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ACTS OF PROVIDENCE: THE RELIGIOUS LATENCY SURROUNDING AND SHAPING MARBURY V. MADISON AND THE STATUS-DENKSCHRIFT

ATOS DE PROVIDÊNCIA: A LATÊNCIA RELIGIOSA QUE ENVOLVE E MOLDA MARBURY VS. MADISON E O STATUS-DENKSCHRIFT

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ABSTRACT: Franklin D. Roosevelt recommended that "like the Bible, [the Constitution] ought to be read again and again." Gustav Heinemann portrayed the Grundgesetz as a "great offering," whose words must become flesh. Nevertheless, does this have any bearing on constitutional adjudication? Although presidents didn't – and more and more don't – shy about handling their respective constitutions as bibles, have justices and constitutional scholars proceeded otherwise? Common wisdom may answer yes, they did. The aim of my study is to show that this not quite the case. I pursue it in reference to two, leading liberal democratic constitutional courts, the US Supreme Court and the German Federal Constitutional Court. 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 especially 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, on the one hand, and of the German Constitutional Court's Status-Denkschrift, 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. My findings point out that, in face of how disruptive the differentiation between law and politics was and is, constitutional actors in 19th century United States and 20th century Germany frequently, if not invariably, relied upon religious resources to embed their positions.

KEYWORDS: Constitutional history; constitutional comparative law; Joseph Story; Gerhard Leibholz; Hans Blumenberg.

RESUMO: Franklin D. Roosevelt recomendou que "como a Bíblia, [a Constituição] deve ser lida repetidas vezes". Gustav Heinemann retratou a Grundgesetz como uma "grande oferta", cujas palavras devem se tornar realidade. No entanto, isso tem alguma relação com o julgamento constitucional? Embora os presidentes não tenham tido - e cada vez mais não têm - vergonha de tratar suas respectivas constituições como bíblias, será que os juízes e os estudiosos constitucionais agiram de outra forma? A sabedoria comum pode responder que sim, eles fizeram isso. O objetivo de meu estudo é mostrar que esse não é exatamente o caso. Faço isso com referência a dois dos principais tribunais constitucionais democráticos liberais, a Suprema Corte dos EUA e o Tribunal Constitucional Federal da Alemanha. Isso se dá em três partes: (1) abordarei a arquitetura do tribunal, entendida como um testemunho da articulação de cada instituição para autojustificação e autoempoderamento; (2) a consagração semântica da adjudicação constitucional, especialmente em relação à política, conforme ocorreu nas lutas sobre o que estava implícito nas inovações promovidas nos contextos de Marbury v. Madison, por um lado, e Marbury v. M., por outro, como um exemplo de como a Constituição pode ser considerada um instrumento de justiça. Madison, por um lado, e do Status-Denkschrift da Corte Constitucional Alemã, por outro; (3) e debates jurídico-metodológicos sobre a relação entre a Bíblia cristã e as disposições constitucionais que ocorrem em paralelo e em

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conexão com esses dois eventos marcantes. Minhas descobertas apontam que, diante de quão perturbadora foi e é a diferenciação entre direito e política, os atores constitucionais nos Estados Unidos do século XIX e na Alemanha do século XX frequentemente, se não invariavelmente, se basearam em recursos religiosos para embasar suas posições.

PALAVRAS-CHAVE: História constitucional; direito constitucional comparativo; Joseph Story; Gerhard Leibholz; Hans Blumenberg.

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." [2] Gustav Heinemann portrayed the *Grundgesetz* as a "great offering," whose words must become flesh[3]. 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 – and more and more don't – shy about handling their respective constitutions as bibles, have justices and constitutional scholars proceeded otherwise? Common wisdom may answer yes, they did. 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. 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*]. "Plausibility" and "evidence" are

[2] *The Public Papers and Addresses of Franklin D. Roosevelt*, v. 6 124 (Samuel I. Rosenman, ed., 1941). For a discussion of this statement, see Sanford Levinson, *Constitutional faith* 30ff (2011).
[3] Gustav Heinemann, *Unser Grundgesetz ist ein grosses Angebot. Rechtspolitische Schriften* [Our Basic Law is a great offering. Legal-political writings] (1989); Wilhelm Hennis gave a convincing interpretation of Heinemann's discourse's religious undertones (and overtones) in Verfassung und Verfassungswirklichkeit [Constitution and constitutional reality] in *Die missverstandene Demokratie* [The misunderstood democracy] (1973).

two terms of art proposed by Niklas Luhmann in the course of his contribution to the sociology of knowledge[4]. 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 the differentiation between law and politics was and is, constitutional judges and scholars in 19th century United States and 20th century Germany frequently, if not invariably, relied – sometimes more, sometimes less stealthily – upon religious resources.

