

Statism, Secularism, Liberalism – Böckenförde’s Contributions to German Staatsrechtslehre in the Light of Contemporary Challenges within and beyond the State

By *Mirjam Künkler and Tine Stein**

Abstract

This introduction lays out the rationale behind the special issue examining Böckenförde’s concepts and arguments in light of contemporary crises of democracy. Considering the enormous challenges facing democracies today, how should one judge Böckenförde’s optimistic view of the regulatory capabilities of the state? Is it irrelevant, given the de facto power of both supra- and non-state actors? Or does Böckenförde’s view still possess explanatory value, as the state remains the most important political unit? The article consists of two parts. First, Böckenförde will be introduced as a thinker whose work centred on questions of statism, liberalism and secularism. He paid special attention to the relation between politics and religion in contexts of democratic statehood. In addition to his interest in these themes, his understanding of the constitution and constitutional interpretation will be sketched. Second, we will introduce the three topoi on which the articles of this special issue focus: Böckenförde’s insistence that the state of exception ought to be constitutionalised by exploring the relevance of this proposition in four different jurisdictions; whether his model of democratic secularism as open encompassing neutrality can serve as a useful starting point to manage religious and social diversity; the future of Europe. Against this backdrop, the conclusion then aims to connect Böckenförde’s ideas on relative homogeneity with the contemporary crises of democracy.

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A. Introduction

Ernst-Wolfgang Böckenförde (b. 1930) is one of the most outstanding constitutional theorists and political thinkers in the Federal Republic of Germany. He has shaped debates in legal and political theory as well as wider public debates from the 1950s up to the present. His work has contributed to a wide array of topics: the conceptual framework of the modern state and its preconditions; constitutional democracy as a type of political order; the theory of fundamental rights and the rule of law principle; the relation between politics, law, and religion; the inquiry into the Catholic Church's complex path towards embracing secular democracy and human rights, especially freedom of conscience; and, last but not least, contested political and ethical problems, ranging from the deployment of nuclear missiles and state measures of counter-terrorism to bioethical issues such as abortion and genetic engineering.

As a judge on Germany's Federal Constitutional Court (on which he served from December 1983 to May 1996) and as the author of one of the highest number of dissenting opinions in the court's history, Böckenförde has profoundly influenced the way in which academics and citizens think about law and politics in Germany and beyond. For his various engagements—as a public office holder, as a public intellectual, and as an exceptional scholar—Böckenförde has been awarded honorary doctorates in both law and Catholic theology, as well as a number of prizes, among them the Grand Cross of Merit (2016), one of the highest tributes the Federal Republic of Germany can bestow upon individuals for services to the nation.¹

This special issue fills a gap in the existing literature on Böckenförde in several ways. First, in Germany, Böckenförde's writings have been widely received and have given rise to a body of literature that includes two monographs dealing specifically with his work, several edited volumes, and four *Festschriften*.² Yet none of these German publications extends the

¹ Böckenförde received honorary doctorates from the Law Schools of the Universities of Basel (1987), Bielefeld (1999), and Münster (2001), as well as from the Faculties of Catholic Theology of Bochum University (1999), and Tübingen University (2005). He has also received the Reuchlin Award 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), and the Sigmund Freud Prize for scholarly prose (2012).

² The *Festschriften* are: *OFFENE STAATLICHKEIT: FESTSCHRIFT FÜR ERNST-WOLFGANG BÖCKENFÖRDE ZUM 65. GEBURTSTAG* (Rolf Grawert ed., 1995); *DAS RECHT DES MENSCHEN IN DER WELT. KOLLOQUIUM AUS ANLASS DES 70. GEBURTSTAGES VON ERNST-WOLFGANG BÖCKENFÖRDE* (Rainer Wahl & Joachim Wieland eds., 2002); *Freiheit des Subjekts und Organisation von Herrschaft. Symposium zu Ehren von Ernst-Wolfgang Böckenförde anlässlich seines 75. Geburtstages*, *DER STAAT*, supplement 17 (Christoph Enders & Johannes Masing eds., 2006); *MENSCHENWÜRDE – DEMOKRATIE – CHRISTLICHE GERECHTIGKEIT. TAGUNGSBAND ZUM FESTLICHEN KOLLOQUIUM AUS ANLASS DES 80. GEBURTSTAGES VON ERNST-WOLFGANG BÖCKENFÖRDE* (Johannes Masing & Joachim Wieland eds., 2011). The edited volumes are: *RELIGION – RECHT – REPUBLIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE* (Hermann-Josef Große Kracht & Klaus Große Kracht eds., 2014), *VORAUSSETZUNGEN UND GARANTIEEN DES STAATES. ERNST-WOLFGANG BÖCKENFÖRDES STAATSVERSTÄNDNIS* (Reinhard Mehring & Martin Otto eds., 2014). The monographs are: *NORBERT MANTERFELD, DIE GRENZEN DER VERFASSUNG: MÖGLICHKEITEN LIMITIERENDER VERFASSUNGSTHEORIE DES GRUNDGESETZES AM BEISPIEL E.-W. BÖCKENFÖRDES* (2000); *JOHANNA FALK, FREIHEIT ALS*

relevance of his work beyond the German context. By and large, they embed him in a larger German history of ideas. By contrast, the articles presented in this collection aim to broaden the scope of Böckenförde's work beyond Germany. In a way, they aim to probe whether Böckenförde can be "inter-" and "transnationalized."

Second, for a long time, Böckenförde's writings were hardly known to an English-speaking audience, even though many of his works have been translated into other languages.³ The low reception of his work in English may partly be due to the fact that Böckenförde hardly traveled in the English-speaking world and, unlike some of his contemporaries, notably Robert Alexy or Dieter Grimm, never accepted visiting positions at universities abroad. Apart from one lecture tour to Japan in the 1990s (where his writings have been extensively translated), another short one to Pakistan, and a private tour to the United States, his travels outside Germany concentrated on Europe, especially Italy (where he regularly took part in conferences at Castel Gandolfo) and Austria (in particular to the Institute for Human Sciences in Vienna on whose advisory board he sat for more than 35 years).⁴

The international interest in Böckenförde's work has recently been rekindled, owing to a variety of factors. His warnings that the economic and political integration project in Europe would run the risk of failure unless greater efforts were exerted towards cultural integration have come to haunt Europe in the 2010s. Intra-European migration and the refugee crisis have refocused public debates on the preconditions of the democratic secular state, in particular what role culture and religion play in this regard. And the adoption, since the early 2000s, and gradual normalization of anti-terror measures have re-opened debates about

POLITISCHES ZIEL. GRUNDMODELLE LIBERALEN DENKENS BEI KANT, HAYEK UND BÖCKENFÖRDE (2006); JONAS PHILIPP PAVELKA, BÜRGER UND CHRIST: POLITISCHE ETHIK UND CHRISTLICHES MENSCHENBILD BEI ERNST-WOLFGANG BÖCKENFÖRDE (2015).

