The constitutional miracle on the Rhine: Towards a history of West German constitutionalism and the Federal Constitutional Court

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1. Introduction

According to a widespread historical narrative, Germany has taken a “special path” (Sonderweg) from absolutist rule to liberal democracy. She deviated from the western mainstream of modernization after the French revolution and only fully became part of the western world again in the last third of the twentieth century. The Federal Republic is thus widely regarded as the era of a “belated westernization” of state and society in Germany. According to this account, the constitutional law of the Federal Republic, which for the first time fully embraced liberal individual rights, egalitarian democracy, and powerful constitutional review, has played a pivotal role in overcoming the Sonderweg. The Constitution has played a crucial role in the construction of a kind of national identity after totalitarianism and during the Cold War, and the idea of “constitutional patriotism” is by many regarded as the West German contribution to

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the international history of political ideas.\(^1\) This idea, however, is embodied in a powerful representative: The rise of West German constitutionalism is intrinsically connected to the rise of the Federal Constitutional Court as the supreme interpreter of the Constitution, which famously assumed a dominant role in the liberalization of social and political order after 1949, and today is widely regarded as the most powerful court in the world.\(^2\) It may be impossible to write a history of a constitution so entirely dominated by the interpretation given to it by a court, and even a history of the Federal Republic, other than by writing a history of that court. Against this backdrop, it is striking how little attention historians have hitherto paid to the Federal Constitutional Court.\(^3\) The rise of constitutionalism and constitutional review in Germany is often all-too easily taken for granted or discounted as a mere and necessary consequence of the horrors of the national socialist rule.

Obviously, judicial history is never a purely historical endeavor, at least when it comes to operating courts. First of all, insofar as their case law has certain precedential effects and is subject to ongoing interpretation and reinterpretation, the historical meaning of landmark decisions has an obvious practical and normative relevance.\(^4\) In the German case, the limits of a historical perspective are even narrower: Analyzing the rise and the structure of the most powerful interpreter of a constitution is nearly impossible without at least implicitly taking a stance in today’s debates on the role and legitimacy of the Constitutional Court, which has recently been questioned by German constitutional theorists with an intensity unknown since the first two decades after the war.\(^5\) Questioning the legal, social, ideological, and political conditions of the historical success of the Court implies asking how sustainable these various resources are, which the Court’s powers rely on. How can the political system with the Court in its present form adequately be described? What kind of constitutional democracy does the Court frame and support? Has overcoming the first Sonderweg eventually given birth to a second one, namely to the “special path” of a democracy under a universal reservation of judicial power? Many observers, mostly European, have expressed such views over the last years, when the Court successively extended its jurisdiction to protect national fiscal sovereignty.

\(^1\) Jan-Werner Müller, Constitutional patriotism 15–45 (2007).

\(^2\) Christoph Möllers, Scope and legitimacy of judicial review in German constitutional law, in Debates in German Public Law 4–7 (Hermann Pünder & Christian Waldhoff eds., 2014); Alec Stone Sweet, Constitutional Courts, in The Oxford Handbook of Comparative Constitutional Law 823 (Michel Rosenfeld & András Sajó eds., 2012); Michaela Hailbronner, Rethinking the rise of the German Constitutional Court, 12 Int’l J Const. L. 626–627 (2014).


Two remarkable new books, by Justin Collings and Michaela Hailbronner, have prepared the field for an in-depth discussion of the historical role of the German Constitutional Court, which for many reasons is truly starting only now. Both books were written in the United States, more precisely at Yale Law School in the orbit of Bruce Ackerman’s constitutional theory. Justin Collings is an American, Michaela Hailbronner is a German lawyer, and both are fascinated by the Court’s rise and its present role in the global constitutional realm. Each approaches the development of the Constitutional Court from a different perspective: Justin Collings uses a wide range of sources to reconstruct the history of the institution as a concrete constitutional history of the federal republic, but also as a study in the contemporary history of political ideas. In his account of the changing structure of the Court and of the context of its decisions, he offers no less than a history of the second German democracy through the lens of its highest interpreter. His book is written in a well-crafted academic prose, full of interesting detail and insightful historical observations, complete with miniature portraits of the *dramatis personae*. The depth and breadth of his understanding of modern German history are admirable. Michaela Hailbronner is less concerned with the exhaustiveness of historical detail and does not aim at the full historical picture. Putting the German case into a broader comparative context, she develops a model of the legitimacy of constitutional review and judicial authority, and thus offers a more structural explanation for the peculiarities of what she calls the German model of constitutionalism.