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. [5] 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." [6] 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

[4] For Niklas Luhmann's theorization of semantics, see, in general, Niklas Luhmann, Gesellschaftliche Struktur und semantische Tradition [Social structure and semantic tradition], in *Gesellschaftsstruktur und Semantik* [Social structure and semantics], v. 1 (1993). On the triptych of variation, selection, and stabilization, see Niklas Luhmann, *Die Gesellschaft der Gesellschaft* [The society of society] (1997).
[5] For this theoretical approach to religion, see Niklas Luhmann, *Funktion der Religion* [The function of religion] (1999) and *Die Religion der Gesellschaft* [The religion of society] (2002).
[6] Hans Blumenberg, *Die Legitimität der Neuzeit* [The Legitimacy of the Modern Age] (2021) 88.

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. [7]

That being the case, we are before a particular instance of what Hans Blumenberg depicts as "reoccupations." [8] 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. They reoccupy positions made vacant by the demise of earlier (religious) answers – such as God's providence or His creation of the world –, whose appendant questions and hopes, but also their "terminology" – in the sense of the symbolics, semantics and media in which they are embedded – cannot be eliminated. [9] 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.

Regarding constitutional adjudication, these instrumentalizations 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 doctrine, but also in the daily practice of constitutional deliberation. What I propose for the remainder of this article 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 I already signed out.

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 especially 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*, on the one hand, and of the German Constitutional Court's *Status-*

[7] 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, [Historians, Max Weber and Niklas Luhmann. About the dififcult (but possibly productive) relationship between historical sciences and systems theory] 7 (1) *Soziale Systeme* 21 (2001). More recently, see Schlögl, *Alter Glaube und moderne Welt. Europäisches Christentum im Umbruch 1750-1850* [Old Faith and Modern World. The European Christianity in Upheaval 1750-1850] (2013).
[8] Blumenberg, *supra* note 6, 75.
[9] *ibid.*, 378.

Denkschrift [Memorandum over its status], 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. 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. [10]

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] 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] – 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]

1 STOPPING BEFORE THE GATES: WHAT DOES ARCHITECTURE TELL US

[10] Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (2018) 162 ("In the realm of political legitimacy, religion was superseded by constitutionalism.")
[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 (1981) 158.
[12] On Verfassungspatriotismus, see, among others, Jan-Werner Müller, *Verfassungspatriotismus* [Constitutional patriotism] (2010).
[13] Blumenberg, *supra* note 6, 99.

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. [14] 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. 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 with letting the stones themselves testify about what was written upon them.

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."[15]

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,[16] while its thirteen tons' bronze doors at the front depict eight historic scenes on "the

[14] For my approach to architecture, communication, and inclusion, I'm relying on Rudolf Schlögl, *Anwesende und Abwesende: Grundriss für eine Gesellschaftsgeschichte der Frühen Neuzeit* [Attendees and Absentees: Outline for a social history of the Early Modern Age] (2014).
[15] Calvin's Case 7 Coke Report 1a, 77 ER 377 392.
[16] 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 *The United States Supreme Court: the pursuit of justice* (Christopher Tomlis, ed., 2005) esp. 378-380.

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.[17]

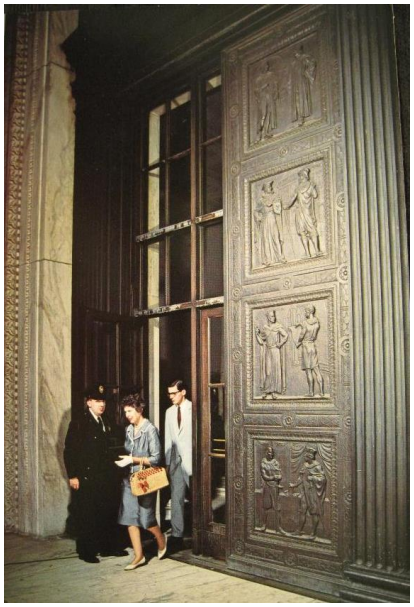
Interestingly, on July 5, 1936, historians were quick to point out the apparent historical inadequacy of portraying Marshall giving the decision to Story, who was appointed to the court only 8 years later. The fact made its way to the first page of The New York Times.[18] Nevertheless, as different sculptors gathered together Moses, Coke, Marshall and Story, this first speaks to the need for history in contrast to the experience of history. Second, it may also betray *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. [19]

[17] 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

[18] 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

[19] Sources for the images below, from top to 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/.

Figura 1 - Massive sliding bronze doors of the supreme court building in Washington, D.C.



Fonte: Todocoleccion, 2022

Figura 2 – John Marshall's Portrait

Fonte: US Supreme Court, 2021

Figura 3 – East Entrance of the U.S. Supreme Court

Fonte: ThoughtCo., 2018

Figura 4 – MacNeil's sculptures of Moses, Confucius, and Solon on the East Pediment of the Supreme Court Building in Washington, D.C

Fonte: Hermon A. MacNeil Virtual Gallery., 2012

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,[20] especially as one notices that like the US Supreme Court, justice's administration preceded its

[20] I substantiate this claim on chapter 3.

setting,[21] 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,[22] prone to secrecy as even Hegel thought necessary to underscore,[23] the choice for glass could be felt as embodying the rupture that constitutional scholarship tirelessly emphasized "constitutional adjudication" represented to "the German constitutional tradition."[24] 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[.]"[25]

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[21] On the history of and for materials on the building's construction, see *Transparenz und Würde: Das Bundesverfassungsgericht und seine Architektur* [Transparency and Dignity: The Federal Constitutional Court and its architecture] (Falk Jaeger, ed., 2014)

[22] Cornelia Vismann, *Medien der Rechtsprechung* [Media of adjudication] (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.")