³ A 1991 edition with Berg Publishers presented eleven of his articles but was soon out of print. His only other English-language publication was a book co-edited with Edward Shils: *JEWS AND CHRISTIANS IN A PLURALISTIC WORLD* (Ernst-Wolfgang Böckenförde & Edward Shils eds., 1991). Audiences working in languages other than English may be familiar with his work, as many of his writings have long been translated into French, Italian, Japanese, Korean, Polish, Portuguese, Spanish, and Swedish. See the editions of collected articles, in chronological order: (1) in Korean: *CONSTITUTION, STATE, FREEDOM* (Bobmun SA 1992); (2) in Polish: *WOLNOŚĆ-PAŃSTWO-KOŚCIÓŁ* [Freedom, State, Church] (Wydawnictwo Znak 1994); *PAŃSTWO PRAWA W JEDNOCZĄCEJ SIĘ EUROPIE* [The rule of law in a unifying Europe] (trans. P. Kaczorowski; Zbigniew Stawrowski ed., ISPPAN 2000); (3) in Japanese: *THE MODERN STATE AND CONSTITUTION, FREEDOM AND DEMOCRACY* (Fukosha 1999); (4) in French: *LE DROIT, L'ÉTAT ET LA CONSTITUTION DÉMOCRATIQUE. ESSAIS DE THÉORIE JURIDIQUE, POLITIQUE ET CONSTITUTIONNELLE* (Olivier Jouanjan eds., Bruylant 2000); (5) in Italian: *LA STORIOGRAFIA COSTITUZIONALE TEDESCA NEL SECOLO DECIMONONO COSTITUZIONALE* (trans. Pierangelo Schiera, Giuffrè 1970); *STATO, COSTITUZIONE, DEMOCRAZIA. STUDI DI TEORIA DELLA COSTITUZIONE E DI DIRITTO COSTITUZIONALE* (Giuffrè 2006); *CRISTIANESIMO, LIBERTÀ, DEMOCRAZIA* (Morcelliana, 2007); *DIRITTO E SECOLARIZZAZIONE. DALLO STATO MODERNO ALL'EUROPA UNITA* (Editori Laterza 2007); (6) in Portuguese: *HISTÓRIA DA FILOSOFIA DO DIREITO E DO ESTADO ANTIGUIDADE E IDADE MÉDIA*, (Porto Alegre Fabris Ed. 2012); (7) in Spanish: *ESTUDIOS SOBRE EL ESTADO DE DERECHO Y LA DEMOCRACIA* (trans. Rafael de Agapito Serrano, Trotta 2000). In addition to these collections, individual articles have been published in these languages as well as in Czech, Slovenian, and Swedish.

⁴ A handicap caused by an accident he suffered in his youth limited his mobility throughout his life.

militant democracy: how can democracy protect itself without undermining the very liberalism upon which it is founded? Böckenförde had much to say on the matter when West Germany faced the terrorism of the Red Army Faction (RAF) in the late 1970s and early 1980s. In light of new states of emergency in several European countries, his writings on the topic have experienced a renaissance.

In addition, a new English-language edition of many of his writings⁵ now makes his contributions more widely accessible than they have hitherto been, and two recent special journal issues on aspects of his work attest to a renewed interest in his work.⁶

The contributors to this special issue take Böckenförde's diagnoses, analyses, and proposals as a starting point to analyze current problems in constitutional law and the crises of democracy. They do so on the state level in Finland, France, India, Sweden, Turkey, the UK, and the United States and on the supranational level with the European Union. They focus on three main themes: recent developments of counter-terrorism measures which may challenge the liberal elements of constitutional democracy (Part I); the principle of religious and ideological neutrality under conditions of diversity (Part II); and the future of the European Union in light of current problems of disintegration and fragmentation (Part III).

The articles thus combine interpretations and extrapolations of Böckenförde's work on major political and legal concepts and problems. In doing so, some deal with issues of highest interest from the perspective of current affairs, such as anti-terrorism measures currently in place in the UK, France, Sweden, Finland and India; the Turkish AKP's notion of secularism or *laiklik* (facilitating conclusions regarding the party's likely future policies on religion); the presence of religious symbols in public space and demands for religious accommodation; approaches to deal with the crises of the European Union; and countermeasures to populist threats in Western and Eastern Europe.

Situating these diverse endeavors in the field of comparative constitutional studies,⁷ the methodological approach most authors take is not a comparative one in the strict sense, which would arguably require a *tertium comparationis* against other objects of research and a strong reflection on case selection. Rather, they probe in how far Böckenförde's theories

⁵ ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., 2017); and ERNST-WOLFGANG BÖCKENFÖRDE, 2 LAW, RELIGION AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein, eds., forthcoming 2018).

⁶ Symposium, *Ernst-Wolfgang Böckenförde, Inner-Catholic Critic and Advocate of Open Neutrality*, 7 OXFORD JOURNAL OF LAW AND RELIGION 1–123 (Mirjam Künkler & Tine Stein eds., 2018); Symposium, *Democratic Pluralism, Social Cohesion and Individual Ethos in the Secularized State – the Political Thought of Ernst-Wolfgang Böckenförde*, 25 CONSTELLATIONS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

⁷ See, for a more comprehensive approach of comparative constitutional studies as opposed to comparative constitutional law, RAN HIRSCHL, *COMPARATIVE MATTERS. THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 15 (2016).

and arguments—which emanated from the specific German constitutional and political context—can be applied to other jurisdictions, and what kind of adaptations that exercise requires. Most of the articles proceed from empirical cases in order to contribute to broader theory-building. They take up concepts and theories developed by Böckenförde, revisit them in light of contemporary crises of democracy, and thus sharpen their respective analytical gaze, in particular with regard to the following questions: Does the constitutionalization of the state of exception protect rights better than possible alternatives might? Is the concept of social homogeneity, so central to many *Staatsrechtslehrer*, still useful when discussing the challenges of social cohesion today? Can the “friendly” separation between religion and state that Böckenförde advocates also work in environments where religious groups influence and shape public law (as strands of the AKP in Turkey do today)? And may one plausibly extend Böckenförde’s “chain of legitimacy” concept from the democratic nation state to an order of supranational authority?

While some of the authors are social scientists, others have a background in normative political theory, or are legal scholars. Consequently, the methods employed range from comparative social science and normative theory-building to comparative constitutional law. In a sense, one may read this collection of articles as a modest attempt at bridging the gap between constitutional law scholarship and political science, as per recent calls.⁸

The purpose of this issue is thus to investigate Böckenförde’s complex constitutional and political theory and to relate his scholarly oeuvre to contemporary legal and political problems in non-German contexts. Before introducing the articles in more detail, we will briefly introduce his emphasis on statism, liberalism, and secularism in order to sketch a background against which the various analyses can be read. In addition, we will present Böckenförde’s views on the constitution and constitutional interpretation, in relation to Böckenförde’s tenure as a judge.

I. Böckenförde the Scholar

The focal point of Böckenförde’s legal and political thought is the state. It is not by accident that he was one of the two founding editors of the journal *Der Staat*, created in 1962, which quickly became—and remains—one of the leading German journals in the field of state

⁸ Ran Hirschl argues that there are three reasons why legal scholars should be open to social scientists’ methods and findings: first, factors of extra-judicial nature such as the socio-cultural context and policy preferences are of crucial importance to understand patterns of constitutional court decision-making; second, despite the tendencies of convergence regarding constitutional texts (especially social rights) in the last decades, the variance in their realization is striking. Thus, in order to describe and explain variance and divergence, one can much benefit from evidence gathered in the social sciences; third, legal scholarship tends to lag behind the social sciences in terms of methodologies and could thus learn a good deal, particularly with regard to the still common conflation of description, taxonomy, normative and explanatory accounts. See Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 JOURNAL OF INTERNATIONAL CONSTITUTIONAL LAW 1 (2013).

theory, constitutional history, and public law.⁹ Böckenförde conceives of the state as an entity of peace (*Friedenseinheit*), wherein “[a]ll disagreements and conflicts between individuals or between groups . . . are pursued peacefully, that is, without the use of physical force and in processes that are regulated by the law.”¹⁰ He views it as “the hallmark and tremendous achievement of the state as a political entity that it succeeds in keeping all internal disputes and conflicts between people and groups below the level of escalation into an extreme antagonism, . . . and in so doing presents itself as a peace-providing framework.”¹¹

While this characterization of the state can be traced back to Thomas Hobbes and Carl Schmitt, another take on the state that Böckenförde endorses originates with Hermann Heller.¹² Böckenförde’s stance that the state also amounts to a “unifying framework of action and effect” (*Handlungs- und Wirkeinheit*) takes on Heller’s sociologically-oriented notion of the state. The main thrust here is that the state can be grasped neither as a mere intellectual construction nor as a detached institution, but rather that it forms the embodiment of real and organized collective action. As such, the state has an integrating function: as a “unifying framework of action and effect,” it integrates the diverse forces within in and channels their energies towards joint action.

