Special Issue
Böckenförde Beyond Germany

Ernst-Wolfgang Böckenförde on Constitutional Judging in a Democracy

By Justin Collings[*]

Abstract

This Article explores Ernst-Wolfgang Böckenförde's views about constitutional judging in a democracy. It offers three ideal types of constitutional judging, each drawn from the extra-judicial writings of prominent constitutional judges who represent it. The three types are: (1) *the prophet*, who views the constitution as visionary and value-laden, and who entertains an expansive view of the judge's role in giving voice and validity to that vision and those values; (2) *the essayist*, who shares the prophet's sense of the vast scope and myriad resources of constitutional judging, but who, lacking the prophet's confidence in getting such bewilderingly difficult questions right, approaches constitutional judging cautiously, skeptically, and deferentially; and (3) *the executor*, who views constitutional judging as the effort to discern the constitution's concrete, limited content, and to enforce that content unflinchingly. Böckenförde, the Article argues, was an executor—one who shared many interpretive commitments with the two most prominent executors in the American constitutional tradition: Hugo Black and, especially, the late Antonin Scalia.

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A. Introduction

Ernst-Wolfgang Böckenförde is perhaps the leading exemplar of a peculiarly German type—the constitutional judge as public intellectual. It is a type, indeed, that Böckenförde helped create.[1] On the one hand, since Böckenförde joined the Second Senate of the German Federal Constitutional Court in 1983, his frequent forays into public debates have been bolstered by the fact that he was a sitting or (after 1996) emeritus constitutional justice. On the other hand, Böckenförde's stature as a public intellectual and leading public law scholar—or, at least, the lexical and forensic gifts that fostered that stature—might have enhanced his authority and influence within the Second Senate. This Article examines the relationship between Böckenförde's dual roles as scholar and judge. More specifically, it explores Böckenförde's view of constitutional judging in a liberal democracy as articulated in his academic writings before, during, and after his tenure on the Court.

My approach is comparative. To situate Böckenförde's view of the constitutional judge's role, I propose three ideal types of constitutional judging. The types are based on the normative accounts of constitutional adjudication put forth in the extra-judicial writings of six internationally prominent (but no longer active[2]) constitutional judges—four from the United States, and one each from Israel and South Africa. One could, of course, have chosen other examples, but these six seem particularly apt for comparison because of their prominence and their extensive reflections about the art of constitutional judging, and because they represent positions that Böckenförde either shared, modified, or relentlessly opposed. I call these ideal types the *prophet*, the *essayist*, and the *executor*. Part I of this Article defines these terms by reference to the writings of the aforementioned judges; Part II examines Böckenförde's own views on constitutional judging, arguing that those views exemplify my third ideal type. A brief conclusion reflects upon Böckenförde's theoretical and practical contributions in comparative and historical contexts.

B. Three Ideal Types of Constitutional Judging

I. The Prophets: William Brennan, Aharon Barak, and Albie Sachs

A prophetic judge is one who views the constitution as visionary and value-laden, and who entertains an expansive view of the judge's role in giving voice and validity to that vision and those values. Prophetic judges see the constitution as the living—and therefore evolving—embodiment of a society's deepest values, and they are confident in their own capacity to

[1] Christoph Schönberger, *Der Indian Summer eines liberalen Etatismus: Ernst-Wolfgang Böckenförde als Verfassungsrichter*, *in* RELIGION, RECHT, POLITIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE 121, 121 (Hermann-Josef Große Kracht & Klaus Große Kracht eds., 2014).

[2] Because these judges are no longer active, I uniformly describe their views—even the views of those still living—in the past tense.

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identify those values and apply them. They see the constitution as comprehensive, or nearly so, reaching every nook and cranny of the legal order, and permeating all social spheres.

Constitutional ubiquity, of course, has consequences. One is that the resources upon which constitutional judges may draw are extensive and wide-ranging. Another is that conflicts among constitutional values are frequent, requiring an interpretive method fit to balance competing values and resolve conflicts among them. Prophetic judges favor liberal rules of standing, look askance at political question doctrines, and are generally more afraid of judicial abdication than of thwarting democratic will.[3]

Prophetic judging is visionary in the sense that it sees the constitution as enshrining a particular socio-political vision. For William Brennan, who served on the United States Supreme Court from 1956 to 1990, the capacious provisions of the U.S. Bill of Rights (including, for Brennan, the Fourteenth Amendment) reflected a foundational vision and required visionary interpretation. The Due Process Clause, for instance, expressed an "underlying vision of human dignity."[4] Other constitutional provisions were similarly visionary. "The Framers," Brennan wrote, "bequeathed to us a vision of rulers and the ruled united by a sense of their common humanity."[5] It was the job of judges "to be faithful to the vision of the Framers."[6] The constitution, for Brennan, was "the lodestar for our aspirations."[7] He believed it would "endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it."[8] The need for interpretive "vision" was central to Brennan's conception of the judge's role. And he clearly found the constitution's "vision" attractive. He described the constitution as "a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law"—one that embodied a "sparkling vision of the human dignity of every individual."[9] He declared that the constitution's "vision of human dignity" was "deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve." He described such evolution as "inevitable"—"the true interpretive genius of the text."[10] Judges, of course, were evolution's central agents. In that role, they must both interpret and inspire. They were

[3] *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 177–78, 193 (2006).

[4] William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law*," 42 REC. ASS'N B. CITY N.Y. 948, 974 (1987).

[5] *Id.* at 974–75.

[6] *Id*. at 975.

[7] William J. Brennan, Jr., *My Encounters with the Constitution*, 26 JUDGES J. 6, 7 (1987).

[8] Brennan, *Reason, Passion, and "The Progress of the Law*," *supra* note 4, at 962.

[9] Brennan, *My Encounters with the Constitution*, *supra* note 7, at 10.

[10] *Id*. at 60.

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the prophets commissioned to keep the constitutional faith vibrant for the future.

For prophetic judges, the constitution's "vision" is primarily a vision of values.[11] For Albie Sachs, who served on the Constitutional Court of South Africa from its founding in 1995 until 2009, defining the nation's values was as important as deciding concrete cases. This was especially so, Sachs believed, in the face of calamity or crisis. "If we judges," he wrote, "are not here to say through our decisions something profound about what our country stands for when it is being tested, then we are not fulfilling our vocation as judges."[12] Sachs's reference to the judicial "vocation," with all its religious resonance, was telling. He maintained that judges must express the community's deepest moral aspirations.

Indeed, Sachs maintained, the court itself must embody those aspirations. In South Africa, this was embedded in the Court's very building, constructed from bricks of the Old Fort prison that once confined Nelson Mandela and, in an earlier time, Mahatma Ghandi. "The Court," Sachs wrote, "represents not only the important 'never-again' principle of constitutional democracy, but also the theme of survival, of hope, of the triumph of courage and humanity over despair and cruelty."[13] Sachs stressed that, in the constitution's text, his Court was "expressly required to promote the values of an open and democratic society."[14] He saw his Court as the guardian of universal values, such as dignity and equality, that had been pursued across the ages and around the globe: "[T]he aspirations of generations of freedom fighters in our country and abroad, over the ages, have come to be embodied in the terms of the Constitution that I as a judge on the Constitutional Court have sworn to defend."[15] Sachs's vision of the judicial role was thus infused by a certain sense of destiny. South Africa's constitution, and Sachs's court, must help realize the immemorial hopes of humankind.

For Aharon Barak—a justice on the Supreme Court of Israel for twenty-eight years (1978–2006), the last eleven as its President—a value-laden constitution was a sine qua non of constitutional democracy. Barak defined democracy in substantive, as well as procedural, terms. A democracy, to be sure, requires representative bodies staffed through free and fair elections. But, to be worthy of the name, a democracy must also embody certain substantive values, among them "separation of powers, the rule of law, the independence of judges, human rights, and fundamental values reflecting ethical values, social objectives, and

[11] *Id*. at 9 (Brennan spoke of the constitution as a series of "substantive value choices.").

[12] ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW 33 (2009).

[13] *Id*. at 90–91.

[14] *Id*.

[15] *Id*. at 92.

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appropriate ways of behavior."[16] Democracy, for Barak, meant "democratic values, and, at their center, human rights"; it meant the peculiar "internal morality" of democracy, "without which the regime is no longer democratic";[17] it meant "the rule of democratic values."[18]

Barak's conception of democracy, then, was thick, substantive, and value-laden. He was confident that he knew what the constitutive democratic values were, and convinced that it was a judge's job to enforce them. Indeed, Barak saw constitutional judicial review itself as a necessary condition of substantive democracy. In his view, the fact that democracy had essential substantive elements, and that constitutional judicial review was one of those elements, was no mere postulate of political or democratic theory; it was the fiat of History. "A key historical lesson of the Holocaust," he wrote, "is that the people, through their representatives, can destroy democracy and human rights. Since the Holocaust, all of us have learned that human rights are the core of substantive democracy. The last few decades have been revolutionary," he concluded, "as we have learned the hard way that without protection for human rights, there can be no democracy and no justification for democracy."[19] Similarly, with respect to constitutional justice, Barak maintained that "a lesson of the Holocaust and of World War II is the need to enact democratic constitutions and ensure that they are put into effect by judges whose main task is to protect democracy."[20] Protecting democracy, substantively understood, was the constitutional judge's "main task." On this view, the judge's job was expansive, ambitious, and sweepingly value-laden.

