution is concerned?

Without a doubt, the fact that in both instances the prevailing answer was affirmative gives much food for thought. Such pious arguments and admonitions shouldn’t be quickly framed as falling outside the strict domains of proper legal reasoning. Otherwise, as one main consequence one would miss the semantic chains submitting these positions to distinct iterations and translations as they cross from one communicative unity or episode to the other, as, say, from a more “ethical” essay to a “technical” and “doctrinal” commentary, or from judicial cases on blasphemy to constitutional treatises.[[153]](#footnote-153)

As I proceed to narrate these debates, I hope to show what kind of phenomena I think may contribute to flesh out what the “unfolding of immanent rationalities” have to do with constitutions, bibles, and constitutional adjudication. One note of caution, however. I intentionally chose to construct the issue as apart from those directly related to religious behavior, in the sense of religious freedom, for instance, or state neutrality – about which, of course, the literature is huge. That notwithstanding, I suggest how the resolution of such debates regarding how Constitutions and Bibles should be read in face of each other can be traced up to the ways later decisions on religiously relevant behavior were taken.

## 4.1. The Bible and the Common Law

Blasphemy, Sunday laws, and explicitly non-Christian organizations brought before 19th century US courts, from local to state to the US Supreme Court itself, again and again, what pious and patriotic elites could hardly frame otherwise: is Christianity part, or even the foundation of the law of the land? Whether they answer it positively, praising the dignity of precedent or the benefits of public religion, or negatively, seeing in it a trace of the tyranny of the English crown (or even English judges), the atmosphere of careful rhetorical acrobatics – going from James Kent[[154]](#footnote-154) and Joseph Story[[155]](#footnote-155) to David Brewer[[156]](#footnote-156) – betrays how we are before the lock, stock, and barrel of reoccupations.

Through the somehow belated fortune and subsequent disappearance of this common law maxim – “Christianity is part of the Common Law” –,[[157]](#footnote-157) one can read, on the one hand, the establishment of positivity as the main criterium of selection and, accordingly, the increasing autonomy of law as a partial social system.[[158]](#footnote-158) On the other, the intrinsic developments of the religious system as located in 19th United States of America, with the multiplication of confessions, pivoting, as mentioned above, on general trends of professionalization, traditionalization (in the openly ambivalent sense of inventing new traditions and recovering lost ones), disciplinarization and the slow, but crucial disentanglement of some of the ties holding together religious institutions and landholders and slave owners.[[159]](#footnote-159)

Of concern to my purposes is how this issue appeared to an old foe of the maxim, who was both a landholder and a slave owner, now resolutely secluded in his villa at Monticello.[[160]](#footnote-160) Although hardly the only one, Thomas Jefferson was an early and important contender of the maxim’s validity, attacking it as someone skilled in the common law would, namely, by tracing and challenging its supporting precedents. His challenge came with the publication of his letter to the diplomat and writer John Cartwright in the *London Nation* and the *Boston Daily Advertiser*.[[161]](#footnote-161)

Commenting on Cartwright’s book *The English Constitution Produced and Illustrated*, Jefferson introduces the issue while remarking how he rejoiced in finding “a formal contradiction, at length, of the Judiciary usurpation of legislative powers; for such the judges have usurped in their repeated decisions that Christianity is part of the Common law[.]”[[162]](#footnote-162) As Jefferson reviews the “chain of authorities hanging, link by link, one upon another, and all ultimately on one and the same hook,” beginning on 1458 and reaching Mansfield in 1767, all of which would ultimately depend upon “a mistranslation,” he ends up defying “the best read lawyer to produce another scrip of authority for this judiciary forgery[.]”[[163]](#footnote-163)

Now, while it is true US courts have been ruling over the persecution of blasphemy, confirming convictions with occasional reference to the maxim since 1811, the conduct was often proscribed through statutes across the colonies throughout the preceding century. While the state constitutions with their clauses on the relationship between Church and State offered a plausible argument, not even Jefferson would challenge Daniel Webster’s claim that (beyond eventual mistranslations) “every thing declares it. […] The dead prove it as well as the living. The generations that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all, proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties […] is the law of the land.”[[164]](#footnote-164)

What Jefferson could, nevertheless, answer is that neither “the plain temple of the Quaker” nor “the log church of the hardy pioneer of the wilderness” count as precedents. But wouldn’t they count as an expression of the popular will, of something “written in their hearts” (to borrow a phrase Jefferson employed in the very same letter)?[[165]](#footnote-165) In this vein, how could the maxim be an expression “of the Judiciary usurpation of legislative powers”?

Maybe Jefferson was hinting at something more comprehensive than mere blasphemy convictions. Arguably, the abruptness of the way he frames the issue gives room to suggest he felt the overlapping of the instrumentalization inherent to reoccupations and the consecration of constitutional adjudication, along with some of the features and undertones associated with “judicial supremacy.” Be that as it may, Joseph Story decided to openly address Jefferson’s challenge, although some years after the latter’s death. In a short essay published in *American Jurist* in 1833, Story begins by naming Jefferson, his letter, and the ultimate reference to “Year Book, 34 Henry VI. 38, 40.”

After quickly expounding “the substance of the case,” Story turns to the statement pronounced by judge Prisot, upon which Jefferson built his case of judicial forgery, then in “law French,” once the ruling idiom throughout the King’s courts: “A tiels leys, que eux de sainte Esglise ont en auncien Scripture convenit pur nous a doner credence, quia ceo est comen ley, sur quell toutes maners leys sont fondues[.]” In Story’s self-styled “literal translation:” “As to those laws, which those of holy church have in ancient scripture, it behooves us to give them credence, for this is common law, upon which all manners of laws are founded[.]”[[166]](#footnote-166) For Jefferson, “auncien scripture” couldn’t refer to the Holy Scriptures, as subsequent cases assumed, “but if this be so,” Story countered, “how could Prisot have said that they were common law, upon which all manners of laws are founded? Do not these words suppose that he was speaking of some superior law, having a foundation in nature or the Divine appointment, and not merely a positive ancient code of the church?”[[167]](#footnote-167)

Some years before, in 1829, as he delivered his inaugural speech as Dane Professor of Law at Harvard University, Story already seized the opportunity to touch upon the subject. As he then phrased it, in a sequence of laudations to the Common law and its study,

[o]ne of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines. And, notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true as it is beautiful. There never has been a period in which the common law did not recognize Christianity as lying at its foundations.[[168]](#footnote-168)

Should one substitute “Christianity” for, say, “Constitutionalism” at the outstart, from which one seeks the sanction of rights and by which one endeavors to regulate one’s doctrines, the very first sentence hardly would deserve any criticism from contemporary audiences. The very fact, however, that Story could conceive of Christianity as such, taking the Bible alongside the Constitution as he delved upon the expounding of the latter, thinking of Puritan saints as he thought and wrote about constitutional guardians, suggests the influence of such materials’ immanent rationality.

Be that as it may, as the maxim’s popularity vaned, Thomas Cooley could already state in 1868, as he dedicated an entire section of his treatise on the *Constitutional Limitations*, that while in a sense Christianity is part of the law of the land, in terms of its underlying morality, in another sense, as to the entitlement of courts “to take notice of and base their judgments upon [Christianity],” it is not. Yet, “except so far as they could find that [Christianity’s] precepts had been incorporated in, and thus become a component part of, the law.”[[169]](#footnote-169)

When Justice White delivered the opinion for the Court in *Bowers v. Hardwick*,[[170]](#footnote-170) the audience assembled within the Marble Palace heard the following statement: “We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case.”[[171]](#footnote-171) As some lines below show, in reference to the doctrine on the Fourteenth Amendment and the role of historical precedent in constructing which rights are covered therein, White underscored how “proscriptions against that conduct have ancient roots.” In his concurrence, in its turn, Chief Justice Burger felt the need for excavating them: “Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31.” As Burges continued in his review of “millennia of moral teaching,"[[172]](#footnote-172) it is tempting to wonder whether he imagined each of the US Supreme Court’s bronze doors’ panels – among which Justinian can be found, next to Marshall and Story – whispering in “constitutional terms” against the rights regarding private sexual conduct between consenting adults.