This view of the state as the embodiment of real and organized collective action does not, however, mean that Böckenförde rejects the differentiation between state and society (as the Smend school had called for, which dominated West German *Staatsrechtslehre* for much of the post-war period). Indeed, he insists on this differentiation, pointing to the fact that in a liberal order both rely on one another: the legal order and the state more generally cannot survive unless supported by society, and civil society in turn requires rights and liberties secured by state institutions.

⁹ On this, see Mirjam Künkler & Tine Stein, *State, law, and constitution: Ernst-Wolfgang Böckenförde’s political and legal thought in context*, in ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 1–35 (Mirjam Künkler & Tine Stein eds., 2017).

¹⁰ ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State [1978]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 86, 88–9 (Mirjam Künkler & Tine Stein eds., 2017).

¹¹ *Id.*, at 89. On Böckenförde’s notion of the state, see in more detail Mirjam Künkler & Tine Stein, *Böckenförde’s Political Theory of the State*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 38–54 (Mirjam Künkler & Tine Stein eds., 2017).

¹² For a discussion of the Schmittian heritage in comparison to Heller’s in Böckenförde’s thought, see Mirjam Künkler & Tine Stein, *Carl Schmitt in Ernst-Wolfgang Böckenförde’s Work: Carrying Weimar constitutional theory into the Bonn Republic*, 25 CONSTELLATIONS (forthcoming 2018); Olivier Jouanjan, *Between Carl Schmitt, the Catholic Church, and Hermann Heller: On the Foundations of Democratic Theory in the Work of Ernst-Wolfgang Böckenförde*, 25 CONSTELLATIONS (forthcoming 2018).

This liberal view on state-society relations also applies to Böckenförde's take on the constitution. Its primary purpose is to limit power, rather than enable it. Böckenförde clearly differentiates between the two dimensions of fundamental rights in a dogmatic fashion, namely as defensive rights and as constitutional principles, whereupon he favors the former. In the same vein, he criticizes understandings of the constitution as a political program rather than a mere ordering frame (*Rahmenordnung*). Contrary to the 1958 *Lüth* Decision of the Federal Constitutional Court,¹³ Böckenförde insists that there is no such thing as an objective order of values in the Basic Law. In his view, such an interpretation would amount to endowing the judiciary with a political mandate. In accordance with his limiting concept of the constitution as a mere ordering frame, he argues against viewing law as enhancing morality and justice. Granted, the state is responsible for compensating economic inequality and creating equal opportunities, and should therefore maintain institutions of public education and a complex welfare system.¹⁴ This, however, is primarily a political task to be fulfilled by the legislature and should not be mistaken as the implementation of a constitutional mandate.

In particular, it is Böckenförde's conviction that the state cannot be responsible for creating morality among the citizenry. Individual ethos and solidarity as civic virtues must emanate from individual sources and from within civil society. They should be seen as part of the state's preconditions rather than its possible products. As a liberal and secular order, the state can (and should) indirectly support individual ethos and a sense of solidarity by ensuring optimal conditions for the flourishing of civil society and for example the public funding of noncommercial media, but it cannot, under any circumstances, guarantee them, for that would ultimately require recourse to means of coercion. Trying to impose notions of morality from above, however, would result in the end of the state's liberal and secular character.¹⁵

When speaking of individual ethos, Böckenförde brings religion into the picture. It would be a mistake to take Böckenförde's dictum, according to which democracy lives from presuppositions it cannot itself guarantee,¹⁶ to imply in a conservative fashion that religion

¹³ Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198.

¹⁴ ERNST-WOLFGANG BÖCKENFÖRDE, *Protection of Liberty against Societal power. Outline of a problem [1975]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 290–98 (Mirjam Künkler & Tine Stein eds., 2017).

¹⁵ This is a view Chancellor Helmut Schmidt had taken in the German *Grundwertedebatte* (debate on core values) of the late 1970s against much opposition from the Catholic bishops and others who called on the government to lead the way against an alleged erosion of values in society. Böckenförde, together with the Catholic intellectual Oswald von Nell-Breuning, served as the ghost writer for Chancellor Schmidt's decisive speeches on the matter.

¹⁶ ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of The State as a Process of Secularization [1967]*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

is the only source from which individual ethos and solidarity may emerge.¹⁷ But religion is *one* of those sources. In order to unfold its positive potential, religious groups ought to direct their energies at serving the common good, not pursuing particular religious goals or the interests of individual religious entities and organizations.¹⁸ This means also that religious communities themselves must acknowledge the legitimacy of the secular state.

For Böckenförde, the most convincing form of a secular state is one based upon the principle of religious and ideological neutrality as a cornerstone. This principle entails, on the one hand, a prohibition of any attempt by the state to justify law on religious grounds and a dissociation of religious from political authority—since this is the only way to secure both an individual sphere of liberty and the peaceful coexistence of citizens with different faiths, as well as with non-believers. On the other hand, individuals are free to decide by themselves whether or not to believe. Böckenförde argues for an open and encompassing neutrality (*offene und übergreifende Neutralität*) that provides space for religious symbols in the public realm, including in schools (but not courthouses).¹⁹ This, in his view, is a more permissive notion of secularism than the French model of *laïcité* (which he regards as a “distancing neutrality”) and as such more appropriate for religiously diverse and simultaneously secular societies, which therefore possess heightened potential for religious-political conflicts.

II. Böckenförde the Judge

Any portrait of Böckenförde, however brief, must also take account of his role as a judge. Böckenförde was an influential voice on the bench who wrote eleven dissenting opinions, almost four times as many as the average number of dissents by a single judge on the Constitutional Court. Some of these dissenting opinions became the majority opinion in later cases, such as in the cases on party finances²⁰ and on the possibility of constitutional limits

¹⁷ Böckenförde tried repeatedly to invalidate that interpretation: what came to be known as the dictum “was in part understood to mean that only religion can guarantee a state-sustaining ethos and a relative homogeneity. But that is not so. I am talking about the lived, living culture; religious aspects flow into it, and it often has religious roots, though these can also wane and be overlaid with other things. I repeatedly tried to make this clear against many an attempt at appropriating my views.” ERNST-WOLFGANG BÖCKENFÖRDE, *Biographical Interview*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

¹⁸ ERNST-WOLFGANG BÖCKENFÖRDE, *German Catholicism in 1933: A Critical Examination [1961]*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

¹⁹ On this, see Aline-Florence Manent, *Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde*, 7 OXFORD JOURNAL OF LAW AND RELIGION 74–96 (2018).

²⁰ Dissenting opinion regarding party donations (joined by Judge Mahrenholz): Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 14, 1986, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 40, 103 et seq. The later majority decision was BVerfG, April 9, 1992, 85 BVERFGE 264, 314 et seq.

on tax legislation.²¹ In one of the dissents, Böckenförde put his call for a limited role of the Constitutional Court in a nutshell: the Federal Constitutional Court should not act like an “authoritative preceptor” towards the legislator.²² Rather, its authority is of supervisory nature, and the constitution should be understood as a framework instrument rather than as programmatic.