These two studies will certainly modify the international perception of the Federal Constitutional Court. Both bring to the reader’s attention the fact that the Court as an institution is not simply a creature of the provisions of the Basic Law. The constitution does not provide any coherent “model” of constitutional review. Rather, the Court is the complex result of more than six decades of historical developments. As Hailbronner convincingly argues, what was later regarded as the German type of constitutional court almost necessarily exceeded anything the drafters had imagined: When the Bonn parliamentary council debated the constitutional text in 1948 and 1949, there simply was no institutional blueprint for a fundamental rights court. The global rise of judicial power is a distinctive phenomenon of the second half of the twentieth century. The European Court of Human Rights did not exist, nor did the Court of Justice of the EU. And even the US Supreme Court only gained its later (and present) scope of power during the civil rights era.

Both authors offer distinct narratives of the historical material. The story Collings tells follows a bit more closely the lines of the master narrative of modern German history cited above. In his account, the pivotal role of the Court in the establishment of a

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rendering it properly. It was through this achievement that the Court gained the moral and political authority that later became the lasting foundation of its popular support and political power. Hence, the substantive underpinning of the Court’s authority is not democracy but a peculiar conception of fundamental rights, rooted in a historical antithesis to the Nazi crimes. According to Hailbronner, this explanation is just one, important yet one-sided, part of the story. In her fascinating account, which transcends the patterns of introverted German self-perceptions, the Court’s authority depended less on its ability to claim the legacy of anti-Nazism than on its success in building a unique model of constitutional review, which ingeniously combined a historically new vision of constitutional law and different traditional elements of German legal culture.

2. How to write the history of a constitutional court

Let us first consider some general difficulties in writing the history of the Federal Constitutional Court. Courts speak, or at least should speak, through their decisions. Decisions are therefore the primary sources of a court’s history. But decisions usually do not deal with the Court but with individual cases. Cases must be decided as they arise. Even the most impressive tradition of case law does not amount to any meaningful history of the Court. Other factors and sources have to be taken into account. Some relate to the inner structure and functioning of the judicial body. This includes, first and foremost, everything that concerns the acting personnel on the bench at the time, i.e., the background, training, motivation, political beliefs, etc. of the judges, as well as the internal organization of the Court. The latter aspect is particularly relevant under a system of juges rapporteurs, as it exists in Germany, where each case is assigned to a single member of the Court who will then draft the judgment for the senate. This responsible judge can exercise a very high degree of influence on the way a case is debated. Internal sources of the greatest importance are therefore the preparatory papers leading to the text of a certain decision. Access to the archives of the Court has only very recently been opened for academic purposes and remains heavily restricted.

The most important obstacle in writing the history of a court is the fact that the core of judicial activity, namely deliberations and voting in the senate, remains inaccessible. Procedural law explicitly prohibits minutes of sessions, and the disclosure of details of the deliberations, or even voting behavior by judges, is subject to criminal liability. Other sources and elements of an institutional history concern the interaction of the court with its environment and in particular with the other actors of the constitutional business: judicial appointments, legislative debates following controversial judgments which often entail the striking down of statutes, political debates over institutional reforms of the Court, but also public reactions to ground-breaking decisions and the broader public debate over the legitimacy of constitutional review,

8 See infra Section 4.
plus theories of constitutional review and the stance legal scholarship takes towards the Court.

Most of this is true of any constitutional court. Specifically in the case of the Federal Constitutional Court, however, the situation is exacerbated by some other general German peculiarities in the functioning of judicial bodies, which make it even more difficult to grasp the court historically. First of all, the German judiciary at large has a pronounced bureaucratic structure and hence shows only few “personal” elements. The acting judge behind a case is not the center of attention, even in spectacular constitutional cases. In fact, the respective judge’s name is usually unknown even to professional commentators. There is almost no public interest in the people on the bench and, unlike in the United States, no tradition of writing biographies and autobiographies of constitutional judges. Among the mounds of literature that have been produced about the Court, there are only two biographies, both devoted to the Court’s first president Hermann Höpker-Aschoff. Both of which certainly would not have been written merely for his activities on the bench: Höpker-Aschoff was also a former Prussian minister of finance and one of the framers of the Grundgesetz.

Furthermore, the acting judges—even minority judges—have to sign each ruling, but do not speak in their own names. Rather, it is always and exclusively Das Bundesverfassungsgericht [the Federal Constitutional Court] as a collective body that is allowed to speak formally in the name of the people. As a consequence, dissenting opinions do not have a very long tradition in Germany and still are a rare exception. A statutory basis for the publication of dissenting and separate opinions was introduced in the early 1970s after tensions within the Court had become more and more visible during the 1960s. “Wild” dissenters even sent out internal opinions to colleagues and the media in highly political cases such as the controversial ruling concerning the provisions of the Reich Concordat between Hitler Germany and the Apostolic See that had remained in force.

Against this backdrop, it is no coincidence that both books under review approach the Court from an outside perspective: Collings from the point of view of the political branches and the German public. Hailbronner from an international perspective. Collings follows the development of the Court chronologically. The historical line of the most prominent cases and the changing personnel of the Court form the basis of his argument. Drawing on an impressive body of contemporary scholarly writings on the Court, biographical material on the key figures, and, most of all, debates over the Court in newspapers and the German public, he is able to contextualize historical case law in an unprecedented richness, which greatly contributes to the understanding of the jurisprudence.