[23] See G. W. F. Hegel, Grundlinien der Philosophie des Rechts [Ontlines of the Philosophy of Law] in *Werke*. v. 7 (1979) [§ 224] 375.

[24] This is a rather widespread common place. See, in general, the four contributions to *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* [The unbounded Court: a critical evaluation after the sixty years of the Federal Constitutional Court] (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* [United States Supreme Court and the Federal Constitutional Court: The meaning of the United States Supreme Court for the establishment and development of the Federal Constitutional Court] (2007) 46ff (who traces the presence of this common place in the discources and debates during the constituion-making process, while noting the references to the US experience as anchoring and offering the possibility of rupture).

[25] Stefan Korioth, Evangelisch-theologische Staatsethik und juristisch Staatslehre in der Weimarer Republik und der frühen Bundesrepublik [Evangelical-theological ethics of the State and the legal doctrine of the State in the Weimar Republic and the early Federal Republic] in *Konfession im Rech*t [Confession in law] (Pascale Cancik et al., eds., 2009) 142.

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 "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.[26] 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,"[27] the materialization thereof takes its cue from one rather curious mythical overlapping. Namely, between the early modern Italian judicial attire,[28] inspiring the garment of the German constitutional judge, and the office of the Schöffe,[29] 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.[30] The Schöffen's representative, integrative force, in contrast to Bourgeoise judgeship, was highlighted in Leibholz' Weimar-era monograph.[31] Hence, in order to weave into fabric what Leibniz was arguing for in the

[26] Horst Bredekamp, Politische Ikonologie des Grundgesetzes [Political iconology of the Basic Law] in Michael Stolleis (ed.) *Herzkammern der Republik: Die Deutschen und das Bundesverfassungsgericht* [The cardiac chambers of the Republic: The Germans and the Federal Constitutional Court] (2011).

[27] See Gerhard Leibholz, Bericht des Berichterstatters des Bundesverfassungsgerichts vom 21. März 1952 [Report of the Reporting Judge of the Federal Constitutional Court from 21 March 1952] 6 *Jahrbuch des Öffentlichen Rechts der Gegenwart* [Yearbook of Public Law of the Present] (1957) e.g. 121, 122, 126.

[28] For its declared Florentine inspiration, see Bundesverfassungsgericht, *Jahrbericht 2021* [Annual Report 2021] (2021) 11 („In the public sphere the image of the judges has 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.")

[29] On the Schöffen, see Adolf Stölzel, *Die Entwicklung der gelehrten Rechtsprechung* [The development of the learned adjudication] (1901). See also Dawson, *Oracles of the Law* (1968); and Helmut Coing, *Die Rezeption des Römischen Rechts in Frankfurt am Main* [The reception of roman law in Frankfurt am Main] (1962).

[30] 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 [Medieval rituals from a systems theory's perspective: rites of passage as basic communicative form in a stratified-segmented society] in *Geschichte und Systemtheorie: Exemplarische Fallstudien* [History and Systems Theory: Exemplary case studies] (Frank Becker, ed., 2001).

[31] Gerhard Leibholz, *Die Repräsentation in der Demokratie* [The representation in democracy] (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, ´The historicity of authority or: the constitutional judge's new robes] 2010 *Jarhbuch junge Rechtsgeschichte* (2011) 109-117; Felix Lange, Der Dehler-Faktor – Die wiederwillige Akzeptanz des Bundesverfassungsgerichts durch die Staatsrechtslehre, [The Dehler-Factor: The resistant

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.

In line with this effort to dress rupture as the reenactment of continuity with the past in face of a momentaneous interruption, transparency hints at traces of enormous religious incisiveness, which, importantly, cuts through confessional lines.[32] Glass and transparency were a popular material and a prevailing architectonic value in the post-war Federal Republic of Germany.[33] Following Daniel Damler's interpretation, one should also see here the entanglement of glass, transparency, and ordoliberalism, across politics and the economy.[34] When one has in mind the confessional background of ordoliberal authors such as Walter Eucken,[35] as well as his connections with equally pious leading legal scholars, such as Helmut Coing,[36] then the appeal of transparency to lawyers, economists, and politicians alike reveals its religious undertones.

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

acceptance of the Federal Constitutional Court through the doctrine of State Law] 56 *Der Staat* [The State] 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 [Remarks on Karlsruhe] in *supra* note 24. I discuss the documents constituting and registering the debates over the velvet robes on part two.