Given these understandings of the function of the constitution and the role of the constitutional court, what are the implications for the mandate of the judge? *Justin Collings* opens the special issue with an article aiming to answer this question, considering Böckenförde's tenure on the Court itself. Collings differentiates three ideal types of constitutional judging: the prophet, the essayist and the executor. While the prophet regards the constitution as full of visions of (universal) values that the judge needs to give voice to, the essayist is (as the French verb *essayer* suggests) tentative and skeptical, fully aware of the enormous power judges have, and reluctant to use it. The executor insists that the judge's authority is to interpret the law as the agent of the legislator, and to enforce the constitution's (limited) content even against potential resistance by the political majority; thus, the judge's role is predominantly executorial. Applying these ideal types in a comparative analysis to some outstanding US, Israeli, and South African judges as well as to Böckenförde, Collings points to some surprising, even bewildering parallels between Böckenförde and Antonin Scalia—despite their divergent political views.

B. Internationalizing Böckenförde

I. Rights Preservation During the State of Emergency

The next four articles in the issue focus on the state of emergency and anti-terrorism measures. In the late 1970s and early 1980s, Böckenförde penned a series of five articles in which he responded to the challenges posed by the terrorist Red Army Faction (RAF) and other radical groups to West German democracy.²³ Against the grain of much public

²¹ Dissenting opinion regarding limits on tax legislation: BVerfG, June 22, 1995, 93 BVERFGE 121, 149 et seq. The later majority decision was BVerfG, Jan. 18, 2006, 115 BVERFGE, 97 (2006).

²² Dissent, *id.*

²³ (1) ERNST-WOLFGANG BÖCKENFÖRDE, *The Repressed of Emergency [1978]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 108–32 (Mirjam Künkler & Tine Stein eds., 2017); (2) ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State [1978]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 86–107 (Mirjam Künkler & Tine Stein eds., 2017); (3) Ernst-Wolfgang Böckenförde, *Verhaltensgewähr oder Gesinnungstreue? Sicherung der freiheitlichen Demokratie in den Formen des Rechtsstaats*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 8, 1978, at 9–10; (4) Ernst-Wolfgang Böckenförde, *Rechtsstaatliche politische Selbstverteidigung als Problem*, in EXTREMISTEN UND ÖFFENTLICHER DIENST. STUDIE DER FRIEDRICH-EBERT-STIFTUNG 9–33 (Ernst-Wolfgang Böckenförde, Christian Tomuschat & Dieter C. Umbach eds., 1981). (5) Ernst-Wolfgang Böckenförde, *Ausnahmerecht und demokratischer Rechtsstaat*, in DIE FREIHEIT DES ANDEREN. FESTSCHRIFT FÜR MARTIN HIRSCH 259–72 (Hans-Jochen Vogel, Helmut Simon & Adalbert Podlech eds., 1981).

discussion at the time, Böckenförde suggested that the threat to the *Rechtsstaat* did not only (and perhaps not even predominantly) emanate from the groups rejecting it and their terrorist methods, but (also) from the manner in which the state chose to fight these groups. In his seminal article “The Repressed State of Emergency” (his 1978 inaugural lecture at the University of Freiburg, following professorial appointments in Heidelberg and Bielefeld), Böckenförde laid open how attorney-client privileges had been violated, how judges’ decisions had not been implemented due to interference by the security services, and how law enforcement had implemented measures without proper authorization. In an often quoted sentence he remarked: “The order of freedom must set itself apart from the order of unfreedom also—and especially—by the methods of its defense.”²⁴

To him, all of these alarming developments, contributing to an erosion of the rule of law, were partly a result of the fact that West Germany had not declared a state of emergency in its struggle to deal with anti-system opposition. Instead, the dubious measures he described had been undertaken as part of a normal state of affairs, some on the basis of the 1968 Emergency Acts. Böckenförde laid out why he thought a constitutional amendment making concrete provisions for an internal state of emergency would be more rights-preserving than emergency legislation. He then went on to draft precisely that: an amendment to the Basic Law that would make provisions for an internal state of emergency necessitated by domestic political action (as opposed to natural disasters).²⁵ Böckenförde’s proposition was not adopted and until today, the Basic Law does not make provisions for a state of emergency on such grounds. In his draft amendment, the organ stipulating the state of emergency would be the legislature, while the organ entrusted with enhanced powers would be part of the executive; in the 1968 Emergency Act, not the executive, but a special subsection of parliament was to be the bearer of emergency power. Böckenförde thought that the organ deciding on the existence of a state of emergency also would need to be the one outlining its limits, that is, the strict boundaries of the exceptional competencies that would be activated (temporal limits, limits of competence, limits in terms of the law that was to be altered). Böckenförde insisted that the exceptional competences would need to be defined as narrowly and purpose-oriented as possible. Furthermore, he stipulated a clear differentiation between measure and law, the latter being of the higher and lasting order, the former being temporary and a product not of the legislature. Connected to this, his blueprint was designed to prevent the policy-making power of the bearer of emergency authorizations from evolving over time into the legislative power.

²⁴ ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State [1978]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 86, 100 (Mirjam Künkler & Tine Stein eds., 2017).

²⁵ Ernst-Wolfgang Böckenförde, *Rechtsstaatliche politische Selbstverteidigung als Problem*, in EXTREMISTEN UND ÖFFENTLICHER DIENST. STUDIE DER FRIEDRICH-EBERT-STIFTUNG 9–33 (Ernst-Wolfgang Böckenförde, Christian Tomuschat & Dieter C. Umbach eds., 1981).

Shylashri Shankar, Pasquale Pasquino, Anna Jonsson Cornell & Janne Salminen, and Julian Rivers take up Böckenförde's writings on the state of emergency and test the applicability of his arguments for the cases of India, France, Sweden and Finland, and Great Britain respectively.

In her article on the "The State of Emergency in India," *Shylashri Shankar* probes the validity and usefulness of Böckenförde's propositions on the state of emergency. Unlike the Basic Law, the Constitution of India recognizes the possibility of states of emergency within one of the units of the federation (that is, the states), and Shankar takes up three of Böckenförde's propositions in light of recent examples: his insistence that the agency authorizing a state of emergency must not be the agency to execute it, the distinction between a "law" and a "measure," and that between a most extreme and a merely difficult situation. By focusing on the actions of the Indian Constitutional Court, Shankar asks whether the safeguards in Böckenförde's model structure (designed for the federal level) also function at the state level in India. As a legal scholar, Böckenförde argued for a *Wirklichkeitswissenschaft* (empirical science) against a pure theory of law; he felt that legal scholarship had to be first and foremost empirically oriented rather than dogmatic. Applying a dosis of such *Wirklichkeitswissenschaft* to judicial politics in India, Shankar concludes that the dynamics of electoral democracy and the reality of how political power is garnered in a federal Westminster-style framework effectively stymie the procedural innovations introduced by Böckenförde's model on the state of emergency, as they tend to create conditions "not for fair play, but for finding ways to subvert the spirit of the law."²⁶ In her analysis, even the procedures outlined by Böckenförde—such as an emphasis on ensuring that the agent who holds emergency power is a political, and not merely an administrative actor—accentuate rather than mitigate this problem.

