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Selected Writings

Ernst-Wolfgang Böckenförde
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and
Former Judge of the Federal Constitutional Court of Germany

Edited by

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VOLUME I

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Preface

We began working on this project several years ago when we realized in discussions about constitutionalism and democracy, about law and religion, and about the courts and politics, how frequently we referred to concepts that Ernst-Wolfgang Böckenförde, legal scholar and constitutional judge, has coined, shaped and analysed. When we made reference to these concepts to colleagues and students from outside Germany and from different disciplinary backgrounds—political science, law, sociology, history, religious studies—they asked us for further reading on Böckenförde. However, only a small edition from 1991, published by Berghahn, provided translations of about a dozen of Böckenförde’s articles and that collection has since gone out of print. Because of this, we decided to publish a new and more comprehensive collection. The edition is published here in two volumes, the first dealing with law, constitutionalism, and politics and the second featuring articles that lie at the interface of religion, law, and democracy. Böckenförde’s oeuvre deserves an international reception not merely as testimony to a classic strand of German political and legal thinking beyond Hans Kelsen and Carl Schmitt, but also as a historically rooted, normatively firm, and at the same time sharply analytical body of work that helps its readers understand the modern state as a political order deeply connected to law.

We have incurred many debts in preparing the publication of this volume. Numerous colleagues have provided immeasurable help with comments and advice. They include David Abraham, Markus Böckenförde, Hubertus Buchstein, Gerhard Dannemann, David Dyzenhaus, Rainer Eckertz, Martin van Gelderen, Dieter Gosewinkel, Ali el-Haj, Michael Heinig, Joachim Krause, Oliver Lepsius, John Madeley, Madalena Meyer-Resende, Stanley Paulson, Christian Polke, Ulrich K. Preuß, Bernhard Schlink, Shylashri Shankar, Patricia Springborg, and Ruth Zimmerling. We are deeply grateful to them. We have been fortunate to employ the services of Thomas Dunlap for the translation. Due to the range of topics and multiple disciplinary perspectives involved, the translation was a particular challenge, compounded by the complex task of transferring legal terms rooted in one specific political and legal culture into English as a universal scholarly language current in not one but several legal and political cultures. We thank Thomas Dunlap for mastering this difficult task so skillfully.

Several colleagues generously offered additional time and concentration to help with the translations of key legal terms: David Abraham, Gerhard Dannemann, Stanley Paulson, Patricia Springborg, and Ruth Zimmerling. Fortunately, we were able to work with an author with whom we could discuss our questions and ideas. We especially thank Ernst-Wolfgang Böckenförde for sharing his thoughts on the selection of articles, and for being available to meet with us and communicate in other ways whenever we sought clarification.
Preface

We thank Oxford University Press, especially Elinor Shields, for accompanying this publication with such generous dedication and support.

We thank Geisteswissenschaften International for partially funding the translations for this volume. We further thank Alexander Balistreri and Simon Fuchs at Princeton University and Eileen Küçükkaraca, Katharina Marcisch, Isabelle Süßmann, and Sonja von Wahl at the University of Kiel for their assistance in the preparation of this volume, and the Deutsche Bischofskonferenz/Verband der Diözesen Deutschlands (VDD), Kiel University and Princeton University for providing financial and/or logistical support, and the Thyssen Foundation, the German Research Foundation as well as the Centre for Interdisciplinary Research (ZiF) at the University of Bielefeld for funding two conferences on Böckenförde’s work.

Wherever it seemed necessary, we have inserted annotations that include further explanations on the context of the subject matter, questions of legal termini, and the context of German or European politics and history. A comprehensive publication list of Ernst-Wolfgang Böckenförde’s can be found in Volume II, which is titled ‘Law, Religion and Democracy’.

Mirjam Künkler and Tine Stein, February 2016.
Table of Contents

Translator’s Note
by Thomas Dunlap ix

State, Constitution, and Law: Ernst-Wolfgang Böckenförde’s Political and Legal Thought in Context
by Mirjam Künkler and Tine Stein 1

PART I POLITICAL THEORY OF THE STATE
Böckenförde’s Political Theory of the State 38
by Mirjam Künkler and Tine Stein


Chapter II. The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory [1988] 69

Chapter III. The State as an Ethical State [1978] 86


PART II CONSTITUTIONAL THEORY
Böckenförde’s Constitutional Theory 134
by Mirjam Künkler and Tine Stein

Chapter V. The Concept and Problems of the Constitutional State [1997] 141

Chapter VI. The Historical Evolution and Changes in the Meaning of the Constitution [1984] 152

Chapter VII. The Constituent Power of the People: A Liminal Concept of Constitutional Law [1986] 169

### Table of Contents

**PART III FUNDAMENTAL RIGHTS AND CONSTITUTIONAL PRINCIPLES**

Fundamental Rights and Constitutional Principles in Böckenförde’s Work

by Mirjam Künkler and Tine Stein

Chapter IX. Critique of the Value-based Grounding of Law [1990]

Chapter X. Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]

Chapter XI. Fundamental Rights: Theory and Interpretation [1974]

Chapter XII. Protection of Liberty against Societal Power: Outline of a Problem [1975]

**PART IV ON THE RELATIONSHIP BETWEEN STATE, CITIZENSHIP, AND POLITICAL AUTONOMY**

Böckenförde on the Relationship between State, Citizenship, and Political Autonomy

by Mirjam Künkler and Tine Stein

Chapter XIII. The Persecution of the Jews as a Civic Betrayal [1997]

Chapter XIV. Citizenship and the Concept of Nationality [1995]


Chapter XVI. Which Path is Europe Taking? [1997]

**PART V. BÖCKENFÖRDE IN CONTEXT**

Chapter XVII. Biographical Interview with Ernst-Wolfgang Böckenförde [2011]

**APPENDIX**

List of Original Titles

**Index**
Translator’s note

This project has been a team effort from beginning to end. Translating legal German into English is a notoriously difficult task. I am grateful that I was able to draw on some previous translations by J. A. Underwood and Heiner Bielefeldt. Professors Stanley Paulson and Ruth Zimmerling were kind enough to read two essays, and their expert suggestions proved invaluable. Mirjam Künkler and Tine Stein read each chapter very carefully and made many crucial improvements. I was very fortunate, indeed, to have had such conscientious and skilled collaborators.

Thomas Dunlap, February 2016
State, Constitution, and Law
Ernst-Wolfgang Böckenförde’s Political and Legal Thought in Context
Mirjam Künkler and Tine Stein

I. INTRODUCTION
Ernst-Wolfgang Böckenförde (b. 1930) is one of Europe’s foremost legal scholars and political thinkers. As a scholar of constitutional law and a judge on Germany’s Federal Constitutional Court (December 1983–May 1996), Böckenförde has been a major contributor to contemporary debates in legal and political theory, to the conceptual framework of the modern state and its presuppositions, and to recent political and ethical issues. His writings have shaped not only academic but also wider public debates from the 1950s to the present, to an extent that few European scholars can match. As a federal constitutional judge and thus holder of one of the most important and most trusted public offices, Böckenförde has influenced the way in which academics and citizens think about law and politics. During his tenure as a member of the Second Senate of the Federal Constitutional Court, several path-breaking decisions for the Federal Republic of Germany were handed down, including decisions pertaining to the deployment of missiles, the law on political parties, the regulation of abortion, and the process of European integration.

Böckenförde is most widely known for his aphorism contained in a 1967 article [included in Volume II] on the rise of the state as a process of secularization: ‘The liberal, secularized state draws its life from presuppositions that it cannot itself guarantee’. Böckenförde here pointed to the problem that the modern constitutional state, as a necessarily secular state, cannot resort to imposing certain values or worldviews on its citizens without undermining the very liberalism on which it is founded. Known as the so-called ‘Böckenförde-Dictum’ or ‘Böckenförde-Paradox’, the sentence has shaped numerous discussions about the pre-political bases of the state.1 Proceeding from this dictum, it is no coincidence that, alongside constitutionalism and rights theory, the principle of

freedom of religion and the relationship between law, religion, and democracy form a focal point in Böckenförde’s work.

Three characteristics explain his influence. First, as someone trained in both law and history, with doctorates in both fields, Böckenförde writes both as a legal scholar and a historian, and although he spent most of his life as a professor of law, rather than history, most of his writings attest to his intense interest in the historicity of concepts. He approaches his topics from the perspective of a jurist interested in dogmatic–systematic criteria for the interpretation of fundamental rights; and from the perspective of a historian and humanist concerned with the historical embeddedness and genealogy of concepts. The combination of these two approaches makes him a particularly original commentator. One of Böckenförde’s main contributions to legal and constitutional theory is therefore in laying out the conceptual foundations of law and politics, which renders his work also relevant to political theory and political philosophy.

Second, Böckenförde writes as a political liberal, as a social democrat, and as a committed Catholic. As a Catholic, he is concerned with questions of social cohesion, political community, and the ethical foundations of the state: what holds the demos together, and whether the state should promote certain worldviews over others (which he ultimately abnegates). As a social democrat, Böckenförde represents a specific social-democratic form of welfarism in a continental tradition. He cares deeply about not only political but also economic and social injustices. For Böckenförde it is a duty of the democratic state to address these injustices, and no political stability can be achieved without social and economic security. Moreover, many rights cannot be enjoyed without certain socio-economic conditions being met. Ultimately, it is the liberal democratic state which may need to provide for these if society does not. Finally, as a political liberal, he has argued fervently in favour of tolerating even those who oppose the system and of prosecuting individuals only on the basis of violations of the law, and not on the basis of a lack of Gesinnungstreue (in this case, declared commitment to the liberal democratic order)—a position that, somewhat surprisingly, goes against the grain of the long-standing legal situation since the early Federal Republic.

Due to his pluralistic normative commitments (Catholicism, social democracy, and political liberalism), it has been difficult to pigeonhole Böckenförde on a left–right continuum. Böckenförde appears progressive in some ways (e.g., dual citizenship does not pose for him a problem of divided loyalty) and conservative in others (e.g., people need grounding in families, and states need to mould their students in school).

Third, Böckenförde unites an intellectual and a practical interest. Even before his appointment as a judge on the constitutional court, he considered legal problems with an eye towards practical solutions which balance the needs

and interests of those involved. To his conceptual–historical treatment of problems he adds the perspective of the practitioner, the judge who seeks to remedy societal problems or imbalances within the given legal framework. Reflecting this interest, he sees the balancing between the needs and interests of different groups and classes as one of the key functions of the state.

Böckenförde’s preferred form of academic and public intervention is the relatively short article of 6,000–12,000 words. Over a period of more than fifty years, he repeatedly instigated scholarly and public debates using this format, on a wide range of topics from the ‘Concept of the Political’ in Carl Schmitt, the Hobbesian transformation of concepts of law, the social foundations of German constitutionalism, to the role of the Catholic Church in 1933, the demise of the Weimar Republic, comparative concepts of citizenship, methods of constitutional interpretation, theories of fundamental rights and fundamental norms, and reflections on the relationship between democracy and religion. Over time, Böckenförde collected these articles in several editions with the Suhrkamp Publishing House.2 These essays were often developed as speeches given at award ceremonies or public functions, that were subsequently published in Germany’s leading daily, the Frankfurter Allgemeine Zeitung, or Switzerland’s Neue Zürcher Zeitung. In this format the essays often triggered public debate and set off broader societal engagements with the topic. Due to his membership in the Social Democratic Party and various associated advisory functions,3 these public interventions also initiated, or at least influenced, internal party debates and reform proposals.