Accordingly, Barak's substantive definition of democracy underwrote a substantial role for the constitutional judge in a democracy. It resolved whatever doubts he might have entertained about the legitimacy of judicial review or about its expansive exercise. For Barak, judicial review's democratic dilemma was no dilemma at all. Judges were not a restraint on democracy; they were a precondition. A polity without judicial review was hardly a democracy at all. He similarly saw no conflict between judicial review and the separation of powers. "When a court rules that a statute is unconstitutional and invalidates it," Barak wrote, "it does not undermine the legislature or violate separation of powers. The legislative authority does not include the authority to pass unconstitutional statutes."[21] Indeed, he added, "it is precisely this principle [of separation of powers] that is the source of judicial

[16] BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 3, at 24.

[17] *Id*. at 25.

[18] *Id*. at 24.

[19] *Id*. at x–xi.

[20] *Id*. at 21.

[21] *Id*. at 43.

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review."[22] For Barak, a democracy worthy of the name must be characterized by the separation of powers, which entailed judicial review, and by democratic values, which judges must enforce.

In Barak's view, judges must enforce democratic values by effectuating fundamental rights and bridging the gap between law and society. This, in turn, compelled certain methodological and interpretive choices, the most important of which was Barak's embrace of purposive interpretation and the principle of proportionality. Not only did Barak deploy purposivism and proportionality as a judge; he felt so strongly about them that he wrote a separate book about each one.[23] Analyzing either one lies beyond this Article's scope. Suffice it to say that a broad mandate to fulfill constitutional aspirations and a universal duty to balance relevant values both characterize the prophetic conception of constitutional judging.

Barak acknowledged many limits to the judicial role,[24] but he invariably spoke of that role in lofty terms. For Barak, judges should not only enforce core values by law, they should cultivate such values among the populace. Judges, in Barak's view, were educators of the national ethos, pedagogues of the democratic spirit. A court, he said, "should function as an educational institution whose judges are teachers participating, as Eugene Rostow put it, 'in a vital national seminar.'"[25] Even more expansively, Barak spoke of judging in vocational terms. "Law has a calling," he wrote. "It is meant to serve the individual and society. The good of society is a value which the law of a democratic state should aspire to realize."[26] Constitutional judges, as the democratic state's legal guardians, must make that aspiration their own.

With that end in sight, Barak took an expansive view of both the opportunities for constitutional judging and the resources available to constitutional judges. He was wary of

[22] *Id*. at 51.

[23] *See generally* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

[24] *See* BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 3, at 88–89 (arguing that courts neither can nor should solve all societal problems, but "that the court has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy, with human rights at the center").

[25] *Id*. at 23 (quoting Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

[26] *Id*. at 75. In the last lines of his book, Barak was more specific and more personal. "I view my office as a mission," he said. "Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial." *Id*. at 315.

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political question doctrines and non-justiciability rules,[27] and favored liberal rules of standing.[28] He celebrated recourse to comparative law, which he said "extend[s] the judge's horizons"[29] and "enriches the options available to us."[30] Barak believed that, by availing themselves of ample interpretive resources, judges could transcend themselves and their private preferences. "[I]t is a myth," he wrote, "that judges always give expression to their subjective beliefs. According to my view—both normatively and descriptively—the judge gives expression not to his own beliefs but to the deep, underlying beliefs of society."[31] The choice, he explained, was

> not between the wishes of the people and the wishes of the judge [, but] . . . between two levels of the wishes of the people. The first, basic level reflects the most profound values of society in its progress through history; the second, ad hoc level reflects passing vogues.[32]

Two features of this language are particularly remarkable. The first is Barak's faith that judges can rise above the distortions and obfuscations of passing vogues to identify a society's deepest values. The second is his faith that societies "progress" through history. His was a melioristic view that societies improve over time, with judges speeding the process by requiring societies to be true to their better selves, and by bridging the gap between societies' profoundest values and their superficial realities. These roles were truly essential, and only the judge could perform them. "[O]nly the judge," he wrote, "who has nothing to hamper his independence, is capable of, and suited for, reflecting the fundamental values of society. It is only the judge who can give effect to substantive democracy."[33]

In a crucial sense, Barak's conception of the judge's role was comprehensive. It is this expansiveness, more than anything else, which qualifies Barak's view of constitutional judging as a prophetic one. That expansiveness shines through in the portrait of "the good

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[27] *See id.* at 177–79 ("The more non-justiciability is expanded, the less opportunity judges have for bridging the gap between law and society and for protecting the constitution and democracy.").

[28] *Id*. at 193 ("I believe that my role as a judge is to bridge the gap between law and society and to protect democracy. It follows that I also favor expanding the rules of standing and releasing them from the requirement of an injury in fact.").

[29] *Id*. at 198.

[30] *Id*. at 197.

[31] *Id*. at 95.

[32] *Id.*

[33] *Id*. at 96.

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judge," with which Barak closed his important book on judging in a democracy:

> The good judge recognizes the text and sees it as a starting point, but not an ending point. Good judges lift their eyes and see the legal system in all its nuances, values, and foundations. The good judge locates the meaning of the text within this general context. Indeed, the good judge does not make do with knowing the law. He should know society, its problems, and its aspirations. The good judge does not just look at the language of the single clause of the constitution, statute, contract, or will which he must interpret. The judge looks at the text in its entirety. One who interprets a single clause of the constitution interprets the entire constitution. One who interprets a single clause of a statute interprets all the statutes in their entirety.[34]

The good judge, in short, sees everything that mortal limits allow. Despite the need to be humble[35]—to recognize one's fallibility and to admit one's mistakes[36]—the good judge must, on this view, be something of a prophet, and something, in the literal etymological sense, of a seer.[37]

II. The Essayist: Felix Frankfurter

An essayistic judge shares the prophet's sense of the vast scope and myriad resources of constitutional judging, but lacks the prophet's confidence in getting such bewilderingly difficult questions right. As a result, the essayist is cautious and skeptical, diffident and deferential. The essayist admits that constitutional judges wield enormous power, but concludes that they should be highly reluctant to use it. For our purposes, the great paladin of the essayistic model was Felix Frankfurter, who served on the U.S. Supreme Court from 1939 to 1962. Frankfurter never believed that judges were mere agents of the legislature or mouthpieces of the law. He acknowledged early and often that judges do and must "bring

[34] *Id*. at 308.

[35] *See id.* at 112 ("[J]udges must display modesty and an absence of arrogance.").

[36] *See id.* at 309–10 (discussing the need for judges to possesses certain traits, such as humility and the ability to listen to others).

[37] That is, one who sees.

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to the issues some creative power."[38] He thought constitutional evolution both necessary and desirable. For Frankfurter, "American constitutional law [was] not a fixed body of truth but a model of social adjustment."[39] He wanted the Supreme Court to be an agent of such adjustment—"responsive to the potentialities of the Constitution to meet the needs of our society."[40] He knew that judges made law, and admitted that the power involved was enormous. But for that very reason, he insisted that judges exercise that power only rarely and only with an essayist's caution.

The very term "essay"—which stems from the French verb essayer, to test or attempt—suggests tentativeness and caution. Frankfurter himself once commented on the form. "The essay form," he said,

> is the fit instrument for a thinker whose concern is to lay bare the contending claims that seek the mediation of law, and to give some indication of how these processes of mediation in fact operate. For the essay is tentative, suggestive, contradictory, and incomplete. It mirrors the perversities and zests and complexities of life.[41]

The description was admiring. The ability to grasp and balance complexity—to wrestle with the hard facts of life—was a virtue that Frankfurter warmly applauded in his predecessors.[42]

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[38] Felix Frankfurter, *The Nomination of Mr. Justice Brandeis*, NEW REPUBLIC, Feb. 5, 1916, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 43, 44 (Philip B. Kurland ed., 1970).

[39] Felix Frankfurter, *Social Issues Before the Supreme Court*, 22 YALE L. REV. 479 (1933), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 286, 288.

[40] *Id*. at 305.

[41] Felix Frankfurter, *When Judge Cardozo Writes*, NEW REPUBLIC, Apr. 8, 1931, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 242, 246.

[42] For example, on Brandeis: "[F]or years Mr. Justice Brandeis had been immersed in the intricacies which modern industry and finance have created for society and in the conflicts engendered by them. Hardly another lawyer had amassed experience over so wide a range and with so firm a grip on the details that matter." Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33 (1931), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 247, 250 [hereinafter Frankfurter, *Mr. Justice Brandeis and the Constitution*]. And again, Brandeis "never flinches from stubborn reality. Facts, not catchwords, are his sovereigns." Id. at 267. And on Cardozo: "[H]e rapidly gained the esteem of the bar and the bench of New York by his arguments and briefs, as counsel as well as referee, a functionary appointed by judges in specific cases, particularly those of a complicated commercial character, a field of law in which Cardozo especially excelled." Felix Frankfurter, *Mr. Justice Cardozo*, in XXII DICTIONARY OF AMERICAN BIOGRAPHY, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 525. And again, "[E]ven the fullest reading of his opinions merely gives intimations of his depth of thought and beauty of character." Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 52 HARV. L. REV. 440 (1939), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 401, 436 [hereinafter Frankfurter, *Mr. Justice Cardozo and Public Law*].

But judges, of course, can never really be essayists. They can never, in their official capacity, revel in ambiguities and defer conclusions. They must decide. But Frankfurter's judicial ideal combined the statesman's imperative to decide with the essayist's reluctance to protest too much. He called for patience, caution, modesty, and restraint—for courts that take a long view, and often stay their hand. "The history of the Court," he wrote, "and the nature of its business admonish against needless or premature decisions. It has no greater duty," he concluded, "than the duty not to decide, or not to decide beyond its circumscribed authority."[43]

Unsurprisingly, Frankfurter's judicial heroes were models of humility and restraint.[44] He praised Holmes for being "keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom,"[45] and for being "unswerving in his resistance to doctrinaire interpretation."[46] He honored Brandeis's detailed grasp of facts on the ground,[47] and lauded Cardozo for wielding judicial power "with the utmost humility."[48] He celebrated judges who upheld laws toward which they personally felt "skepticism and even hostility."[49] He hailed, and would claim as his own, Brandeis's "philosophy of intellectual humility"; his mistrust of over-arching theories; and his "instinct against the tyranny of dogma and skepticism regarding the

[43] Frankfurter, *Mr. Justice Brandeis and the Constitution*, *supra* note 42, at 263.