## 4.2. The Bible and *Grundrechte*

As we turn to Germany, the necessity of reoccupation went hand-in-hand with the mediality of the reoccupied claims, semantic patterns, and media. Either in anticipation or in the wake of the *Grundgesetz*, legal scholars clashed over the possibility of appealing to natural law principles, rules, and measures amidst the travails of constitutional adjudication. In line with the massive number of publications by many of the same actors preceding this particular debate, who mostly pleaded a “return to Christianity” in face of “the greatest sin of legal positivism”[[173]](#footnote-173) as the guiding ethical thread for Germany’s lawful future. Although some were more cautious in stating it, attempting to submit such thrust to the caveats of rationalization, there is hardly any doubt what the struggle over the features of the semantic apparatus meant materially, structurally and methodologically. The question, therefore, was: should we have the Bible opened alongside – or even over – the Constitution as we interpret the latter? Depending on the circumstances, should we maintain the first open while actually closing the latter?

To date, Birgit von Bülow has probably offered the most comprehensive account of this debate, notwithstanding the somewhat questionable choice to separate between “ethical and religious writings,” “State law contributions,” and “technical, doctrinal commentaries.”[[174]](#footnote-174) What Von Bülow paints as clear methodological frontiers are much closer to fault lines, which not rarely became the subject of fierce dispute across publications, but also during the meetings of the *Vereinigung der Deutschen Staatsrechtslehrer*.[[175]](#footnote-175) That notwithstanding, Von Bülow distinguishes three main positions on this quandary. From 1945 to 1952, scholars ranged between the enthusiastic, “moral-theological” assertion of the validity of referring to and deploying “super-positive values, maxims, and rules” in the course of constitutional interpretation and application,[[176]](#footnote-176) and its complete, “positivistic” denial.[[177]](#footnote-177) As a sort of middle ground, one would have the stance which entertained the restrained appeal to a “super-positive order,” insofar as it has been more or less incorporated by the *Grundgesetz*, especially by dint of its preamble and Article 1.[[178]](#footnote-178) Some of the most preeminent problems of the day were in one way or another touched upon within the gravitational field of this struggle over constitutional doctrine. Illustratively, as constitutional scholars clashed over the existence, content, and valence of an “unwritten Constitution” underlying and fulfilling the written one, the order of the day went from the ambiguous status regarding the sovereignty of and popular participation in the constitution-making process to the reasons for the failure of the Weimar constitution, alongside what should be the task of *Staatsrecht*, and even the issue of German’s remilitarization.

In hindsight, the tradition of commentary regarding both normative texts and much of the *Bundesverfassungsgericht*’s early decisions[[179]](#footnote-179) give little room for doubt over which position prevailed. As the compromise between the two extremes was settled, rather peculiar methodological requirements came to the fore. One reads in the preamble of the 1949 *Grundgesetz*, “the German people” exercised its *verfassungsgebenden Gewalt* (its constitution-giving power) “in conscience of their responsibility before God and humanity.”[[180]](#footnote-180) Consider the words of E.-W. Böckenförde, one worldwide famous constitutional scholar and former constitutional judge. Beyond the debate on the legal force of the preamble, as its writing suggests, the fact that the people are responsible before God entails they can minister their power of decision in one way or another. Hence, “[G]od’s will as the highest law has not in itself political or legal validity, but only when and as long as the people make the will of God also content of their will.”[[181]](#footnote-181) Undoubtfully, the issue as such and the phrasing of its solution may sound as strange and unproper to foreign ears. Interestingly, that it is a matter of hearing, and not reading, is something emphasized by Paul Kirchhof: “The presuppositions of the Constitution [*Verfassungsvoraussetzungen*] are not printed in the constitutional document, but they are addressed [*angesprochen*].”[[182]](#footnote-182)

Underscoring the role played by such constitutional presuppositions, while also facing the methodological problem of where to find and how to work with them, is something rather common in authoritative literature on *Staatsrecht*. Quite often, this common place makes room for the rhetoric of worldification. The surmount of interpreting the Basic Law would demand something akin to the doctrine of faith, in the sense pleaded by Luther concerning biblical exegesis, according to Klaus Stern.[[183]](#footnote-183) In the words of the equally famous Konrad Hesse, in one much celebrated and discussed contribution, and in admittedly more secular terms, there is a need for willing the Constitution, subtending its normative power.[[184]](#footnote-184) Occasionally referring to the parliamentary debates over the drafting of the *Grundgesetz*, even contemporary doctrinal commentary highlight how the representatives understood the document’s fundamental rights’ articles as declaring, instead of constituting something, in reference to *überpositiver* principles. As one opens the authoritative *Maunz/Dürig Kommentar*, in the blink of an eye, one goes from the head of the page, stating the wording of the inviolability of human dignity which opens the Basic Law, to a discussion of how humanism and Christianism stand as the two main columns supporting the article, and finally to how Thomas Aquinas’ understanding of human dignity carries some weight over the meaning of this central, basic right.[[185]](#footnote-185)

As recent and ongoing debates on the constitutional foundations underpinning the current German integration policy prove,[[186]](#footnote-186) a discussion pursued by way of footnotes full of historiographical monographs, Latin and historical sources, this goes beyond German scholarly erudition. Should “German” human dignity by will of its people (but then, the people who?) be “Christian” human dignity or even “Christian-Humanist” human dignity, then handshakes are an ingredient feature of being a German citizen. Consequently, the religious commandment to abstain from touching another person’s hands following marriage are impeditive to acquiring German citizenship.[[187]](#footnote-187) Following the theoretical armature therein proposed, one way of accounting for the conditions of possibility of this state of affairs is to grasp it as the bursting out of the religious undertones attendant to German constitutional semantics, the unfolding of immanent rationality.

# Concluding remarks

Questions such as these regarding the validity or the nature of the Constitution can be approached as indirectly presenting at the social dimension of meaning the problem of the interdependency between law and politics, whose interruption is one crucial task. In this sense, we can see constitutional judges and scholars constructing the court’s frame of reference regarding politics and its environment in general while consolidating constitutional courts as an embedding organization of law’s function. Further, , those discussions touch the semantic apparatus subtending the performance- and audience-roles thereof, namely, constitutional judges and its public. One can also note how the debates carried on the level of doctrine and constitutional theory shaped the medial substrate of constitutional adjudication, from judicial attire to court architecture.

On the one hand, Joseph Story’s reoccupations rhetorically anoint the novel practice of unanimous judicial opinions. As he strives to mirror constitutional adjudication with the Philadelphia Convention, stare decisis attains the contours and authoritativeness of constitutional making. Comparatively, Gerhard Leibholz contributes to the consolidation of the “integrative role” of constitutional adjudication, consecrating the comprehensiveness of the court’s competence, but also the “objective character” of the main vehicle to reach it, the constitutional complaint. On the other, Story’s depiction of constitutional justices as Visible Saints fits the hanging of Marshall’s portrait on the ceiling of the Court’s chamber. In its turn, Leibholz’s take on the *Schöffen* meshes well with the Court’s scarlet garments. Notice, however, that the relationship between the social and material dimensions, constitutional doctrine, and the details of the courtroom’s atmosphere, can also take place in reverse. The sculpture adorning the *Bundesverfassungsgericht*’s courtroom, a block of massive stone out of which an eagle is partially carved, resonates with Kirchhof’s allusion to how constitutions in light of their prefiguration in the ten commandments should be also approached as if their identities were written in stone.

The work on myth has always already begun, in a forcefield wherein attempts at rationalization do not always have the upper hand vis-à-vis re-mythifications. As the debates on the relationship between Bibles and Constitutions show, what was once meant frivolously can be later piously announced. Accordingly, such potentiality for “historical misunderstandings” can be theoretically ascribed to a material’s mediality, the unfolding of its “immanent rationality.” As constitutional-legal forms are ornated with religious garments, it may well happen that the legal value underpinning whatever is of relevance to the operations therein starts to appear under a different, godly light.

1. This chapter profited from the readership and commentary of Carolina Moulin, Gwinyai Machona, Luc Heuschling, Gustavo Zatelli, and Kaius Tuori. I’m thankful to all of them. While much of its merits derive from their engagement, suggestions, and criticism, all mistakes remain my own.

   Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt*, v. 6 (New York: Dodd, Mead Co., 1941) 124. For a discussion of this statement, see Sanford Levinson, *Constitutional faith* (Princeton: Princeton University Press, 2011) 30ff. [↑](#footnote-ref-1)
2. Gustav Heinemann, *Unser Grundgesetz ist ein grosses Angebot. Rechtspolitische Schriften* (München: Kaiser, 1989); Wilhelm Hennis gave a convincing interpretation of Heinemann’s discourse’s religious undertones (and overtones) in Verfassung und Verfassungswirklichkeit in *Die missverstandene Demokratie* (Freiburg: Herder Verlag, 1973). [↑](#footnote-ref-2)
3. I return to this on Chapter 2. For Luhmann’s theorization of semantics, see, in general, Niklas Luhmann, Gesellschaftliche Struktur und semantische Tradition, in *Gesellschaftsstruktur und Semantik*, v. 1 (Frankfurt a. M.: Suhrkamp, 1993. On the tryptych of variation, selection, and stabilization, see Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt a. M.: Suhrkamp, 1997). These criticisms have been first formulated by Urs Stäheli*, Sinnzusammenbrüche: Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie*, (Weilerswist: Velbrück, 2000) and in some of the contributions to the volume *Geschichte und Systemtheorie: Exemplarische Fallstudien*, ed. by Frank Becker, (Frankfurt/New York: Campus Verlag, 2001). [↑](#footnote-ref-3)
4. McCulloch v. Maryland, 17 U.S 316 (1819) 407 (emphasis in original). On the fortune of this formula, see David S. Schwartz, *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland* (Oxford: Oxford University Press, 2019). [↑](#footnote-ref-4)
5. Franklin D. Roosevelt, Address on Constitution Day, Washington D.C., September 17, 1937, available at https://www.presidency.ucsb.edu/documents/address-constitution-day-washington-dc. [↑](#footnote-ref-5)
6. As noted by H. Jefferson Powell, in The Principles of ’98: an essay in historical retrieval 80 *Vancouver Law Review* (1994) 689, 731. See also Mark Graber, Federalist or Friends of Adams: The Marshall Court and Party Politics, 12 *Studies in American Political Development* (1998) 229, 256ff. I’m thankful to Mike Banerjee and Gwinyai Machona for a discussion over this point during the Max Planck Summer Academy for Legal History 2022. [↑](#footnote-ref-6)
7. For this theoretical approach to religion, see Niklas Luhmann, *Funktion der Religion* (1999) and *Die Religion der Gesellschaft* (2002). [↑](#footnote-ref-7)
8. Hans Blumenberg, *Die Legitimität der Neuzeit* (2021) 88. [↑](#footnote-ref-8)
9. I’m drawing on Rudolf Schlögl’s approach to these two concepts. See Rudolf Schlögl, Historiker, Max Weber und Niklas Luhmann. Zum schwierigen (aber möglicherweise produktiven) Verhältnis von Geschichtswissenschaft und Systemtheorie, 7 *Soziale Systeme* 1 (2001). More recently, see Schlögl, *Alter Glaube und moderne Welt. Europäisches Christentum im Umbruch 1750-1850* (Frankfurt a. M.: Fischer, 2013). [↑](#footnote-ref-9)
10. Ibid., 378. [↑](#footnote-ref-10)
11. Edward Corwin, *Corwin on the Constitution, v. 1: The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President’s Power of Removal*, ed. by Richard Loss (Ithaca: Cornell University Press, 1981) 158. [↑](#footnote-ref-11)
12. On Verfassungspatriotismus, see, among others, Jan-Werner Müller, *Verfassungspatriotismus* (Frankfurt a. M.: Suhrkamp, 2010). I discuss this concept thoroughly on the second part of this thesis. [↑](#footnote-ref-12)
13. Blumenberg, *Die Legitimität...* 99. [↑](#footnote-ref-13)
14. In the words of Justice Kagan, who also served as solicitor general, oral argument is “a ton of fun,” Elena Kagan, *Conversation with Supreme Court Justice Elena Kagan*, C-SPAN, 20 September, 2012. Available at http://www.cspan.org/Events/Conversation-with-Supreme-Court-Justice-Elena-Kagan/10737434240. [↑](#footnote-ref-14)
15. As documented by Charles Warren, The Supreme Court in United States History, v. I (Boston: Little, Brown, 1922) 401-402. The hearings concerned the case *Vidal et al. v. Philadelphia*, 2 How. 127. [↑](#footnote-ref-15)
16. Bundesverfassungsgericht, *Jahresbericht 2021*, (Karlsruhe: Bundesverfassungsgericht, 2021) 35. [↑](#footnote-ref-16)
17. For instance, see Werner J. Patzelt, Warum verachten die Deutschen ihr Parlament und lieben ihr Verfassungsgericht? Ergebnisse eine vergleichenden demoskopischen Studie, 36 *Zeitschrift für Parlamentsfragen* 3 (2005). [↑](#footnote-ref-17)
18. Although the rating of the US Supreme Court reached a new historic low, the fact that it can be a subject of opinion polls alongside the presidency, Congress and so on, with individual Justices standing shoulder to shoulder with the President, tells much about how it attracts the public eye. *Confidence in Jeffrey M. Jones, U.S. Supreme Court Sinks to Historic Low*, Gallup June 23 2022, available at: <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>. On the relationship between the US Supreme Court and public opinion, see Barry Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2010) For a constitutional-theoretical reflection on opinion polls in the US law-world, see Bruce Ackerman, *The Decline and Fall of the American Republic*, (Cambridge: Belknap Press, 2013). [↑](#footnote-ref-18)
19. I borrow the expression from Pierre Legrand. Implicit, therefore, is his argument about the fabric of the law, and how it is composed of a manifold of traces, stemming from different domains and underlying the meaningfulness of any legal artifact. See, among others, Legrand, Foreign law: understanding understanding, *Journal of Comparative Law* 2 (2011). I prefer it to other more common expressions, such as “legal systems” or “legal orders” due to how the remission to “world” already suggests this reference to what subtends legal experience. [↑](#footnote-ref-19)
20. Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Cheltenham: Edward Elgar, 2018) 162 (“In the realm of political legitimacy, religion was superseded by constitutionalism.”) [↑](#footnote-ref-20)
21. See Olaf Blaschke, Das 19. Jahrhundert: Ein Zweites Konfessionelles Zeitalter, 26 *Geschichte und Gesellschaft* (2000) 38-75; further, id. (ed.), *Konfessionen im Konflikt. Deutschland zwischen 1800 und 1970: ein zweites konfessionelles Zeitalter*, (Göttingen: Vandenhoeck & Ruprecht, 2002). For a use of this “epochal signature” in legal history, see Pascale Cancik, Thomas Henne, Thomas Simon, Stefan Ruppert, Milos Vec, (eds.) *Konfession im Recht: Auf der Suche nach konfessionell geprägten Denkmustern und Argumentationsstrategien in Recht und Rechtswissenschaft des 19. und 20. Jahrhunderts*, (Frankfurt a. M.: Vittorio Klostermann, 2008). [↑](#footnote-ref-21)
22. On these threads, see Blaschke, Das 19 Jahrhundert…; for a reformulation of them from a systems theory’s inspired perspective, see Rudolf Schlögl, Differenzierung und Integration: Konfessionalisierung im frühneuzeitlichen Gesellschaftssystem. Das Beispiel der habsburgischen Vorlande 91 *Archiv für Reformationsgeschichte* 238-284 (2000). [↑](#footnote-ref-22)
23. As argued by Nathan O. Hatch, *The Democratization of American Christianity* (New Haven: Yale University Press, 1989). [↑](#footnote-ref-23)
24. See the contributions in Olaf Blaschke (ed.) *Konfessionen im Konflikt: Deutschland zwischen 1800 und 1970: ein zweites konfessionelles Zeitalter* (Göttingen: Vandehoeck & Ruprecht, 2002). [↑](#footnote-ref-24)
25. Blaschke, Das 19 Jahrhundert… [↑](#footnote-ref-25)
26. Robert McCloskey, *The American Supreme Court*, rev. by Sanford Levison, 6th ed. (Chicago: The University of Chicago Press, 2016) 54. [↑](#footnote-ref-26)
27. As, for instance, Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and his times* (New York, Riverhead Books, 2019); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996); G. Edward White*, The Marshall Court & Cultural Change 1815-1835*, Abridged Edition (Cambridge: Oxford University Press, 1991). [↑](#footnote-ref-27)
28. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, v. 4 (München: C. H. Beck, ) 217. [↑](#footnote-ref-28)