Böckenförde’s writings have received wide reception in the academic world. Aside from three Festschrifts, several edited volumes and monographs have already been published about his work.4 He has received numerous prizes and awards, as well as five honorary doctorates.5 His writings have been

3 In Germany, in contrast to many other countries, judges may be members of political parties. See for a further discussion, page XX.
5 Böckenförde received honorary doctorates from the Law Schools of the Universities of Basel (1987), Bielefeld (1999), and Münster (2001), and from the Faculties of Catholic Theology of Bochum University (1999), and Tübingen University (2005). In 1970 he became a member of the North-Rhine Westphalian Academy of
translated into French, Italian, Japanese, Korean, Polish, Portuguese, Spanish, and Swedish. Yet only a small number of his writings have been published in English, and the main collection of English translations is no longer in print. The present collection, made in consultation with the author, introduces some of his most influential writings for the first time in English.

The collection presented here, in the first of two volumes, brings together his most important essays in constitutional and political thought, while the second volume focuses on issues of religion, ethics, and morals in relation to law and the state. Volume I is organized alongside the cornerstones of Böckenförde’s legal and political thinking: political theory of the state (Part I), constitutional theory (Part II), fundamental rights and constitutional principles (Part III), and the relationship between state, citizenship, and political autonomy (Part IV). Each of these parts is preceded by a short introduction by the editors that includes a brief outline of the articles. The last chapter consists of selections of a biographical interview with Böckenförde, conducted in 2009/2010 by historian and legal scholar Dieter Gosewinkel.

In the following, we provide an overview of Böckenförde’s academic and political career, the intellectual influences that have shaped his thinking, the decisions to which he contributed while serving on the federal constitutional court, his co-founding of the journal Der Staat, and his engagements as a public intellectual, qua political liberal, social democrat, and committed Catholic.

Sciences and in 1989 corresponding member of the Bavarian Academy of Sciences and Humanities. He has received the Reuchlin Award of the City of Pforzheim for outstanding work in the humanities (1978), the order of merit of the state of Baden-Württemberg (2003), the Guardini Award of the Catholic Academy in Bavaria for work in the field of the philosophy of religion (2004), the Hannah-Arendt Prize for Political Thought (2004), the Sigmund Freud Prize for scholarly prose (2012), and the Grand Cross ofMerit (2016), one of the highest tributes the Federal Republic of Germany can pay to individuals for services to the nation. Böckenförde is Knight Commander of the Pontifical Equestrian Order of St. Gregory appointed by John Paul II (1999).


II. Legal Scholar, Constitutional Judge, and Public Intellectual

1. Formation and academic career

Böckenförde wrote two doctoral dissertations: one in law titled ‘Gesetz und gesetzgebende Gewalt: Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus’ ['Law and Law-Making Power: From the Beginnings of German Constitutional Law Scholarship to the Heights of Constitutional Law Positivism'] under the supervision of Hans Julius Wolff (Münster)\(^9\) and submitted in 1956; and one in history titled ‘Die verfassungsgeschichtliche Forschung im 19. Jahrhundert. Zeitgebundene Fragestellungen und Leitbilder’ ['The Scholarship on Constitutional History in the 19th Century: Contemporary Questions and Models'] under the supervision of Franz Schnabel (Munich),\(^10\) submitted in 1960. Both dissertations historicized concepts of law across time—they applied a historical–critical hermeneutic to unlock insights into changes in the meaning of concepts as a result of changing power constellations. This remained a major theme in Böckenförde’s work throughout his career. In his law dissertation, ‘Law and Law-Making Power’, Böckenförde examined the public understanding of law, tracing back the origins of the differentiation between formal and substantive notions of law from the nineteenth century to the Weimar Republic. Against the background of conceptual history, he then showed what the changing meaning of concepts could reveal about changing political constellations, in this case the relationship between monarchy and popular sovereignty seen through the prism of the statutory basis requirement for encroachment (Gesetzesvorbehalt): the idea that the executive may not encroach upon the citizens’ fundamental rights unless the legislature passes a law permitting such encroachment.

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\(^9\) Hans Julius Wolff (1898–1976) was professor of public law in Frankfurt am Main (as successor to Hermann Heller) but was dismissed under Nazi rule. He left for Riga and later taught in Prague. After the war he eventually received a professorship in Münster. He wrote what is still regarded today as the standard work on German administrative law, in three volumes. Wolff was also one of the drafters of the rules governing the administrative courts in the British zone after World War II, the so-called military ordinance [Militärverordnung] 165. While Wolff’s research assistant, Böckenförde helped draft volume 1 of Wolff’s major work, particularly § 2-31, which cover historical issues and the sources of administrative law.

\(^10\) Franz Schnabel (1887–1966) was a historian, most known for his (unfinished) four-volume work on nineteenth century history of Germany, in which he tried to integrate political with social, economic, cultural, and technological history. In the contemporaneous historiography dominated by Prussian scholars and perspectives, he represented the more liberal perspectives from the Southwest of Germany. He was one of the few historians in the Weimar Republic who believed in parliamentary democracy and defended it in his writings. Partly because of this he lost his professorship in Karlsruhe under the Nazis. After the war he was appointed professor of history at the University of Munich (1947). Schnabel received several honorary doctorates and was honorary member of the British Historical Association and the American Historical Association. As a liberal, Schnabel was an outsider in his profession in Germany at that time. He acknowledged the positive influence of the French revolution on German political culture, interpreted Lorenz von Stein as a liberal thinker (as Böckenförde did later), promoted the historiography of culture and technology beside political history, and prioritized European over German/national perspectives. Besides his university career he was also an author of schoolbooks, encouraged by his experience as a Gymnasium (secondary school) teacher, as which he had started his career.
The topic of the history dissertation, a review of German scholarship on constitutional history in the nineteenth century, was chosen at the recommendation of his adviser, because Böckenförde’s first choice, to write on the Bavarian State Council, proved unfeasible. Here he examined the major conflict lines and models of constitutionalism that emerged over the course of the century; how the concept of constitution evolved from a mere juridical contract into a political category transforming the meaning of a political community which bound itself legally.

With their historicizing approach, both dissertations were noted with interest among German legal scholars, for whom this approach was still unusual. Most legal academic work at that time concentrated on interpreting norms as positive law. Both dissertations were published by the academic publisher Duncker and Humblot (the publisher of Carl Schmitt and Rudolf Smend decades earlier), and significantly, both monographs founded book series. In other words, both of Böckenförde’s doctoral dissertations themselves laid the ground for new fields of inquiry.

Returning from Munich to Münster, Böckenförde completed his habilitation in Law in 1964, again working with Wolff, this time on ‘Die Organisationsgewalt im Bereich der Regierung. Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland’ [‘Organizational Power in the Realm of Government. An Inquiry into the Public Law of the Federal Republic of Germany’]. In the same year, he was appointed professor of public law in Heidelberg, where he stayed for five years until moving on to the newly founded University of Bielefeld, and then later to Freiburg (1977–95), where he remained until his retirement. Over the course of these appointments, he functioned as professor of Public Law, Constitutional History, Legal History, and Philosophy of Law.

The work of Franz Schnabel, Böckenförde’s doctoral adviser for his dissertation in history, became a recurring reference point in Böckenförde’s later


12 To become eligible for a professorship in Germany, it used to be the case that an applicant needed to have a doctorate and a second major work, usually in the same field, i.e., the habilitation (combined with the venia legendi, the authorization to teach the subject at the university level). Nowadays a second book is widely regarded as equivalent to the formal habilitation, although many scholars still seek the formal acquisition of a habilitation as well. To have two doctorates like Böckenförde is rather unusual and testifies to his broad intellectual interests.

13 Die Organisationsgewalt im Bereich der Regierung. Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland (Berlin 1964 (= Schriften zum Öffentlichen Recht 18) [iur. Habilitationsschrift], 2nd edn. 1998).

II. Legal Scholar, Constitutional Judge, and Public Intellectual

work, especially in his analyses of the relation between monarchy and popular sovereignty, and the emergence of modern constitutionalism in the nineteenth century. From Schnabel, Böckenförde says, he learned to try and think in big structures rather than empirical details and aimed to help students do the same. To develop a critical disposition, Schnabel believed, was otherwise not possible.

From Hans Julius Wolff he learned that the argument alone counted and one’s position in the hierarchy between professor and student was not important. Moreover, Wolff integrated the teaching of public law and the teaching of the philosophy of law, by alternating between the two in his introductory lecture course. Böckenförde later adopted the same format of an integrated lecture course covering both fields. The effects of this approach are not difficult to see in Böckenförde’s work, where he developed a strong inclination towards questions in the philosophy of law.

During his time in Münster, while working on his doctorate in law, Böckenförde became part of the Collegium Philosophicum, a discussion circle convened by the philosopher Joachim Ritter. Here he gained much of his philosophical formation, and met colleagues who would accompany him intellectually throughout his life. Böckenförde’s interest in and concern with Hegel and his notion of an ethical state can partly be traced back to this colloquium, where he was first exposed to intensive discussions on the topic. It is also here that he met philosopher Robert Spaemann, who became a frequent interlocutor and later an occasional co-author. The format of the collegium involved one participant starting the session with a presentation (on a newly published book, for example), which was then followed by intensive discussions moderated by Ritter. The collegium gave birth to one of the great projects of the humanities in post-war West Germany, the *Historical Dictionary of Philosophy*, to which Böckenförde contributed two entries.

Another colloquium that exerted great influence on Böckenförde’s development as a legal scholar was the summer seminar, held at Ebrach, a village in Upper Franconia (Bavaria), which the legal scholar Ernst Forsthoff convened on an annual basis. Only a select number of scholars and students were invited,


14 Joachim Ritter, professor in Münster, was one of the most influential German philosophers of the post-war period, who edited the leading *Historisches Wörterbuch der Philosophie*. On the Ritter-collegium, see Jens Hacke: *Philosophie der Bürgerlichkeit. Die liberal-konservative Begründung der Bundesrepublik*, 2nd ed. (Göttingen, 2008).


16 Ernst Forsthoff (1902–74) was a German scholar of constitutional and administrative law, teaching over the course of his career at the universities of Frankfurt am Main (where, after Hans Julius Wolff (cf. note 9), he took over Hermann Heller’s professorship), Hamburg, Königsberg, Vienna, and Heidelberg. Like
and Böckenförde and Carl Schmitt were regular participants. Some of the lectures given in Ebrach were later published in a Festschrift for Forsthoff, including Böckenförde’s ground-breaking article on ‘The Rise of the State as a Process of Secularization’ as well as Schmitt’s ‘The Tyranny of Values’.  

During his career, colleagues like Reinhart Koselleck shaped the evolution of Böckenförde’s thought. While at the University of Heidelberg, Böckenförde and Koselleck co-taught a seminar on the General State Laws for the Prussian States, the civil code of Prussia that covered fields of civil law, penal law, family law, public law, and administrative law. Both were also members of the working group on social history in Heidelberg, which understood social history primarily as an alternative to the focus on individual elite actors, and as such also embraced institutional history. Both Böckenförde and Koselleck later moved to the University of Bielefeld, where Koselleck further pursued his programme of Begriffsgeschichte (conceptual history), culminating in the Geschichtliche Grundbegriffe (basic historical concepts), a magnum opus to which Böckenförde contributed an article. That Böckenförde shared an interest in Begriffsgeschichte is hardly surprising, given that his first doctorate on ‘Law and Law-making Power’ had at its basis a similar line of inquiry: how do concepts emerge and evolve, and how do they at one point take on a new implied meaning that is no longer questioned?