12 Meinel & Kram, supra note 9, at 915–916.
Hailbronner’s argument is different and, unlike Collings’s, constructed in a very systematic way. She uses evidence from constitutional history to set out her comparative theory about the origins of the Federal Constitutional Court’s power. She starts with the assumption that the degree of influence a constitutional court may ever gain depends on two essential parameters. First, the court has to develop, embrace, or uphold a general notion of constitutionalism that encompasses broad review powers. Following an American typology, Hailbronner defines this notion as “activist,” as opposed to “reactive,” constitutionalism.13 Whereas reactive constitutions, she argues, restrict the scope of constitutional review to the protection of the boundaries of individual freedom against infringement by the political realm and hence are devoted to a “negative” idea of freedom, activist constitutions define the role of both the state and of constitutional law in a much broader way.

An activist constitution . . . lays out a vision of a just society and provides directions for realizing it. And because realizing a comprehensive vision of justice is a challenging task, activist constitutions will typically require the transformation of society and individual behaviour. There are hence no social or individual spheres that are considered private, sacrosanct, and above legal intervention. State planning and the administration of government programmes extend to potentially all areas of its citizens’ lives.14

This implies that constitutional review is necessarily based on “a much broader understanding of justice,” which bears on a wide range of doctrinal issues, most of all on the theory of fundamental rights.15

The second component of a constitutional court’s power is the general stance on judicial authority prevailing within a certain legal culture, in other words, the legal, political, and social modes of interaction between the constitutional court and the political branches and the rest of the judiciary. Again, Hailbronner distinguishes two basic types of judicial authority. Whereas “coordinate systems of authority,” such as the United States, are based on a shared responsibility of all branches to interpret the constitution, “hierarchical models” of judicial authority, such as Japan or Germany, tend to separate law-making and interpretation quite strictly, whereas the political branches are equally strictly subordinated to the judicial power in interpreting the law including the constitution.16

Hailbronner’s principal argument then is clear: The astonishing rise of the German Constitutional Court is explained by the fact that it has successfully combined, or even merged, activist constitutionalism with a hierarchical culture of judicial authority.17 It has followed the global trend of the “progressive age” to a more socially engaged vision of politics and society in terms of constitutional law and, in Hailbronner’s words, became the “frontrunner of social progressivism” in the 1950s and 1960s,18 when, for instance, the US Supreme Court famously adopted a similar vision of a more

14 Id. at 17.
15 Id. at 18–20.
16 Id. at 26–39.
17 Id. at 97.
18 Id. at 99.
socially engaged constitutionalism in the civil rights era. But, unlike its American counterpart, the German Court could do so by exploiting older resources of German legal culture including a great trust in the judiciary deeply rooted in the German society’s general confidence in law as a “neutral” force of dispute resolution. A confidence which arguably stems as much from a certain nineteenth-century conception of the rule of law (Rechtsstaat) as from older patterns of organizing political legitimacy in a country divided between the denominations.19

With regard to the hierarchical authority of the Constitutional Court, Collings suggests a slightly different conclusion, yet without making it explicit. In his account, as we will see, the Court has, over decades, considerably transformed the nature of its own power, and now habitually acts as a political institution in an established interplay of checks and balances with the other actors in the German political system. He also explains its triumph differently than does Hailbronner:

The observation that the Court had helped to democratize a pre-democratic political culture led, in the fullness of time, to a conviction that the Court was a constitutive element of the democratic political culture it helped create. The key to the Court’s success was the public’s embrace of the following syllogism: No democracy without fundamental rights (major premise); No fundamental rights without constitutional justice (minor premise); No democracy without the Constitutional Court (conclusion).20

3. The heroic age: an entrenchment of progressive constitutionalism?

Both biographies of this remarkable institution pay a lot of attention to the Court’s early years. It has often been remarked that the Court entered its most formative years as soon as it took up work in autumn 1951. The Court immediately plunged into the “high politics” of the young West German state and had to face a series of heavy challenges. The framers had not anticipated such a distinctly political role for the Court, although the constitution did allow for full-blown constitutional review.21 As the Basic Law was meant to be no more than a provisional constitution for the West German state, the attention that was paid to the Court during the constitutional deliberations was comparatively poor.22

Within the first decade of its operation, the Court handed down a series of impressive decisions, each touching upon some of the most fundamental questions of the new constitution. In particular, the Court in several landmark cases contributed tremendously to the idea of “militant democracy.” First of all, however, the Court asserted its status of a supreme constitutional body, independent from the federal ministry of justice but also from the other federal courts, and defended it against a heavy resistance on the part of the federal government. The battle over the Court’s “status”, in which

19 Christoph Schönberger, Anmerkungen zu Karlsruhe, in Das entgrenzte Gericht 19 (2011).
20 Collings, supra note 11, at xxxvii.
21 Id., at xxv–xxvi.
22 Hailbronner, supra note 7, at 48–53.
both sides mobilized considerable energies, ended in a complete defeat of the government. The Court was also engaged in the constitutional conflict over ratification of the treaties on the European Defence Community. The issue raises one of the most troubling questions of German politics less than a decade after the end of Nazi rule, namely whether the country should again deploy a standing army. The proceedings eventually came to an end without a substantive decision after the French National Assembly voted down the project of a Defense Community, and Adenauer later won a supermajority to amend the constitution, which, ever since 1955, has explicitly provided that Armed Forces for purposes of defense shall be established.