29. Uwe Wesel, *Der Gang nach Karlsruhe* (München: Karl Blessing, 2004); Justice Collings, *Democracy’s Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford: Oxford University Press, 2015). [↑](#footnote-ref-29)
30. See Joseph Isensee, Die Verfassung als Vaterland: Zur Staatsverdrängung der Deutschen in Armin Mohler (ed.) *Wirklichkeit als Tabu: Anmerkungen zur Lage* (München: R. Oldenbourg, 1986). [↑](#footnote-ref-30)
31. There is a growing literature on “law and architecture.” Although it is not the space to submit a review of this scholarship, whose focus on the disciplinary effects of space organization is insightful and inspiring, I note Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (New York: Routledge, 2011) and Jonathan Simon; Nicholas Temple (eds.) *Architecture and Justice: Judicial Meanings in the Public Realm* (New York: Routledge, 2013). I thank Jan Langemeyer and Michael Banerjee for these references. My approach, however, is deeply embedded in systems theory, and, as highlighted from the beginning, through its reception by early modern historiography, with the corresponding conceptual developments required to account for the primacy of “interaction” in communication and, accordingly, space. I return to this on chapter 3. [↑](#footnote-ref-31)
32. See Rudolf Stichweh, Inklusion in Funktionssysteme der modernen Gesellschaft, in Renate Mayntz, Bernd Rosewitz, Uwe Schmank, Rudolf Stichweh (eds.), *Differenzierung und Verselbständigung: Zur Entwicklung gesellschaftlicher Teilsysteme* (Frankfurt/New York: Campus Verlag, 1988). [↑](#footnote-ref-32)
33. Calvin’s Case 7 Coke Report 1a, 77 ER 377 392. [↑](#footnote-ref-33)
34. On the history of the US Supreme Court spatial index, see Katherine Fischer Taylor, First Appearances: The Material Setting and Culture of the Early Supreme Court, in Christopher L. Tomlins (ed.) *The United States Supreme Court: the pursuit of justice* (Boston/New York: Houghton Mifflin Company, 2005) esp. 378-380. [↑](#footnote-ref-34)
35. US Supreme Court, The Bronze Doors, Information Sheet, Office of the Curator, 11 Aug. 2021. Available at https://www.supremecourt.gov/about/BronzeDoors\_11-8-2021.pdf [↑](#footnote-ref-35)
36. The New York Times, ‘Error’ Found in Supreme Court, But It’s in the Art of a Door Panel; Scene Depicts Marshall Handing to a Fellow-Justice the Famed Madison Decision, but Jurist Represented Is Story and he Was Not Appointed to Bench Until 8 Years Later, July 5 1936. Available at https://www.nytimes.com/1936/07/05/archives/error-found-in-supreme-court-but-its-in-the-art-of-a-door-panel.html [↑](#footnote-ref-36)
37. Sources for the images below, from left top to right bottom: Photo available at <https://en.todocoleccion.net/postcards-america/postal-massive-sliding-bronze-doors-of-the-supreme-court-building-in-washington-d-c~x101850111>; Photo available at Supreme Court of the United States, Detect the Differences: John Marshall’s Portrait, available at <https://www.supremecourt.gov/visiting/activities/pdf/JM_Portrait_DD_Web_Version.pdf>; Photo available at <https://www.thoughtco.com/us-supreme-court-building-by-cass-gilbert-177925>; Photo available at https://hermonatkinsmacneil.com/2012/01/13/hermon-macneils-supreme-court-sculptures-moses-revisited/. [↑](#footnote-ref-37)
38. I substantiate this claim on chapter 3. [↑](#footnote-ref-38)
39. On the history of and for materials on the building’s construction, see Falk Jaeger (ed.) *Transparenz und Würde: Das Bundesverfassungsgericht und seine Architektur* (Berlin: Jovis, 2014) [↑](#footnote-ref-39)
40. Cornelia Vismann, *Medien der Rechtsprechung* (Frankfurt a. M.: S. Fischer, 2011) 40 (“One cannot imagine extremely enough the closure of a courtroom as it usually was in Kleist’s time. Often it is windowless, and otherwise the window does not enable a look to an outside. All that could remember within the courtroom to an outside is therefore banned.”) [↑](#footnote-ref-40)
41. See G. W. F. Hegel, Grundlinien der Philosophie des Rechts in *Werke*. v. 7 (Frankfurt a. M.: Suhrkamp, 1979) [§ 224] 375. [↑](#footnote-ref-41)
42. This is a rather widespread common place. See, in general, the four contributions to *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Frankfurt a. M.: Suhrkamp, 2019). See also Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht: Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgericht* (Berlin/Heidelberg/New York: Springer, 2007) 46ff (who traces the presence of this common place in the discourses and debates during the constitution-making process, while noting the references to the US experience as anchoring and offering the possibility of rupture). Interestingly, if not paradoxically, although German scholarship underscores the rupture constitutional adjudication meant vis-à-vis the “German tradition of adjudication,” it also likes to qualify the kind of constitutional court the Bundesverfassungsgericht would be the best representative of as an “authentic constitutional court.” See, for instance, Matthias Jestaedt, Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist in *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Frankfurt a. M.: Suhrkamp, 2019). [↑](#footnote-ref-42)
43. Stefan Korioth, Evangelisch-theologische Staatsethik und juristisch Staatslehre in der Weimarer Republik und der frühen Bundesrepublik in Pascale Cancik, Thomas Henne, Thomas Simon, Stefan Ruppert, Milos Vec (eds.) *Konfession im Rech*t (Frankfurt a. M.: Vitorrio Klostermann, 2009) 142. [↑](#footnote-ref-43)
44. Horst Bredekamp, Politische Ikonologie des Grundgesetzes in Michael Stolleis (ed.) *Herzkammern der Republik: Die Deutschen und das Bundesverfassungsgericht* (München: C. H. Beck, 2011). [↑](#footnote-ref-44)
45. Falk Jaeger (ed.) *Transparenz und Würde*… [↑](#footnote-ref-45)
46. The influence of confessions and the construction of cross-confessional alliances and understandings in German politics is a really convoluted subject. In this regard, I find Maria D. Mitchel’s work particularly helpful, *The Origins of Christian Democracy: Politics and Confession in Modern Germany* (Ann Arbor: The University of Michigan Press, 2012). [↑](#footnote-ref-46)
47. For the meaning of glass in the architecture of the Federal Republic of Germany, see Sabine Körner, *Transparenz in Architektur und Demokratie: Die Plenarbreiche des Deutschen Bundestags in Bonn und Berlin seit 1949* (Dotmund: Universität Dormund Bauwesen, 2003). [↑](#footnote-ref-47)
48. Daniel Damler, *Konzern und Moderne* (Frankfurt a. M.: Vittorio Klostermann, 2016) 266-272. [↑](#footnote-ref-48)
49. See, in general, Norbert Huse, Neues Bauen 1918 bis 1933 (München: Heinz Moos, 1975). [↑](#footnote-ref-49)
50. For a discussion of such traits of the Neues Bauen movement, see Tanja Poppelreuter, *Das neue Bauen für den neuen Menschen: zur Wandlung und Wirkung des Menschenbildes in der Architektur der 1920er Jahre in Deutschland* (Hildenscheim: Olms, 2007). On Paul Baumgarten, see Falk Jaeger (ed.) *Transparenz und Würde*. [↑](#footnote-ref-50)
51. Blumenberg, *Die Legitimität*… 60. See also below. [↑](#footnote-ref-51)
52. See, in general, Elizabeth Otto, Haunted Bauhaus. Occult Spirituality, Gender Fluidity, Queer Identities and Radical Politics (Cambridge: The MIT Press, 2019). For the cover of the manifesto, see Lyonel Feininger, Kathedrale, Woodblock print, Bauhaus-Archiv Berlin, 1919. [↑](#footnote-ref-52)
53. Johan van der Walt, When One Religious Extremism unmasks Another: Reflections on Europe’s States of Emergency as a Legacy of Ordo-Liberal De-hermeneuticisation 24 *New Perspectives* 1 (2016). [↑](#footnote-ref-53)
54. In his *Grundzüge der Rechtsphilsophie* (Berlin: De Gruyter, 1993), for instance, Helmut Coing recurrently refers to Walter Eucken, either to support his positions or for inspiration. On Coing’s background, see Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020). [↑](#footnote-ref-54)
55. Thomas Aquinas, Summa Theologiae, Suppl. Tertiae partis, art. I, ad sec., Quaestio 85 De claritate corporum beatorum. [↑](#footnote-ref-55)
56. Martin Luther, Von der Freiheit eines Christenmenschen in *Luther lesen: Die zentralen Texte*, ed. by the Office of the Vereinigten Eangelisch-Lutherischen Kirche Deutschlands (Göttingen: Vandenhoeck & Ruprecht, 2017) 57. [↑](#footnote-ref-56)