When Böckenförde moved to Bielefeld, the sociologist Helmut Schelsky had just opened the country’s first institute of advanced study (the ‘Centre for Interdisciplinary Research’), and introduced the proviso that all professors spend every second year free of teaching at the institute, and undertake research there in an interdisciplinary manner. Böckenförde later referred to this as a ‘scientific club transcending boundaries of the faculty’—an idea he highly cherished and

Carl Schmitt (Forsthoff’s mentor) and many other German legal scholars, he welcomed the Third Reich and worked on an ideological justification of the totalitarian state. But unlike most other legal scholars, Forsthoff distanced himself from the regime still during the Nazi period and was banned from teaching in 1942. Unlike Carl Schmitt, he was ultimately permitted to resume teaching in the Federal Republic and returned to his professorship at the University of Heidelberg in 1952. Forsthoff was a leading author of the Constitution of Cyprus and served as the president of the Supreme Constitutional Court of Cyprus from 1960 to 1963. On Forsthoff, see Florian Meinel: Der Jurist in der industriellen Gesellschaft. Ernst Forsthoff und seine Zeit (Berlin: Akademie-Verlag, 2011). For the relationship between Forsthoff and Schmitt, see the exchange of letters Ernst Forsthoff – Carl Schmitt. Briefwechsel 1926-1974, edited by Dorothee Mußgnug, Reinhard Mußgnug, and Angela Reithal (Berlin: Akademie Verlag, 2007).


20 The working group had been founded by Werner Conze who understood social history more broadly as structural history, in the sense that one should focus methodologically on structures in all kinds of societal institutions rather than analysing the actions of individuals. As such, the Conzian sort of social history was quite different, for example, from the left-liberal social history that Hans-Ulrich Wehler pursued in Bielefeld.


22 This proviso did not survive for long and Schelsky, frustrated by what he saw as politically motivated opposition to his various reform efforts, returned to Münster in 1973.
took from Bielefeld to Freiburg. In Freiburg, this ‘Wissenschaftlicher Club’ regularly brought together scholars like political scientist Wilhelm Hennis, the later Catholic cardinal Karl Lehmann, and jurist Joseph H. Kaiser for lively debates. In Freiburg, Böckenförde also introduced the ‘Lehrstuhlrunde’ (discussion circle of the academic chair), which included all the staff and students of the chair, from research assistants to PhD students and post-docs (Habilitanden). Similar to Ritter’s colloquium, discussions focused on a recently published article, book, or in this case also court decision. Dieter Gosewinkel reflected years later on this Lehrstuhlrunde with words similar to those Böckenförde had used to characterize his mentor Julius Wolff: only the strength of the argument counts. Criticism and dissent lie at the very core of academic culture, irrespective of questions of social hierarchy—again an idea rather rare in German academia at that time.

As a professor, Böckenförde became an influential teacher and mentor: eight scholars wrote their habilitation under his guidance, a comparatively high number: Christoph Enders, Rolf Grawert, Albert Janssen, Johannes Masing, Adalbert Podlech, Bernhard Schlink, Rainer Wahl, and Joachim Wieland. These post-doctoral students (‘Habilitanden’) became successful professors themselves, and some serve or served as judges in high courts at the federal or state level: Johannes Masing is a judge at the Federal Constitutional Court, and Joachim Wieland serves on the constitutional court of North Rhine-Westphalia, where Bernhard Schlink also was once a judge. Christoph Enders was a judge at Saxony’s High Administrative Court, and Adalbert Podlech served on Hessen’s State Social Court. All of those who clerked for Böckenförde in Karlsruhe went on to assume judgeships at high courts later in their careers: these include the mentioned Johannes Masing and Joachim Wieland; Ute Sacksofsky, who wrote her doctoral dissertation with Böckenförde, is now vice president of the constitutional court of Hessen, besides being Dean of the Law Faculty at Goethe University Frankfurt; Klaus Rennert, who also wrote his doctoral dissertation with Böckenförde, is now president of the Federal Administrative Court, where another former clerk of Böckenförde’s serves as a judge, Martin Brandt; Thomas Clemens was a judge on the Federal Social Court and Rainer Eckertz, another clerk who also wrote his doctoral dissertation with Böckenförde, was judge on Saxon-Anhalt’s State Social Court; Bettina Limperg is now president of the German Federal Court of Justice.

23 Joseph H. Kaiser (1921–98) was professor of public and international law in Freiburg. He was a disciple of Carl Schmitt and the literary executor of his academic works.

24 See Biographisches Interview, p. 308.

25 The German court system has three main categories of courts: ordinary, specialized and constitutional courts. Ordinary courts deal with criminal and most civil cases. They are organized in four tiers from the municipal to the regional, Länder and federal level, where the Federal Court of Justice (Bundesgerichtshof) is the court of final appeal. The specialized courts are subdivided into five legal fields: administrative, labour, social, fiscal, and patent law. With the exception of the patent and finance courts that operate only at one level and two levels respectively, the specialised courts are organised hierarchically on three tiers: on a local, a Länder, and a federal tier. Issues at stake in administrative cases are government policies that may harm the legal interests of individuals, for instance plans for land use that infringe on property owners’ rights. Labour cases deal with relations between employees and employers. Finally, social courts deal with cases relating to
2. Hermann Heller and Carl Schmitt

Although not his immediate academic teachers, the works of two legal and political thinkers were key to the evolution of Böckenförde’s thought and work, especially conceptually. Their ideological orientation could hardly have been more different: Hermann Heller, who died already in 1933 at the young age of forty-two, and Carl Schmitt with whom Böckenförde developed a close personal relationship from the mid-1950s until Schmitt’s death in 1985.

From Heller’s *Staatslehre* (theory of the state), Böckenförde adopted the idea of the state as a unifying framework, what he refers to as ‘*Handlungseinheit*’ (literally unit(y) in action) and what Heller often terms ‘Wirkungs- und Entscheidungseinheit’. What Böckenförde associates with *Handlungseinheit* is the welfare state and its system of social insurance. A constitutional court exists in each of the sixteen Länder (with different designations) and on the federal level with the Federal Constitutional Court (for more detail on the latter, see note xx).

Hermann Heller (1891–1933) was a German legal scholar and philosopher of social democratic persuasion, who defended the Weimar Republic legally against the onslaught of Nazism. His debates and disputes with Hans Kelsen, Carl Schmitt, and Rudolf Smend have shaped twentieth century German Staatsrechtslehre (constitutional law theory) like few others. See Arthur J. Jacobson and Bernhard Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (University of California Press, 2000); and David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press, 1999). Of Jewish descent, Heller was forced to resign in 1933 and went into Spanish exile where he died the same year, leaving his magnum opus, the *Staatslehre* (theory of the state), unfinished. (It was published posthumously by Gerhard Niemeyer in 1934.) Against Carl Schmitt he argued that it is not so much the state of emergency, but rather the state of social and political stability that defines the sovereign. As a social democrat, he called for the integration of the working class in the social, cultural, and political structures of the nation state. Some of Heller’s works have been translated and have been influential, particularly in Japan and the Spanish-speaking world. For the most extensive translation into English, see ‘Hermann Heller: The Essence and Structure of the State’ (translated and introduced by David Dyzenhaus), in Jacobson and Schlink, *A Jurisprudence of Crisis*, pp. 249–79.

No German legal scholar has aroused more controversy than Carl Schmitt (1888–1985). A brilliant legal and political thinker with a keen sense for power, Schmitt played a decisive role in laying the ground for the legal demise of the Weimar Republic and the rise of the Nazi regime, earning him the dishonorable designation of ‘crown jurist of the Third Reich’. He was also a fervent anti-Semite who personally saw to the dismissal of his Jewish colleagues and the banning of their publications. Throughout his life, he never showed remorse for either his anti-Semitism or for having justified various human rights abuses by way of his legal writings and the laws he drafted for the Nazis. Moreover, he felt victimized for having been deprived of the permission to teach after World War II, and for consequently never again attaining a post at a German university. The only thing he later questioned was his belief that a concentration of power in the executive was *per se* a desirable goal. For the most comprehensive biography to date, which also includes a theoretical discussion of Schmitt’s thinking, see Reinhard Mehring: *Carl Schmitt: A Biography* (Polity Press, 2014).

Heller and Schmitt were antipodes both in theory and in practice. In the famous 1912 case ‘Preußen contra Reich’, Heller represented Prussia, which had sued the Reich, represented by Schmitt, for illegitimately taking over its administrative functions through emergency powers—something that was fully accomplished by the Nazi Reichsstatthaltergesetz in 1935, a law that Schmitt drafted. The case is considered a marker of the legal demise of Weimar’s parliamentary democracy. Dyzenhaus comments fittingly ‘Heller understood Schmitt’s philosophy of politics as the one most likely to exploit the problems raised by Kelsen’s apolitical Pure Theory of Law—in particular, by the logic of legal norms, which grants legal validity to any political act.’ Cf. note 26, there p. 251.

David Dyzenhaus translates this as ‘unity through action and decision’. See ‘Hermann Heller: The Essence and Structure of the State’ (note 26) pp. 272f. Interestingly, although the term ‘Handlungseinheit’ is often ascribed to Heller’s *Staatslehre*, he does not actually use it in this work, nor in his *Politische Demokratie*.
the idea that the state is the product of human actions, and creates unity in action. Whereas Georg Jellinek suggested that the state is composed of three elements, namely a territory, a people, and a monopoly of violence, Heller, and following him Böckenförde, argued that the state is more than its constitutive parts. First and foremost, they see the state sociologically as emanating from human acts. By acting for and on behalf of its citizens, the state creates a certain kind of unity. Of course, the type of state Böckenförde has in mind is the democratic state, which is constituted on the basis of popular sovereignty. As Böckenförde outlines, '[The state] is not in place as an entity that is fixed once and for all, and is not independent of individuals and their willingness to integrate into and commit to the state. As a unifying actor, the state requires continuous affirmation and reproduction in and through the actions of the humans who constitute it.' This reproduction in turn can be accomplished only if 'some kind of ordering and structured system exists in the first place' and the system is considered legitimate in the eyes of the citizens. In other words, the efficacy of the state’s legal regulations is dependent on the willingness of the individuals to submit to and follow the law. This willingness in turn is dependent on the state’s legitimacy, which ultimately must be based on popular sovereignty.

Böckenförde also relied on Heller for his notion of the type of state–society relations that are a requirement for a liberal order. The demands for ‘total democratization’ of the late 1960s and 1970s sought to collapse the differentiation between state and society. Arguing against this, Böckenförde insisted, referencing Heller, that state and society must be differentiated conceptually lest the grounds were laid for totalitarianism. At the same time, it was unhelpful
to think of them as entirely separate (as opposed to differentiated).\textsuperscript{36} For in a liberal order both rely on one another: the legal order and the state more generally cannot survive unless supported by society, and a liberal society in turn requires rights and liberties that are secured by state institutions. What may appear today as a rather obvious differentiation from the viewpoint of the social sciences and the study of law was by no means academic consensus in West Germany until the late 1970s. Following Smend’s integration theory, influential scholars like Horst Ehmke and Konrad Hesse at the time still argued against thinking of state and society as separate or differentiated entities.\textsuperscript{37}

Like Heller, Böckenförde regards the political unity of the people not as a natural given. Instead, it must be brought about creatively: it must be constructed. This is where the concept of homogeneity (of the citizenry) comes in. Like the concepts of the state, the constitution, the law, and the political, which were subject to fierce debates among the leading jurists of the Weimar Republic, homogeneity, too, and its function in state–society relations, was a key concept in terms of which jurists defined their differences.\textsuperscript{38} Carl Schmitt spoke of substantive homogeneity, by which he meant an organic relationship between the people that preceded the state, and in some ways made it possible. Herman Heller, by contrast, in his main work on the topic, Political Democracy and Social Homogeneity, spoke of social homogeneity as a necessary basis for the state, resulting in a common consciousness of ‘we the people’, a shared sentiment of cohesion, which evolves in substance depending on how people specify it. This homogeneity can be the facilitator of an ethic of constitutional rules. Böckenförde, finally, like much post-war constitutional scholarship speaks of relative homogeneity, which like Heller’s is constructed and malleable. Böckenförde underlines that homogeneity must have a socio-economic and political dimension. Socio-economically, the differences in wealth and opportunity among the citizenry must not be too stark. Politically, a certain shared understanding of democratic procedures and the common good must exist. In


\textsuperscript{37} Horst Ehmke is a legal scholar and politician, who led three different ministries over the course of his career, among them the ministry of justice in 1969. Konrad Hesse was a colleague of Böckenförde’s in Freiburg. Böckenförde was first considered for the position at the Federal Constitutional Court in 1975, but as a result of the commission of inquiry for constitutional reform of which he was a member, the so-called neutral posts in the appointment procedure of judges were introduced, which meant that such candidates should not be members of any political party. Since Böckenförde was a long-time member of the Social Democratic Party, a neutral candidate was sought in the person of Konrad Hesse. For the appointment procedure of Böckenförde himself in more detail, see Biographical Interview (Chapter XVII), pp. xxf.