[44] *See* Felix Frankfurter, *Mr. Justice Holmes: 8 March 1841–6 March 1935*, 48 HARV. L. REV. 1279 (1935), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 333, 334 (on Holmes); Frankfurter, *Mr. Justice Brandeis and the Constitution*, *supra* note 42, at 247, 264, 270 (on Brandeis); Frankfurter, *Mr. Justice Cardozo and Public Law*, *supra* note 42, at 401, 405 ("Cardozo realized the essentially empiric character of government and the range of discretion implied by its activities."). *See also* Felix Frankfurter, *Chief Justice Stone*, YEAR BOOK OF THE AMERICAN PHILOSOPHICAL SOCIETY (1946), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 437, 437 (citing approvingly a statement of Chief Justice Stone: "It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power.").

[45] Frankfurter, *The Nomination of Mr. Justice Brandeis*, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 22, 25.

[46] *Id*. at 35.

[47] *See* Frankfurter, *The Nomination of Mr. Justice Brandeis*, *supra* note 38, at 45 ("The difficulty is with the application of the principle, and the application involves grasp and imagination and contact with the realities of a modern industrial democracy. To the consideration of these very questions Mr. Brandeis has given his whole life.").

[48] Felix Frankfurter, *Taft and the Supreme Court*, NEW REPUBLIC, Oct. 27, 1920, Jan. 18, 1922, & Jan. 29, 1922, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 49, 63.

[49] Felix Frankfurter, *Justice Holmes Defines the Constitution*, 162 ATLANTIC MONTHLY 484 (1938), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 377, 400.

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perdurance of any man's wisdom, though he be a judge."[50]

Ironically, Frankfurter derived his essayist's skepticism from his recognition that judges are, in a certain sense, prophetic. "Since judges must be prophets," he wrote, "in other words since judges not merely register the past but direct the future, they had best not presume too much upon a wisdom that was denied the Delphic oracles."[51] For judges who did so presume, Frankfurter had nothing but scorn. The Constitution, he wrote, "is not a document whose text was divinely inspired, and whose meaning is to be proclaimed by an anointed priesthood removed from knowledge of the stress of life."[52] He chided William Howard Taft for dealing "with abstractions and not with the work-a-day world, its men and its struggles"[53]—for treating "words [as] things and not symbols of things."[54] Holmes, by contrast, "bids us, steadily, to think things and not words."[55] "Freed of its enveloping fog," Frankfurter wrote on another occasion, "constitutional law is neither mystery nor metaphysics—nor revelation."[56] Judges, the oracles of constitutional law, were not really oracular, and should not try to be.

Frankfurter insisted constantly that courts "act within relatively narrow bounds of discretion."[57] He was a champion of avoidance canons,[58] a critic of their neglect.[59] He insisted that courts "decide, not whether legislation is wise, but whether legislators were reasonable

[50] Frankfurter, *Mr. Justice Brandeis and the Constitution*, *supra* note 42, at 264–65. Frankfurter also praised Brandeis for being "mindful of the limited range of human foresight," and for "practic[ing] humility in attempting to preclude the freedom of action of those who are to follow." *Id*. at 270.

[51] Frankfurter, *Social Issues Before the Supreme Court*, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 243.

[52] Frankfurter, *The Nomination of Mr. Justice Brandeis*, *supra* note 38, at 61.

[53] *Id*. at 59.

[54] *Id*.

[55] Felix Frankfurter, *Twenty Years of Mr. Justice Holmes's Constitutional Opinions*, 36 HARV. L. REV. 909 (1923), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 112, 135.

[56] *Id*. at 114.

[57] Felix Frankfurter & Adrian S. Fisher, *The Orbit of Judicial Power*, *in The Business of the Supreme Court at October Terms*, 1935 and 1936, 51 HARV. L. REV. 577 (1938), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 338, 339.

[58] *See id.* at 344 ("Needless clash with the legislature is avoided by construing statutes so as to save them . . . .").

[59] *See id.* at 357 ("A disregard of settled doctrines of constitutional procedure dangerously borrows trouble.").

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in believing it to be wise."[60] He favored a robust political question doctrine.[61] He had a soaring vision of what a constitutional judge ought to be, coupled with a sober recognition that few mortals fit the bill. Constitutional judges, he said, "should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet."[62] In reality, alas, nobody was so compounded, except perhaps Holmes. And even Holmes achieved his greatness by realizing that it was not his office to impose his visionary brilliance on the country-at-large.

For judges denied the gifts reserved for prophet-historian-philosopher kings, but tasked with a role that seemed to require those very gifts, the best available path was essayistic caution. Still, as noted earlier, judges, unlike essayists, must finally decide. In the last analysis, Frankfurter maintained that constitutional judges must strike a parlous balance between pretense and abdication.[63] But their decisions must be marked by skepticism, caution, humility, and restraint. Judges were not, for Frankfurter, the enforcers of enduring values. As we have seen, Frankfurter valued facts more than values. He saw the craft of governance as essentially empirical and experimental—fact-laden and fluid.[64] The law, he believed, must change with the facts. The courts must channel change, but not thwart it. Judges must allow room for legislative experimentation and space for law's organic growth. "[T]he stream of the Zeitgeist" he wrote, as early as 1916, "must be allowed to flood the sympathies and the intelligences of our judges."[65] The metaphor was telling. For Frankfurter, the Zeitgeist was a stream that judges must passively and deferentially channel—not a stallion that they must break, restrain, or spur ahead.

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[60] Frankfurter, *Justice Holmes Defines the Constitution*, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT *supra* note 38, at 390.

[61] *See* Felix Frankfurter, *The Supreme Court*, ASPECTS AM. GOV'T (1950), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 448, 453–54.

[62] Felix Frankfurter, *The Judicial Process and the Supreme Court*, 98 PROCEEDINGS AM. PHIL. SOC'Y (1954), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 496, 504.

[63] *See* Felix Frankfurter, *John Marshall and the Judicial Function*, *in* GOVERNMENT UNDER LAW (Arthur E. Sutherland ed., 1956), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 533, 557:

> Self-willed judges are the least defensible offenders against government under law. But since the grounds of decisions and their general direction suffuse the public mind and the operations of government, judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government.

[64] *See* Felix Frankfurter, *The Zeitgeist and the Judiciary*, 29 SURVEY 542 (Jan. 1913), *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 38, at 1, 3–7.

[65] *Id.* at 5.

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III. The Executors: Hugo Black and Antonin Scalia

Within the mid-twentieth century U.S. Supreme Court, Frankfurter's bitterest rival was surely Hugo Black, who joined the Court in 1937 and retired in 1971.[66] Black's view of constitutional judging was almost the inverse of Frankfurter's. Whereas Frankfurter avowed that judges possessed vast authority but should exercise that authority with great restraint, Black maintained that judges possessed authority only within a narrow range, but that, within that range, they should exert their power to the hilt. Black insisted that judges must interpret law, not make it; that they were lawmakers' agents, not their partners or principals.[67] The judge's role, in Black's view, was essentially executorial.

Black was suspicious of judicial attempts to make the law or the constitution more reasonable, fair, or just.[68] He loathed the importation of extra-constitutional values—whether of economic liberty or individual privacy—through doctrines of substantive due process.[69] However attractive the values, judges must never "substitute their choice of constitutional values for the choice made by the Constitution itself."[70] Implicit in this credo was Black's view that the content of "the Constitution itself" was relatively fixed and readily identifiable.

Black viewed the constitution as a series of grants of authority.[71] For the most part, these grants were directed to the executive and the legislature, and Black was more than willing to read those grants broadly. He had no problem accepting, or exuberantly fostering, the post-New Deal Court's expansive reading of the commerce clause.[72] But Black was

[66] *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010).

[67] *See* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH xvi (1968) ("[T]he courts should always try faithfully to follow the true meaning of the Constitution and other laws as actually written, leaving to Congress changes in its statutes, and leaving the problem of adapting the Constitution to meet new needs to constitutional amendments approved by the people under constitutional procedures.").

[68] *See id.* at 14 ("[C]onstitutional cases must be decided according to the terms of our Constitution itself and not according to judges' views of fairness, reasonableness, or justice.").

[69] *See id.* at 24–42.

[70] *Id*. at 42.

[71] I am indebted to Guido Calabresi, Black's former law clerk, for this insight.

[72] *See* BLACK, A CONSTITUTIONAL FAITH, *supra* note 67, at 8–9 ("This view which I have of the Constitution does not render government powerless to meet new times, new circumstances, and new conditions. And I think that is exemplified most clearly by the Commerce Clause which gives Congress the broad, general power to regulate commerce.").

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suspicious—and he believed that the founders were suspicious—of creative judicial power.[73] The Court, Black warned, would not always be the Warren Court. And, as a matter of principle, he would rather trust the people and their elected representatives than nine unelected lawyers.[74]

Black believed that the constitution *did* grant authority to judges within specific spheres. Within those spheres, he believed, judges should exercise their delegated authority unflinchingly. Unlike Frankfurter, Black was highly critical of avoidance canons.[75] Judges, he argued, should not abdicate the responsibility assigned them under *Marbury v. Madison*,[76] and they shouldn't deny "essential protection of the liberty of our people . . . by invocation of a doctrine of so-called judicial self-restraint."[77] For Black, the key question was never whether to defer to the legislature, either because of its superior expertise or greater democratic legitimacy. The question was simply whether the constitution granted courts the authority to intervene. If the answer to that question was no, courts had no business meddling by adducing doctrines like substantive due process. If the answer was yes, courts had no business hiding under the craven rock of avoidance canons.