57. Id., Über die Gefangenschaft der Kirche in *Luther lesen*, 70. [↑](#footnote-ref-57)
58. Yet, on Luther and Thomas Aquinas, see, among others, Denis R. Janz, *Luther on Thomas Aquinas: The angelic doctor in the thought of the reformer* (Stuttgart: Franz Steiner Verlag, 1989). [↑](#footnote-ref-58)
59. For a tremendously well-researched account of this process, see Hans Maier, Katholische Sozial- und Staatslehre und neuere deutsche Staatslehre, 93 Archiv des öffentlichen Rechts 1 (1968) 1-36, esp. 37. [↑](#footnote-ref-59)
60. Sources for the images below, from left top to right bottom: Bundesarchiv Bild 183-42346-0003, available at <https://www.lto.de/recht/feuilleton/f/rechtsgeschichte-reichsgericht-75-jahre-urteile-banalitaet-rechtsstaat/>; Photo available at Bundesverfassungsgericht, *Jahrbericht 2021*… 21; Photo available at <https://www.kunstundjustiz.bund.de/haus-saal/>; Photo available at Bundesverfassungsgericht, *Jahrbericht 2021*… 23. The photographs on the left correspond to the building in Leipzig where once the Reichskammergericht operated, and which was also the seat of Weimar’s *Staatsgerichthof für das Deutsche Reich*. [↑](#footnote-ref-60)
61. See, for instance, due to his mastery of the craft of working on myth, Edward Corwin, The “Higher Law” Background of American Constitutional Law 42 *Harvard Law Review* 2-3 (1928-1929). [↑](#footnote-ref-61)
62. As noted in the Jahrbericht of the Bundesverfassungsgericht, see Bundesverfassungsgericht, Jahrbericht 2021; see also Uwe Wesel, *Der Gang nach Karlsruhe: Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* (München/Zurich: Karl Blessing Verlag, 2004) 26ff. [↑](#footnote-ref-62)
63. Blumenberg, *Die Legitimität*... 60. [↑](#footnote-ref-63)
64. Id. *Präfigurationen* (Frankfurt a. M.: Suhrkamp, DATE) 11 [↑](#footnote-ref-64)
65. Ibid., 14. [↑](#footnote-ref-65)
66. Id., *Arbeit am Mythos* 180. [↑](#footnote-ref-66)
67. Correspondingly, the literature is massive. I note Edward Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (New York: Routledge, 2014); Gordon S. Wood, The Origin of Judicial Review Revisisted, or How The Marshall Court Made More Out of Less, 56 *Wash. & Lee L. Rev.* 787 (1999); Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 *Stanford Law Review* 843 (1978); Philip Hamburger, Law and Judicial Duty, 72 *Geo. Wash. L. Rev.* 1 (2003). [↑](#footnote-ref-67)
68. Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 *Yale Law Journal* 3 (2006) 508; see also id., *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004). [↑](#footnote-ref-68)
69. Katherine Fischer Taylor, *First Appearances*… 378. [↑](#footnote-ref-69)
70. On the practices of judgeship and legal reasoning in England between the 15th and 16th centuries, see Sebastian Sobecki, *Unwritten Verities: The Making of England’s Vernacular Legal Culture, 1463-1549* (Notre Dame: University of Notre Dame Press, 2015); for the 18th century, with emphasis on the role of Lord Mansfield, Chief Justice of the Court of King’s Bench, see James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: The University of North Carolina Press, 2004). [↑](#footnote-ref-70)
71. On the political circumstances surrounding Marbury v. Madison, see the evocative Sanford Levison; Jack M. Balkin, What Are the Facts of Marbury v. Madison? 20 *Constitutional Commentary* (2003); see also Mark Tushnet, Constitutional Hardball, 37 *J. Marshall L. Rev.* (2004). [↑](#footnote-ref-71)
72. See, for instance, Keith E. Whittington, Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning, 33 *Polity* 3 (2001); more recently, Richard Fallon, Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 *Texas Law Review* (2018), and the literature cited therein [↑](#footnote-ref-72)
73. Thomas Jefferson, Letter to Thomas Ritchie, December 25, 1820, and Letter to Judge William Johnson, March 4, 1823, in *The Works of Thomas Jefferson*, ed. by Paul Leicester Ford, v. 12, (New York: G. P. Putnam’s Sons, 1904) 177-178. [↑](#footnote-ref-73)
74. On Joseph Story’s legal and political thought, see R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (Chapel Hill: The University of North Carolina Press, 1985); and James McClellan, Joseph Story and the American Constitution (Norman: University of Oklahoma Press, 1990). [↑](#footnote-ref-74)
75. For a history of the reception of Marshall’s myth, see Michael J. Gerhardt, The Lives of John Marshall 43 William & Mary Law Review 4 (2001-2002). [↑](#footnote-ref-75)
76. The Supreme Court of the United States in 1853-54, by George N. Searle, 2 American Law Register (1854) in Warren, *The Supreme Court in United States History*, 475. [↑](#footnote-ref-76)
77. Once again, the literature is huge, being particularly difficult to navigate between myth-making narratives and historiography, insofar as the divide should be more or less clear. For a sort of “history” (and critique) of such fault line, see Bartolomé Clavero, Why American Constitutional History is not yet written 36 *Quaderni Fiorentini per la storia del pensiero giuridico moderno* (2007). I thank Haris Durrani for this reference. See also Steven K. Green, *Inventing a Christian America: The Myth of the Religious Founding*, (New York: Oxford University Press, 2015) 211, esp. 219-227 (On Story’s role in painting the founding with godly colors); for a different, but equally perspicuous take on this issue, see Philip Gorski, *American Covenant: A history of Civil Religion from the Puritans to the present* (Princeton: Princeton University Press, 2017). [↑](#footnote-ref-77)
78. I explore this in Chapter 2. [↑](#footnote-ref-78)
79. On the latter feature, see Richard Fallon, Stare decisis and the Constitution: an essay on Constitutional Methodology 76 *N. Y. U. Law Review* 2 (2001). [↑](#footnote-ref-79)
80. McCulloch v. Maryland, 17 U.S 316 (1819). [↑](#footnote-ref-80)
81. Joseph Story, *Commentaries on the Constitution of the United States*, 2. ed., v. I (Boston: Charles C. Little and James Brown, 1851) 329. [↑](#footnote-ref-81)
82. Ibid., 242-243. [↑](#footnote-ref-82)
83. Laurence Tribe and Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution (New York: Picador, 2014) 126. [↑](#footnote-ref-83)
84. Of course, between one and the other there is American legal realism. However, as, for instance, the rhetoric of Karl N. Llewellyn betrays, one notorious representative of the movement, if not by the imminence with which the kinds of Story first consecrated the judge’s personality, hardly the realists’ attention would be drawn to wonder what she or he had for breakfast. See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (New Orleans: Quid Pro Books, 2016). [↑](#footnote-ref-84)
85. On the connections between the “conversion narrative,” testimony and courtroom practice, see John Charles Adams, Ramist Concepts of Testimony, Judicial Analogies, and the Puritan Conversion Narrative, 9 *A Journal of the History of Rhetoric* 3 (1991) 251, 257, 259. [↑](#footnote-ref-85)
86. Edmund S. Morgan, *Visible Saints: The History of a Puritan idea* (New York: New York University, 1963) 67, 91-95, 101. [↑](#footnote-ref-86)
87. Joseph Story, History and Influence of the Puritans in Miscellaneous Writings of Joseph Story, ed. by William W. Story (Boston: C. C. Little and J. Brown, 1852) 418. [↑](#footnote-ref-87)
88. Ibid., 435. [↑](#footnote-ref-88)
89. See, among others, Richard P. Longaker, Andrew Jackson and the Judiciary, 71 *Political Science Quarterly* 3 (1956); on the historical significance of Jackson’s election, which quite probably animated Story’s references to demagogues, Lynn Hudson Parsons, The birth of Modern Politics: Andrew Jackson, John Quincy Adams, and the Election of 1828 (New York: Oxford University Press, 2011). [↑](#footnote-ref-89)
90. Story, *Commentaries*… v. I, 265. [↑](#footnote-ref-90)
91. William Blackstone, *Commentaries on the Laws of England*, v. I (Oxford: The Clarendon Press, 1765)  
    257. [↑](#footnote-ref-91)
92. John Calvin, *Institutes of the Christian Religion*, v. III, transl. by John Allen (London: J. G. Barnard,