[32] 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* (2012).

[33] For the meaning of glass in the architecture of the Federal Republic of Germany, see Sabine Körner, *Transparenz in Architektur und Demokratie: Die Plenarbereiche des Deutschen Bundestags in Bonn und Berlin seit 1949* [Transparency in Architecture and Democracy: The Plenary of the German Federal Parliament in Bonn and Berlin since 1949] (2003).

[34] Daniel Damler, *Konzern und Moderne* [The corporation and the modern] (2016) 266-272.

[35] 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 (1) *New Perspectives* (2016) 79.

[36] 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).

authority of none other than Gregory the Great: "Gregorius comparat corpora gloriosa auro et vitro; auro propter claritatem & vitro propter hoc quod translucebunt."[37] "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.[38] 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."[39] 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 they expound, walls of glass fit perfectly well to compose the view.[40]

Figura 5 - Bundesarchiv Bild 183-42346-0003

Fonte: LTO, 2019

[37] Thomas Aquinas, Summa Theologiae, Suppl. Tertiae partis, art. I, ad sec., Quaestio 85 De claritate corporum beatorum.
[38] Martin Luther, Von der Freiheit eines Christenmenschen [On the Freedom of the Christian man] in *Luther lesen: Die zentralen Texte* [Reading Luther: The main texts] (The Office of the Vereinigten Eangelisch-Lutherischen Kirche Deutschlands, ed., 2017) 57.
[39] Id., Über die Gefangenschaft der Kirche [About the captivity of the Church] in *supra* note 38, 70.
[40] Sources for the images below, from top to 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 *supra* note 21; Photo available at https://www.kunstundjustiz.bund.de/haus-saal/; Photo available at *supra* note 21.

Figura 6 – Baumgarten-Bau, the Federal Constitutional Court

Fonte: Falk Jaeger, 2014

Figura 7 – Great Courtroom of Federal Administrative Court

Fonte: Kunst & Justiz im Bundesverwaltungsgericht, 2013

Figura 8 – The interior of the Federal Constitutional Court

Fonte: Falk Jaeger, 2014

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. 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.

2 "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?[41] By the way, are you aware that, notwithstanding its novelty, constitutional complaints [Verfassungsbeschwerde] were already imagined in 1849?[42]

These two usages resonate with a crucial methodological caveat Hans Blumenberg insisted upon. 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]

[41] 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).
[42] As noted in the Jahrbericht of the Bundesverfassungsgericht, see *supra* note 28; see also Uwe Wesel, *Der Gang nach Karlsruhe: Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* [The road towards Karlsruhe: The Federal Constitutional Court in the History of the Federal Republic] (2004) 26ff.

[they] receiv[e].”[43] 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).

What Blumenberg wrote on prefigurations, a specific instrument for generating meaningfulness, and hence, working on myth, may probably apply to other rhetoric means depending on the circumstances as well. 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 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.”[44]

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.[45] “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,” or even “imminence,” 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*.

2.1 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,[46] arguably betrays how it may fashion as an exemplar of

[43] Blumenberg, *supra* note 6, 60.
[44] Ibid., 14.
[45] Id., *Arbeit am Mythos* [Work on myth] (2021) 180.
[46] Correspondingly, the literature is massive. I note Edward Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (2014); Gordon S. Wood, The Origin of Judicial Review Revisisted, or

"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 a 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." Such adequacy was ultimately under the control of the King's Privy Council, whose unanimous opinions stood on the reasoning that as the King himself, it 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."[47]

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],"[48] like the ones of the King's Privy Council, and in contrast to the practice of the King's bench.

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

How The Marshall Court Made More Out of Less, 56 *Wash. & Lee L. Rev.* (1999) 787; Philip Hamburger, Law and Judicial Duty, 72 *Geo. Wash. L. Rev.* (2003) 1.

[47] Mary Sarah Bilder, The Corporate Origins of Judicial Review, 116 (3) *Yale Law Journal* (2006) 502 508; see also id., *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2004).

[48] Taylor, *supra* 16, 378.

and Republicans as the presidency transited from John Adams to Thomas Jefferson,[49] 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.[50]

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."[51]

Jefferson found in Joseph Story's *Commentaries* one fierce rebuke,[52] just as Marshall was submitted to a process of ascension. Of course, Marshall's reputation underwent oscillations across the years.[53] 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

[49] 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) 255; see also Mark Tushnet, Constitutional Hardball, 37 *J. Marshall L. Rev.* (2004) 523.
[50] See, for instance, Keith E. Whittington, Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning, 33 (3) *Polity* (2001) 365; more recently, Richard Fallon, Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 (3) *Texas Law Review* (2018) 487, and the literature cited therein
[51] Thomas Jefferson, Letter to Thomas Ritchie, December 25, 1820, and Letter to Judge William Johnson, March 4, 1823, in *The Works of Thomas Jefferson*, v. 12, (Paul Leicester Ford, ed., 1904) 177-178.
[52] On Joseph Story's legal and political thought, see R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985); and James McClellan, Joseph Story and the American Constitution (1990).
[53] For a history of the reception of Marshall's myth, see Michael J. Gerhardt, The Lives of John Marshall 43 (4) William & Mary Law Review (2001-2002) 1399.