As concerns domestic politics, the Court decided on the constitutionality of the federal government’s motions to ban the reorganized Nazi party in 1952 and the German Communist party in 1957 and, what eventually was even more important, the judges made enemies of the former civil servants who had served under Hitler. Article 131 of the Basic Law left it to the legislature to decide upon the “legal relations of persons . . . , who on 8 May 1945 were employed in the public service, have left the service for reasons other than those recognized by civil service regulations or collective bargaining agreements [in plain terms: by denazification], and have not yet been reinstated or are employed in positions that do not correspond to those they previously held.” As is well known, those civil servants were treated quite well at large. The worst of them, however, who had not been reappointed by the democratic state, were now furiously blaming democracy for this “betrayal” and took the view that their acquired rights had to be acknowledged by the new state. In one of its most fiercely attacked judgments ever the Court held that this view was unfounded. Since National Socialism had perverted the civil service as an institution, the new state had full powers to decide whether to employ them or not. According to Collings,

> The judgment produced a decidedly mixed response from the west German press lords . . . . Within the legal academy and the civil service itself, the decision provoked almost unbounded fury. Within a year more than eighty articles appeared in legal journals criticizing the decision at varying pitches of vehement wrath.

At the same time, the Court laid the foundations of its fundamental rights jurisprudence, which would later contribute most to its international reputation. In Elfes, the Court developed the famous concept of a “general” fundamental right, which can be invoked against any act of public authority to vindicate freedoms not explicitly guaranteed by the constitutional text. Collings’s conclusion backs the established understanding of German constitutional scholarship: “This was an extraordinary extension of protection; its implications for the Court’s future jurisprudence were colossal.” The next extension of fundamental rights protection followed less than a year later. In Lüth, constitutional review was broadly extended to the realm of private law and the ordinary courts: The Constitutional Court held that the Basic Law embodied “an
objective system of values”—including, for example, free speech—which must be obeyed not only by the state in relation to the citizens, but also by the citizens among themselves.

This value system—centred on the dignity and free development of the human personality within the social community—must be regarded as the fundamental constitutional decision for all areas of law. It governs and animates legislature, executive, and judiciary. Thus, self-evidently, it also influences civil law. No civil law provision may contradict it; each must be construed in its spirit.28

The Court concluded that the fundamental rights provisions should have a “radiating effect” upon the entire legal order. Collings rightly calls this judgment an “earthquake”29 as it gave a constitutional dimension to virtually every single case that could arise in any field of law.30 And another six months later, the third constitutive element of German fundamental rights jurisprudence—proportionality—was established as the standard constitutional test in the Pharmacies case.31 The case challenged the traditional corporatist approach to economic regulation and used the freedom of occupation (Article 12 of the Basic Law) to push for more economic competition.

What do these early landmark decisions tell us about the history of the Court? In Collings’s account, “it emerged as an emblem of moral legitimacy, courageously confronting and fearlessly repudiating the country’s recent past. It proved willing to take fundamental rights seriously. It was a moral success story to match the economic miracle.”12 It needs to be highlighted that, as Collings rightly observes and unlike the master narrative suggests, the early achievements of the Court were not so much about the democratic structure of the early Federal Republic, but about fundamental rights and the restoration of the rule of law.33

Hailbronner’s story runs differently, at least in parts. She argues that we have to distinguish two competing layers of constitutional argument in this early jurisprudence. One line of argument, most prominently expressed in the militant democracy decisions and some of the fundamental rights cases, consisted, as Hailbronner puts it, in an “aggressive protection of liberal individual rights”34 and was essentially in line with Adenauer’s Cold War policies. Outlawing Communists and pushing for more economic competition certainly was not likely to upset the government at the time. Even Lüth had a firmly conservative, anti-democratic theory of “values” at its core.35 But at the same time, Hailbronner argues, the paramount idea of constitutionalism embraced in Lüth paved the way for a transformative idea of constitutional justice, which was later pursued in the fields of gender equality and criminal procedure and

28 BVerfGE 7, 198 (205). I cite the translation given by Collings, supra note 11, at 58.
29 Collings, supra note 11, at 59.
31 BVerfGE 7, 377.
32 Collings, supra note 11, at 61.
33 Id. at 62.
34 Hailbronner, supra note 7, at 57.
35 Dominik Rennert, Die verdrängte Werttheorie und ihre Historisierung, 53 Der Staat 38 (2014).
which resulted in a series of heavy conflicts with the government during the dusk of Adenauer’s reign. As Hailbronner puts it:

Lüth signalled that the Court was moving beyond the established reactive paradigm of rights protection towards a more transformative model of constitutionalism. This new kind of constitutional thinking would view the constitution as a comprehensive vision for a better and more just society that would require not only considerable state-driven change but also intervention in formerly sacrosanct private relationships.