Pasquale Pasquino reviews the recent (unsuccessful) attempts in France to constitutionalize a state of emergency. Against the background of several terror attacks over the past five years, the French government continuously enacted emergency measures from November 2015 until November 2017. The Constitution of the Fifth Republic does recognize the state of emergency in its Article 16, but that provision presupposes the disruption of the working of constitutional organs, which was not the case at the time of the various terrorist attacks. Separately, Article 36 allows for the declaration of martial law, but only in the case of an impending threat *resulting from a war with a foreign power or from an armed insurgency*. This condition, according to the predominant interpretation of the situation, was also not met at the time. Articles 16 and 36 could therefore not be invoked to deal with the threat of Islamist terrorism. President Hollande therefore proposed a constitutional amendment that could take account of the type of emergency France faced in the fall of 2015, yet the Parliament failed to pass it. Pasquino appears to suggest that France would have done well to consider an amendment along the lines Böckenförde proposed for West Germany in 1981, and he criticizes the fact that the failure to do so upholds a situation where a regular law can

²⁶ Shylashri Shankar, *The State of Emergency in India*, in this issue.

suspend constitutionally protected fundamental rights (such as Loi n° 55-385 does) without the French Constitutional Council being able to do much about that. Pasquino comments that in a constitutional *Rechtsstaat* like that existing in France, Germany, or Italy today, with a hierarchy of norms, it is paradoxical that an ordinary statute (*loi*) could suspend constitutionally protected rights.

Anna Jonsson Cornell and *Janne Salminen* apply Böckenförde's proposals for a constitutionally recognized state of emergency to the situation in Sweden and Finland. The Swedish Constitution does not recognize emergency situations except in the case of war. Nor are such situations regulated in legislation. It is not clear therefore whether a supra-legal state of emergency would be a constitutional practice, a political practice, or just an exception to be applied in casu at the discretion of the government. The Finnish constitution by contrast provides for time-limited restrictions on the protection of fundamental rights under a state of emergency, if stipulated by law and in congruence with international rights obligations. When and how a state of emergency can be invoked in Finland is, however, laid down in ordinary law, not in the constitution. Drawing on the two cases, in both of which the state of emergency is not constitutionally regulated in the way that Böckenförde recommends, the authors show that there are alternative ways of safeguarding the rule of law against potential abuses of power in situations of emergency. After putting the Finnish and Swedish solutions in a historical and theoretical context, the authors highlight the potential challenges and risks these solutions are nevertheless subject to.

Julian Rivers reviews the counter-terrorism measures in place introduced by the British Government. He warns that proposals currently under consideration would intensify the severe limits on civil liberties already in place. Drawing on Böckenförde's writings both on the state of emergency and on value fundamentalism, Rivers argues that insisting on value commitments to the British public order will not make the country safer. Instead, the standard should be upheld that citizens can only be expected to respect the law, but not to hold specific value commitments to the polity in which they live. Rivers echoes Böckenförde when he suggests that what the state can do is to create an environment where robust notions of a "we-consciousness" and a commitment to the common good are created within civil society, but that any state efforts at trying to impose this from above will be both anti-liberal and ineffective.

II. Open Neutrality as an Appropriate Response to Diversity?

Böckenförde began his scholarly career with publications on the intersection of politics and religion. His early publications proved his skills as a historian (he holds doctoral degrees in both law and history) and were motivated predominantly by questions of inner-Catholic reform.²⁷ In 1957, he published the first article of his career, titled "The Ethos of Modern

²⁷ Mirjam Künkler & Tine Stein, *Ernst-Wolfgang Böckenförde: Inner-Catholic Critic and Advocate of Open Neutrality*, 7 OXFORD JOURNAL OF LAW AND RELIGION 1 (2018). On Böckenförde's biography, see Mirjam Künkler & Tine Stein, *State*,

Democracy and the Church.”²⁸ In it, he pleaded with Catholics to accept secular democracy for the sake of their own well-being and called on the Catholic magisterium to give up its predominantly instrumentalist view of democracy. According to the latter, democracy was acceptable as long as the majority of the electorate was Catholic, and as long as political leaders would in the final instance turn to church authorities in moral questions. In 1961, he followed with a pathbreaking article (“German Catholicism in 1933”²⁹) that laid bare the complicity and sometimes open endorsement of the rise of National Socialism in Germany, not only on the part of a few publicly visible leaders (apologetically portrayed as “bad apples”), but throughout the church and various church-affiliated organizations. In this article, as well as several related articles on natural law, he proposed that Catholics ought to accept natural law as an inspiration for individual ethos, but no more (and no less) than that. The Catholic Church ought to give up all pretences at possessing a higher knowledge of human nature and public order, including any policy prerogatives justified with reference to natural law theories. In 1967 then, his article on “The Rise of the Modern State as a process of secularization” was published, in which he traced the emergence of the modern state as a process of emancipation from ecclesiastical authority.³⁰ There was no return, he wrote, beyond the threshold of 1789 and the realization of popular sovereignty. All that religions could (and should) do in its aftermath was to accept the self-determination and autonomy of the individual. Religions could no longer make any claims on political authority and would need to make peace with this situation. But this, Böckenförde underlined, would not mean that religions had no role to play in the modern state. By contrast, religious organizations ought to put themselves into the service of the common good, and religious guidance would be of primary importance in shaping individual ethos.³¹ This series was crowned with his article “The Basic Right of Freedom of Conscience” (1970), in which he asked “How far can a constitution that sees the State as a democratic embodiment of the rule of law actually guarantee freedom of conscience without placing itself in jeopardy in the process?”³² He

law, and constitution: Ernst-Wolfgang Böckenförde's political and legal thought in context, in ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 1 (Mirjam Künkler & Tine Stein eds., 2017).

²⁸ ERNST-WOLFGANG BÖCKENFÖRDE, *The Ethos of Modern Democracy and the Church [1957]*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

²⁹ ERNST-WOLFGANG BÖCKENFÖRDE, *German Catholicism in 1933 [1961]*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018). Also published in 11 CROSSCURRENTS 283–304 (1961).

³⁰ ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularization [1967]*, in 2 LAW, RELIGION, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

³¹ On this, see Jan-Werner Müller, *What the Dictum Really Meant—and What It Could Mean for Us*, 25 CONSTELLATIONS (forthcoming 2018).

³² Ernst-Wolfgang Böckenförde, *Das Grundrecht der Gewissensfreiheit*, 28 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VVDSRTL] 33, 37 (1970), translated as ERNST-WOLFGANG BÖCKENFÖRDE, *The Basic Right of Freedom of Conscience*, in 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

traced the historical process through which freedom of conscience as a basic right has emerged and was shaped. Böckenförde aimed to show that providing freedom of conscience was the ultimate act of the emancipation of the state from ecclesiastical authority, and as such the hallmark of modernity.

The articles in this section revisit Böckenförde's writings on religious freedom, freedom of conscience, and secularism, by placing these notions in the context of contemporary judicial and political struggles about their interpretation.

Böckenförde (like the Federal Constitutional Court he served on) proceeds from the notion of religious freedom as a "strong right." When comparing the French and German models of religion-state relations, several German observers would have certainly described Germany as the less secular state of the two, as the country with a secularization deficit (*Säkularisierungsrückstand*). Böckenförde, by contrast, argues that "the extent to which religious freedom is realized in a given state indicates the extent to which the state is fully secularized."³³ Where the wearing of religious garb is limited in public spaces, such as schools, religious freedom is not realized as a strong right, he suggests. He juxtaposes the French model of *laïcité* as one of "distancing neutrality," where religion is largely relegated to the private sphere, with his preferred model of an "open encompassing neutrality" that allows for greater public presence of religious practice and champions religious freedom as a strong right.