\textsuperscript{38} On the Weimar debate on methodology [Weimarer Methodenstreit], in which Hans Kelsen, Herman Heller, Rudolf Smend and Carl Schmitt were major antipodes, see Jacobson and Schlink, A Jurisprudence of Crisis; also Frieder Günther: Denken vom Staat her. Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949–1970 [Coming from the State. Staatsrechtslehre of Federal Germany between Decision and Integration 1949–1970] (München, 2004), pp.112ff. Günther holds that the controversy between the Smend and the Schmitt School has become largely irrelevant today due to what he calls the Westernization process. (op. cit., S. 321).
Böckenförde’s view, homogeneity must first and foremost be created by social forces. The state can play a supportive role, but the driving forces for creating homogeneity must stem from society, which he understands in the broadest sense as including private, religious, political, civic, cultural, and economic institutions.

Both Heller and Böckenförde guard the concept of homogeneity against any totalitarian impetus: it is meant to designate belonging to a shared community, the demos, bound together by solidarity and reciprocity.39 In contrast to Schmitt, homogeneity of a nation does not entail a given substantive equality based on a physical or moral quality. Instead, it is something that has to be built out of society’s pluralism. It must never be used to impose a worldview, to impose social uniformity, or economic sameness. Both Heller’s and Böckenförde’s work is clear that homogeneity of the citizenry as a shared sense of belonging is important for sustaining the functioning of the liberal state, for prompting people to abide by the law, to pay their taxes, etc., but should not be seen as a counter concept to society’s inevitable pluralism of interests, beliefs, and values. Even though intuitive, it would be highly misleading to read homogeneity here as the opposite of heterogeneity. That a society is and must be heterogeneous as a necessary element of any liberal order is the starting point for both Heller and Böckenförde. The embrace, protection, and cultivation of pluralism is for them a basis for liberal thinking. But given the heterogeneity in interests, beliefs, and values among liberal societies, certain institutions must be created to ensure a sense of solidarity and reciprocity among its members. The construction of homogeneity, which again is a task first and foremost for society and not for the state, must never be prioritized over the preservation of liberty.40 In Böckenförde’s work, this becomes particularly clear in his essay ‘Protection of Liberty against Societal Power’.41 Compare this to Schmitt’s notion of homogeneity, about which he writes that it must be substantial: ‘Political democracy … rest[s] … on the quality of belonging to a particular people [Volk]. This quality of belonging to a people can be defined by very different elements (ideas of common race, belief, common destiny, and tradition).’42 In contrast to Heller

41 Included here as chapter XII. In recent years, Böckenförde has further pondered the potential of religion in creating and/or maintaining homogeneity. See Ernst-Wolfgang Böckenförde, Der säkularisierte Staat. Sein Charakter, seine Rechtfertigung und seine Probleme im 21. Jahrhundert (Carl-Friedrich-von-Siemens-Stiftung: München, 2007), included as Chapter II in Volume II of this edition.
42 Carl Schmitt, Verfassungslehre, (Berlin: Duncker & Humblot, 1928), p. 227 (Constitutional Theory, Jeffrey Seitzer, trans. (Duke University Press, 2007), p. 258). Schmitt also considers and discusses what can be done when national homogeneity is not a given. One possibility is the peaceful arrangement (friedlicher Ausgleich), which must ultimately lead to either friendly separation, or assimilation into the majority culture. ‘The other method is faster and more violent: elimination of the foreignness through oppression, exclusion (emigration) of the heterogeneous population, or equally radical means.’ For a detailed discussion, see Gertrude
and Böckenförde, Schmitt considered homogeneity to be the central characteristic of democracy: ‘Democracy requires first, homogeneity, and second, if necessary, the exclusion and elimination of the heterogeneous.’ For Böckenförde it is a great achievement of the modern democratic state that it can cope with and manage social heterogeneity, whereas from the viewpoint of Schmitt’s substantive homogeneity, heterogeneity must to some extent be dissolved, even eliminated, prior to the state.

Carl Schmitt first appears in Böckenförde’s biographical interview when he recapitulates the preparation of his first state exam in law: he read Schmitt’s Constitutional Theory as breaking through the positive legal surface to ‘how things really are organized and why’. It left a deep impression on Böckenförde, as well as his older brother Werner. Both wrote to Schmitt and subsequently visited him as they did not live more than a sixty minute drive away. Even though Böckenförde recalls feeling that Schmitt must have been disappointed by the meeting (what could a young student like Böckenförde offer to Schmitt intellectually?), Schmitt did give him a copy of Legality and Legitimacy at the end of it, and a pattern of regular contact ensued—not least perhaps because Böckenförde could supply Schmitt, who had no institutional affiliation, with material from the university libraries. Böckenförde then provided editorial suggestions when Schmitt prepared the publication of his collected essays on Constitutional Law [Verfassungsrechtliche Aufsätze], and when Schmitt published ‘The Theory of the Partisan’, Böckenförde recommended adding the subtitle ‘Intermediate Commentary on the Concept of the Political’. While working on his two doctoral dissertations, Böckenförde discussed both with


43 Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus (1926), pp. 15f. The Crisis of Parliamentary Democracy, Ellen Kennedy, trans. (MIT Press, 1988). As Heller was first to point out, Schmitt remains ambiguous on how homogeneity is created and maintained. On the one hand, it must exist prior to the state, on the other hand, as mentioned, Schmitt writes that democracy needs to ‘eliminate the heterogeneous’. Compare Hermann Heller, ‘Politische Demokratie und soziale Homogenität [1928]’, in Heller’s Gesammelte Schriften (ed. by Christoph Müller), (Volume II, Mohr Siebeck: Tübingen, 1992), pp. 421–33.

44 Schmitt, Constitutional Theory (note 43) is Schmitt’s most celebrated academic contribution. Here he introduces the differentiation between constitution and constitutional reality, as well as between the Rechtsstaat principle and the political principle. The emphasis Schmitt placed on the close connection between law and politics, while at the same time defining distinctly legal and political concepts, is one of the main reasons for the tremendous reception his work has received in legal and political theory.

45 Werner Böckenförde (1928–2003), one of seven siblings of Ernst-Wolfgang, was a legal scholar and a Catholic theologian and priest, who like his younger brother, completed two doctorates, one in law, and one in theology. Besides working as a Domkapitular (a priest who is eligible to fulfil special tasks delegated by the bishop) in the diocese of Limburg, he also taught as honorary professor canon law and Staatskirchenrecht (law regulating the relationship between church and state) at the University of Frankfurt.


II. Legal Scholar, Constitutional Judge, and Public Intellectual

Schmitt and remembers that Schmitt recommended he strengthen the analysis of the evolution of concepts rather than provide only a political history. Later, when Böckenförde searched for a fitting topic for his habilitation and was reluctant to write about fundamental rights, which he felt was too much of a fashion at that time (1957), Schmitt recommended turning to the law of state organization [Staatsorganisationsrecht].

The influence of Schmitt’s work, and the personal interactions and exchanges between the two have shaped Böckenförde’s way of thinking in manifold ways, as he discusses in detail in the biographical interview. Four areas stand out in this regard: first, the idea of the primacy of the state, and of thinking of it as a peace-providing framework and a unity of decision-making; second, the insistence on conceptual analysis and the historicization of concepts; third, to see law embedded in the wider realms of politics, the economy, and culture; and fourth, resisting the attempt to ground law in values.

Like Schmitt, Böckenförde, adheres to the tradition of statism (Denken vom Staat her) as one important strand of German constitutional law theory. He thinks about the law by beginning with the state, and repeatedly in his writings, like Schmitt, emphasizes the primacy of the state, which is prior to law, and in particular the constitution. Following from this, Böckenförde insists that in order to grasp the state’s legal order sufficiently one has to analyse what lies beneath the surface: the stabilizing power mechanisms, social belief systems, and fundamental norms.

Conceptually, Böckenförde takes on two characteristics of the state, both inspired by Hobbes, that preoccupied Schmitt. First, an emphasis of the state as a unity of peace [Friedenseinheit]: as the institutional solution to conflict. Böckenförde argues that Schmitt’s concept of ‘The Political’ is conceived to draw attention to the fact that conflict is inherent in human life and always ready to escalate into a friend–enemy distinction. Against this background, the very existence of the state indicates its great achievement: that it has succeeded in relativizing ‘all the antagonisms, tensions, and conflicts that arise within it, making it possible—within the framework of the state’s peaceful order—to debate them, struggle for answers, and eventually arrive at solutions in public discourse and through orderly procedures’. Böckenförde also often refers to the state as a unit of decision-making [Entscheidungseinheit]. ‘No state that is organized as an entity of peace can avoid the necessity of institutionalizing somewhere the authority of having the “last word”’.

Böckenförde could be read here as sharing Schmitt’s decisionism. After all, he writes: ‘To the extent that [norms and rules are not evident in an unquestioned general consensus], they can be established only through the decision of a higher authority, namely an authority that is also endowed with the ‘last

48 Böckenförde explicitly relates his use of Friedenseinheit to Schmitt (specifically from Schmitt’s essay on The Concept of the Political) in note 7 of ‘The State as an Ethical State’, here included as Chapter III.


50 See ‘The State as an Ethical State’, Chapter III, p. xx.
word’ against which there is no appeal.’ It is important to bear in mind, however, that decisionism in the Schmittian sense means sovereign decision, that is, an act of will that is devoid of any kind of justification with reference to content, value, or interest. By contrast, Böckenförde’s necessity of the ‘last word’ refers to authority, that is, a normative concept based upon reason, not sovereignty. Thus the final decision of the last instance of a court is an act of authority, not decisionism.

In the interview Böckenförde repeatedly returns to Schmitt’s thinking in big structures and his sheer awe for the breadth and depth of Schmitt’s mastery of legal, political, social thought and history. Over the course of his career as a scholar and a judge, Böckenförde repeatedly felt that Schmitt had correctly analysed the structural elements of the Rechtsstaat (rule of law state) and grasped them conceptually. Regarding this influence, Böckenförde feels the need to clarify ‘I am not one of Schmitt’s hagiographers. Everyone who reads my writings will notice that. [Schmitt biographer] Mehring is no doubt right when he says: the liberal reception of Carl Schmitt within Staatsrechtslehre after 1945 emanated in part from me. I always selected from his work what I could adopt and accept. You will not find in my work his criticism of democracy or parliamentarianism. But the analysis of what representation means, or the distinction between "pouvoir constituant" and "pouvoir constitué," and the many conceptualizations in constitutional law, these were influential for me.’