Whether one follows Collings’s or Hailbronner’s interpretation of the Court’s jurisprudence in the 1950s and early 1960s, it seems clear that the lines of conflict between the judges in Karlsruhe and the federal government in Bonn were suddenly turned upside down, when the social-liberal coalition under the new chancellor Willy Brandt came into power in 1969. Contemporary commentators, as well as later historians, have described this change of government as the “constitutional moment,” or the re-foundation of the young republic. In an atmosphere of change and optimism, the Court found itself in the conservative role of the guardian of constitutional “values” against the politics of “progress.” With meticulous care, Collings reviews the major cases of this period, which marked certainly the fiercest confrontation between the Constitutional Court and both the legislature and the executive. They include a famous and extremely controversial 1975 judgment striking down a reformist and liberal statute decriminalizing abortion, the imposition of heavy constitutional burdens on Brandt’s “New Eastern Policy,” and the reversal of a key element of social-liberal reforms of higher education. But Collings’s appraisal also shows that conservative opposition was never the exclusive stance of the Court, let alone internally undisputed. It was precisely at that time, when the first, and allegedly more left-wing, senate of the Court promoted its own “progressive” agenda in a ruling that pushed for change in the traditional system of university admissions as it recognized a fundamental right to “participation” in public institutions of education.

Hailbronner’s reading of this period comes with a more robust political perspective, suggesting that German constitutional law should embrace the theoretical agenda of popular constitutionalism. The Court’s jurisprudence in the “progressive age” is obviously decisive for the validity of her theoretical argument. She acknowledges that the Court indeed lost its position as “frontrunner of social progressivism.” But what about the activist model of constitutionalism the Court had advocated before? At this point, Hailbronner adopts Bruce Ackerman’s famous description of the US Constitution as a “dualist democracy” to make her case for a constitutionally entrenched “progressive”

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36 Hailbronner, supra note 7, at 61–63.
37 Id. at 60–61.
38 Collings, supra note 11, at 181; for a good historical account, see Conze, supra note 3, at 361–416.
39 Collings, supra note 11, at 113–114.
40 Id. at 148–158 (cf. BVerfGE 39, 1).
41 Collings, supra note 11, at 136–144 (cf. BVerfGE 36, 1).
42 Collings, supra note 11, at 130–134 (cf. BVerfGE 35, 79).
43 BVerfGE 33, 303.
44 Hailbronner, supra note 7, at 99.
character of the Basic Law. According to Ackerman, constitutional change can not only be brought about by formal amendments of the constitution but also by a set of formalized interactions among the branches of government and the sovereign people which result in what he calls “higher law-making.” A constitutional transformation of this kind is usually initiated by a distinct constitutional agenda that is being pushed for by one branch (“signaling”), embraced by the others, and eventually gains popular support, is approved, and codified. Hailbronner claims that the long-term interplay between the German Constitutional Court and the government, too, can be conceived in terms of higher law-making. She suggests that it was precisely the transformative agenda that the Court had itself helped to shape in cases like Lüth in the 1950s, which won popular approval when the reformist Brandt government was elected to office, and which was entrenched by this government even though the judicial branch then took a more distanced view.

It is a shortcoming of Hailbronner’s book that she does not make this core of her constitutional theory very explicit and leaves it to the reader to decide whether its application to the German Constitution is actually plausible. It is anything but obvious whether this notion of constitutional transformations makes much sense outside the US context and the difficulty to bring about constitutional amendments under Article V of the US Constitution, and more generally outside the American understanding of the separation of the three branches of the government, which act with a relative independence from one another. With both a relatively undemanding procedure of amending the constitution (Art. 79(2) Basic Law requires a majority of two-thirds in both houses of parliament) and parliamentary, rather than presidential, government, the interplay between constitutional amendment, interpretation, and change is utterly different in Germany. In the same vein, Hailbronner’s reading of the German procedure of constitutional amendments as an essentially apolitical, “technical” instrument of lawmaking takes the admittedly dreary decades after the political failure of a new constitution for the reunited country to be the full historical picture. Amendment initiatives used to be highly politicized; consider, for instance, the adoption of the state of emergency provisions in 1968 and the fiercely debated constitutional amendment allowing for Germany’s rearmament in 1955. Again, the relative flexibility of the constitution as concerns amendments leaves less room for transformative interpretation. Moreover, a more skeptical view would object that what Hailbronner calls the “progressive” agenda of the Court mirrored merely a complete lack of ideological visions on behalf of the political branches and public law scholarship in the first two post-war decades so that the Court without great own efforts managed to be the “substitute visionary” (Ersatzvisionär).