For Black, the most explicit grants of judicial power were found in the Bill of Rights, especially the First Amendment. Black saw in the Amendment's categorical terms ("Congress shall make no law . . .") a mandate for judicial intervention. He deemed the guarantees of speech, press, and religion "the paramount protections against despotic government," and insisted that "courts must never allow this protection to be diluted or weakened in any way."[78] Black resisted any attempt to subject those protections to any form of balancing, which he thought "most dangerous."[79] The Court had no business asking whether an infringement of First Amendment rights was reasonable, justified, or desirable on any other ground. If a law infringed these rights, the constitution commanded the courts to strike it down. The First Amendment, on this view, was both a sweeping grant of authority and an inescapable mandate to use it. It was, Black said, "the heart of our Bill of Rights, our Constitution, and

[73] *See id.* at 10 ("This view is based on my belief that the Founders wrote into our Constitution their unending fear of granting too much power to judges.").

[74] *See id*. at 11 ("I would much prefer to put my faith in the people and their elected representatives to choose the proper policies for our government to follow, leaving to the courts questions of constitutional interpretation and enforcement.").

[75] *See id*. at 15–20.

[76] *See id*. at 18.

[77] *Id*. at 19–20.

[78] *Id*. at 44.

[79] *Id*. at 50.

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our nation."[80]

Black, as all the world knows, was a First Amendment "absolutist." But if you are going to make a right absolute, you must also, as a practical matter, make it narrow. If a constitutional value is immune to balancing, it cannot accommodate collisions with other constitutional values. Accordingly, to take just one example, the German Constitutional Court has held that human dignity, the consummate value under the Basic Law, is not subject to proportionality balancing, but has found only rarely that dignity *as such*—and not dignity in connection with some other right—was implicated.[81] Similarly, Justice Black insisted that First Amendment values must not be balanced, but was also "vigorously opposed to efforts to extend the First Amendment's freedom of speech beyond speech, freedom of press beyond press, and freedom of religion beyond religious beliefs."[82] Black adhered staunchly to a rigid speech/conduct distinction, as well as to a stark belief/conduct distinction.[83] His First Amendment could reign as an absolute monarch because its domain was comparatively small.

Black was confident that his views about constitutional rights guarantees were dictated by their objectively verifiable content. For Black, the source of interpretive objectivity lay close at hand. He sought it by looking to language and history.[84] In this respect, of course, Black's most vocal methodological heir was the late Antonin Scalia, a justice from 1986 until his death in February 2016. Like Black, Scalia loathed values-based jurisprudence, not least because he doubted judges' capacity to identify society's true values. (Indeed, in matters of religious faith as well as of constitutional interpretation, he despised the very term values.)[85] Scalia saw his values-skepticism, moreover, as peculiarly American. "Do not mistake me," Scalia once told a mixed audience of American and European eminences, "I am all in favor of human rights and living in a perfect society; but Europeans have far more confidence than

[80] *Id*. at 63.

[81] For a rare case in which the Court found that dignity was directly infringed, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 ENTSCHEIDUNGEN DES BUNDEVERFASSUNGSGERICHTS [BVERFGE] 118.

[82] BLACK, A CONSTITUTIONAL FAITH, *supra* note 67, 44–45.

[83] *See id*. at 53 ("In giving absolute protection to free speech, I have always been careful to draw a line between speech and conduct.").

[84] *Id.* at 8 ("[I]t is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by justices of the Supreme Court.").

[85] *See* ANTONIN SCALIA, *Religious Retreats*, *in* SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL-LIVED 144, 144 (Christopher J. Scalia & Edward Whelan eds., 2017) (transcript of a speech given to Georgetown students in April 1998) ("I . . . detest the term 'values,' which suggests to me a greater degree of inter-changeability than ought to exist—as though the principles that guide a man's life are something like monetary exchange rates, subject to change with the times.").

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Americans that they know what a perfect society entails, and that their own policy preferences should therefore trump majority will around the world."[86] Scalia was skeptical, moreover, of judges' ability to separate enduring "values" from their own desires. "Equity and spirit," he wrote, "tend to be what the judge believes is a good idea; and the unexpressed intention of the lawgiver has an uncanny tendency to comport with the wishes of the judge."[87] In Scalia's view, judges had no greater insight into questions of moral value than anyone else—and a great deal less authority than legislatures to try to answer such questions. "I in fact believe," he said,

> that there are right and wrong answers to [moral] questions. But it surpasses my understanding why judges believe that they are authorized, or are suited by their legal training, to provide answers to those questions that supersede the answers arrived at by the democratic societies over which they preside. But that is where we are. A worldwide brotherhood of the judiciary believes that it is our function to determine the true content of human rights.[88]

Scalia expressed deep hostility toward this brotherhood and what he saw as its elite and moralizing pretensions. He scored constitutional judges generally as "mullahs of the West."[89] He famously and vehemently rejected recourse to foreign law in domestic constitutional judgments. In his view, citing foreign law was merely a cheap means of making desired outcomes look more lawlike. "[A]dding foreign law to the box of available legal tools," he noted, "is enormously attractive to judges because it vastly increases the scope of their discretion."[90] Scalia wished, relentlessly and in all things, to narrow that discretion.

But he wished to do so, he explained, precisely because he also wanted to preserve the constitution's legitimately anti-majoritarian character. Like Black, Scalia believed that constitutional rights are fundamentally anti-majoritarian, and that strict allegiance to text and original understanding were necessary to preserve their counter-majoritarian power. "If courts are free to write the Constitution anew," he warned,

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[86] ANTONIN SCALIA, *American Values and European Values*, *in* SCALIA SPEAKS, *supra* note 85, at 29, 39 (transcript of a speech given at a Le Cercle meeting in Washington, D.C. in June 2007).

[87] ANTONIN SCALIA, *Natural Law*, *in* SCALIA SPEAKS, *supra* note 85, at 243, 246 (transcript of a speech given at the Dominican House of Studies in Washington, D.C. on January 7, 2016).

[88] ANTONIN SCALIA, *Foreign Law*, *in* SCALIA SPEAKS, *supra* note 85, at 250, 255 (transcript of a speech given in 2006 at the American Enterprise Institute).

[89] ANTONIN SCALIA, *Judges as Mullahs*, *in* SCALIA SPEAKS, *supra* note 85, at 260.

[90] SCALIA, *American Values and European Values*, *supra* note 86, at 256.

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> they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[91]

Scalia was, of course, more like Frankfurter than like Black in his willingness to defer to legislatures and to the entrenched traditions of the American people. That deference led him to approve practices, such as non-sectarian prayer at a public school graduation, which Black would have likely condemned.[92] Scalia similarly deferred to a wide range of criminal processes and punishments, reasoning in each case that it was wrong for "five unelected lawyers" to substitute their values and policy judgment for that of the American people, or the people of a given state.[93] Scalia applied the same logic to many of the most controversial issues that came before the Court during his tenure, most prominently to questions about abortion[94] and gay rights.[95]

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[91] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997). *See also* ANTONIN SCALIA, *Interpreting the Constitution*, *in* SCALIA SPEAKS, *supra* note 85, at 188, 200 [hereinafter SCALIA, *Interpreting the Constitution*] (transcript of a speech given in Parliament House in Sydney, Australia in August 1994):

> Once the secret is out that the judges are evolving a new constitution rather than applying an old one, the people will see to it that judges are selected who will evolve it the way they want it to evolve. Then, of course, the whole value of a constitution will have been destroyed, by placing its content within the hands of the very body it is meant to protect against: the majority.

[92] *See* Lee v. Wiseman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting) (defending the constitutionality of non-sectarian prayer at a public school graduation). *Cf.* Everson v. Bd. of Educ. Of Ewing Twp., 330 U.S. 1, 18 (1947) ("[The First Amendment] requires that the state be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."); Sch. Dist. Of Abington v. Schempp, 374 U.S. 203, 218 (1963) (condemning the practice of school-sponsored Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (ditto for school-sponsored prayer).

[93] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 607–30 (2005) (Scalia, J., dissenting); Rogers v. Tennessee, 532 U.S. 451, 468 (2001) (Scalia, J., dissenting); Obergefell v. Hodges, 135 S.Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 586–606 (2003) (Scalia, J., dissenting).

[94] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 979–999 (1992) (Scalia, J. dissenting); Webster v. Reproductive Health Services, 492 U.S. 490, 532–37 (1989) (Scalia, J., concurring); Stenberg v. Carhart, 530 U.S. 914, 953–56 (2000) (Scalia, J., dissenting).

[95] *See, e.g.*, *Obergefell*, 135 S.Ct. at 2626–31 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 586–606 (Scalia, J., dissenting); Romer v. Evans, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

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Scalia was much less restrained, however, when he thought that the constitutional text mandated judicial intervention. Like Black, he seems to have viewed some constitutional rights provisions as grants of judicial authority. Thus, he applied the Sixth Amendment's Confrontation Clause—the promise that accused persons may "confront" their accusers—literally and implacably, even when the accuser was a child victim of sexual abuse and the accused was her tormenter.[96] Like Black, Scalia read the First Amendment's guarantees broadly, leading him to condemn laws that penalized flag burning,[97] criminalized hate speech,[98] or restricted corporate campaign financing.[99] But, also like Black, he understood "speech" narrowly. Indeed, his view of the category was much narrower than Black's. Speech, for Scalia, did not encompass pornography,[100] libel,[101] nude dancing,[102] and many forms of artistic expression.[103] The First Amendment, he argued, did not guarantee "freedom of speech" as such, but rather "*the* freedom of speech," which Scalia understood as "that freedom which was the right of Englishmen when the First Amendment was adopted."[104]

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[96] *See, e.g.*, Coy v. Iowa, 487 U.S. 1012 (1988) (holding that placing a viewing screen between defendant and child sexual assault victim violated defendant's confrontation clause rights); Maryland v. Craig, 497 U.S. 836, 860–70 (1990) (Scalia J., dissenting).