Concerning Schmitt’s legal and political defence of the Nazi regime, his sympathy for Nazi ideology, and his anti-Semitism, Böckenförde’s statements suggest a certain degree of ambiguity. On the one hand, Böckenförde clearly acknowledges with abhorrence Schmitt’s defence of the NS-dictatorship. In his widely discussed article on ‘German Catholicism in 1933’ Böckenförde draws attention to how Schmitt justified and advocated the new regime as the new order and authority. In the biographical interview Böckenförde recalls a comment by Schmitt on 1933. Schmitt described in detail the intensity of the concentration of power in 1933 which he noticed most of all during the negotiations of the Reich about a concordat with the Catholic Church. All sorts of agreements could now be made which had been impossible during the Weimar Republic due to the immediate resistance of various political or social groups as soon as plans for such negotiations became public. Schmitt

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52 Schmitt speaks of ‘das “dezisionistische” Element jeder Entscheidung, das nicht normativ abzuleiten ist’ [Verfassungsrecht. Aufsätze p. 79].
54 See note 45 in the article ‘German Catholicism in 1933: A Critical Examination’ (published as Chapter VIII in Volume II of this edition). The article is one of the very few that was translated into English, and published abroad shortly after its publication in Germany. See Ernst-Wolfgang Böckenförde, ‘German Catholicism in 1933’, Cross Currents 11 (1961), 283–303.
confided to Böckenförde that he felt ‘much could be achieved’ given such a concentration of power, but that this assumption had proven to be a mistake. His konkretes Ordnungsdenken (‘concrete order thinking’) stemmed in no small part from this experience, he told Böckenförde. Böckenförde in turn comments elsewhere in the interview ‘One can perhaps say that [Schmitt] wrote a dogmatics of the Rechtsstaat he himself did not believe in. But’, Böckenförde adds, ‘for a jurist, unlike for a theologian, it is not necessary to do so.’

On the other hand, when asked about the extent to which Schmitt’s Nazi past became a topic of conversation between the two, Böckenförde replies ‘I knew it was a touchy topic for him, since he always felt under suspicion and marginalized [after the war when he was not permitted to teach again]. [Regarding] Schmitt’s anti-Jewish or anti-Semitic diatribes, when I found out about them later, I was quite speechless. What can one say about that? [...]’ Böckenförde goes on to note that there are in every life ‘dark, perhaps also very dark, sides and stains’ and that he sees himself not as Schmitt’s judge: ‘Why should I hold him accountable and carry out a belated denazification trial?’ In another article, one of the rare pieces where Böckenförde wrote exclusively on Schmitt as a scholar, he sharply criticizes Schmitt’s position, but refers to it as ‘anti-Judaism’ instead of ‘anti-Semitism’—a slight move away from the accusation of racism.

There is no doubt what Böckenförde himself thought of anti-Semitism and the jurists’ role in the Nazi regime, which becomes most clear in three of his contributions: his essay ‘The Persecution of the Jews as Civic Betrayal’, included in the present volume, his essay on ‘German Catholicism in 1933’, included in 55

55 Böckenförde wrote the entry about Schmitt’s concrete order thinking in Ritter’s Historisches Wörterbuch der Philosophie (see note 17, Ernst-Wolfgang Böckenförde, ‘Ordnungsdenken, konkretes’ in Joachim Ritter and Karlfried Gründer (eds.), Historisches Wörterbuch der Philosophie (Wissenschaftliche Buchgesellschaft Darmstadt vol. 6, column 1312-15). One of its key assumptions, writes Böckenförde, is that the rule does not stand on its own, but owes its validity to the order. Methodologically inspired by Maurice Hauriou’s theory of the institution, concrete order thinking concentrates on the empirical study of rules and institutions and interprets them in the context of the overall order, rather than the intention of the legislator. It implies a critique of legal thinking that grounds norms in an abstract validity. Instead, concrete order thinking postulates that norms must be thought of as serving to safeguard (the identity of) the overall order, and are contextual accordingly. Schmitt sees roots of concrete order thinking in medieval Aristotelian-Thomistic natural law, which he associates with both Savigny and Hegel. Chronologically, Schmitt’s order thinking came after his emphasis on decisionism, and was developed in particular as he began to analyse the emerging Nazi state. Böckenförde, like Schmitt, is a statist and an institutionalist, but overall Böckenförde sways towards locating agency in the creation of rules and institutions rather than seeing them as somehow internal to a larger order where accountability therefore remains somewhat untraceable.

56 Biographical Interview (Chapter XVII), here p. xx.
57 Biographical Interview (Chapter XVII), here p. xx.
58 Biographical Interview (Chapter XVII), here p. xx.
Volume II, and a book he edited in 1985 on *Constitutional Law and Constitutional Law Theory in the Third Reich*.\(^{60}\) In the preface to the latter, Böckenförde laid out the intent of the volume as being to examine the specific character of constitutional law in the Nazi era, especially the role of *Staatsrechtslehre*. The puzzle the authors addressed was how to explain the extent to which constitutional law theorists turned away, not only from Weimar democracy, but also from a longer tradition of a rule-of-law oriented legal culture. How did it come about that the liberal tradition in *Staatsrechtslehre* so rapidly went into decline?\(^{61}\) Like his analysis of the behaviour of the Catholic Church in 1933, Böckenförde was again more interested in structural reasons for human failure than judging the shortcomings of individual jurists.\(^{62}\)

Finally, Böckenförde was highly influenced by Schmitt concerning the place of values in legal theory. Schmitt abhorred the possibility of informal power: of influences exerting themselves outside the legal and formal channels. As such, his strong opposition to the notion that the law incorporates or expresses certain values stems from the same sentiment.\(^{63}\) As Böckenförde lays out in depth in his article on the value-based grounding of the law, included here as Chapter IX, he believes that law cannot be based on values, as these are ultimately subjective, and neither the discipline of law nor that of philosophy or the social sciences have yet developed satisfactory methodologies for weighing one value against another. After all, the entire exercise of balancing would not be necessary if societies had clear, agreed-upon, value hierarchies which the legal profession would then merely need to apply.\(^{64}\)

In sum, one can agree with Schmitt’s biographer Reinhard Mehring that Böckenförde is Schmitt’s most important disciple in the post-war period, though a disciple who has taken Schmitt’s conceptual thinking further in an autonomous, liberal direction.\(^{65}\)


\(^{61}\) Positing a similar question is Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (München: Beck, 1994).

\(^{62}\) This does not mean, Böckenförde underlines, that one may abnegate the personal responsibility to assess and evaluate. To the contrary, what is most important in becoming a citizen–scholar is the ability to show judgment, and as elaborated below, Böckenförde himself aspired to being a citizen–scholar who repeatedly sought to influence public discourse and policy-making. On this, regarding the legal profession, see also Ernst-Wolfgang Böckenförde, *Vom Ethos des Juristen* (Duncker and Humblot, 2010).

\(^{63}\) Along these lines, see Schmitt’s ‘Die Tyrannei der Werte’ in the Festschrift for Ernst Forsthoft (note 19), [published in English as *The Tyranny of Values* (Washington, DC: Plutarch Press, 1996)].

\(^{64}\) Jürgen Habermas discusses Böckenförde’s critique at length in his *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996), ch. 6.2.

\(^{65}\) Mehring, *Carl Schmitt*, p. 477.
II. Legal Scholar, Constitutional Judge, and Public Intellectual

3. Founding the Journal Der Staat

Together with Roman Schnur, another young legal scholar on the intellectual periphery of Carl Schmitt and Ernst Forsthoeff, 66 Böckenförde founded the journal Der Staat. Zeitschrift für Staatslehre, öffentliches Recht und Verfassungsgeschichte [The State—Journal for Theory of the State, Public Law, and Constitutional History] in 1962. 67 The journal was conceived as an alternative to the then leading journal Archiv des Öffentlichen Rechts, which was focused on the analysis of the doctrinal side of public law. What was missing in Böckenförde’s and Schnur’s eyes was a journal whose articles would focus mainly on the state—not only from a legal perspective but also from the perspective of political science and history. 68 As Böckenförde notes in the biographical interview, in the beginning its editors were faced with the suspicion of being proxies for Carl Schmitt. This suspicion was an effect of the polarization in the field of German constitutional law in the 1950s, between two opposing intellectual camps, that of Carl Schmitt and that of Rudolf Smend. 69 Smend and Schmitt had already been rivals in the Weimar Republic. Although both were antipositivistic in opposition to Hans Kelsen, their disagreement stemmed from their diverging conceptualizations of the relationship between state and society, and the role of the constitution. Rudolf Smend’s notion of a ‘material’ dimension to the constitution, laid out in his ‘Verfassung und Verfassungsrecht’ (published concurrently with Schmitt’s ‘Constitutional Theory in 1928), 70 proceeded from the viewpoint that a constitution was an element of the intellectual life [geistige Wirklichkeit] of a society, in that it forms and reproduces in a permanent integral process the state’s institutions. Schmitt, by contrast, viewed the constitution as something that was the result of a decision in favour of a specific structure for the political; the state and its legal order could not be equated. According to Schmitt, the validity of legal norms (including constitutional norms) rested upon an

66 Trained as a legal scholar, Roman Schnur (1927–96) became a professor of political science with a research focus on the administration and bureaucracy. He wrote his habilitation under the supervision of Ernst Forsthoeff.


68 See Biographisches Interview, pp. 385ff.

69 This dichotomy in Germany’s constitutional law was long-standing. When Böckenförde was appointed to the law faculty at the University of Freiburg in 1977, the faculty was still shaped by the idea of an opposition between the Smend school and the Schmitt school. Whereas the influential Konrad Hesse (professor in Freiburg 1956-1987 and judge on the Federal Constitutional Court 1975–87) was thought to represent the Smend school (for which Freiburg was especially famous in the 1960s), Böckenförde was associated with the Schmitt school and he himself accentuated this in dedicating to Carl Schmitt his inaugural lecture, which dealt with ‘The Repressed State of Emergency’, included here as Chapter IV (Ernst-Wolfgang Böckenförde, ‘Der verdrängte Ausnahmezustand’ in Neue Juristische Wochenschrift (1978), pp. 1881–90).

70 Rudolf Smend, Verfassung und Verfassungsrecht (1928); Carl Schmitt: Verfassungslehre.
extra-legal sovereign political will creating and maintaining them, as expressed in his famous definition of sovereignty: ‘(s)overeign is he who decides on the exception’.  

In the early years of the Federal Republic the paradigm of Smend’s constitutional thinking took the lead in framing the interpretation of the Basic Law. The Federal Constitutional Court ruled that the Basic Law was not a value-neutral document, but established an ‘objective order of values’, especially in terms of fundamental rights, which permeated the entire legal system. Against the backdrop of the accusation that legal positivism had legally paved the way for the takeover of the Nazi regime, this substantive rather than formal view of the constitution seemed reasonable. The Schmitt school, meanwhile, severely criticized this approach and argued that it empowered the Federal Constitutional Court to become the final decision-making authority, which in turn would weaken the executive branch and politicize the judiciary. In general, the Schmitt school was concerned about the erosion of sovereignty and the weakening of a strong state.

In the editorial remarks of the first issue of Der Staat one can see how far Böckenförde and Schnur went in linking the new journal to the specific Schmittian concern that the state had become weak in a pluralist society, failing to guard its sovereign power vis-à-vis societal powers. At the same time, the editors opened a new chapter in the liberalization of the Schmitt school, in setting the intellectual task of the journal as recognizing the order established by the state as one of the most important safeguards of personal and political freedom and protection against internal and external threats. Maintaining state order as a guarantor of individual freedom was by no means among Carl Schmitt’s concerns. But against this backdrop Böckenförde shaped the journal’s profile for several decades: first in the editorial office until 1984; and later (until today) on the advisory board. In no time, Der Staat had become one of the leading journals of German

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72 The Weimar constitution did not entail provisions that would have safeguarded the democratic and liberal content of the constitution. Thus, after the Machtergreifung the Nazi regime could abrogate the constitution without much difficulty. The thesis of the weakness of the Weimar constitution in facilitating its own neutralization later led to an interpretation of the Basic Law as being based on values and natural law. See on this especially Günter Dürig, ‘Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes’, in Archiv des Öffentlichen Rechts 81 (1956), pp. 117ff.

73 In this context, see the mentioned ‘Tyrannie der Werte’ [‘The Tyranny of Values’] by Schmitt.


75 Verlag und Herausgeber, ‘Zum Geleit’, in Der Staat, vol. 1, issue 1 (1962), pp. 1–2. Although the editorial is not signed by Böckenförde and Schnur, we know today that it was written by them and not the editors Gerhard Oestreich, Werner Weber and Hans J. Wolff.
II. Legal Scholar, Constitutional Judge, and Public Intellectual

academia, not only for legal scholars but for political scientists and historians as well.