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."[54]

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[,]"[55] 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 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.[56]

Of the many instances composing Story's book, I would like to focus on two.

First, Story quotes Marshall's *McCulloch v. Maryland* (1819)[57] 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

[54] The Supreme Court of the United States in 1853-54, by George N. Searle, 2 American Law Register (1854) in Charles Warren, *The Supreme Court in United States History* v. II (1922) 475.
[55] 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) 1445. See also Steven K. Green, *Inventing a Christian America: The Myth of the Religious Founding* (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* (2017).
[56] 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) 570.
[57] McCulloch v. Maryland, 17 U.S 316 (1819).

occasion," the kind of occasion that calls for expressive language.[58] 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."[59] 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."[60] 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[61] 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, the coming of the Kingdom of God. They do

[58] Joseph Story, *Commentaries on the Constitution of the United States*, v. I (1851) 329.
[59] Ibid., 242-243.
[60] Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (2014) 126.
[61] 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* (2016).

so through their life long strive for justification, the subject of a ritual later named the "conversion narrative." 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.[62]

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,"[63] 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[.]"[64]

Accordingly, as Story had before him the strife between Andrew Jackson and John Marshall,[65] 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."[66]

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

[62] Edmund S. Morgan, *Visible Saints: The History of a Puritan idea* (1963) 67, 91-95, 101.
[63] Joseph Story, History and Influence of the Puritans in Miscellaneous Writings of Joseph Story (William Story, ed., 1852) 418.
[64] Ibid., 435.
[65] See, among others, Richard P. Longaker, Andrew Jackson and the Judiciary, 71 (3) *Political Science Quarterly* (1956) 341; 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* (2011).
[66] Story, *supra* note 58, 265.

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 been exercised by the king or his substitutes.[67]

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.[68]

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"?[69] 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

[67] William Blackstone, *Commentaries on the Laws of England*, v. I (1765) 257.
[68] John Calvin, *Institutes of the Christian Religion*, v. III, translated by John Allen (1813) 394.
[69] 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, (William Story ed., 1857) p. 57, 86, 94, 419, 441, 512, 533.

promise of immortality, our participation in the kingdom to come.[70] 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.[71] Indeed, it would be on this account "that our law is justly deemed certain, and founded in permanent principles."[72] 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."[73]

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."[74]

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,[75] 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."[76] 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;

[70] For Calvin's take on the Christian sacraments, see Calvin, *supra* note 68, 385ff..
[71] Story, *supra* note 58, 293.
[72] Ibid., 258.
[73] Ibid., 300.
[74] Calvin, supra note 68, 448.
[75] Willian Brennan, In defense of dissents 37 *The Hastings Law Journal* (1986) 427. On the significance of prophecy in US political discourse, see George Schulman, *American Prophecy: Race and Redemption in American Political Culture* (2008).
[76] Morgan, *supra* note 62, 99.

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."[77]

2.2 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? 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,[78] 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.[79]

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. 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.[80] This emphasis on rupture may well speak to how attractive it was to entertain the notion of a lack of precedents to those involved in the German's

[77] Ephesians 4, 11-16.
[78] See, for instance, Kau, *supra* note 24; see also Wesel, *supra* note 42.
[79] On the role of the occupying powers in the constitution-making process, see Werner Sörgel, *Konsensus und Interessen: Eine Studie zur Entstehung des Grundgesetzes* [Consensus and Interest: A study on the emergence of the Basic Law] (1985); see also Frieder Günther, *Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970* [Thinking from the State: the Federal German Doctrine of State Law between decision and integration 1949-1970] (2004).
[80] See Michael Stolleis, Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic, 16 (2) *Ratio Juris* (2003) 266.

Stunde Null.[81] Its persistence, in 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.[82] 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.[83] Those actors regularly painted the *Grundgesetz* with godly and traditional colors, its preamble being a shred of forceful evidence thereof[84] – while occasionally and notoriously even printing it with the typography evocative of the German Empire.[85] Accordingly, notwithstanding their novelty, constitutional justices would be modern-day *Schöffen*, as I pointed out above. In its turn, their milieu, an authentic constitutional court should be considered as the touching stone that enables the words of the Constitution to remain one with its spirit.[86]

Just as 200 years later 1787 still was the year of the *Miracle at Philadelphia*,[87] 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

[81] Id., *Geschichte des öffentlichen Rechts in Deutschland* [History of Public Law in Germany] v. 4 1945-1990 (2012) 25-32.
[82] See the contributions to the volume *Neugründung auf alten Werten? Konservative Intellektuelle und Politik in der Bundesrepublik*, [A new foundation based on old values? Conservative intellectuals and politics in the Federal Republic] (Sebastian Liebold and Frank Schale, eds., 2017).
[83] For a perspicuous depiction and forceful critique of this narrative, see Ingeborg Maus, *Justiz als gesellschaftliches Über-Ich* (2018).
[84] Grundgesetz für die Bundesrepublik Deutschland (1949).
[85] See Bredekamp, *supra* note 26.
[86] Protokolle Parlamentarischer Rat, Bd. 9, Dokumentennummer 2 (Zweite Sitzung d. Plenums, 8. 9. 1948), 18, 66 f. in Kau, *supra* note 24, 34.
[87] Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention* (1966).