46 HAILBRONNER, supra note 7, at 165–166.
47 COLLINGS, supra note 11, at 100–103.
What is far more interesting than her implicit constitutional theory of German democracy is Hailbronner’s further argument concerning the two sources of the Court’s authority. Following her account, the Court was able to confront the Brandt government’s challenge to its authority not so much on political grounds but by recourse to old virtues of the German Rechtsstaat (rule of law) and its essential cultural features: the habit of obedience to the judiciary, an apolitical ideology of law, and a bureaucratic style of legal reasoning. During the 1970s and 1980, she argues, the Court could gradually withdraw from the high political stage of constitutional review by assuming a more doctrinal rhetoric. In particular, the Court successfully managed to convert its proclaimed “system of constitutional values” into an ostensibly de-politicized doctrinal structure, which Hailbronner persuasively calls “value formalism”:

This included (i) a set of operable “effective dimensions” of rights such as the “protective function”\(^{49}\) or the famous “horizontal effect,”\(^{50}\) (ii) a highly professional style of argument, and (iii) a standard doctrinal structure for any constitutionality test: proportionality analysis.\(^{51}\) In her own words, the breadth of constitutional review... is contained by the dry deductive style and the abstract decontextualized categories of a hierarchical culture, which highly value legal autonomy. Legalistic and expansive, Value Formalism underwrites the power of the German Constitutional Court.\(^{52}\)

If she is right on this point, her account of a formalist turn in constitutional reasoning would also explain another peculiar feature of German constitutional law. The limits of constitutional review are—if ever—debated as a mere political problem of the Court’s “legitimacy” or, what arguably is even worse, left to some obscure personal ethos of the bench,\(^{53}\) rather than being properly treated as a matter of constitutional law.

On this point, the contrast with the United States is striking and the comparison, for this reason, may not be very fruitful after all. Popular constitutionalism of the sort Hailbronner has in mind has never had any political chance in Germany and at no moment in history was it an issue of public debate. In a country without a single successful democratic revolution in history, lawyers have every professional reason to adopt an apolitical ideology of law. On this point, Collings offers a detailed, complex, and accurate analysis. Since he can draw not only on the Court’s jurisprudence, but also on a plethora of archival sources including the papers of some of the most important judges, he is able to show that, irrespective of a general political rhetoric which broadly endorses the authority of the Court, the political branches have found means to limit the exercise of powers by the Court. Professional academic analysis of constitutional review, too, has played a role in keeping the Court in check. It may be not the least virtue of the German trust in “doctrine” (Dogmatik), which Hailbronner is so opposed to, that it makes the acting judges susceptible to a more subtle yet highly influential form of criticism.

\(^{49}\) Hailbronner, supra note 7, at 104–107.

\(^{50}\) Id. at 107–108.

\(^{51}\) Id. at 117–121.

\(^{52}\) Id. at 123.

\(^{53}\) Id. at 148–149.
4. Perspectives of a constitutional history of the Federal Republic

What are the consequences of these accounts for German constitutional law and constitutional history? Both Collings and Hailbronner repudiate the Court as a general model of constitutional review, albeit Collings does so more implicitly. Both rightly see the Karlsruhe Court as a genuine German institution, deeply implicated in the peculiarities of German post war history (Collings) or legal culture (Hailbronner), an institution, which for this reason can only be grasped historically. In this respect, both confront German constitutional scholarship with its own characteristic lack of historical understanding. Although constitutional interpretation in the Federal Republic has been largely driven by historical argument, namely references to the constitutional history of Weimar and Nazism, it has not developed any means to contextualize and frame its own tradition historically. German constitutional theory has hitherto largely failed to conceive the historical development of the constitution as an integral part of the understanding of the constitution itself.

These deficits can easily be demonstrated by the jurisprudence of the Constitutional Court. There is a long list of judgments which rely on quite straightforward historical arguments and rightly interpret the constitution as a historical antithesis to the national socialist past. The most prominent decisions of this sort include Lüth, the civil servants case, or the revision of the expatriation of Jews after 1933, but also more recent decisions such as the Wunsiedel judgment. In Wunsiedel, the Court upheld a criminal statute that punishes certain forms of national-socialist hate speech, even though it does not meet the constitutional standard of generality as required by the Article 5(1) of the Basic Law (freedom of opinion). This tradition of constitutional reasoning is becoming increasingly problematic. As the constitutional logic of Vergangenheitsbewältigung (coming to terms with the past) itself is becoming historical, its rhetoric and motivation are increasingly unconvincing: Do the lessons of the past rather call for banning a fascist party or for having more confidence in democratic politics? Does a tough policy on hate speech follow from the past or is it rather the same past’s lesson to adopt a more liberal approach? As the constitution endures, the precise meaning of the antithesis which it is supposed to embody, is more and more ambiguous and inconclusive, which of course is as much a legal as a general political and cultural problem.

