Pitting the state against Europe

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THE DEVELOPMENT OF LEGAL ORTHODOXY IN THE FEDERAL REPUBLIC OF GERMANY FROM 1949 TO THE MAASTRICHT DECISION

Christophe Majastre
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The judges of the German Federal Constitutional Court (FCC) in Karlsruhe occupy a special place in the historiography of European integration. They have regularly found themselves embroiled in controversies that have considerably surpassed the bounds of academia—a recent example being the multitude of political and scholarly reactions to their decisions on the eurozone crisis.[1] It has been freely admitted that they have the power to influence or even halt European integration, with their sometimes Euroskeptic reputation.[2] The subject of this article is one particular decision among those that helped forge this reputation: the so-called Maastricht decision. This ruling, issued on October 12, 1993, by the Second Senate of the FCC, more than a year after the Maastricht Treaty was signed by Europe's heads of state and government, was truly extraordinary. Described as "fundamental"[3] for European integration the day after it was issued, the judgment made a distinct impact on the academic debate around the legitimacy of the European Union (EU).[4] Nearly seven years on, Alec Stone Sweet spoke about the "shockwaves" continuing to emanate from the ruling.[5]

1. I am referring here to the decision concerning the establishment of the fiscal compact (see Antoine Vauchez, "Autour de la décision de la Cour constitutionnelle allemande du 12 septembre 2012 (Bundesverfassungsgericht, 2 BvR 1390/12): Regard de politiste," *Revue trimestrielle de droit européen* 1 [2013]: 87-93), and to the decisions in the Outright Monetary Transactions case (OMT I and II) regarding the constitutionality of the policies of the European Central Bank (see Franz C. Mayer, "Rebelles sans cause? Une analyse critique du renvoi de la Cour constitutionnelle fédérale allemande dans le dossier des OMT," *Revue trimestrielle de droit européen* 3 [2014]: 683-715).
2. See, for example, Beke Zwingmann, "The Continuing Myth of Euro-Scepticism? The German Federal Constitutional Court Two Years after Lisbon," *The International and Comparative Law Quarterly* 61, no. 3 (2012): 665-95.
3. See Éric Le Boucher, "Le dernier acte de la réunification allemande," *Le Monde*, October 15, 1993, 2.
4. Without seeking to offer an exhaustive list, the following references provide an overview of the geographical and temporal scope, both among specialists in European law (Joseph Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision," *European Law Journal* 1, no. 3 [1995]: 219-58; Bruno De Witte, "Sovereignty and European Integration: The Weight of Legal Tradition," *Maastricht Journal of European and Comparative Law* 2, no. 2 [1995]: 145-73; Juliane Kokott, "German Constitutional Jurisprudence and European Integration: Part One," *European Public Law* 2, no. 2 [1996]: 237-69; Peter Lindseth, "The Maastricht Decision Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation Reconsidered," *RSCAS Working Papers* 18 [2003]; Julio Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement," *European Law Journal* 14, no. 4 [2008]: 389-422) and in the German legal field (Armin von Bogdandy, "Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung: Gängige Missverständnisse des Maastricht-Urteils und deren Gründe [BVerfGE89,155 ff.]," *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 83, nos. 3-4 [2000]: 284-97).
5. Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 175.

Like the major rulings of the European Court of Justice, the Maastricht decision underwent a retrospective canonization process in the years that followed, and is now a central topic in the literature on European integration. At the time it was issued, however, many observers expressed a mixture of surprise and disquiet. The grounds for these worries essentially lie within the sixty-eight pages[1]—of the decision itself: although the judges of the FCC recognized the compatibility of the Maastricht Treaty with the German constitution (the *Grundgesetz* or Basic Law), they also acknowledged that the Basic Law set strict limits to the democratic legitimacy of any European political construct. Invoking the indissoluble nature of the link between the "people" (meaning the national community) and democracy, the judges seemed to invalidate any future evolution of the EU into a democratic political structure. According to Joseph Weiler, this apparently pessimistic forecast for the future of European integration also heralded a return to the concept of "political community" based on ethnic criteria.[2] Weiler's thesis, which came to be widely contested,[3] nevertheless conveyed the shock that greeted the abrupt manner with which the German judges weighed into the controversy on the apparent democratic deficit of the European project. While it may not be possible to reduce the ruling to some pro- or anti-European indictment, it does form part of a collective theoretical undertaking on European integration, as indicated by the scholarly descriptions of the EU as a *Staatenverbund* or grouping of states, thus distinguishing it from the notion of a European state: "the [European] Union treaty constitutes the foundation of a grouping of states aimed at the realization of an ever closer union of the peoples of Europe—constituted as states—and not as a state based on the people of a European state."[4]

This article investigates the nature of this coup on the part of the FCC judges by shifting the focus to the world of academic law. It offers a perspective that complements the existing literature, from which we may draw a distinction between interpretative approaches, which seek to explain decisions in the light of the values and representations articulated by the judges, and more rationalist approaches. Aside from the work of Jo Eric Kushal Murkens on the history of public law in Germany,[5] the former, interpretative, approaches bring together a series of German studies specifically examining the FCC, some of which relate to the history of ideas and some of which draw on political science.[6] The latter, rationalist, approaches more or less directly correspond to a research tradition initiated in the United States through the work on the Supreme Court conducted by Lee Epstein and Jack Knight.[7] At the heart of this work lies the question of the extent to which the American constitutional