To understand religious freedom as a strong right entails, in Böckenförde's view, the right to have a religious faith (*Glaubensfreiheit*), to profess this faith privately or publicly (*Bekenntnisfreiheit*), to exercise one's religion publicly (*Kultusfreiheit*), and to associate with others to form a religious group (*religiöse Vereinigungsfreiheit*). These rights also include the rights to abstain from any of these in the sense of a negative religious freedom, the freedom not to profess and exercise a religion.³⁴

Ute Sacksofsky shows in her article that of these four facets, Böckenförde prioritizes *Bekenntnisfreiheit*, the freedom to profess one's religion privately or publicly. This prioritization, she argues, goes at the expense of antidiscrimination and equality perspectives. Böckenförde appears to be most sympathetic to judicial decisions that prioritize the right to practice one's religion in public space, while being less concerned with antidiscrimination measures and equal treatment between adherents of different religions, as well as between adherents and non-adherents of religion, that is, between believers and non-believers. Examining the headscarf issue in both Germany and in France, Sacksofsky lays

³³ ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of The State as a Process of Secularization [1967]*, in 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

³⁴ ERNST-WOLFGANG BÖCKENFÖRDE, *Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates*, in KIRCHE UND CHRISTLICHER GLAUBE IN DEN HERAUSFORDERUNGEN DER ZEIT 439, 442 (2nd ed. 2003).

out the implications of this prioritization of freedom of religious practice over antidiscrimination and equality, in order to then relate Böckenförde's views on religious freedom to recent cases the European Court of Human Rights had to decide against the backdrop of the plural arrangements between religion and state in its 47 member states.

Samuel Watters probes the policies towards religion under Turkey's AKP government post-2002 in light of Böckenförde's concept of "encompassing, open neutrality." He shows that the AKP's understanding of secularism (*laiklik*) entails state control of Islam in order to control religious messaging and support efforts to build social homogeneity. Yet many, including representatives of the ruling AKP, claim that reforms under the party indicate a move away from this understanding of *laiklik*, toward a more pluralistic and liberal understanding. To evaluate these claims, Watters analyses developments that have occurred in the past five years under the AK Party in the areas of programming and messaging of the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı*), the state institution tasked with administering Islam to the Turkish population, and thus the institution that implements *laiklik*. He traces meticulously how the AK Party has used the Directorate of Religious Affairs in its project of social transformation while simultaneously drawing on a discourse that allows it to distance itself from past policies that purportedly placed religion policy in the service of political goals.

Ralf Michaels applies the Böckenförde dictum to the question of how the state ought to deal with face veils in particular, and with Islamist claims on accommodation more generally. Böckenförde formulated the dictum in the 1960s, asking Catholics to accept the secular state in the interest of their own well-being. Only in the secular state, Böckenförde wrote then, could the freedom of conscience, which he viewed as the cardinal freedom and the hallmark of modernity, be fully realized. Böckenförde was confident that with time, in particular with the experience of participating in democratic politics and of enjoying democratic freedoms, inner-Catholic suspicions against the secular order would gradually disappear. Exploring the relevance of the dictum in addressing contemporary value conflicts around face veil bans in European countries, Michael argues that the relevant debates demonstrate the limits of contemporary applications of the dictum.

III. The Future of Europe

The third and final part of this issue turns to the future of Europe. The European Union currently faces the greatest crisis since its founding. The upcoming Brexit paradigmatically represents the sudden insight that the process of European integration is indeed reversible. All the while, the Polish and Hungarian governments continue to undermine the liberal principles upon which their own constitutions and the EU are built. The current crisis reveals dynamics of fragmentation rather than integration. The question suggests itself whether the willingness of some new member states to partake in this historic form of supranational order was overestimated during the EU enlargement and deepening processes. But perhaps the current crisis also presents an opportunity to pause and rethink the EU's current quality

as a supranational polity: does it resemble empires of old, with bureaucratic centres, local cultural autonomy, and little participation? Or does it rather embody the nucleus of a statehood-based federation that is capable of developing in a democratic fashion and generating forms of democratic legitimacy?

Ernst-Wolfgang Böckenförde's writings are of great relevance and topicality in this respect. The three authors of the articles in this section, *Jan-Christoph Suntrup*, *Vlad Perju* and *Alexander Somek* draw on Böckenförde's political and constitutional thought to address some of the current challenges the EU faces.

In his seminal 1997 article "Which path is Europe taking," Böckenförde analyzed the development of the EU's legitimacy deficit, which one could argue is at the root of the current European crisis.³⁵ Böckenförde does not dispute the EU's merits as a historically unique, unifying, and peace-providing organization built after devastating wars. He is also a far cry from arguing for a dissolution of the Union or a revitalized national isolationism; by contrast, he has repeatedly spoken out against nation-state centered policy approaches. But Böckenförde does question whether there is something of an evolutionary logic towards a European federal state, without this logic being much reflected upon and debated among European publics. In the second pertinent article in this regard, "The Future of Political Autonomy," published just a year later, Böckenförde analyzes the impact of increased globalization, Europeanization, and individualization on local communities and social cohesion.³⁶ He criticizes what he views as the dark sides of the "economically caused liberation": the ongoing destruction of the life world, namely the destruction "of the farming life, of tradition, of demography (through rural flight on a large scale), and individual culture."³⁷ In this regard, Böckenförde represents a strand of political thought that has been labeled as value conservatism.³⁸ What is more, he worries that political-democratic statehood might be affected by these developments insofar as citizens decreasingly identify with their political communities. Against the specter of fragmentation, Böckenförde puts forth an understanding of democratic statehood that encompasses comprehensive welfare

³⁵ ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking? [1997]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 343 (Mirjam Künkler & Tine Stein eds., 2017). Together with constitutional scholar Dieter Grimm (who focuses mainly on conceptual issues pertaining to the connection between constitution and state) and political scientist Peter Graf Kielmansegg (who addresses, in particular, issues of democratic legitimacy), Böckenförde represents a rather skeptical stance on the future of European integration.

³⁶ ERNST-WOLFGANG BÖCKENFÖRDE, *The Future of Political Autonomy: Democracy and Statehood in a Time of Globalization and Europeanization, and Individualization [1998]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 325 (Mirjam Künkler & Tine Stein eds., 2017).

³⁷ *Id.* at 335.

³⁸ Value conservatism is commonly opposed to structural conservatism. While the latter supports the change that comes with modern capitalist production and consumption, the former criticizes the negative impacts on social cohesion and traditional life forms.

policies, thus compensating for inequalities and life risks resulting from a free capitalist market economy.

Turning to the current state of the European Union, it remains an open question to what extent commonality and a willingness to integrate have emerged among the member states, even if one admits that the Union is a much "thinner" political entity than a nation state is. Böckenförde notes one specific problem in this regard, resulting in the EU's legitimacy gap. His main focus lies here on the relationship between economic and political integration. Taking a long-term view from the 1950s to the 1990s, he diagnoses how the process of political integration in terms of democratic participation, public discussion, and legitimate consent-based political decision-making has lagged behind the achieved intensity of economic integration: for a long time, the four market freedoms (free movement of goods, people, capital, and services within the EU) were not accompanied by political rights. Whereas European law on the internal market takes precedence over national law, the member states, as Böckenförde notes, "remain responsible for economic policy, labour market policy, and distributive social policy,"³⁹ without being able to establish restraints for the common market. Böckenförde argues that the disconnect between economic and political integration in combination with the division of authority between the national and supranational levels of government in the EU results in a "fragmentation of the care for the common good."⁴⁰ The type of solidarity that the large-scale transfer payments emanating from a common currency zone require is lacking and must be created. In Böckenförde's view, inner-European transfer payments do not produce solidarity but rather presuppose it. "Banking on the market-economic approach as the vehicle and motor of Europe's integration will not lead to greater unity, but to greater separation and a dead end."⁴¹ Solidarity is a political product, he argues, and EU member states have for long criminally neglected to promote its creation among the European publics.