[97] *See* Texas v. Johnson, 491 U.S. 397 (1989) (invalidating criminal sanctions for the expressive burning of the American flag).

[98] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invaliding a local ordinance that criminalized hate speech).

[99] *See* Citizens United v. Fed. Election Com'n, 558 U.S. 310, 385–479 (2010) (Scalia, J., concurring) ("Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.").

[100] *See* U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) ("We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior.").

[101] *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views.").

[102] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 302–310 (2000) (Scalia, J., concurring) (upholding the constitutionality of a ban on nudity in public places); *see also* ANTONIN SCALIA, *The Arts*, *in* SCALIA SPEAKS, *supra* note 85, at 43, 48 (transcript of a speech given at Juilliard School's Symposium on the Arts and American Society in New York City on September 22, 2005).

[103] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 590–600 (1998) (Scalia, J., concurring) (maintaining that the government may constitutionally withhold grants from offensive art). For an exposition of Scalia's views about the freedom of speech, and for his critique of Black's, see ANTONIN SCALIA, *The Freedom of Speech*, *in* SCALIA SPEAKS, *supra* note 85, at 201 (transcript of a speech given at Wesleyan University in March 2012); *see also* SCALIA, *The Arts*, *in* SCALIA SPEAKS, *supra* note 85, at 43.

[104] SCALIA, *Judges as Mullahs*, *in* SCALIA SPEAKS, *supra* note 85, at 47*; see also* SCALIA, *The Arts*, *in* SCALIA SPEAKS, *supra* note 85. The definite article in the title of the latter speech was definitely intentional.

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Scalia loved neither the speech he thought the Constitution commanded him to protect,[105] nor the restrictions that he thought the Constitution permitted. "But I am not king,"[106] he sighed, and "not everything that is stupid is unconstitutional."[107]

Scalia's most famous and controversial assertion of judicial authority was surely his majority opinion in *District of Columbia v. Heller*, in which the majority ruled that the Second Amendment guaranteed an individual right to bear arms and hence precluded local restrictions on handgun possession.[108] Critics of Heller, including prominent conservative critics, accused Justice Scalia of inconsistently abandoning his oft-professed deference to legislatures.[109] But Scalia insisted that this was one of those areas in which deference is barred by the constitution itself. "[T]he enshrinement of constitutional rights," Scalia wrote, "necessarily takes certain policy choices off the table . . . . [I]t is not the role of this Court to pronounce the Second Amendment extinct."[110] In Scalia's telling, the holding in *Heller* faithfully followed the clear command of the constitutional text, objectively understood. He and his fellows in the majority were not, he claimed, flouting his oft- and forcefully-expressed devotion to democratic majoritarianism. They were merely acting—within this limited and objectively-determined realm—as the faithful executors of the constitution's own will.

C. Böckenförde as Executorial Theorist

Where, within this tripartite schema, do Böckenförde's views on constitutional judging fit? I argue that in both extra-judicial theory (the main focus of this Article) and official practice (the subject of a separate contribution) Böckenförde was an executor. To be sure, his views on constitutional interpretation and constitutional adjudication were in some respects more

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[105] *See Scott* Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning "Weirdos*," CONSTITUTION DAILY (Nov. 12, 2015), https://constitutioncenter.org/blog/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes/ (quoting Scalia at a Princeton event) ("If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag.").

[106] *Id*.

[107] SCALIA, *The Arts*, *in* SCALIA SPEAKS, *supra* note 85, at 48.

[108] District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008).

[109] *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009):

> I am unable to join in the jubilation [surrounding *Heller*] . . . . [I]t . . . represents a failure—the Court's failure to adhere to a conservative judicial methodology in reaching its decision. In fact, Heller encourages Americans to do what conservative jurists warned for years they should not do: by-pass the ballot and seek to press their political agenda in the courts.

[110] *Heller*, 554 U.S. at 636.

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flexible, more sophisticated, and more deeply theorized than those of Black and Scalia. But he shared their concerns about the tension between constitutional justice and democracy; about the imprecise, relativizing, and judge-empowering nature of values-based jurisprudence; about the inadequacy and danger of balancing tests; and about the vagueness and variability of constitutional interpretation not rooted in history. In what follows, I shall briefly reconstruct Böckenförde's views as expressed in his scholarly and extra-judicial writings. In conclusion, I will note briefly how those views were reflected in his work as a justice of the Second Senate.

I. The Nature of Constitutionalism and Democracy

Böckenförde's views on constitutional judging in a democracy were an outgrowth of his conceptions of constitutionalism and of democracy, which in their turn were two sides of the same coin. Böckenförde's constitution was a limited constitution. It had to be, he insisted, or it would swallow democracy.

The constitution, in Böckenförde's view, did not answer all questions or cover all disputes. One of his earliest censures of the Federal Constitutional Court (FCC) was for its failure to address adequately "the problem of how far the scope of the constitution's normative claims is and must be limited."[111] For Böckenförde, the constitution could "only be a framework [Rahmenordnung] for political life."[112] The constitution, he explained, was "addressed to the basic relationship between citizen and State, and to the organization, competences, and division of powers among the State's supreme organs."[113] It was not, he insisted, "the value-laden [wertbezogen] basic order of the community writ large." It did not define the structure of the legal order to such an extent that the democratic legislature had little left to do beyond "concretiz[ing] it in terms of foundational values" already contained "in the constitution."[114] The constitution prescribed how other actors were to make political decisions; it did not, for the most part, make those decisions itself.[115]

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[111] ERNST-WOLFGANG BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT 120, 152 (2011).

[112] Ernst-Wolfgang Böckenförde, *Diskussionsbeitrag*, 30 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VVDStRL] 162, 165 (1972).

[113] ERNST-WOLFGANG BÖCKENFÖRDE, *Vorwort*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 9.

[114] *Id*.

[115] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 153; ERNST-WOLFGANG BÖCKENFÖRDE, *Begriff und Probleme des Verfassungsstaates*, *in* STAAT, NATION, EUROPA: STUDIEN ZUR STAATSLEHRE, VERFASSUNGSTHEORIE UND RECHTSPHILOSOPHIE 127, 138 (1999), *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *The Concept and Problems of the Constitutional State [1997], in* 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 141 (Mirjam Künkler & Tine Stein eds., 2017) [hereinafter BÖCKENFÖRDE, Begriff und Probleme]; ERNST-WOLFGANG BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation*, *in* STAAT, NATION, EUROPA, *supra*, at 157, 168, *translated in* ERNST-

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Stylizing the constitution as a *Rahmenordnung*, or framework, for political decision-making is a leitmotif of Böckenförde's writings on constitutional theory. The phrase recurs again and again.[116] A constitution, he insisted, could never be "a comprehensive and seamless system of guarantees—not even of guarantees of freedom."[117] Quite the contrary. A constitution was necessarily skeletal and fragmentary.[118] That left it, to be sure, in need of completion and reform. But completion and reform must come overwhelmingly through legislation and formal constitutional amendment, and only "within narrow limits" through judicial interpretation.[119] Interpretive development must be "truly limited, because interpretation and application worthy of the name remain bound to the normative content of individual constitutional norms and the basic decisions of the constitution itself."[120] Extensive informal constitutional development was illegitimate. The constitution's domain must retain strict limits.[121]

But that wasn't happening, Böckenförde feared, in the postwar Federal Republic. Instead, the constitution was becoming not merely the basic order of the state, but the basic order of the community (*Gemeinwesen*) writ large.[122] Under the totalizing constitution of the Basic Law, the principles and substance of the legal order were already comprised in the objective norms of the constitution.[123] For Böckenförde, this state of affairs threatened democracy, which he thought required a legislature with ample "openness for legal configuration,"

WOLFGANG BÖCKENFÖRDE, *Constitutional Jurisdiction: Structure, Organization, and Legitimation [1999]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 186 [hereinafter BÖCKENFÖRDE, Verfassungsgerichtsbarkeit].

[116] *See, e.g.*, BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 123–27, 153; ERNST-WOLFGANG BÖCKENFÖRDE, Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 230, 256–57; Böckenförde, *Diskussionsbeitrag*, 30 VVDSTRL, *supra* note 112.

[117] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 256.

[118] *Id.* at 153.

[119] *Id.* at 256–57.

[120] ERNST-WOLFGANG BÖCKENFÖRDE, *Anmerkungen zum Begriff Verfassungswandel*, *in* STAAT, NATION, EUROPA, *supra* note 115, at 141, 150 (1999).

[121] BÖCKENFÖRDE, *Diskussionsbeitrag*, 58 VVDSTRL 144, 148 (2000).

[122] ERNST-WOLFGANG BÖCKENFÖRDE, *Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, at 189, 219, *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 235.

[123] *Id*.