4. On the Federal Constitutional Bench

As a judge of the Federal Constitutional Court (December 1983–May 1996), Böckenförde shaped numerous decisions. According to the division of labour between the two senates (chambers) of the court, the Second Senate, of which Böckenförde was a member, is primarily responsible for issues of state organization such as institutional conflicts between different branches of government (although its mandate also includes the competence to decide some constitutional complaints and concrete review cases). Thus, Böckenförde did not have many opportunities to bring to bear his fundamental rights theory and doctrinal perspective, but his position that fundamental rights have to be seen as specific entitlements with clear contours, and not as vested in values, which would give broad leeway to judicial discretion, found its way into some decisions.

Most remarkable are his dissenting opinions. In eleven cases he wrote dissenting opinions, which is a rather large number in the Court’s practice. Even

76 On the general workings of the court, see Michaela Hailbronner and Stefan Martini, ‘Constitutional Reasoning in the German Federal Constitutional Court’, in András Jakab, Arthur Dyevre, and Giulio Itzcovich (eds.), Comparative Constitutional Reasoning (Cambridge University Press, forthcoming 2017). See note 122 below for the appointment procedures of constitutional court judges. Note that Böckenförde did not complete his second state examination, which is a general qualification for judicial office. An alternative qualification for becoming a constitutional court judge (which Böckenförde fulfilled) is an appointment as a university professor.

77 The First Senate decides mainly on constitutional complaints and judicial review cases. But since the workload turned out to be imbalanced, in 1956 the Federal Constitutional Court Act was amended to the effect that henceforth the Second Senate, too, would decide on some constitutional complaints and judicial review cases dealing with civil and criminal procedure. See for this Kommers and Miller: Constitutional Jurisprudence, pp. 18f.


79 See in detail Patrick Bahners, ‘Im Namen des Gesetzes. Böckenförde, der Dissenter’, in Reinhard Mehring and Martin Otto (eds.), Voraussetzungen und Garantien des Staates. Ernst-Wolfgang Böckenfördes Staatsverständnis (Baden-Baden: Nomos, 2014), pp. 145–91. In contrast to common law jurisprudence, where the individual opinion becomes the norm (especially but not only in the case of stare decisis), in the civil law tradition jurisprudence is supposed to be insulated from the person of the individual judge. In this sense, every dissenting opinion to some extent relativizes the authority of the court as it draws attention to the fact that the opinion of the individual judge does matter after all. As Johannes Masing has commented, the dissenting opinion introduces an element of legal realism into civil law jurisprudence. He also notes, however, that it places a necessary counterpoint to a tradition in Germany where the rule of law has been prioritized over democracy. Johannes Masing, Zur Bedeutung von Sondervoten (unpublished ms, 2015). In the German Federal Constitutional Court it only became possible in 1971 to issue an individual opinion.

80 Between 1971 (when it became permissible to publish a dissent) and 2012, only 7 per cent of all published decisions were accompanied by dissenting opinions. Through the end of 2014, 156 of 2,137 published decisions
more remarkable, some of these dissenting opinions became the *majority decision* in later cases, such as in the case on party finance, and in the case regarding the possibility of a constitutional limit on tax legislation.\(^8^1\) In the latter case, Böckenförde coined a *bon mot* qualifying the relationship between the judicial and the legislative branch: the Federal Constitutional Court should not act like an ‘authoritative preceptor’ (‘praecceptor Germaniae’) towards the legislator;\(^8^2\) the constitution should be understood as a framework instrument and thus, the constitutional court as a supervisory authority, but not as an expansive interpreter of the constitution. Constitutional interpretation should always be case-related and reach beyond that only if it was absolutely indispensable in order to decide the matter.

According to some critics, however, Böckenförde did not always meet his own standards. In some cases, they claim, he wove too much of his own (scholarly) interpretation of the constitution into the decision. Two issues have been problematized in particular: the first concerns the interpretation of Article 2 paragraph 2 in the abortion case of 1993. Here, the court argued that the state had to protect the life of the unborn, because the right to life not only entails a right to be protected from the state but also an objective duty to act on behalf of life, including the life of the unborn.\(^8^3\) As Christoph Schönberger and Christoph Möllers have suggested separately, Böckenförde, while concurring on this main point with the majority, did not adhere to his own critique of a value-based interpretation of the constitution.\(^8^4\) An interpretation of fundamental rights in accordance with his own doctrinal perspective should have led him to take a more liberal stance on abortion.\(^8^5\)

The second issue pertains to Böckenförde’s democratic theory.\(^8^6\) Böckenförde has been charged, by Robert Christian van Ooyen, for example, with having an

included dissents. Calculated on the basis of a full term of twelve years, the average rate for the sixteen judges would amount to 2.7 dissenting opinions per judge. Thus, Böckenförde wrote dissenting opinions four times more often than the average. For official Court statistics, see *Entscheidungen mit oder ohne Sondervotum in der amtlichen Sammlung (BVerfGE)—Bände 30–114 (1971–2014)*, http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/Statistik/statistik_2014.pdf?__blob=publicationFile&v=2. Unlike the US Supreme Court, the decision-making process of the Federal Constitutional Court includes broad discussion between the judges. As Dieter Grimm has described based on his experience as a constitutional judge, the deliberations may change one’s mind: ‘… there is an open discussion within which many people move and find arguments convincing they hadn’t taken into account sufficiently before. So, many people make a move. Even if you are not completely satisfied with the results, you are reluctant to file a dissenting opinion.’ Quoted from the typescript of the conversation, ‘To Be a Constitutional Court Judge’, between Joseph Weiler and Dieter Grimm held at NYU School of Law, 3 March 2003, p. 9 (unpublished ms.).

\(^8^1\) Dissenting opinion regarding party donations (1986): BVerfGE 85, 264 (314ff); dissenting opinion regarding limits on tax legislation (1995) BVerfGE 93,121 (149ff).

\(^8^2\) BVerfGE 93, 121 (149ff), see on this pp. xx–xx (Biographical Interview, Chapter XVII).

\(^8^3\) BVerfGE 88, 203 (1993).


\(^8^5\) The court decided that abortion is illegal, but exempt from punishment if carried out in the first trimester and after ethical counselling. See on this in more detail Volume II.

\(^8^6\) See for a summary of Böckenförde’s understanding of democracy Dirk Lüdecke, ‘Gegenstreitige Fügungen der Demokratie. Überlegungen zum historisch-institutionellen und ordo-sozialliberalen
understanding of ‘a people’ allegedly based on the idea of substantial homogeneity: a people bound together not only by history, culture, and tradition, but also by descent, here: biological descent. That is clearly Carl Schmitt’s view. But neither Böckenförde’s writings nor his opinions on the court lend credence to this charge. Böckenförde does not use Schmitt’s phrase ‘substantial homogeneity’ anywhere. In his very early work he speaks simply of ‘homogeneity,’ emphasizing that it needs to be created (through interaction, participation), while in most of his work from the 1970s onwards he uses ‘relative homogeneity’, a term he borrows from Hermann Heller contra Schmitt. In parts of the biographical interview with Dieter Gosewinkel, Böckenförde is adamant: ‘I would always only speak of relative homogeneity and moreover underline “relative”. Such relative homogeneity need not be of an ethnic nature. It rather consists of shared visions for the way of living together. […] At the beginning of a political unit there is always also a bit of daring: in a political community that is democratically organized I have to submit myself to the decision of the majority. That I will do so presupposes a certain trust in shared visions and a sense of cohesion, just that “relative homogeneity”. There is a wise sentence by Adolf Arndt: democracy as a system of majority decision requires consensus over those things that cannot be voted on. This sentence is simply the flip side of the coin “relative homogeneity”.

That neither Böckenförde nor the Federal Constitutional Court employs a primordial notion of the people also becomes clear when one looks at the Court’s 1990 decision on the question whether granting municipal suffrage to permanent residents was constitutional. In its decision, the Court followed Böckenförde’s argument outlined in an article published in the influential ‘Handbuch des deutschen Staatsrechts’.


87 See for instance Robert Christian van Ooyen, Politik und Verfassung. Beiträge zu einer politikwissenschaftlichen Verfassungsidee (Wiesbaden, 2006); already the title of the chapter dealing with Böckenförde’s democratic theory insinuates this reproach: “Staatliche Volksdemokratie”: Implikationen der Schmitt-Rezeption bei Ernst-Wolfgang Böckenförde” (pp. 64–76).
89 See Biographisches Interview, p. 477. Adolf Arndt (1904–74) was a lawyer and one of the leading politicians in the SPD in the 1950s and 1960s for issues of legal policy.
90 BVerfGE 83, 37 (right to vote for foreigners/Schleswig-Holstein, 1990). Böckenförde took part in the decision as one of the judges. The judgment became obsolete for EU citizens only two years later in 1992 when the Maastricht Treaty gave EU citizens the right to vote in municipal elections of the EU member state where they reside, regardless of citizenship.
and duties who together formulate a political will, vote for a government, and decide on the composition of the parliament, so that every decision of the state can be traced back to the people in a continuous ‘chain of legitimation’ \((\text{Legitimationskette})\). The people are a people due to being the source of legitimation of the legal order. There is no reference, however implicit, to a common origin or descent. Neither does the Basic Law, which defines the German people as the group of those who are bearers of German citizenship, contain any such reference, of course. In the decision cited, the Federal Constitutional Court argued that even where a person is affected by political decisions of the German state although not a citizen (e.g., as a tax-paying long-term resident), granting him or her the right to vote would interfere with the constitutional link between the state people \((\text{Staatsvolk})\) and the German people, which the constitution understands to be identical. Thus, the Federal Constitutional Court ruled the voting law unconstitutional. Notably, the decision includes a proposal for the legislator: in order to have greater congruence between the owners of political rights and those who are affected by legislative decisions, the legislator could expedite the acquisition of citizenship for permanent residents. Here again it becomes clear that the judges, including Böckenförde, did not have in mind a primordial view of ‘the people’, nor in fact any other antipluralistic view. What can be argued against the court’s ruling, however, (and accordingly against Böckenförde’s democratic theory) is that it is not self-evident why on the municipal level the local community should be grasped as the state people \((\text{Staatsvolk})\) rather than simply consisting of residents regardless of their citizenship. The latter view could easily pave the way for granting permanent residents certain political rights while still remaining within the bounds of the constitution.

Another instance when Böckenförde was accused of secretly adhering to a Schmittian notion of homogeneity occurred in connection with the 1993 Maastricht decision. Here the Federal Constitutional Court ruled that in general the principle of democracy does not prevent the Federal Republic from being part of a joint federation of countries as long as the people is the source of legitimation in this joint federation, and as long as democratic participation is guaranteed.

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93 Basic Law, ‘Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship …’ (Art. 116 Par. 1).


95 Ibid.


the member states still need to retain meaningful competencies so that each member state’s people may continue to manifest and articulate itself in democratic decision-making processes which in turn give legal expression to the people’s relative homogeneity, understood in ‘intellectual, social and political’ terms. In the European legal literature the court and especially Böckenförde (who was not the rapporteur of the decision but Paul Kirchhof) were criticized for allegedly introducing here Schmitt’s idea of a homogenous people, although, by contrast, Hermann Heller, Schmitt’s opponent in this question, is explicitly quoted in the decision. The critics however argue—somewhat implausibly—that the court only referred to Heller in form (and misleadingly so), while suggesting a notion of homogeneity that was in fact closer to Schmitt’s.