"constitutional shifts" [*Verfassungswandlungen*],[88] 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."[89]

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."[90] 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 if it is a Court that signs its rulings "in the name of the People."[91]

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,[92] the *Bundesverfassungsgericht*'s exertion towards self-empowerment is rarely the

[88] 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.

[89] Paul Kirchhof, Die Identität der Verfassung in ihren unabänderlichen Inhalten [Th identity of the Constitution in its immutable contents] in Handbuch des Staatsrechts [Handbook of State Law] (Josef Isensee and Paul Kirchhof, eds., 1987) 779.

[90] Rudolf Smend, Das Bundesverfassungsgericht [The Federal Constitutional Court] in Staatsrechtliche Abhandlungen [Treatises on State Law], 4th ed., (2010) 583, 588.

[91] Id., Verfassung und Verfassungsrecht [Constitution and Constitutional Law] in *supra* 90, 204, note 23.

[92] See Konstantin Chatziathanasiou, Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung [The memorandum of the Federal Constitutional Court on its status as a informal contribution to the emergence of the constitutional order] 11 (2) *Rechtswissenschaft* [Legal science] (2020) 145.

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,[93] 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, that 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,[94] having on its side none other 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.[95]

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[96] brother-in-law pursues to

[93] Wesel, *supra* note 42.
[94] Ibid., 53-75; Lange, *supra* note 31; Bundesverfassungsgericht, Denkschrift des Bundesverfassungsgerichts [Memorandum of the Federal Constitutional Court] and also Schreiben des Vizepräsidenten des Bundesverfassungsgerichts vom 29. Oktober 1952 [Writing of the Vice-president of the Federal Constitutional Court from 29 October 1952], both edited in 6 Jahrbuch des öffentlichen Rechts der Gegenwart [Yearbook of Public Law of the Present] (1957) 144-148; 156-159.
[95] Oliver Lembcke, *Hüter der Verfassung* (2007) 105-166.
[96] On Leibholz and Dietrich Bonhoeffer's mutual influence, see Korioth, *supra* note 25; see also Karola Radier, The Leibholz-Schmitt connection's formative influence on Bonhoeffer's 1932-1933 entry into public theology, 4 (2) *Stellenbosch Theological Journal* (2018) 683.

anoint the Court as a kind of *sanctorum communio*,[97] while here and there already submitting such efforts to rationalizations. In contrast, neither Höpker-Aschoff nor Geiger ventured into such enterprise.[98] 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.[99] 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, 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[100] – demanded a confrontation with what he portraited as the "colossus" of a "great part of the traditional Christian-ethical thinking."[101] 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.[102] 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

[97] Dietrich Bonhoeffer, *Sanctorum Communio, Werkausgabe* v. 1 (Joachim von Soosten, ed., 2005).
[98] See Willi Geiger, Ergänzende Bemerkungen zum Bericht des Berichterstatters zur Stellung des Bundesverfassungsgericht [Complementing remarks on the report of the reporting judge about the position of Federal Constitutional Court] and Hermann Höpker-Aschoff, Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13. Oktober 1952 [Writing of the President of the Federal Constitutional Court from 13 October 1952], both edited in 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 137-142, 149-159.
[99] For Thoma's highlight and criticism of Leibholz's rhetorics, see Richard Thoma, Rechtsgutachten betr. Die Stellung des Bundesverfassungsgerichts [Legal opinion concerning the position of the Federal Constitutional Court] 6 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1957) 161-193, esp. 165-168.
[100] Dietrich Bonhoeffer, Die Geschichte und das Gute [Erste Fassung] [The History and the Good, first version] in *Ethik*, Werke v. 6, (Ilse Tödt et al., ed. 1992) 226-227.
[101] Id., Christus, die Wirklichkeit und das Gute. Christus, Kirche und Welt [Christ, the reality, and the Good. Christ, Church and the World] in *Ethik*, Werke v. 6, ed. (Ilse Tödt et al., ed., 1992) 41.
[102] Ibid., 41, editor note 34. About the relationship between Hitler and the Evangelical Church, see Klaus Scholder, Die evangelische Kirche in der Sicht der nationalsozialistichen Führung bis zum Kriegsausbruch [The evangelical church from the perspective of the National Socialist leadership until the outburst of the war]16 (1) *Vierteljahrshefte für Zeitgeschichte* [Quarterly for Contemporary History] (1968) 15.