Contrary to Habermas, democratic institutions and the possibility to partake in the democratic process are not alone sufficient, in Böckenförde's view, to create trust in shared visions and a sense of solidarity. These must be created through multifaceted exchanges in society, and states can support this process with instruments of cultural policy. In this regard Böckenförde has been a long-standing critic of the fact that EU citizens still predominantly consume their news from nation-based newspapers and TV channels with their inevitable national foci. How can the sense of a shared belonging emerge if the citizens from one part of the Union are still overwhelmingly uninformed about the ways of life, concerns and needs

³⁹ ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking? [1997]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY. SELECTED WRITINGS 343, 351 (Mirjam Künkler & Tine Stein eds., 2017).

⁴⁰ *Id.* See for Böckenförde's argumentation, Vlad Perju, *Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration*, in this issue.

⁴¹ ERNST-WOLFGANG BÖCKENFÖRDE, *Which Path is Europe Taking? [1997]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY. SELECTED WRITINGS 343, 364 (Mirjam Künkler & Tine Stein eds., 2017).

of citizens in another part? Cultural policy, Böckenförde observed in the 1990s, is still a national prerogative and, he lamented that 50 years after the Act of Rome, history textbooks are still written by national instead of European history commissions, whose accounts might sensitize citizens towards non-nationalist interpretations of the past. In his dismay over lacking concerns for the forces of cultural integration, Böckenförde liked to quote Jean Monnet, one of the architects of the European Union, who is reported to have famously said: "If I were to do it all over again, I would start with culture [rather than economics]."

From today's perspective, after the 2007 financial crisis and the ongoing struggle of the European institutions to stabilize the Euro and the European Economic Area, Böckenförde's skepticism about the EU as a predominantly economic project at the expense of political and cultural integration seems almost prophetic.⁴²

In his article "Reflections on Ernst-Wolfgang Böckenförde's Work on European Integration," *Vlad Perju* expands on Böckenförde's critical analysis by focussing on the current constitutional crises of some EU member states, whose elected authoritarian governments attack the liberal structure of their respective democracies. Perju introduces a differentiation between vertical fragmentation on the one hand, by which he refers to Böckenförde's diagnoses of the disconnect between economic and political integration of the EU, combined with the division of authority between the national and the supranational levels, and, on the other hand, horizontal fragmentation, which he takes to denote a move away from the EU's common good.

How can Böckenförde's work be used to investigate and theorize the EU's response to the recent turn to authoritarianism in Eastern Europe, particularly in Poland, Hungary, and Romania? The national governments of these states have sought to justify their turn to identitarianism and authoritarian constitutional reforms by reference to their sovereign rights and national identity, which are protected in a European Union understood as a community of states. Perju argues that "European constitutionalism need not stand by and watch Europe's normative collapse. Through its inclusion into the Treaty, the concept of national identity has become a concept of EU law. As such, the concept needs to be interpreted."⁴³ This raises the question how, in particular, the European Court of Justice's jurisprudence may act in this regard. Perju outlines why, however, from Böckenförde's vantage point not only the attacks on the rule of law within EU member states are detrimental to EU common values, but paradoxically also potential EU interventions to counter these, as they could deepen fragmentation of the member states' authority.

⁴² In a 2015 interview, Böckenförde laments that the type of nation-centered thinking present in many member states obstructs the necessary joint action. Thus, he goes on, he unfortunately cannot share Angela Merkel's optimism in this regard. See Ernst-Wolfgang Böckenförde: *Anwalt des Parlaments*, BADISCHE ZEITUNG, Sept. 19, 2015.

⁴³ Perju, *supra* note 40.

In his article "From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management," *Jan Christoph Suntrup* links Böckenförde's critique of how the West German state handled the "undeclared" state of emergency in the 1970s with an essay Böckenförde wrote at the beginning of the Euro crisis.⁴⁴ His position here would be misunderstood, as Suntrup shows, as a sheer legitimization of unlawful emergency measures in times of severe crisis. The structural error of the Maastricht Treaty, which established an economic and monetary union without an accompanying political union, has been brought to the fore by the financial crisis. Böckenförde criticizes that the European Financial Stability Facility conflicts with the European treaties and that the principle of "necessity has no law" cannot provide for a satisfactory legitimization.

Suntrup then deepens the critique of the EU's crisis management as non-democratic as it replaced "the project of integration through law . . . by a strategy of 'integration through fear,' which aims at taming critical debate on competing political projects on the future of the EU".⁴⁵ Some might perceive European austerity policy as a trend towards more supranational integration of the EU. For Suntrup, however, both the economic content and the authoritarian form tend to increase "the risk of amplifying the disintegrative tendencies within the EU by augmenting social inequalities, neglecting national economic traditions, betraying a technocratic, almost colonialist spirit—which lacks legitimacy by trying to shun agonistic democratic debate . . . and by demonstrating a managerial depreciation of the rule of law at least in some regards," which is especially problematic given the violation of the rule of law principle in some member states.⁴⁶ A critique by the EU could be repudiated as hypocritical. In the end, the pledge for an ultimately political union seems most justified to Suntrup, as Böckenförde argues in his essay: "The European Union must take the character of a federation, a political federation of the European peoples No longer must it appear as a technical-pragmatic construct of governmental dominance; on the contrary, it must embody an idea of political order that establishes a relation to the peoples of Europe and is open to their participation."⁴⁷

The last article of this Part focuses on democracy at the European level. In "The European Model of Transnational Democracy" *Alexander Somek* examines two paths towards transnational democracy: a proto-national and a non-national path. One may read the first part of this article as philosophical reflection on the substance of nations and their relation to culture. Somek elucidates how the mutual recognition of life forms and the expectation

⁴⁴ Ernst-Wolfgang Böckenförde: *Kennt die Europäische Not kein Gebot?*, NEUE ZÜRCHER ZEITUNG (June 21, 2010), https://www.nzz.ch/kennt_die_europaeische_not_kein_gebot-1.6182412.

⁴⁵ Jan Christoph Suntrup, *From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management*, in this issue.

⁴⁶ *Id.*

⁴⁷ Böckenförde, *supra* note 44 (transl. by Jan Christoph Suntrup).

to abide with the rules of fair play—which results in long-term commitments to build up the requisite trust “explains why the most engaging issues of public policy are usually tied up with a national culture . . . Nations are, at the bottom, communities that exist over time and draw on shared memories in order to sustain commitments among its members. These memories are linked to territories.”⁴⁸ It is not by accident that Somek then turns to the concept of relative homogeneity, which Böckenförde refers to time and again. Somek underlines that homogeneity is often misunderstood as uniformity sustained by coercion but should be rather viewed as a consensus among the citizenry: “Böckenförde is right in claiming that more homogenous [that is, less politically polarized] democracies are freer than others, for even members of the minority do not experience the evaluative outlook of the majority as foreign.”⁴⁹

In the second part of his article, Somek explores what a non-national democracy would look like and whether it could be a viable model for transnational democracy, one in which both the nation and a common culture are absent. In such a scenario, the world consists of free and equal individuals, only bound together by their interest in collective self-determination and in the exercise of political control. State boundaries are acceptable only because the citizenry would otherwise be indefinite, rendering decision-making and action impossible. While this scenario opens up thought-provoking theoretical and normative questions, the argument presented here also “reveals that a transnational democracy, properly understood, cannot deliver what we expect a sufficiently *lively* democratic process to achieve.”⁵⁰ In the end, one might conclude that abstract democratic engineering from the drawing board cannot replace the search for a convincing transnational model of democracy for the European Union. A more perfect democratic Union has to be built and rebuilt incrementally.