Another aspect of Böckenförde’s democratic theory that has shaped the Federal Constitutional Court’s understanding of the democratic principle is his insistence that the only legitimate source of state power is not the people per se, but the people as a collective. Böckenförde is wary of situations where some members of the citizenry have structurally more possibilities to influence the political process than others. In his dissenting opinion on party donations (which became the majority decision in a later case), he stressed that those who empirically emerge as the most powerful in the collective of the people need to be limited in their striving for political influence so that less powerful citizens have equal opportunities in the democratic process. Economic power must not translate into political power. Here his roots in the social-democratic milieu can be seen once again as complementing his liberalism—Böckenförde is a fervent defender of the need to establish and abide by agreed-upon rules and procedures, but at the same time he believes that these rules need to be complemented by mechanisms that elevate the voice of those who are not in a position (physically, economically, socially) to exercise their rights fully.

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100 BVerfGE 73, 40 (103ff). For more details, see the annotation [insert number] in the biographical interview, Chapter XVII.

101 These mechanisms can include a high quality public education system, student grants, high quality public broadcasting, anti-discrimination measures, economic redistributive mechanisms, among others.
5. Böckenförde as public intellectual

In Böckenförde’s civic commitment as a public intellectual the three more substantive dimensions of his thought come to the fore again: Böckenförde is a political liberal, a social democrat, and a committed Catholic. Time and again, he instigated public debates, sometimes from his position as a scholar, sometimes as a member of the Social Democratic Party, and sometimes as a former judge.

As a scholar, Böckenförde initiated important public debates on interpretations of Nazi history, in particular with three pieces: in 1961 he published an article on the role of the Catholic Church in tolerating and implicitly aiding the emergence of the Nazi state in 1933.\(^{102}\) The article was considered so explosive that several of his mentors either strongly advised against publishing it, or even betted it would not see the light of day.\(^{103}\) It was ultimately published in the eminent Catholic monthly Hochland,\(^ {104}\) and several exchanges between him and his critics appeared in following editions. The German Catholic Church convened a special committee of church-related historians, the ‘Committee for Contemporary History’ to examine Böckenförde’s claims. It ultimately agreed with most of his findings. Fortunately, the article also did not seem to damage his changes of acquiring a tenured professorship three years later.

Then, in 1983, Böckenförde took the 50th anniversary of the emergence of the Nazi state as an occasion to offer a graduate law seminar that analysed how Staatsrechtslehre and its theorists in the 1930s legitimized the Nazi state. This seminar led, as mentioned, to a book he edited on the topic, which cast a grave shadow on some of the leading legal personalities who had shaped post-war West Germany.\(^ {105}\)

Later, in the article ‘The Persecution of the Jews as Civic Betrayal’ [1997], Böckenförde laid out the manifold ways in which the Holocaust should be recognized in Germany as a civil war, a betrayal of one’s own countrymen.\(^ {106}\) Legally, the liberalization of citizenship laws in the late-nineteenth century had...
made Jews full German citizens. The argument of his essay, published in one of Germany’s leading intellectual reviews, the monthly journal Merkur, should not be surprising but given the immense backing of the legal profession for the rise of Nazism and also in its apology after 1945, his article broke new ground.

As a university administrator and public speaker on issues of higher education, Böckenförde also exerted some influence. He became dean at the University of Heidelberg in the tense atmosphere of the 1968 students’ movement when the internal organization of the university was under reform. The faculties were newly organized (with the exception of medicine and law), state regulation was increased, and the scope of decisions in which students were allowed to have a say expanded. Although Böckenförde agreed with some of the reforms and contributed to drafting the new Heidelberger Grundordnung [basic order], he ultimately voted against it, especially because of provisions that gave each of the four groups at the university, that is, professors, lecturers, students, and the non-academic staff, the same voting rights (Viertelparität). Overall, he felt the new Grundordnung would not offer solutions to the major challenges of learning and teaching that the university faced at the time, and this insight was part of the reason why he moved on to Bielefeld in 1969. In his resignation letter Böckenförde explains that he felt finding sufficient time to conduct research had become nearly impossible in Heidelberg, and as a member of the scientific advisory council to the founding committee of the new university in Bielefeld he hoped moreover to exert considerable influence on the design of the new course of study in law. Böckenförde felt that the latter needed to integrate practical training before the first state exam, and allow for specialization earlier in the degree program. The Bielefeld course of study realized these reforms in what became known as the ‘einstufige Juristenausbildung’. Later, in the 1990s, Böckenförde mobilized considerable opposition to the implementation of the Bologna reforms in the study of law, which would have introduced BA and MA programmes in lieu of the Staatsexamen, and entirely reorganized the study of law in line with Europeanized curricula. Indeed the discipline ultimately did not go along with the Bologna reforms.

eccumenicalism. Böckenförde and Shils co-wrote the introduction as well as separate chapters each on religious pluralism and civil society.

107 See on this Mehring, Von der diktatorischen ‘Maßnahme’ zur liberalen Freiheit.

108 Biographisches Interview, p. 419.

109 Parts of the letter are cited in Mehring, ‘Von der diktatorischen “Maßnahme” zur liberalen Freiheit’. He was appointed to the scientific advisory council in November 1965, most likely at the recommendation of professor of philosophy Hermann Lübbe, who served as secretary in the ministry of culture of North Rhine-Westphalia at the time.

110 This model was also introduced in a number of other universities at the time (Konstanz, Augsburg, Bayreuth, Bremen, Hamburg, Frankfurt, Hanover, and Trier), but phased out by law in 1984.

111 In 1996, Böckenförde was invited to give a lecture in honour of the 90th birthday of Wolfgang Hefermehl, Professor of commercial law in Heidelberg, and chose the topic ‘Legal Training on the Road to Nowhere?’ [E.-W. Böckenförde, ‘Juristenausbildung – auf dem Weg ins Abseits?’, in Juristen Zeitung (1997), Vol. 52, pp. 317ff.] which led to the formulation of the Ladenburger Manifest by the Association of German Jurists (Deutscher Juristentag) and its publication in the Frankfurter Allgemeine Zeitung. The manifesto argued against
In his capacity as a member of the Social Democratic Party, and various committees to which he was appointed over the course of his career, Böckenförde influenced policy positions of the SPD. Given his confessional and familial background, membership in the Christian Democratic Party might have seemed more likely. He himself explains in the biographical interview that three developments facilitated his rapprochement with the SPD instead. First, he was troubled by the fact that Catholic bishops called on Catholic believers to vote for the CDU, an act of instrumentalizing religion for political purposes that Böckenförde considered absolutely unacceptable. Second, this occurred at a time when the Christian elements in CDU-politics became more and more an empty formula. Third, the SPD undertook a remarkable transformation in 1959 when at its party convention in Bad Godesberg it distanced itself from being a ‘Weltanschauungspartei’, a party with a comprehensive doctrine. This opened the way, Böckenförde says, to reconcile his Catholic faith with membership in the party. He mentions how the persuasive argumentation of jurist Adolf Arndt, one of the driving forces behind the SPD’s decision to abandon its ideological character, played a role in convincing Böckenförde to join the party. Another important influence was of course his study of Lorenz von Stein, from whom he took the notion that liberal rights cannot be enjoyed unless the socio-economic conditions allow one to do so. Böckenförde discloses in the interview that he would have welcomed it if Catholic social doctrine (Soziallehre) had argued more fervently in favour of economic justice, but that the latter unfortunately still offered too little substance in this regard. Ultimately, it seemed to him that only social democracy can provide a vehicle towards creating the socioeconomic conditions necessary for liberal rights to be truly enjoyed.

Böckenförde was invited in 1969 to be a member of an expert committee of the Federal Ministry of Defence which was to make proposals regarding the competencies of the Inspector General of the Federal Armed Forces (Generalinspekteur der Bundeswehr). The issue touched upon the relationship between the military leadership on the one hand and the democratically elected representatives and the administration on the other. The priority of the government over the military was of course undisputed, but the relationship between implementing the Bologna reforms (including the introduction of BA and MA programs in Law) and insisted on the importance of keeping the overall structure of the teaching of law in German universities up until the Staatsexamen in two levels: basic surveys first, followed by advanced courses which should help students acquire the ability to evaluate and judge. The Ladenburger Manifest became the dominant approach in Germany to thinking about how the study of law should be organized.

Biographical interview (Chapter XVII), p. xx.

Biographisches Interview, p. 414. In a widely discussed essay, ‘What Capitalism is suffering from’ [’Woran der Kapitalismus krankt‘], published in the midst of the economic crisis in 2009, Böckenförde lays out the principle of solidarity as a foundational principle for a healthy social life, and reminds readers that solidarity played an important role in the thought of both Thomas Aquinas and Pope John Paul II. Ernst-Wolfgang Böckenförde, ‘Woran der Kapitalismus krankt‘, in Süddeutsche Zeitung (24 April 2009), re-printed in his Wissenschaft, Politik, Verfassungsgericht, pp. 64–71.

Biographisches Interview, p. 349. The Inspector General was the highest ranking German soldier and was on the same level as the Chiefs of Staff, although he had no operational military competencies in
the administration and the military continued to be a source of tension. Together with the state secretary in the Ministry of Defence and later German Ambassador to London, Karl-Günther von Hase, Böckenförde was in a minority position within the expert committee. Ultimately, the Minister of Defence at the time, Helmut Schmidt, adopted their solution in the Blankeneser Erlass of 1970, which for the first time regulated the competencies of the Inspector General.

Böckenförde also advised the party executive when becoming a member of its committee on legal policies in 1969. Here the first consequential debate dealt with abortion. As discussed in more detail in Volume II, Böckenförde favoured a solution that allowed for abortion only in exceptional cases (e.g., pregnancy as a result of rape, health risks to the mother or baby). In this, his position was closer to that of the CDU. He initially convinced the committee to adopt his position, but when the debate was opened to the entire party, another position prevailed: that abortion would not be criminally prosecuted if conducted in the first trimester. This was the policy ultimately adopted by the Bundestag (however immediately declared unconstitutional by the constitutional court).

In 1971, Böckenförde was appointed to the Special Parliamentary Commission of Inquiry on Constitutional Reform (1971–76). In general, the expert group confirmed the Basic Law’s system of a strict representative democracy and rejected the adoption of both referenda and the direct election of the Federal President. Instead it proposed reforms to strengthen the position of parliament vis-à-vis the executive. One of the most consequential results of the discussions conducted in the context of the commission was an informal agreement between the major political parties that altered the appointment of Constitutional Court judges. The so-called neutral positions were introduced in 1975, that is, appointments of individuals who are not party members. Two positions (out of eight) in each senate were henceforth reserved for individuals without party membership.

In wartime. One issue was to clarify who should be named as his deputy. There were two options: one was to take the most senior general among the chiefs of the three services (army, navy, air force), the other was to take the deputy head of the Military-Political Department in the Ministry of Defence (Führungsstab der Streitkräfte), a department that was working directly in support of the Inspector General of the Armed Forces. Böckenförde was in favour of the second option since he considered it to be the best way of guaranteeing the primacy of the democratically elected political leadership over the military. One section of Böckenförde’s habilitation had dealt with how the military should be organizationally integrated into the democratic state.

Biographisches Interview, pp. 409f.


Formally, nominees have to be elected by a two-thirds majority; half of the bench (of both the first and second senate) is elected by the Bundestag, the other half by the Bundesrat. In order to reach this majority, the two larger parties, SPD and CDU, made an informal agreement according to which each
After Helmut Schmidt became chancellor in 1974, he did consult Böckenförde from time to time, for example, in the Grundwertedebatte (debate on core values) regarding the question of whether it was the state’s purpose to provide a common ethos. Among others, the Catholic bishops were strong proponents of an affirmative stance in the debate. Böckenförde argued against it, emphasizing that working towards a shared ethos was a task for society, and not the state. This was also the position Chancellor Schmidt defended in his speech ‘Ethos and Law in State and Society’ in mid-1976, a speech co-written by Böckenförde and Catholic scholar Oswald von Nell-Breuning, which emphasized that the state needs to be neutral towards worldviews. The speech caused much controversy, as the chancellor’s position was regarded as being too reserved, and as indirectly contributing to the public erosion of values (Werteverfall) the Catholic Church diagnosed at that time.