of blood).”[103] 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.”[104]

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.[105] 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.[106] “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.”[107] 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.”[108]

The resonance of Bonhoeffer’s theological writings within the sphere of the law go beyond his family connections to Gerhard Leibholz. 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.”[109]

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

[103] See Der „Ansbacher Ratschlag“ zu der Barmer „Theologischen Erklärung“ [The Ansbacher Counsel to the Barmer Theological Explanation] in Kurt Dietrich Schmidt, *Die Bekenntnisse und grundsätzlichen Äußerungen zur Kirchenfrage*. [The Confessions and fundamental statements on Church Affairs] v. 2: Das Jahr 1934 (1935) 102–104.
[104] Bonhoeffer, *supra* note 101, 47.
[105] Ibid., 54.
[106] Ibid., 45.
[107] Ibid., 49.
[108] Idem.
[109] Hennis, *supra* note 3, 64.

and ethical reason would have in constitutional law and constitutional adjudication its "essential imprint."[110] 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."[111] 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*[112] – to have within his attention the political consequences and effects of his decisions. The Constitutional Court as a "Creature of the Constitution"[113] is the Constitution's place within the political realm, seizing it as a whole and laying down its ultimate foundations.[114]

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.[115] 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,[116] he suggests

[110] Leibholz, *supra* note 27, 122.
[111] Idem.
[112] Bonhoeffer, *supra* note 101, 55-57.
[113] Peter Badura, Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgericht [Constitution, State and Society from the perspective of the Federal Constitutional Court] in *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlass des 25 jährigen Bestehens des Bundesverfassungsgerichts*, [The Federal Constitutional Court and the Basic Law: Commemorative publication on occasion of the 25 years of the Federal Constitutional Court] v. 2 (1976) 2; see also BverfGE 3, 225, 234-235. (Gleichberechtigung) [Gender equality]
[114] See Gerhard Leibholz, Verfassungsrecht und Verfassungswirklichkeit [Constitutional law and Constitutional Reality] 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.")
[115] 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 [Illegal theological formation: the vicariate reunited], Werke v. 15 (1992) 296-300.
[116] Christoph Gusy, "Vergangenheitsrechtsprechung:" Die Nachwirkungen Weimars in der Rechsprechung des Bundesverfassungsgericht [„Adjudication over the past:" The aftermath of Weimar in the adjudication of the Federal Constitutional Court] in *Weimars lange Schatten – „Weimar" als Argument nach 1945* [Weimar's long shadow – Weimar as argument after 1945] (Christoph Gusy, ed., 2003) esp. 411-418.

that what could be once obscured due to 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,"[117] 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.*"[118]

3 "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? 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 the 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

[117] Leibholz, *supra* note 27, 125

[118] 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."

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.

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 highlight how the resolution thereof can be read in the ways later decisions were taken regarding how Constitutions and Bibles should be read in face of each other.

3.1 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[119] and Joseph Story[120] to David Brewer[121] – betrays how we are before the lock, stock, and barrel of reoccupations.

[119] New York Supreme Court, People v. Ruggles, 8 Johns. 290 (1811).
[120] US Supreme Court, Vidal v. Girard's Executors, 43 U.S. 127 (1844).
[121] US Supreme Court, Church of the Holy Trinity v. United States, 143 U.S. 467 (1892).

Through the somehow belated fortune and subsequent disappearance of this common law maxim – "Christianity is part of the Common Law" –,[122] 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.[123] On the other, the intrinsic developments of the religious system as located in 19th United States of America, with the multiplication of confessions, pivoting 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 slaveholders.[124]

Of concern to my purposes is how this issue appeared to an old foe of the maxim, who was both a landholder and a slaveholder, now resolutely secluded in his villa at Monticello.[125] 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*.[126]

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[.]"[127] 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[.]"[128]

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[122] Stuart Banner, When Christianity Was Part of the Common Law, 16 (1) *Law and History Review* (1998) 27.
[123] Ibid., 59-60.
[124] See, for instance, Nathan O. Hatch, *The Democratization of American Christianity* (1989).
[125] Victoria Larson, "Man of the Mountain": Seeing Jefferson at Monticello, 42 (3) *Journal for eighteenth-century studies* 3 (2019) 283.
[126] Thomas Jefferson, *From Thomas Jefferson to John Cartwright*, 5 June 1824, available at https://founders.archives.gov/documents/Jefferson/98-01-02-4313.
[127] Idem.
[128] Idem.

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. 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[.]"[129] 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?"[130]

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,

[129] Joseph Story, Christianity: A part of the Common Law, in *Joseph Story: A Collection of Writings by and about an Eminent American Jurist* (Mortimer D. Schwartz and John C Hogan, ed., 1959) 182
[130] Idem.