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rather than a legislature confined within "a net of constitutional concretizations."[124] In a constitutional democracy, he maintained, the legislature must matter. That can't be the case, however, if the constitution has already decided every matter of importance.[125]

II. Against a Jurisprudence of Objective Values

Böckenförde's opposition to the totalizing constitution was matched by his opposition to the interpretive methods by which, in the Federal Republic, the totalizing constitution was pursued. Beginning in the early 1970s and stretching into the twenty-first century, Böckenförde consistently criticized the FCC's fundamental rights jurisprudence and the academic theories underwriting that jurisprudence.[126] More specifically, Böckenförde criticized the notion that the Basic Law's fundamental rights charter enshrined "an objective system of values,"[127] and defended a classical, liberal conception of rights as negative guarantees against the State. As Patrick Bahners has summarized, Böckenförde's collected essays and articles on constitutional interpretation constitute "a dissenting opinion, stubbornly maintained and patiently pursued, against the foundational conceptual decisions of the Federal Constitutional Court."[128]

One of Böckenförde's core objections to values-based jurisprudence was epistemological.

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[124] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 257.

[125] In these concerns, Böckenförde resembled Scalia, who bemoaned that fact that, as he saw it,

> the American people seem to have become persuaded that the Constitution is not a fixed and limited text, but rather an all-purpose, shorthand embodiment of whatever they care deeply about . . . We know what we want, and if we want it passionately enough, it must be guaranteed (or if we hate it passionately enough, it must be prohibited) by the Constitution! We cannot leave such issues to be decided by the democratic process; only unimportant issues belong there. The really significant, heartfelt issues are all resolved in the Constitution, whether the text says anything about them or not.

ANTONIN SCALIA, *Faith and Judging*, *in* SCALIA SPEAKS, *supra* note 85, at 148, 153 (transcript of a speech given at the Long Island Catholic newspaper's 30th anniversary celebration in October 1992).

[126] *See* Patrick Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES 145, 152–57 (Reinhard Mehring & Martin Otto eds., 2014).

[127] Bundesverfassungsgericht, Jan. 5, 1958, 7 BVERFGE 198, 205.

[128] Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES, *supra* note 126, at 177.

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There was, he insisted, no rational way to identify values.[129] And once (irrationally) identified, there was no rational way to quantify them—no standard for assessing the weight afforded to any given value, or to compare it to the weight given to any other value.[130] The theory of objective values, Böckenförde concluded, presupposed a hierarchy of values but provided no objective means for constructing one.[131] In the end, there were "serious doubts about the possibility of grounding law in values."[132] The exercise was ultimately irrational,[133] and would lead ineluctably, in practice, to legal-philosophical relativism.[134] It could have no basis, Böckenförde lamented, but "society's prevailing subjective value perceptions [*Wertauffassungen*]."[135] A values-based jurisprudence would open "the floodgates for the influx of methodologically uncontrollable subjective opinions and views on the part of judges and law professors, and of the prevailing values and valuations of the day within society, into the interpretation, application, and development of the law."[136] Böckenförde would spend much of his scholarly career howling against this rising tide.

The relativizing tendency that Böckenförde identified and deplored made the constitution itself unstable. At bottom, Böckenförde argued, values-based jurisprudence was "no longer constitutional interpretation, but permanent law-creating constitutional transformation under the guise of interpretation."[137] And this pattern of permanent transformation didn't just modify the constitution at the margins; it touched its very essence. It shifted the locus of sovereignty, which, for a protégé of Carl Schmitt, was little short of revolutionary. Broadly speaking, Böckenförde said, there were two views of constitutionalism vis-à-vis popular sovereignty: one that viewed the constitution as a limitation, and another that saw it as an expression of popular sovereignty. "It is obvious," he wrote, "that the Basic Law follows more strongly the first conception, and the Constitutional Court's interpretation of the

[129] ERNST-WOLFGANG BÖCKENFÖRDE, *Zur Kritik der Wertbegründung des Rechts*, *in* RECHT, STAAT, FREIHEIT 67, 73 (5th ed. 2013), *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *Critique of the Value-Based Grounding of Law [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 217.

[130] *Id*. at 78–79.

[131] *Id*. at 85.

[132] *Id.* at 217, 227.

[133] *Id.* at 84.

[134] *Id*. at 84, 86.

[135] *Id*. at 89.

[136] *Id.* at 227.

[137] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT *supra* note 111, at 134*; see also* BÖCKENFÖRDE, *Anmerkungen zum Begriff Verfassungswandel*, *in* STAAT, NATION, EUROPA, *supra* note 115, at 151.

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constitution as an 'order of values' has strengthened this tendency."[138] Böckenförde thus suggested that the Court, through its jurisprudence of values, was weakening the Basic Law's already equivocal commitment to popular sovereignty.

To Böckenförde's mind, the interpretive method by which the Court was doing so had only made matters worse. A jurisprudence of values, he noted, was invariably a jurisprudence of balancing. If rights were to be treated as objective values radiating throughout the legal order, different values would inevitably collide, and when they did, interpreters must balance them. In West Germany—and, soon enough, throughout the world—this meant applying the principle of proportionality.[139] But for Böckenförde, the irreducible difficulty of identifying and measuring constitutional values made any attempt to balance them equally quixotic. Combining values and proportionality produced confusion worse confounded. As applied to fundamental rights jurisprudence, Böckenförde wrote, the principle of proportionality lacked any "fixed point of reference."[140] It was, he said, little more than a synonym for justice. To speak of proportionality jurisprudence in terms of constitutional "concretization" was to employ a word that "obscures more than it explains what is actually going on."[141] The process was vague and unprincipled, and the consequences were often perverse. "The acceptance," he wrote, "of the killing of thousands of unborn children by the legal system can thus be presented and grounded as the result of a weighing of values, a weighing between supreme values, if necessary."[142] A method that led to such intolerable results must be itself intolerable.

Böckenförde opposed objective, values-based jurisprudence implemented through proportionality balancing for three principal reasons: first, such a jurisprudence was vague, uncertain, and imprecise; second, it was anti-democratic; and third, it was anti-constitutional in the classical sense of what constitutions are supposed to do.

Böckenförde never tired of stressing just how imprecise and uncertain values-based approaches were.[143] Treating rights as principles and values, he said, made them a mash of

[138] BÖCKENFÖRDE, Verfassungsgerichtsbarkeit, *supra* note 115, at 181.

[139] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 213.

[140] *Id*. at 235, 254.

[141] *Id*. at 255.

[142] BÖCKENFÖRDE, *Critique of the Value-Based Grounding of Law [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 233.

[143] *See, e.g.*, BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 198, 204, 211–16; BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK,

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"indeterminacy, flexibility, and dynamism."[144] This gave interpreters enormous discretion not only to identify, but also to determine, the right's content—a shift from *Inhaltsermittlung* to *Inhaltsbestimmung*.[145] The result was a constitution resembling "an open vessel into which—according to the standard of the prevailing consensus of preconceptions—various and heterogeneous 'interpretations' could flow."[146] For Böckenförde, this was not only a theoretical possibility, but the reality of academic commentary and Constitutional Court jurisprudence.[147] It was a reality, moreover, that risked the "entire collapse of the constitution as a norm."[148]

The upshot was bad for both democracy and freedom—for democracy, because democratic actors had fewer significant decisions to make; for freedom, because objective liberties were general liberties—which is to say, relative liberties.[149] Such relativizing deprived rights of "the substantive certainty that allows for the derivation of precisely defined legal consequences, and in this way it loses its (excluding) character as a claim."[150] Indeed, instead of limiting the state in a precise and concrete way, rights themselves were—in a world of proportionality and values—necessarily subject to limitation. Treating rights as objective values required determining their outer limits. Without extensive rights limitations, treating rights protection as an uninterrupted whole without seams or gaps might paralyze governance. The academic and jurisprudential response, in the Federal Republic, was to elaborate limitations on fundamental rights that were deemed inherent to the constitution (*verfassungsimmanente Schranken der Grundrechte*).

Böckenförde was quite critical of this response.[151] In his view the notion of "immanent" limits on fundamental rights had two cardinal flaws. First, it shifted power from the

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VERFASSUNGSGERICHT, *supra* note 111, at 132–34, 146; BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit*, *supra* note 115, at 167.

[144] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 255.

[145] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 132–33.

[146] *Id*. at 132.

[147] *Id*. at 133.

[148] *Id*.

[149] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 211.

[150] *Id.* at 252.

[151] *See generally* BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111.

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democratic legislature to the constitutional judiciary,[152] replacing the traditional statutory reservation (Gesetzesvorbehalt) with a newfangled judicial reservation (Richtervorbehalt).[153] It allowed constitutional judges to define the limits as well as the scope of fundamental rights. Second, the notion flouted the intention of the constitution's framers, whose aim, Böckenförde wrote, "was an especially intense protection of freedom for individuals after the experiences of the Nazi era."[154] Rights that did too much were in danger of becoming rights that did too little. A totalizing constitution was sometimes—and perhaps when it really counted—an impotent constitution. In any case, it was an imprecise and unpredictable constitution. It was a constitution that flouted the intentions of the framers, narrowed the scope of the democratic legislature, and placed unconscionable power in the hands of constitutional judges—including, eventually, Böckenförde himself.

III. Against the Judicial State

As Christoph Schönberger has observed, Böckenförde's elevation to the Federal Constitutional Court in 1983 presents something of a paradox. "With Böckenförde," Schönberger writes, "a man became a constitutional judge who, perhaps like no other, stood with critical distance vis-à-vis the Constitutional Court as an institution."[155] But while Böckenförde was a persistent critic of the Court as an institution, he was not an implacable foe. His was not the strident hostility of Ernst Forsthoff and Carl Schmitt,[156] though he certainly echoed both Forsthoff and Schmitt in his discussions of constitutional justice.[157] Böckenförde accepted the Court both as a *fait accompli*[158] and as the only viable means for securing a free democratic constitution.[159] In a constitutional democracy, he reasoned, somebody had to have the final word in constitutional controversies; and the final word

[152] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 235.

[153] *Id*. at 240.

[154] *Id*. at 237.