Now publishing under his own name, Böckenförde took up the question of the ethical state again in 1978 in his acceptance speech for the Reuchlin Prize, when he asked whether the core functions of the state ought to go beyond providing for security and liberty (see Chapter III). In the same speech, he spoke out against the ‘Radicals Decree’ (Radikalenerlass), insisting that a truly liberal state could only prosecute citizens for violations of the law, but not for their political inclinations and sympathies. The decree, issued by Chancellor Willy...
Brandt in 1972, became a topic at the meeting of the SPD party executive the day after Böckenförde’s speech.\textsuperscript{121}

In the late 1970s and early 1980s Böckenförde published a series of articles debating appropriate state responses to the Red Army Faction (RAF) and other violence-embracing groups that threatened state order at the time. One key argument of his was that the extant 1968 Emergency Acts were a greater threat to the rule of law than anchoring a state of emergency in the Basic Law,\textsuperscript{122} which at that point (and until today) does not recognize the eventuality of a state of emergency. In ‘The Repressed State of Emergency’ (here Chapter IV) Böckenförde laid out how the Emergency Acts had given rise to, among other things, questionable practices on part of the security services (installing eavesdropping devices that violated the confidentiality of attorney-client privileges during the meetings between RAF prisoners and their lawyers, wiretapping of the private apartment of a nuclear physicist under suspicion of collaborating with terrorists). He expounded why a constitutional provision for a tightly regulated state of emergency would be less rights-eroding than the contemporaneous emergency acts, which he suggested went further in providing a blanket authorization to state practices than even the Enabling Act of 1933. Böckenförde argued in favour of a constitutional amendment that would provide for the possibility of a declared state of emergency, and in 1981 he published a blueprint of such clauses.\textsuperscript{123} His position did not prevail, partly because the respective clause in the Weimar Constitution (Article 48) is regarded by some as having paved the way for the ascendance of the Nazi regime while preserving constitutional continuity.\textsuperscript{124}

During his twelve-and-a-half years on the Federal Constitutional Court (1983–96), Böckenförde held off from public interventions, which he deemed inappropriate for an active judge. After he retired from Karlsruhe, he resumed his public engagement with pressing societal concerns, commenting on a range of issues, from bioethical questions, abortion, pre-implantation diagnosis and pre-natal genetic testing in the light of human dignity, to European enlargement, citizenship, and constitutionalism in the context of Europeanization, and finally to the broad field of politics and

\textsuperscript{121} See Biographisches Interview, p. 429. Böckenförde elaborated on his critique of the Radicals decree in Ernst-Wolfgang Böckenförde, ‘Rechtsstaatliche politische Selbstverteidigung als Problem’, in Friedrich-Ebert-Stiftung, 


\textsuperscript{124} Compare also Biographisches Interview, p. 428. In the interview with Dieter Gosewinkel, Böckenförde states that the argument laid out in this article represented the majority opinion in the committee on legal policies advising the SPD party executive, but due to the explosiveness of the topic it was agreed that he would publish this only as his personal opinion.
Among these topics, one of his contributions to the bioethical debate deserves special mention. In 2003 Böckenförde published an essay in the *Frankfurter Allgemeine Zeitung* titled ‘Die Würde des Menschen war unantastbar’ [‘Human Dignity was Inviolable’] that caused a heated debate among scholars and politicians. Here he criticized a new interpretation of Article 1 of the Basic Law published in one of the leading constitutional commentaries, the ‘Maunz-Dürig’, where legal scholar Matthias Herdegen laid the ground for an understanding of human dignity as being very open to different interpretations, depending on the specific circumstances of the case. Böckenförde regards this opinion as not only shaking the constitutional foundation of the Basic Law but as entirely relativizing any concept of human dignity by effectively allowing humans to judge who is likely to live a life worth living and who is not. Accordingly, Böckenförde argues here and in several other articles for a rather restrictive bioethical policy, including a prohibition on pre-implantation genetic diagnosis.

Finally, Böckenförde also played a role in the Catholic Church from time to time. Starting in the 1950s, at a very early stage of his career, he was engaged in the debate on the church’s view towards territorial law and political structure. At a time when from a doctrinal point of view it was still unacceptable for Catholics to live in a secular state, Böckenförde argued that democracy and human rights were the legitimate form of political order from a Christian perspective, and he did so long before Vatican II adopted the same view. Moreover, as mentioned earlier, in response to his research on the Church’s role under Nazism, an article that can be considered one of the key entry points to his work, the German Catholic Church felt compelled to convene a committee of historians to probe his theses, which ultimately confirmed his major findings. Then in the early 1960s, together with Robert Spaemann, he criticized sharply a position represented by Jesuit Gustav Gundlach who legitimized a war of nuclear defence on theological grounds. In the late 1960s Böckenförde joined the ‘Bensberger Kreis’, a group of rather liberal-minded Catholics, who

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125 See for example his essays on bioethics, abortion, and the relation between politics and religion collected in Volume II of this edition, where they are presented in context in greater detail.


127 For one of his last articles regarding a plea for the prohibition of pre-implantation genetic diagnosis, see Ernst-Wolfgang Böckenförde, ‘Einspruch im Namen der Menschenwürde’, in *Frankfurter Allgemeine Zeitung* (31 March 2011). Interestingly, at the height of the bioethical debate between 1999 and 2003, Jürgen Habermas made a similar contribution, arguing that the normative self-understanding of humankind according to which humans are free and equal requires the idea that all humans, including the unborn life, should be seen and treated as those persons they eventually will become. Jürgen Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?* (Suhrkamp, Frankfurt am Main, 2001).


129 See above note 54.
wrote a memorandum on Poland stating that a lasting European peace arrangement could not be achieved without a reconciliation with Poland and that Germany should give up on all territorial claims towards Poland. The memorandum played an important role in preparing the ‘Ostpolitik’ of Chancellor Willy Brandt, a ground-breaking re-orientation in West German foreign policy towards rapprochement with the Eastern bloc. Aside from these intellectual contributions, Böckenförde was an active citizen of lay Catholicism: he was a member of the executive committee of German Catholics, the most important institution of lay Catholicism in Germany.\textsuperscript{130} He was also one of the founding members of Donum Vitae, a Catholic organization offering prenatal consultancy, including to those planning to undertake an abortion.\textsuperscript{131} Needless to say, the creation of Donum Vitae caused a serious conflict with the Vatican, which accuses the organization of indirectly taking part in the state’s legally tolerated abortion procedure.

\textbf{III. CONCLUSIONS}

Böckenförde has a positive view of the state: on balance, the individual-empowering consequences of its regulatory capacities by far outweigh its risks to individual liberty. The state is the major source of peace and societal stability, and the precondition for a legal order that guarantees individual freedom. To the extent that society does not create the conditions in which these freedoms can be fully appreciated and realized, the state has the duty to ensure them: it needs to compensate for what society and the market do not provide. From this perspective, Böckenförde can indeed be characterized as a social–liberal statist.\textsuperscript{132}

Three dimensions have been suggested here as axes of Böckenförde’s thinking that explain the richness and scope of his work: first, the dimension of a liberal thinker, who reaffirms the distinction between state and society, and the liberal tradition of the state as based on the rule of law. The primary purpose of constitutions is to limit, not to facilitate power. Second, there is the dimension

\textsuperscript{130} The executive committee is elected by an assembly of Catholics representing the different groups and branches of lay Catholicism. Its tasks include organizing the biennial Catholic Kirchentag (church day), discussing pending issues with the German conference of bishops, and representing lay Catholicism in public.

\textsuperscript{131} Donum Vitae was founded after the Federal Constitutional Court’s second abortion decision of 1993 in which Böckenförde took part as a judge. He was challenged with the task of identifying a solution that was in accordance with the secular constitution and that he could answer for as a Catholic at the same time. The decision of 1993 held that in general abortion is unlawful but goes unpunished if specific conditions are fulfilled, among them that women who want to have an abortion certify that they have taken part in prenatal consultancy provided by professional organisations. The Vatican insists that no Catholic organization must take part in any such consultancy, while Donum Vitae argues that the aim of the consultancy is to convince women not to terminate the pregnancy. For Böckenförde’s personal reflection on this difficult decision, see his article ‘Als Christ im Amt eines Verfassungsrichters’ [‘Being a Christian in the Position of Constitutional Judge’], published in: Ernst-Wolfgang Böckenförde: \textit{Kirche und christlicher Glaube in den Herausforderungen der Zeit} (Lit-Verlag: Münster 2007), pp. 415ff. [included as Chapter X in Volume II of this edition].

\textsuperscript{132} See on this Christoph Schönberger, ‘Indian Summer eines liberalen Etatismus’.
of a socially conscious thinker, who is well aware of the societal preconditions of liberty, including the need to compensate economic inequality with societal and state action, in particular through the public educational system. Third, there is the dimension of a committed Catholic, whose horizon extends to another world beyond the one of positive law without introducing religious bases for the law of the state. These three dimensions can and should be contextualized: connecting factors in his biography can be found and have been outlined here. Nonetheless, the wide reception of Böckenförde’s work beyond German borders and across time indicates that his contributions to legal and political thinking transcend context: they stand on their own.

Relating Böckenförde against this backdrop to German legal theory and state thinking, the difficulty of situating him in a particular school of thought becomes apparent. He obviously does not adhere to the kind of integration theory in the tradition of Rudolf Smend. He is not persuaded by a pure theory of law like Hans Kelsen, for Böckenförde regards law as always embedded in specific political and social contexts which a theory of law has to reflect. Böckenförde’s approach is conceptual and thus takes again and again inspiration from Carl Schmitt’s analyses, in particular concerning the meaning of representation, the concept of the political, and Schmitt’s dogmatics of the Rechtsstaat. Yet Schmitt’s lack of appreciation for a pluralistic democracy is unacceptable to Böckenförde, whose normative frame of reference is the political order of the democratic constitutional state. Böckenförde works with Schmitt’s doctrines and concepts in order to clarify and justify the second German democracy that was so much despised by Schmitt.

Although not as often cited as Schmitt in the relevant context, Herman Heller is the second outstanding thinker of the Weimar Republic whose works have been foundational for Böckenförde. One of the key ideas he took from Heller is that of social (or: relative) homogeneity, the societal basis for political unity. Böckenförde describes this homogeneity as the social–psychological condition of a ‘we consciousness’, which is in perennial need of construction. It not only embraces diversity, but is necessitated by it: homogeneity creates agreement over those things that cannot be voted upon. As such, it is reconcilable with a liberal position. From Heller, Böckenförde also took the insistence on a differentiation between state and society, which the Smend school sought to collapse.

Did Böckenförde then found a school of thought of his own that would integrate these various influences? As Germany’s president Joachim Gauck observed in April 2016 while awarding Böckenförde the highest order of merit, ‘You were clearly reluctant to found a school of thought. Instead it was more important for you that your doctoral and other post-graduate students developed arguments and approaches independently and with courage. In this discursive manner, you have actually brought into being a Böckenförde school of its own particular stamp: a school of free intellectual self-development.’

Böckenförde has sharpened the view that the democratic constitutional state is a complex form of political order resting on pre-legal conditions, namely a specific kind of community. An individual will only be willing to submit herself to the majority decision if that community is bound together by shared visions, a sense of cohesion, and a consensus over subjects that are not open to political vote. This sense of political belonging is the other side of what Böckenförde calls ‘relative homogeneity’.

Finally, Böckenförde argues against viewing law as enhancing morality. Rather, by dispensing with the aim of attaining maximalist moral standards, the democratic constitutional state leaves room for the citizen to decide on his own reasons and justifications for action. The only thing the state can demand from its citizens is to abide by the law. The necessary loyalty towards the political order does not include any kind of uncritical inner commitment (Gesinnungstreue): thoughts are free. In search for ethical beholdenness Böckenförde does not invoke particular political communities, such as the nation, but the constructive power of individual rights and their protection by an effective and superior state power.