The other side of the coin is, more precisely, a structural problem of constitutional interpretation in Germany. The more recent constitutional history is systematically ignored by constitutional interpretation. Big history outweighs the smaller histories of the Constitution. First of all, the historical context of decisions does not play any major role in constitutional reasoning. Even though judgments of the Federal

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56 On this point, see Oliver Lepsis, Die maßstäbsetzende Gewalt, in Das entsrensre Gericht 159, 200–202 (2011).
Constitutional Court enjoy a de facto status of precedents, they are commonly cited irrespective of their context, the facts of the case, or the political background.\(^5^7\) German legal education has also never really developed a canon of decisions, notwithstanding several convincing attempts.\(^5^8\) As a consequence, almost no efforts have been made to include the more recent history of the Federal Republic, or the case law relating to that history, into constitutional reasoning, at least as compared to the role that the history and failure of the Weimar Constitution or the Nazi era have played in constitutional interpretation. Lüth, a case deeply engaged with the Nazi past, is certainly the only case whose context any German lawyer will be able to recount. Among the most telling examples of the asymmetrical perception of constitutional history are two of the Court’s leading separation-of-powers cases, dealing with the dissolution of the Bundestag by the Federal president following an arranged vote of no confidence.\(^5^9\) Not only in the first decision of 1983, but also in the second decision of August 2005, a close analysis of the precedents, their contextual analysis etc. played only a minor role in the Court’s reasoning as compared to arguments drawing on the crisis of parliamentary government in Weimar. The reader of the cases eventually learns more about pre-history than about history. As the German post-war constitutional framework is no longer the self-evident historical context of constitutional interpretation, there is an increasing demand for a more historical perspective on the Court and its jurisprudence, to which both books under review contribute tremendously.

Both studies could not foresee, however, the recently widened possibilities of historical research on the Court. As of 2014, an amendment of the Federal Constitutional Court Act grants at least partial access to the archives of the Court, which have been transferred to the Federal Archives (Bundesarchiv) in Koblenz. Historians will be able to do in the future what neither Hailbronner nor Collings could. It will be possible to examine individual cases in detail, including their background, context, and the dynamics within the Court. The provisions governing access to the files, however, are quite strict.\(^6^0\) As a rule, any document that was originally protected by the secrecy of judicial deliberations can be requested no less than sixty years after the respective judgment was handed down. This means that even the files relating to the famous Lüth case of 1957 will not be accessible before the end of 2017, whereas for example the files of the ground-breaking civil servants case (1953) can now be used without restrictions.\(^6^1\) There remains one further limitation: The Court refuses to make available, for the purposes of historical research, any documents other than those relating to a particular case. This exception covers a lot of interesting material, such as files relating to the institutional status of the Court or to the procedure of case assignments, personal files of the judges, and session calendars of each senate.\(^6^2\)

\(^5^7\) Oliver Lepsius, The Quest for Middle-range Theories in German Public Law, 12 Int’l J. Const. L. 696 (2014).
\(^5^8\) Verfassungsrechtsprechung (Jörg Menzel ed., 2011); Entscheidungen des Bundesverfassungsgerichts (Jürgen Schwabe ed., 2004); Entscheidungen des Bundesverfassungsgerichts (Dieter Grimm, Paul Kirchhof & Michael Eichberger eds., 2007).
\(^5^9\) BVerfGE 62, 1; BVerfGE 114, 107.
\(^6^0\) In more detail, see Meinel & Kram, supra note 9, at 916–918.
\(^6^1\) For a first survey, see id. at 918–921.
\(^6^2\) Id. at 917–918.
It is certainly too early to predict what kind of insights future archival work on the Court will yield and impossible to say whether it will change the general view of the Court at all. But it is fair to say that, thanks to Collings’s and Hailbronner’s books, we need less another comprehensive historical overview than specific and detailed studies of smaller segments of the Court’s history. Historical analyses of single cases or groups of cases might be the most obvious starting point, but studies on institutional dynamics within the Court or even biographical studies on the key judges might be equally profitable. It is worth noticing that the Court of Justice of the European Union (CJEU) has opened its archives almost at the same time as the Federal Constitutional Court. The files have been given to the European University Institute in Florence. This is certainly no pure coincidence but points to a widely shared need for broader historical understanding of the constitutional order which emerged after the Second World War. First remarkable efforts have been made to contextualize the landmark cases of the CJEU.