[155] Schönberger, *Der Indian Summer eines liberalen Etatismus: Ernst-Wolfgang Böckenförde als Verfassungsrichter, in* RELIGION, RECHT, POLITIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE, *supra* note 1, at 122.

[156] *Id*. at 124.

[157] Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES *supra* note 126, at 176–83.

[158] In 1976, in connection with the Court's silver anniversary, Böckenförde observed that the Court's status was "no longer questioned" and that it had "so to speak, consolidated itself." BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 115, at 120.

[159] *See generally* BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit*, *supra* note 115; *see also* BÖCKENFÖRDE, Begriff und Probleme, *supra* note 115, at 134.

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could be lodged more safely in a constitutional court than anywhere else. This did not stop him, however, from arguing forcefully and often for a Court with a limited role, or from criticizing the justices in Karlsruhe for (as he saw things) transgressing the limits of its mandate.

For Böckenförde, a constitutional court with the power of the final word was both a necessary condition and a perpetual peril for constitutional democracy. One risk was that of "constitutional transformation through interpretation"[160]—the risk that constitutional law, which had hitherto been limited to questions of institutional organization, would become "a self-propelled political process" placed squarely in the hands of the Court as authorized interpreter.[161] The Constitutional Court wielded a "unique power of interpretation,"[162] and that power raised the ubiquitous specter of overreach. A related risk was that the Court would wander from the path of securing the constitution toward the path of defining the constitution—that it would morph from the guardian (*Hüter*) of the constitution to its master (*Herr*), abandoning "democratic ground" in the process.[163]

This danger to democracy was, to Böckenförde's mind, always clear and present. He descried—and condemned—a gradual transition from a parliamentary state based on legislation to a judicial state (*Jurisdiktionsstaat*) based on constitutional adjudication.[164] The development, in Böckenförde's view, was a zero-sum game: The judicial state grew at the expense of democratic politics.[165] As the former gained in significance, the latter declined. On this view, the legislature and the Court were competitors in the work of constitutional concretization. Within that competition, Böckenförde observed, "the legislature has the upper hand, but the Constitutional Court has precedence."[166] The trend made the Court a

[160] BÖCKENFÖRDE, *Anmerkungen zum Begriff Verfassungswandel*, *in* STAAT, NATION, EUROPA, *supra* note 115, at 155–56.

[161] *Id*. at 156.

[162] BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit – Strukturfragen, Organisation, Legitimation, in* STAAT, NATION, EUROPA, *supra* note 115, at 166, *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *Constitutional Jurisdiction: Structure, Organization, and Legitimation [1999]*, *in* 1 CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 192.

[163] *Id*. at 190; BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 154.

[164] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 220.

[165] *Id*. at 227.

[166] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 259.

site of sovereignty,[167] a wielder of the *Kompetenz-Kompetenz*,[168] a kind of "constitutional Areopagus."[169] In the judicial state, the appointment of constitutional justices was as important as—perhaps more important than—federal or state parliamentary elections.[170] The development posed a stark alternative. "[T]he decisive question," Böckenförde wrote,

> is who should have the power—from the perspectives of democracy and the *Rechtsstaat*, of political and civic liberty—to shape the legal order with respect to its substantive content. Does the citizen entrust himself in this regard to the elected parliamentary legislature, or to the Constitutional Court? Depending on which path it takes, the doctrine of fundamental rights determines the answer to this question. It should be aware of this fact.[171]

It was clear that Böckenförde's loyalties lay on the side of parliamentary democracy. It was also clear that he wished to admonish the shapers of fundamental rights doctrine—primarily constitutional judges, whose decisions were subject to almost no supervisory control, sometimes not even by formal constitutional amendment.[172]

The Court was not only immune to external review, Böckenförde noted, it was almost entirely unaccountable to anyone.[173] This being so, the justices must subject themselves to strict internal controls. They must remember that a "Constitutional Court is not called to be the preceptor—not even the benevolent preceptor—of the other constitutional organs."[174] They must "be aware of the special duties, the obligations, and also the limits of their office, and they must fully immerse themselves within these obligations and limits."[175] A lot

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[167] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 221.

[168] BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit*, *supra* note 115, at 168.

[169] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 259.

[170] *Id.* at 221.

[171] *Id.* at 265.

[172] BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit*, *supra* note 115, at 180.

[173] *Id*.

[174] Ernst-Wolfgang Böckenförde, *Organisationsgewalt und Gesetzesvorbehalt*, 53 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1235, 1235 (1999).

[175] BÖCKENFÖRDE, *Verfassungsgerichtsbarkeit*, *supra* note 115, at 182.

depended, in Böckenförde's view, on the justices themselves—on their conception of the judicial role, and on their theory of the constitution and its proper implementation.

IV. Böckenförde's Positive Theory of Constitutional Adjudication

What, then, was Böckenförde's own theory of constitutional adjudication—the theory of the man who identified "the necessity of a (binding) constitutional theory" as "the central problem of constitutional interpretation"?[176] It began with the Schmittian premise that "the constitution is also a decision—a determination of specific foundational decisions and normative content."[177] From this premise, it followed that a constitution's catalogue of fundamental rights presupposed and rested upon "a particular conception—i.e. a theory—of fundamental rights."[178] How were the relevant constitutional decisions, content, and conceptions to be identified? Böckenförde's answer, in crucial part, was that they must be identified by recourse to history—both the particular history of the constitution's framing and constitutional history writ large.[179]

For the Basic Law itself, Böckenförde explained, the point of departure was the *Rechtsstaat* of classical democratic liberalism, with its conception of fundamental rights as guarantees of individual liberties against state encroachment.[180] Like the constitution itself, he added, fundamental rights guarantees provided only a "framework."[181] Their "'realization'" was largely "a question of political will formation and decision and of active citizen participation."[182] This was, Böckenförde noted, a comparatively "modest" conception of fundamental rights.[183] But it had the advantage of taking rights seriously within their proper sphere, and of a precision borne of roots in history.[184]

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[176] BÖCKENFÖRDE, *Die Methoden der Verfassungsinterpretation: Bestandaufnahme und Kritik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 147.

[177] Böckenförde, *Diskussionsbeitrag*, *supra* note 112, at 162.

[178] *Id*.

[179] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 190–91.

[180] Böckenförde, *Diskussionsbeitrag*, *supra* note 112, at 162–65.

[181] *Id*. at 165.

[182] *Id*.

[183] BÖCKENFÖRDE, *Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights [1990]*, *in* CONSTITUTIONAL AND POLITICAL THEORY, *supra* note 115, at 257.

[184] Part of what Böckenförde objected to in objective, values-based rights jurisprudence was its lack of foundation in history and text. *See id.* at 190–91.

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For Böckenförde, the fundamental task of rights interpretation was to identify the specific content—the *Gewährleistungsinhalt*—of each constitutional guarantee.[185] Each such guarantee, he argued, had its own discrete content, which must be identified independent of all other rights[186]—not by reference to abstract or unitary notions of "liberty" in some comprehensive sense, but by reference to concrete historical developments and decisions. "For the individual fundamental rights," Böckenförde observed, "arose from the concrete defense against injustice or from the battle for specific rights."[187] Their "historical-genetic . . . purpose," as well as their "objective profile," must be derived from those contexts. This does not quite make Böckenförde a "German originalist";[188] he never claimed that ascertaining original meaning comprised the whole or even the essence of constitutional interpretation. But his theory of interpretation did begin with history and genealogy. One might, then, describe Böckenförde's approach as *originalisierend*. It always began in dialogue with history.

Böckenförde offered several examples of concrete content-determination, some from cases decided by the Second Senate during Böckenförde's tenure on that bench.[189] The examples dealt with artistic freedom,[190] academic freedom,[191] religious freedom,[192] and the ban on forced labor.[193] In each instance, the Court (or Böckenförde in retrospect) looked to the genealogy and history of the right in question before concluding, not that the circumstances of the case justified a limitation on the right, but that the right's actual content did not reach the case's circumstances. In each instance, Böckenförde's review of the cases was manifestly approving.

His treatment of freedom of conscience is representative. Böckenförde began by examining

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[185] BÖCKENFÖRDE, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 241–63.

[186] *Id*. at 241.

[187] *Id*.

[188] *Cf*. Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES, *supra* note 126 at, 152–57.

[189] BÖCKENFÖRDE, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 242–54.

[190] *Decision of the Second Senate's* Vorprüfungsausschuß *of 19 March 1984*, 37 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1293 (1984).

[191] BÖCKENFÖRDE, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 253–55.

[192] *See* ERNST-WOLFGANG BÖCKENFÖRDE, *Das Grundrecht der Gewissensfreiheit*, *in* STAAT, VERFASSUNG, DEMOKRATIE 200 (1991).

[193] Bundesverfassungsgericht, Jan. 13, 1987, 74 BVERFGE 102.

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what he called "the normative impulse unique to the guarantee of freedom of conscience," maintaining that the content of the right could be "clearly identified" and with "systematic support" through a "historical-genetic" approach.[194] That approach made clear that the guarantee's aim was "not only the freedom of conscience, but the inviolability of this freedom."[195] It had its roots "in the experiences of the Nazi era" and was consistent with "the basic decision of the Parliamentary Council to give priority to the protection of individual liberty and to its insulation against official encroachment."[196] It was not a comprehensive right subject to certain limitations; it was a concrete right that was, within its proper sphere, illimitable. It was not, in other words, a general shield for religiously, conscientiously, or ideologically (*weltanschaulich*) motivated behavior.[197] If it were, it might give religious and ideological groups a veto—a form of *Kompetenz-Kompetenz*—over the State's commands.[198] Similarly, with respect to academic freedom, Böckenförde argued that Article 5(3) GG secured "the freedom of posing questions [*Fragestellung*] and the freedom of choosing methods."[199] It was not "a universal freedom of research"; rather, "it meant something specific."[200] It did not mean, for instance, that the State owed material assistance to researchers. Scholars must seek resources under the existing property regime just like everybody else.[201]

The affinity of these views with those of Hugo Black should be obvious; in some respects, the affinity with Scalia is even closer—for instance to Scalia's view that the First Amendment enshrined, not "freedom of speech," but "the freedom of speech," which Scalia understood in "historical-genetic" terms as "that freedom which was the right of Englishmen when the First Amendment was adopted."[202] It meant something specific, with concrete—not immanent—outer borders. Similarly, Scalia's best-known opinion about religious liberty—his opinion for the majority in *Employment Division v. Smith*—presents concerns about

[194] BÖCKENFÖRDE, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 247.