    1813) 394. [↑](#footnote-ref-92)
93. On Story’s religious background, see Joseph Story, Life and Letters of Joseph Story: Associate Justice of the Supreme Court and Dane Professor of Law at Harvard University, v. I, ed. by William W. Story, (Boston: Charles C. Little and James Brown, 1851) p. 57, 86, 94, 419, 441, 512, 533. [↑](#footnote-ref-93)
94. For Calvin’s take on the Christian sacraments, see Calvin, Institutes… v. III, 385ff. I discuss this in more detail in part two of this dissertation. [↑](#footnote-ref-94)
95. Story, Commentaries... v. I, 293. [↑](#footnote-ref-95)
96. Ibid., 258. [↑](#footnote-ref-96)
97. Ibid., 300. [↑](#footnote-ref-97)
98. Calvin, Institutes... v. III, 448. [↑](#footnote-ref-98)
99. Story, Commentaries… v. I, 191. [↑](#footnote-ref-99)
100. Ibid., 197. [↑](#footnote-ref-100)
101. Ibid., 206. Although not a legal opinion properly speaking, for a very clear example of this typological interpretation, see William H. Rehnquist, The Notion of a Living Constitution, Harvard Journal of Law & Public Policy, v. 29, n. 2, p. 401-415, 2006. From the other side of the party line, as it were, as former Chief Justice Rehnquist is usually painted by its environment as a conservative, Bruce Ackerman’s three-volume endeavor dedicated to capture, through typological exegesis, a morphology of constitutional change in the United States of America is, perhaps, the pinnacle of the scholarly possibilities first opened by Joseph Story, in his connection of constitutional interpretation and constitutional history, metonym and typology, Bruce Ackerman, We The People, Volume 1: Foundations, (Cambridge: Harvard University Press, 1993); id., We The People, Volume 2: Transformations, (Cambridge: Harvard University Press, 2000); id., We The People, Volume 3: The Civil Rights Revolution, (Cambridge: Harvard University Press, 2018). [↑](#footnote-ref-101)
102. Willian Brennan, In defense of dissents 37 *The Hastings Law Journal* (1986). On the significance of prophecy in US political discourse, see George Schulman, *American Prophecy: Race and Redemption in American Political Culture* (Minneapolis: University of Minnesota Press, 2008). [↑](#footnote-ref-102)
103. Morgan, *The Visible Saints*, 99. [↑](#footnote-ref-103)
104. [↑](#footnote-ref-104)
105. For a critique thereof, see Pierre Legrand, Foreign Law: Understanding Understanding 6 *Journal of Comparative Law* 2 (2011). [↑](#footnote-ref-105)
106. See, for instance, Kau, *United States Supreme Court und Bundesverfassungsgericht*...; see also Wesel, *Der Gang nach Karlsruhe*. [↑](#footnote-ref-106)
107. On the role of the occupying powers in the constitution-making process, see Werner Sörgel, Konsensus und Interessen: Eine Studie zur Entstehung des Grundgesetzes (Opladen: Leske Verlag, 1985); see also Frieder Günther, Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970 (München: R. Oldenbourg Verlag, 2004). [↑](#footnote-ref-107)
108. For one authoritative, doctrinal articulation of this common place, see, among others, Klaus Stern’s discussion about the constitutional court in *Das Staatsrecht der Bundesrepublik Deutschland*, v. 2 (Munich: C. H. Beck, 1984). [↑](#footnote-ref-108)
109. See Michael Stolleis, Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic, 16 *Ratio Juris* 2 (2003). [↑](#footnote-ref-109)
110. Id., Geschichte des öffentlichen Rechts in Deutschland v. 4 1945-1990 (München: C. H. Beck, 2012) 25-32. [↑](#footnote-ref-110)
111. See the contributions to the volume *Neugründung auf alten Werten? Konservative Intellektuelle und Politik in der Bundesrepublik*, ed. by Sebastian Liebold and Frank Schale, (Baden-Baden: Nomos, 2017). [↑](#footnote-ref-111)
112. For a perspicuous depiction and forceful critique of this narrative, see Ingeborg Maus, *Justiz als gesellschaftliches Über-Ich* (Frankfurt a. M.: Suhrkamp, 2018). [↑](#footnote-ref-112)
113. Grundgesetz für die Bundesrepublik Deutschland (1949) [↑](#footnote-ref-113)
114. See Bredekamp, Politische Ikonologie... [↑](#footnote-ref-114)
115. Protokolle Parlamentarischer Rat, Bd. 9, Dokumentennummer 2 (Zweite Sitzung d. Plenums, 8. 9. 1948), 18, 66 f. in Marcel Kau, United States Supreme Court und Bundesverfassungsgericht..., 34. [↑](#footnote-ref-115)
116. See Gerhard Leibholz, Bericht des Berichterstatters des Bundesverfassungsgerichts vom 21. März 1952 6 *Jahrbuch des Öffentlichen Rechts der Gegenwart* (1957) e.g. 121, 122, 126. [↑](#footnote-ref-116)
117. For its declared Florentine inspiration, see Bundesverfassungsgericht, *Jahrbericht* *2021*... 11 („In the public sphere the image of the judges have been engraved with the velvet robes with the white laces. The judges wear the robes during oral procedures and the pronouncement of judgments. They were based on the traditional judicial habit of the City of Florence in the 15th century.”) [↑](#footnote-ref-117)
118. On the Schöffen, see Adolf Stölzel, *Die Entwicklung der gelehrten Rechtsprechung* (Berlin: Franz Vahlen, 1901). See also Dawson, *Oracles of the Law* (Ann Arbor: The University of Michigan Press, 1968); and Helmut Coing, *Die Rezeption des Römischen Rechts in Frankfurt am Main* (Frankfurt a. M.: Vittorio Klostermann, 1962). [↑](#footnote-ref-118)
119. On the lack of special garment for either Schöffen or German city judges during the Middle Ages, see Franz-Josef Arlinghaus, Mittelalterliche Rituale in systemtheoretischer Perspektive. Übergangsriten als basale Kommunikationsform in einer stratifikatorisch-segmentären Gesellschaft in *Geschichte und Systemtheorie: Exemplarische Fallstudien*, ed. by Frank Becker, (Frankfurt/New York: Campus Verlag, 2001). [↑](#footnote-ref-119)
120. Gerhard Leibholz, *Die Repräsentation in der Demokratie*, (Berlin/New York: De Gruyter, 1973) 39, note 1. On the deliberations preceding the adoption of the velvet robes, see Sebastian Felz: Die Historizität der Autorität oder: Des Verfassungsrichters neue Robe, 2010 *Jarhbuch junge Rechtsgeschichte* (2011) 109-117; Felix Lange, Der Dehler-Faktor – Die wiederwillige Akzeptanz des Bundesverfassungsgerichts durch die Staatsrechtslehre, 56 *Der Staat* 1 (2017) 77-105. Christoph Schönberger undescores how its adoption was a deliberate strategy to translate in terms of the Court’s medial constellation what they were pushing for structurally, by the way of articulating its semantic apparatus, and, ultimately, how the Court related to politics, see Anmerkungen zu Karlsruhe in *Das entgrenzte Gericht*… I discuss the documents constituting and registering the debates over the velvet robes on part two. [↑](#footnote-ref-120)
121. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention* (New York: Little Brown & Co., 1966). [↑](#footnote-ref-121)