> [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.[131]

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."[132]

When Justice White delivered the opinion for the Court in *Bowers v. Hardwick*,[133] 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."[134] As some lines below show, in reference to the doctrine on the Fourteenth Amendment and the role of historical precedent

[131] Id., The Value and Importance of Legal Studies, in *Miscellaneous Writings of Joseph Story* (William Story, ed. 1852) 517.
[132] Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, (1868) 472.
[133] 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) 1805.
[134] Idem.

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,"[135] 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.

3.2 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"[136] 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."[137] What Von Bülow paints as clear methodological frontiers are much closer to fault lines, which

[135] US Supreme Court, Bowers v. Hardwick 478 U.S. 186 (1986) (C.J. Burger concurring)
[136] Ernst von Hippel, Ungeschriebenes Verfassungsrecht, [Unwritten Constitutional Law] Bericht [Report] in *VVdStL* (Berlin: VVdStL, 1952) 5.
[137] Von Bülow, *Die Staatsrechtslehre...* 20.

not rarely became the subject of fierce dispute across publications, but also during the meetings of the *Vereinigung der Deutschen Staatsrechtslehrer* [Association of German State Law Scholars].[138] 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,[139] and its complete, "positivistic" denial.[140] 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.[141] 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[142] give little room for doubt over which

[138] On the Vereinigung der Deutschen Staatsrechtslehrer, see Michael Stolleis, Die Vereinigung der Deutschen Staatsrechtslehrer. Bemerkungen zu ihrer Geschichte [The Association of German State Law Scholars: Remarks over its story] 80 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* [Critical Quarterly Journal for Legislation and Legal Science] 4 (1997); see also Günther, *supra* note 79.

[139] Among others, I note Otto Bachof, *Verfassungswidrige Verfassungsnormen?* [Unconstitutional Constitutional norms?] (Tübingen: Mohr Siebeck, 1951); also the already mentioned Von Hippel, *supra* note 136*;* and Gerhard Leibholz, Der Struktur der neuen Verfassung [The Structure of the new Constitution] *Die Verwaltung* [The Administration] (1948).

[140] Such as Apelt, Zum Bedeutungswandel der Gleichheitssatzes [On the change of meaning of the principle of equality], *Deutsche Rechts-Zeitschrift* [German Law Journal] (1946); Nawiasky, Ungeschriebenes Verfassungsrecht, Aussprache [Debate], *VVdStL* v. 10 (1951); and Richard Thoma, *Über Wesen und Erscheinungsformen der modernen Demokratie* [On the essence and the manifestations of modern Democracy] (Bonn: F. Dümmler, 1948).

[141] Notoriously, Ulrich Schneuer, Probleme und Verantwortungen der Verfassungsgerichtsbarkeit der Bundesrepublik [Problems and responsibilities of constitutional adjudication in the Federal Republic] *Deutsches Verwaltungsblatt* (1952); Theodor Maunz, *Deutsches Staatsrecht* [German State Law] (1951); and Hermann von Mangoldt, Die Grundrechte *Die Öffentliche Verwaltung* [The Public Administration] (1949).

[142] 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* [The Lüth Case out of a (legal)-historical perspective. The conflict over Veit Harlan and the judicatur of fundamental rights of the Federal Constitutional Court] (2005).

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."[143] 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."[144] 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*]."[145]

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.[146] 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.[147] Occasionally referring to the parliamentary debates over the drafting of the *Grundgesetz*, even contemporary doctrinal commentary underscores how the representatives understood the document's fundamental

[143] Grundgesetz für die Bundesrepublik Deutschland (1949) Präambel ("Im Bewußtsein seiner Verantwortung vor Gott und den Menschen...").
[144] Ernst-Wolfgang Böckenförde, Demokratie als Verfassungsprinzip [Democracy as a constitutional principle] in *Handbuch des Staatsrechts* (Josef Isensee and Paul Kirchhof, eds., 1987) 894.
[145] Kirchhof, *supra* note 89, 795
[146] Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, [The State Law of the Federal Republic of Germany] v. 1 (1984) 102ff.
[147] Konrad Hesse, Die normative Kraft der Verfassung [The normative force of the Constitution] in *Konrad Hesses normative Kraft der Verfassung* [Konrad Hesse's The normative force of the Constitution] (Julian Krüper, Mehrdad Payandeh and Heiko Sauer, eds., 2019).

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.[148]

As recent and ongoing debates on the constitutional foundations underpinning the current German integration policy prove,[149] 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.[150] 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

[148] See Theodor Maunz; Günter Dürig; Roman Herzog; Rupert Scholz, Grundgezetz Kommentar [Commentary of the Basic Law] (1958) [on article 1 GG].
[149] Illustrativelly, consider Horst Dreier, *Säkularisierung und Sakralität* [Secularization and Sacrality] (2013) 79ff on one side, and Joseph Isensee, Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten, [Human Dignity: the secular society in search for the absolute] 131 (2) *Archiv des öffentlichen Rechts* [Archive of Public Law] (2006).
[150] Süddeutsche Zeitung [South Germany News], Händenschütteln erwünscht [Handshaking required], 16 Oct. 2020.

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.

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Artigo convidado