[195] *Id*. at 247.

[196] *Id*. at 248.

[197] *Id*. at 250–51.

[198] *Id*. at 250.

[199] *Id*. at 253.

[200] *Id*.

[201] *Id*. at 254.

[202] SCALIA, *The Arts*, *in* SCALIA SPEAKS, *supra* note 85, at 47; *see also* SCALIA, *The Freedom of Speech*, *in* SCALIA SPEAKS, *supra* note 85, at 202–12. The definite article in the title of the latter speech was definitely intentional. "Historical-genetic," of course, is Böckenförde's term, not Scalia's.

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minority-religious vetoes that are virtually identical to Böckenförde's.[203]

Böckenförde also resembled Scalia in defending his approach against potential criticisms. Böckenförde acknowledged that some might object that his search for the specific content of rights guarantees would be just as uncertain as the search for those rights' "immanent" limits. "But the question," he maintained,

> is not whether and how the problem raised by fundamental rights that the Parliamentary Council wished to make illimitable can be made to disappear, but rather how that problem can be handled and brought nearer to resolution in an objective way that does no harm to a constitutional structure marked by the separation of powers and the rule of law; a certain shrinking of the flexibility of argumentation seems to be compelled by, rather than a peril to, the existing constitutional structure.[204]

Böckenförde did not claim, then, that his approach would eliminate the problem of uncertainty. But he did assert that it reduced the problem, and that it committed its resolution to the actors who could most appropriately (and legitimately) address it. Scalia took a similar approach in defending originalism. In answering "the charge that originalism does not always produce clear answers," Scalia insisted that "the relevant question is whether any other system produces clearer ones. And that question," for Scalia, was "not at all difficult to answer," because "there is no alternative to originalism but standardless judicial constitution-making."[205]

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[203] *See* Emp't Div., Dept. of Hum. Resources of Or. v. Smith, 494 U.S. 872, 888 (1990):

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . . (internal citation omitted).

[204] BÖCKENFÖRDE, Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 255.

[205] SCALIA, *Interpreting the Constitution*, *in* SCALIA SPEAKS, *supra* note 85, at 195, 197.

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Böckenförde never put the point quite so starkly, but he did defend his approach as "the normal work of interpretation—not covert constitutional amendment or even transformation."[206] Like Scalia, Böckenförde insisted that open and evolutionary models of constitutional interpretation actually imperiled liberty. Because of its lack of clear boundaries, a system that relies on "immanent" rights limitations always risked narrowing the content of fundamental rights and thereby "making fundamental rights comfortable."[207] A content-based approach, by contrast, minimized this risk. Such an approach, Böckenförde maintained, was methodologically secure. It restored to fundamental rights their "deep dimensions" and embedded them in the "historical-genetic" contents of local and general constitutional history. It allowed their content to be precisely determined and their limits to be clearly defined. It restored dignity and scope to parliamentary democracy and rolled back the inroads of the judicial state.[208] It took rights seriously, and made them uncomfortable—safe both for, and from, democracy.

As should be clear by now, Böckenförde's positive theory of constitutionalism and rights adjudication fits squarely within the executorial model of constitutional judging. Böckenförde maintained that constitutional provisions have a clear and relatively fixed content, which applies within a defined sphere and which courts should apply vigorously within that sphere. By contrast, he rejected the expansive evolution of constitutional guarantees as covert constitutional amendment—both illegitimate and anti-democratic. Böckenförde's negative theory of constitutional interpretation—his relentless critique of objective, values-based judging implemented through proportionality balancing—can therefore be read as a sustained repudiation of the prophetic model of constitutional judging. But Böckenförde never countenanced deference to the legislature for its own sake. When the precise content of a rights guarantee was being infringed, deference to political actors was simply abdication—merely a different, and feckless, means of making rights comfortable. He was no essayist, then; he was an executor.

D. Conclusion

This was true, by and large, of his work as a judge as well as of his prescriptions as a scholar, though a detailed assessment of his judicial career must await a separate contribution.[209] Here it is enough to note that the major prongs of Böckenförde's executorial commitment—

[206] BÖCKENFÖRDE, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *in* WISSENSCHAFT, POLITIK, VERFASSUNGSGERICHT, *supra* note 111, at 258.

[207] *Id*. at 261.

[208] *Id*. at 261–62.

[209] See my contribution, entitled "Ernst-Wolfgang Böckenförde in the History of the German Constitutional Court," as well as the wonderful essays, cited above, by Christoph Schönberger and Patrick Bahners.

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his hostility to balancing, his reverence for democracy, and his antipathy to rights doctrine that constricts the legislature's valid sphere of action—appeared at various points in the dozen dissents he registered during his twelve-and-a-half year tenure on the Constitutional Court,[210] as well as in several Senate judgments in which Böckenförde's influence was palpable.[211]

Perhaps ironically, Böckenförde had few opportunities to influence the Court's rights jurisprudence.[212] He was assigned to the Second Senate, with primary jurisdiction over questions of *Staatsrecht*, rather than to the First Senate, with primary jurisdiction over fundamental rights. During Böckenförde's tenure on the Second Senate, the First Senate continued to develop its fundamental rights jurisprudence along the lines elaborated in the quarter century between 1957/1958 and 1983—the lines, that is, that Böckenförde had so frequently and forcefully criticized. Böckenförde's own Senate addressed fundamental rights questions comparatively rarely, with little impact on the Court's doctrine.[213] The decisions that Böckenförde later cited as models of fundamental rights adjudication made few ripples in the Court's doctrinal seas.

In other areas, however, Böckenförde's influence was considerable. More than one of his dissents became the foundation for a future judgment of the Court. Some of the judgments he helped shape became enduring landmarks. Even so, one of Böckenförde's greatest contributions to the Court's history was his continuing to accompany the Court—as he had before his appointment, and as he would after his retirement—as a kind of loyal opposition.[214] At the heart of that opposition was his assertion of the executorial against the prophetic model of constitutional judging. In limited but enduring ways, Justice Böckenförde managed to inscribe something of that model into the jurisprudence of the Constitutional Court.

In both his scholarly and judicial *oeuvre*, Böckenförde not only reflected the executorial view of constitutional judging, he almost became its prototype. Neither Scalia nor Black set forth

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[210] *See, e.g.*, Bundesverfassungsgericht, Apr. 10, 1984, 67 BVERFGE 1, 21–25 (Böckenförde & Steinberger, J.J., dissenting); Apr. 24, 1985, 69 BVERFGE 1, 57–87 (Böckenförde & Mahrenholz, J.J., dissenting); June 22, 1995, 93 BVERFGE 121, 149–65 (Böckenförde, J., dissenting).

[211] The most obvious example is the Second Senate's Maastricht judgment of 1993, in which the traces of Böckenförde's theory of democracy are striking. *See* Bundesverfassungsgericht, Oct. 12, 1993, 89 BVERFGE 155; *see also* Schönberger, *Der Indian Summer eines liberalen Etatismus: Ernst-Wolfgang Böckenförde als Verfassungsrichter*, *in* RELIGION, RECHT, POLITIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE, *supra* note 1, at 133–34.

[212] *See* Schönberger, *Der Indian Summer eines liberalen Etatismus: Ernst-Wolfgang Böckenförde als Verfassungsrichter*, *in* RELIGION, RECHT, POLITIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE, *supra* note 1, at 126–28.

[213] *Id*.

[214] *See* Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES *supra* note 126, at 181–83.

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in quite so systematic a way—nor in a manner so deeply informed by general constitutional history and legal-political theory—a model of judging centered in the core convictions (1) that the constitution provides a framework for political decision-making, but leaves existential questions to the democratic legislature; (2) that constitutional rights guarantees have a discernable and relatively fixed content informed, at least initially, by their history and genealogy; and (3) that constitutional courts must both enforce that content unflinchingly and observe scrupulously its limits. In the process, Böckenförde emerged as one of the world's most persistent and articulate critics of the prophetic model of judging—a critic, indeed, of the very model of judging that is arguably Germany's most successful constitutional export. He was the liberal champion of an outlook often associated with a conservative American insurgency.

In all of this, Böckenförde was something of a paradox, and something of a contrarian—a familiar role for a man who often found himself at odds with the institutions to which he devoted his life—his church, his party, the professoriate, and his Court.[215] In this paradoxical, contrarian role, Böckenförde deserves a permanent place in the perennial debates of democratic constitutionalism—debates between fixed and open adjudication; between framework and totalizing constitutions; between historical and presentist interpretation; between rights as subjective shields and rights as objective values; between content determination and proportionality balancing; and between the prophetic, essayistic, and executorial models of constitutional judging in a democracy.

[215] *See* Schönberger, *Der Indian Summer eines liberalen Etatismus: Ernst-Wolfgang Böckenförde als Verfassungsrichter*, *in* RELIGION, RECHT, POLITIK. STUDIEN ZU ERNST-WOLFGANG BÖCKENFÖRDE, *supra* note 1, at 131.

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