122. This construction was of the greatest importance for the series of decisions of the *Bundesverfassungsgericht* on the treaties of the European Union, beginning with the Maastricht-Urteil (BVerfGE 89, 155). For a discussion and critique of the underlying rationale of this judgment, see J. H. H. Weiler, The State “über alles”: Demos, Telos and the German Maastricht Decision (1995) available at <https://jeanmonnetprogram.org/archive/papers/95/9506ind.html>. I thank Gwinyai Machona for this reference. [↑](#footnote-ref-122)
123. Paul Kirchhof, Die Identität der Verfassung in ihren unabänderlichen Inhalten in Josef Isensee; Paul Kirchhof (eds.) Handbuch des Staatsrechts (Heidelberg: C. F. Müller Juristischer Verlag, 1987) 779. [↑](#footnote-ref-123)
124. Rudolf Smend, Das Bundesverfassungsgericht in *Staatsrechtliche Abhandlungen*, 4th ed., (Berlin: Duncker & Humblot, 2010) 583, 588. [↑](#footnote-ref-124)
125. Id., Verfassung und Verfassungsrecht in Staatsrechtliche Abhandlungen, 204, note 23. [↑](#footnote-ref-125)
126. See, in general, the contributions to *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Frankfurt a. M.: Suhrkamp, 2019). Esp., see Konstantin Chatziathanasiou, Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung 11 Rechtswissenschaft 2 (2020). [↑](#footnote-ref-126)
127. Wesel, *Der Gang nach Karlsruhe*, 38-42. [↑](#footnote-ref-127)
128. Ibid., 53-75; Lange, Der Dehler-Faktor...; Bundesverfassungsgericht, Denkschrift des Bundesverfassungsgerichts and also Schreiben des Vizepräsidenten des Bundesverfassungsgerichts vom 29. Oktober 1952, both edited in 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 144-148; 156-159. [↑](#footnote-ref-128)
129. Lembcke, Hüter der Verfassung, 105-166. [↑](#footnote-ref-129)
130. On Leibholz and Dietrich Bonhoeffer’s mutual influence, see Korioth, in Evangelisch-theologische Staatsethik und juristisch Staatslehre; see also Karola Radier, The Leibholz-Schmitt connection’s formative influence on Bonhoeffer’s 1932-1933 entry into public theology, 4 *Stellenbosch Theological Journal* 2, (2018). [↑](#footnote-ref-130)
131. Dietrich Bonhoeffer, *Sanctorum Communio*, Werkausgabe v. 1, ed. by Joachim von Soosten (München: Chr. Kaiser, 2005). [↑](#footnote-ref-131)
132. See Willi Geiger, Ergänzende Bemerkungen zum Bericht des Berichterstatters zur Stellung des Bundesverfassungsgericht and Hermann Höpker-Aschoff, Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13. Oktober 1952, both edited in 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 137-142, 149-159. [↑](#footnote-ref-132)
133. For Thoma’s highlight and criticism of Leibholz’s rhetorics, see Richard Thoma, Rechtsgutachten betr. Die Stellung des Bundesverfassungsgerichts 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 161-193, esp. 165-168. [↑](#footnote-ref-133)
134. Dietrich Bonhoeffer, Die Geschichte und das Gute [Erste Fassung] in *Ethik*, Werke v. 6, ed. by Ilse Tödt et al. (München: Gütersloher Verlag, 1992) 226-227. [↑](#footnote-ref-134)
135. Id., Christus, die Wirklichkeit und das Gute. Christus, Kirche und Welt in *Ethik*, Werke v. 6, ed. by Ilse Tödt et al. (München: Gütersloher Verlag, 1992) 41. [↑](#footnote-ref-135)
136. Ibid., 41, editor note 34. About the relationship between Hitler and the Evangelical Church, see Klaus Scholder, Die evangelische Kirche in der Sicht der national-sozialistichen Führung bis zum Kriegsausbruch 16 *Vierteljahrshefte für Zeitgeschichte* 1 (1968). [↑](#footnote-ref-136)
137. See Der „Ansbacher Ratschlag“ zu der Barmer „Theologischen Erklärung“ in: Kurt Dietrich Schmidt, *Die Bekenntnisse und grundsätzlichen Äußerungen zur Kirchenfrage*. v. 2: Das Jahr 1934 (Göttingen: Vandenhoeck & Ruprecht, 1935) 102–104. [↑](#footnote-ref-137)
138. Bonhoeffer, Christus... 47. [↑](#footnote-ref-138)
139. Ibid., 54. [↑](#footnote-ref-139)
140. Ibid., 45. [↑](#footnote-ref-140)
141. Ibid., 49. [↑](#footnote-ref-141)
142. Idem. [↑](#footnote-ref-142)
143. Sabine Leibholz, Gerhard Leibholz and Dietrich Bonhoeffer often discussed and exchanged letters over this subject (Bonhoeffer refers to it as their “old topic of discussion”). See, for instance, Brief 182. An Sabine und Gerhard Leibholz 7.3.1940 in Illegale Theologenausbildung: Sammelvikariate 1937-1940, Werke v. 15 (München: Gütersloher Verlag, 1992) 296-300. [↑](#footnote-ref-143)
144. Wilhelm Hennis, Verfassung und Verfassungswirklichkeit. – Ein deutsches Problem in *Die missverstandene Demokratie* (Freiburg: Herder, 1973) 64. [↑](#footnote-ref-144)
145. Gerhard Leibholz, Bericht des Berichterstatters an das Plenum des Bundesverfassungsgerichts zur „Status“-Frage 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 122. [↑](#footnote-ref-145)
146. Idem. [↑](#footnote-ref-146)
147. Bonhoeffer, Christus... 55-57. [↑](#footnote-ref-147)
148. Peter Badura, Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgericht in *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlass des 25 jährigen Bestehens des Bundesverfassungsgerichts*, v. 2 (Tübingen: Mohr Siebeck, 1976) 2; see also BverfGE 3, 225, 234-235. (Gleichberechtigung) [↑](#footnote-ref-148)
149. See Gerhard Leibholz, Verfassungsrecht und Verfassungswirklichkeit in *Die Repräsentation in der Demokratie* (Berlin/New York: Walter de Gruyter, 1973) 271 (“The existing tension between constitutional law and constitutional reality is ultimately a tension inherent to life, mirroring the tension between normativity and existentiality, between ought and being, between ethical reason and nature. The task is therefore to rectify through a creative interpretation of the constitution this existing dialectic tension in concreto[.] […] Therefore the constitutional jurist must also understand something of the essence of the political and its forces, if he wants to live up to the dignity and intrinsic value of the legal norms.”) [↑](#footnote-ref-149)
150. Christoph Gusy, “Vergangenheitsrechtsprechung:” Die Nachwirkungen Weimars in der Rechsprechung des Bundesverfassungsgericht in Gusy (ed.) Weimars lange Schatten – „Weimar“ als Argument nach 1945 (Baden-Baden: Nomos, 2003) esp. 411-418. [↑](#footnote-ref-150)
151. Leibholz, Bericht... 125 [↑](#footnote-ref-151)
152. 1 Corinthinas 13, 1, in Luther’s translation. “We see now through a mirror in an obscure word, but then from countenance to countenance. Now I recognize partially; but then I will recognize, just as I have been recognized.” [↑](#footnote-ref-152)