C. Conclusion

In their critical diagnosis of a “methodological nationalism,” sociologist Andreas Wimmer and anthropologist Nina Glick Schiller identified the weak spot of modern social theory, which had long assumed that society and culture were “naturally” confined by the nation state.⁵¹ This conception of society, state, and nation has changed dramatically in the last

⁴⁸ Alexander Somek, *The European Model of Transnational Democracy*, in this issue.

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis in the original).

⁵¹ Andreas Wimmer & Nina Glick Schiller, *Methodological nationalism and beyond: nation-state building, migration and the social sciences*, 2 GLOBAL NETWORKS 301 (2002); Andreas Wimmer & Nina Glick Schiller, *Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology*, 37 INT’L MIGRATION REV. 576 (2003). See also Ulrich Beck & Edgar Grande, *Jenseits des methodologischen Nationalismus. Außereuropäische und europäische Variationen der Zweiten Moderne*, 61 SOZIALE WELT 187 (2010).

decades, and German *Staatsrechtslehre* has been part of this shift not least because its main subject, German law, has experienced a structural change. The principle of open statehood, already acknowledged in the German Basic Law in 1949, has become more and more of a reality—first and foremost with regard to the Europeanization of national law since the Federal Republic became part of the European Economic Community in 1957, but also with regard to other commitments resulting from international treaties.

Böckenförde's work is primarily situated in the context of West German political and legal developments, even if it embeds the German state's regulatory capacities in the EU context. The aspect of methodological nationalism becomes apparent, for example, in Böckenförde's perception of democracy as still grounded in the nation state. For Böckenförde, the concept of citizenship is a precondition to conceive of the chain of legitimation from "the people," understood as a political entity, to the government. As a consequence, the only possible path Böckenförde appears to foresee for a further Europeanization is an extrapolation from the nation state to the European level, where the European peoples will ultimately merge into one European people, integrated under one single political authority that is dependent on their political will (as discussed here by Vlad Perju and Alexander Somek). However, in today's multi-layered international and supranational political order, thick and thin bodies of politics overlap. How can the idea of popular sovereignty be reconciled with the institutional quality of a supranational entity? Here Böckenförde's perpetuation of (liberal) statism does not seem outdated, given the overwhelming evidence that even though the state has indeed undergone profound transformation in the post-war period, it still remains "the most important political unit of the modern world."⁵²

Böckenförde has emphasized the necessity of specific preconditions from which the liberal state draws its life. As described above, among these preconditions are civic virtues such as solidarity and mutual respect as well as a sense of belonging and "we-consciousness" of the citizenry. The concept that Böckenförde uses in this regard time and again is that of "relative homogeneity." Böckenförde defined such relative homogeneity, with a nod to Hermann Heller, as a "socio-psychological condition, in which the existing political, economic, social, and even cultural antagonisms" were permeated "by a common sense of We (*Wir-Bewußtsein*),"⁵³ that binds them to one another and provides the necessary trust that minorities will not perennially remain minorities.

⁵² Evelyne Huber et al., *Introduction. Transformations of the State*, in OXFORD HANDBOOK ON TRANSFORMATIONS ON THE STATE 1, 1 (Stephan Leibfried et al. eds., 2015).

⁵³ ERNST-WOLFGANG BÖCKENFÖRDE, *Demokratie als Verfassungsprinzip*, in STAAT, VERFASSUNG, DEMOKRATIE: STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECHT 348 (1991).

As Alexander Somek has written, relative “homogeneity has nothing to do with uniformity that is sustained by oppressive means. Actually, . . . it presupposes the antithesis to it.”⁵⁴ Contemporary societies are overwhelmingly plural and their citizenry diverse. This is both an empirical situation and, in any liberal democracy that deserves its name, also normatively desirable. Yet, what can hold such deeply diverse societies together? This is where relative homogeneity comes in:

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’.⁵⁵

Any democracy lives from an agreement on the things that cannot be voted on, beginning with the unamendable clauses of a constitution. Usually this implied agreement goes further: one trusts that fellow citizens will overwhelmingly obey the laws made by the democratic legislature through majority vote; that those who hold contrary political views are thought of as the opposition, but not as the enemy; that the rules of engagement will be guided by forbearance and not the abuse of one’s power, even if that is within the realm of the legal. Nowadays, one can witness in real time what happens in a liberal democracy if this assumed consensus over those things that cannot be voted on is no longer a given.⁵⁶ In the US context, this implicit agreement had included for example the expectation that

⁵⁴ Alexander Somek, *The European Model of Transnational Democracy*, in this issue.

⁵⁵ Dieter Gosewinkel, “Beim Staat geht es nicht allein um Macht, sondern um die staatliche Ordnung als Freiheitsordnung.” *Biographisches Interview mit Ernst-Wolfgang Böckenförde*, in ERNST-WOLFGANG BÖCKENFÖRDE, WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT 307, 477 (2011); English trans. quoted after Mirjam Künkler & Tine Stein, *State, law, and constitution: Ernst-Wolfgang Böckenförde’s political and legal thought in context*, in ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 23 (Mirjam Künkler & Tine Stein eds., 2017). Other excerpts of the interview are contained *id.* at 369, and in ERNST-WOLFGANG BÖCKENFÖRDE, 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

⁵⁶ What Daniel Zieblatt and Steve Levitsky recently diagnosed as a breakdown of forbearance in US politics certainly also applies to other contemporary polities. Society was so polarized, the authors suggest, and political parties so distrustful of one another that politicians no longer showed self-restraint. Instead, one used all tools at one’s disposal to weaken the other party. Citing polling data, the authors give examples indicative of how intra-societal trust has broken down in the US context: One out of four Trump voters deemed Trump to be unfit for president—yet preferred to vote for him rather than Hillary Clinton. A majority of Trump voters saw Vladimir Putin more favorably than the Democratic Party candidate. See DANIEL ZIEBLAT & STEVE LEVITSKY, *THE BREAKDOWN OF DEMOCRACY* (2018).

presidents will not choose to rule excessively by executive decrees, even if this is within the realm of the legal; that senators will not seriously undermine the functioning of the judiciary by repeatedly blocking confirmation hearings, even if that is legally possible. It also had included the expectation that political parties will do everything to prevent governmental shutdown, even if the latter is a possible strategic tool.

What can the state do when this ethos, this trust in shared visions is lost? Böckenförde's answer is: the state's role here is limited, but not unimportant. On the one hand, shared visions must be generated within society, not by the state: a democratic state cannot impose shared visions or liberal and tolerant attitudes on its citizens without undermining the very liberalism on which it is founded. Hence, respect for diversity, along with trust that agreed upon rules will not be violated must be cultivated in society. Religion, philosophical and political movements: they all can "strengthen the sense of commonality in the populace and the willingness to not always look out for one's own benefit only, but to act companionably and in solidarity with others."⁵⁷ On the other hand, there are certain institutions that are spectacularly important for making sure citizens have similar starting positions to develop these shared visions: apart from an elaborate welfare regime that creates comparable living conditions among the citizenry, public education and public media are key. This is where the state has a role to play: its chief tools for supporting those societal processes that create shared visions and implicit agreement on the things that cannot be voted upon are the public educational sector and publicly funded media, facilitating the soundness of political judgment and forbearance required in the light of democracy's fragility.

⁵⁷ Ernst-Wolfgang Böckenförde, "Freiheit ist ansteckend," TAZ. DIE TAGESZEITUNG, Sept. 23, 2009, at 4 (trans. the authors).