5. Back to the golden age? The restored Baumgarten building in Karlsruhe

History is always a construction. Anyone who seeks deeper insights into the identity and self-conception of the German Constitutional Court, as well as its institutional history, will therefore have to study the impressive illustrated documentation of the Court’s building in Karlsruhe edited by Falk Jäger, which affords the reader a remarkably detailed panorama of the environment in which the Court is working. The volume was published on the occasion of the completion of a thorough renovation of the Court’s building between 2011 and 2014. The renovation improved the technical infrastructure, while taking care to preserve the character of the building as a whole. During the time the building was under construction, the Court took up quarters in former barracks in the outskirts of Karlsruhe. It must be kept in mind that questions of visual representation of court architecture are of higher importance to the Federal Constitutional Court than to any other German court, because the Court very regularly appears on the national television. It is the only German court that permits TV recordings in the courtroom.

The present headquarters next to the baroque Karlsruhe Palace are not the Court’s first office. For almost twenty years it had inhabited the Prinz-Max-Palais, a nineteenth-century villa, imposing yet far too confined for the Court’s needs. The later building, eventually opened in May 1969, is a work of Paul Baumgarten, an important representative of West German post-war architecture. The building is one of the

63 A conference on the occasion of the opening of the archives was held in Florence in December 2015: http://www.eui.eu/SeminarsAndEvents/Events/2015/December/SettinganAgendaforHistoricalResearchinEuropeanLawActorsInstitutionsPoliciesandMemberStates.aspx.


66 FEDERAL CONSTITUTIONAL COURT ACT [BUNDESVERFASSUNGSGERICHTSGESETZ], ¶ 17a.
finest examples of the light “transparent” style that was to become the paradigm of “democratic” architecture in the Federal Republic. Other famous examples of the same style include the chancellor’s residence and the new Bundestag building in Bonn and of course—albeit with a characteristic twist—Norman Foster’s iconic cupola on top of the rebuilt Reichstag in Berlin. Until the present time, it is a commonplace of German political thought to associate democratic representation with façades of glass and steel. The political architecture of transparency is more entrenched in Germany than anywhere else, because it is usually conceived as the only possible answer to Albert Speer’s neo-classical architecture of the Nazi state available after 1949.67

The restoration of the Court’s building is more than of mere cultural interest; it is highly emblematic of a constitutional transformation affecting its acquired position. After the Bundestag and the government, including most of the ministries, moved to Berlin, the Constitutional Court has remained the only constitutional institution still inhabiting the old architecture of glass and steel. This is certainly no coincidence for a court whose structure, standing, power, style, and language are so deeply grounded in the post-war political situation of West Germany—deeper than those of the other branches, which have now accommodated themselves to the “normality of a Berlin republic” (Jürgen Habermas).68 Indeed, the decrepitude of the Baumgarten building would have been an opportunity to move the Court closer to the center of power in Berlin. The president of the Court, Andreas Voßkuhle, firmly rejects such ideas:

A debate, similar to the one that followed the reunification, when Potsdam was discussed, did not take place during the restoration. And why should we relocate, anyway? The Federal Constitutional Court works independently from the business of politics and does not rely upon spatial proximity to the Bundestag or the government. We are very comfortable here in Karlsruhe.69

In the same vein, he emphasizes that the Court has never considered moving to a different building:

I always find it amazing how strongly the building is influencing our work. It is very bright and accessible, and seems light and understated. Through its transparency and unpretentiousness it has a very special charisma. Pedestrians can watch us at work from the Schlossplatz or the botanical gardens. Hence, we feel anew every single day that we are there for the people.70

There are good reasons for taking such statements about the political implications of court architecture very seriously. Political architecture is part of the concrete constitutional reality, in Germany as much as anywhere else. If that is true, then what does the return to the transparent glass façades of the 1960s mean for the Court whose political and legal environment has so fundamentally changed in the last decade? The Court is no longer an agent of social change in a post-totalitarian state. The

69 Andreas Voßkuhle, Ein Haus für ein Verfassungsorgan, in Transparenz und Würde 156, 156 (Falk Jaeger ed., 2014) (reviewer’s own translation).
70 Id. at 157.
protection of constitutional rights has become a complex interplay between national and European courts. The Court’s struggle for a more “democratic” European constitutionalism and national fiscal sovereignty can hardly be linked to the architectonic ideas of lightness, transparency, and a democratic society. Would the Court have been better advised to settle in Berlin and reinvent itself as a post-national constitutional court? Moving back into an environment where everything recalls a golden age has always been a tough challenge, and there is of course no exception for a constitutional court. Johann Wolfgang von Goethe gives one of the finest literary descriptions of this challenge in chapter 17 of Elective Affinities. Ottilie, Eduard, Charlotte, and the Captain have resumed their common life in Eduard’s renovated estates after the tragic death of Charlotte’s son. A situation of which Goethe remarks: “Auf diese Weise zeigte sich der häusliche Zirkel als ein Scheinbild des vorigen Lebens, und der Wahn, als ob noch alles beim alten sei, war verzeihlich.”—“In this way their domestic round was the illusory image of their former lives, and it was forgivable that they should delude themselves into thinking things were still the same.”71