153. Regarding the US law-world, one must note the thread of scholarship around the maxim “Christianity is parcel of the laws of England,” which was the battleground in the 19th century for many, among which once again Thomas Jefferson and Joseph Story. For the classic discussion of the maxim in English Law, see W. S. Holdsworth, *A History of English Law* v. 8 (Boston: Litle, Brown, 1926) 403, n. 5; for the maxim’s fortune in 19th century United States, the best entry is still Stuart Banner, When Christianity Was Part of the Common Law, 16 *Law and History Review* 1 (1998) (who summarizes the existing literature until then, and offers a careful scrutiny of the available sources, although Banner ultimately frames the maxim as “mere rhetoric,” while rhetoric is of the greatest importance to me, as it is inherently related to the dynamics of reoccupation permeating the articulation of constitutional semantics in reference to constitutional adjudication, as ignited by the increasing autonomy of the legal system vis-à-vis politics); especially on Story’s view, see Jay Alan Sekulow; Jeremy Tedesco, The Story behind Vidal v. Girard’s Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty, 32 *Pepp. L. Rev*. 3 (2005); and James McClellan, *Joseph Story and the American Constitution*… 118-159. Regarding post-war Germany, see esp. Birgit von Bülow, *Die Staatsrechtslehre der Nachkriegszeit (1945-1952*) (Baden-Baden: Nomos, 1996). Of course, regarding the relationship between law, “legal imagination” and the reformation, the scholarship is massive. See, for instance, Harold Berman, Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition (Cambridge: Harvard University Press, 2003); John Jr. Witte, Law and Protestantism: The Legal Teachings of the Lutheran Reformation (Cambridge: Cambridge University Press, 2002); Virpi Mäkinen (ed.) Lutheran Reformation and the Law (Leiden: Brill, 2005). [↑](#footnote-ref-153)
154. New York Supreme Court, People v. Ruggles, 8 Johns. 290 (1811). [↑](#footnote-ref-154)
155. US Supreme Court, Vidal v. Girard’s Executors, 43 U.S. 127 (1844). [↑](#footnote-ref-155)
156. US Supreme Court, Church of the Holy Trinity v. United States, 143 U.S. 467 (1892). [↑](#footnote-ref-156)
157. Banner, When Christianity… [↑](#footnote-ref-157)
158. Ibid., 59-60. [↑](#footnote-ref-158)
159. See, for instance, Hatch, *The Democratization of American Christianity*. [↑](#footnote-ref-159)
160. Victoria Larson, “Man of the Mountain”: Seeing Jefferson at Monticello, *42 Journal for eighteenth-century studies* 3 (2019). [↑](#footnote-ref-160)
161. Thomas Jefferson, *From Thomas Jefferson to John Cartwright*, 5 June 1824, available at https://founders.archives.gov/documents/Jefferson/98-01-02-4313. [↑](#footnote-ref-161)
162. Idem. [↑](#footnote-ref-162)
163. Idem. [↑](#footnote-ref-163)
164. Daniel Webster, *The Writings and Speeches of Daniel Webster* v. 11 (Boston: Litle, Brown, 1903) 176. [↑](#footnote-ref-164)
165. Thomas Jefferson, *From Thomas Jefferson to John Cartwright*… [↑](#footnote-ref-165)
166. Joseph Story, Christianity: A part of the Common Law, in *Joseph Story: A Collection of Writings by and about an Eminent American Jurist*, ed. by Mortimer D. Schwartz and John C Hogan, (New York: Oceana Publications, 1959) 182 [↑](#footnote-ref-166)
167. Idem. [↑](#footnote-ref-167)
168. Id., The Value and Importance of Legal Studies, in *Miscellaneous Writings of Joseph Story*, ed. by William W. Story (Boston: C. C. Little and J. Brown, 1852) 517. [↑](#footnote-ref-168)
169. Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, (Boston: Little, Brown and Co., 1868) 472. [↑](#footnote-ref-169)
170. US Supreme Court, Bowers v. Hardwick 478 U.S. 186 (1986). There is a huge literature on Bowers. Sharing the perspective of analysis presented therein, see Kendall Thomas, The Eclipse of Reason: A rhetorical reading of Bowers v. Hardwick, 79 *Virginia Law Review* (1993). [↑](#footnote-ref-170)
171. Idem. [↑](#footnote-ref-171)
172. US Supreme Court, Bowers v. Hardwick 478 U.S. 186 (1986) (C.J. Burger concurring) [↑](#footnote-ref-172)
173. Ernst von Hippel, Ungeschriebenes Verfassungsrecht, Bericht in *Vereinigung der Deutschen Staatsrechtslehrer* (Berlin: VVdStL, 1952) 5. [↑](#footnote-ref-173)
174. Von Bülow, *Die Staatsrechtslehre...* 20. [↑](#footnote-ref-174)
175. On the Vereinigung der Deutschen Staatsrechtslehrer, see Michael Stolleis, Die Vereinigung der Deutschen Staatsrechtslehrer. Bemerkngen zu ihrer Geschichte 80 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 4 (1997); see also Günther, *Denken vom Staat her*... [↑](#footnote-ref-175)
176. Among others, I note Otto Bachof, *Verfassungswidrige Verfassungsnormen?* (Tübingen: Mohr Siebeck, 1951); also the already mentioned Von Hippel, *Ungeschriebenes Verfassungsrecht*...; and Gerhard Leibholz, Der Struktur der neuen Verfassung, *Die Verwaltung* (1948). [↑](#footnote-ref-176)
177. Such as Apelt, Zum Bedeutungswandel der Gelichheitssatzes, *Deutsche Rechts-Zeitschrift* (1946); Nawiasky, Ungeschriebenes Verfassungsrecht, Ausprache, *VVdStL* v. 10 (1951); and Richard Thoma, *Über Wesen und Erscheinungsformen der modernen Demokratie* (Bonn: F. Dümmler, 1948). [↑](#footnote-ref-177)
178. Notoriously, Ulrich Schneuer, Probleme und Verantwortungen der Verfassungsgerichtsbarkeit der Bundesrepublik, *Deutsches Verwaltungsblatt* (1952); Theodor Maunz, *Deutsches Staatsrecht* (München: C. H. Beck, 1951); and Hermann von Mangoldt, Die Grundrechte *Die Öffentliche Verwaltung* (1949). [↑](#footnote-ref-178)
179. See, in general, the contributions in Thomas Henne; Arne Riedlinger (eds.) *Das Lüth-Urteil aus (rechts-)historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berlin: Berliner Wissenschafts-Verlag, 2005). [↑](#footnote-ref-179)
180. *Grundgesetz für die Bundesrepublik Deutschland* (1949) Präambel (“Im Bewußtsein seiner Verantwortung vor Gott und den Menschen...“). [↑](#footnote-ref-180)
181. Ernst-Wolfgang Böckenförde, Demokratie als Verfassungsprinzip in Josef Isensee; Paul Kirchhof (eds.) *Handbuch des Staatsrechts* (Heidelberg: C. F. Müller Juristischer Verlag, 1987) 894. [↑](#footnote-ref-181)
182. Kirchhof, Die Identität der Verfassung... 795 [↑](#footnote-ref-182)
183. Klaus Stern*, Das Staatsrecht der Bundesrepublik Deutschland*, v. 1 (Munich: C. H. Beck, 1984) 102ff. [↑](#footnote-ref-183)
184. Konrad Hesse, Die normative Kraft der Verfassung in *Konrad Hesses normative Kraft der Verfassung*, ed. by Julian Krüper, Mehrdad Payandeh and Heiko Sauer (Tübingen: Mohr Siebeck, 2019). [↑](#footnote-ref-184)
185. See Theodor Maunz; Günter Dürig; Roman Herzog; Rupert Scholz, *Grundgezetz Kommentar* (München: C. H. Beck, 1958) [on article 1 GG]. [↑](#footnote-ref-185)
186. Illustrativelly, consider Horst Dreier, *Säkularisierung und Sakralität* (Tübingen: Mohr Siebeck, 2013) 79ff on one side, and Joseph Isensee, Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten, 131 *Archiv des öffentlichen Rechts* 2 (2006). [↑](#footnote-ref-186)
187. Süddeutsche Zeitung, *Händenschütteln erwünscht*, 16 Oct. 2020. [↑](#footnote-ref-187)