1. At least according to the pagination of the FCC official publications (*Entscheidungen des Bundesverfassungsgerichts* 89 [Tübingen: Mohr Siebeck, 1994], 155-213).
2. Weiler, "Does Europe Need a Constitution?"
3. Peter Lindseth, however, sought to show that the 1993 judgment, by reinforcing the legislative control of national governments with respect to European policy, had merely prolonged the ongoing trends in European public law (Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* [Oxford: Oxford University Press, 2010], 179-85).
4. Ingo Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993: Dokumentation des Verfahrens mit Einführung* (Berlin: Duncker und Humblot, 1994), 728-29. Translator's note: Unless otherwise stated, all translations of cited foreign language material are our own.
5. Jo Eric Kushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford: Oxford University Press, 2013).
6. Robert C. Ooyen, *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: Verlag für Sozialwissenschaften, 2006); Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Wiesbaden: Verlag für Sozialwissenschaften, 2010).
7. Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998).

judges were influenced in their decision-making by their political loyalties. Comparative research inspired by these approaches has brought to light the influence of institutional rules governing the selection of judges and that of the rules of access to constitutional litigation on the decisions of constitutional courts.[1] As to the relationship between national constitutional courts and the process of European integration, Karen Alter's research also draws on this tradition: it introduces the notion of *judicial interest*, which seeks to take into account the position of each jurisdiction in its respective national context.[2] Several authors have recently highlighted the need to bring the constitution of "legal communities" into the analysis of value- and preference-formation among judges.[3] Thus, this body of scholarship invites us to look beyond the judges' positions within their national political systems and to examine the relationships between the constitutional courts and the legal professions, particularly specialists in *doctrine*.

This article examines the social processes at work in forming a constitutional interpretation—processes that take place over a long period of time. The central argument is that, in seeking to explain an outcome such as the Maastricht decision, we must take a further step into historicization, re-situating the origins of the ruling in the context of conflicts among the constitutional interpretation experts known in Germany as the *Staatsrechtslehrer*. As with other academic fields, such areas of doctrine may be examined as a realm where proponents of an orthodox interpretation of the constitutional text compete against the advocates of heretical interpretations, who call the former's monopoly into question.[4] In the history of this particular doctrinal field, the imposition of orthodoxy has had the effect of silencing those heretical interpretations and of unequivocally bolstering the orthodox understanding. It is the nature of doctrine to reduce arbitrary elements linked to any interpretation by attaching them to the collective and anonymous authority of the incorporated interpreters of the law.[5]—In the German legal tradition, this corresponds to the *herrschende Meinung*—the prevailing opinion. Only in this collectivized form does *doctrine* play a role in the formation of constitutional judgments.[6] It may thus be shown that the Maastricht decision represents the imposition of an orthodox approach to building constitutional expertise: that of *Staatsrecht* ("state law" or constitutional law).

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1. Christoph Hönnige, "The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts," *West European Politics* 32, no. 5 (2009): 963-84; Georg Vanberg, "Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers," *Comparative Politics* 32, no. 3 (2000): 333-53; Sylvain Brouard and Christoph Hönnige, "Constitutional Courts as Veto Players: Lessons from the United States, France and Germany," *European Journal of Political Research* 56, no. 3 (2017): 529-52.
2. Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).
3. R. Daniel Kelemen and Susanne K. Schmidt, "Introduction: The European Court of Justice and Legal Integration: Perpetual Momentum?," *Journal of European Public Policy* 19, no. 1 (2012): 1-7, here 4; Christoph Hönnige and Thomas Gschwend, "Das Bundesverfassungsgericht im politischen System der BRD: Ein unbekanntes Wesen?," *Politische Vierteljahresschrift* 51, no. 3 (2010): 507-30, here 514.
4. Pierre Bourdieu, "Séminaires sur le concept de champ, 1972-1975," *Actes de la recherche en sciences sociales* 200 (2013): 4-37, here 21.
5. "In the legal world, the term *doctrine* signifies both a community of scholars and a body of knowledge. This effective metonymy makes it possible to highlight the silence on the part of jurists, especially scholars, on their practice, which leads them to conceal themselves behind their work and to disappear as individuals, only ever to appear again in the form of ideas" (Julie Bailleux, *Penser l'Europe par le droit: L'invention du droit communautaire en France* [Paris: Dalloz, 2014], 7).
6. Alain Bancaud, "Considérations sur une ~~p~~ieuse hypocrisie': La forme des arrêts de la Cour de cassation," *Droit et société* 7 (1987): 373-87.

This article, like a number of recent works, is interested in elucidating the social conditions under which the power of certain categories of professionals to shape politics is produced and reproduced.[1] Legal professionals, especially academics, have recently been the subject of a series of studies that have sought to shed light on their role in legitimizing political orders.[2] Indeed, political sociologists studying European integration have long taken an interest in these *légistes* or legal drafters,[3] who have played a major role in developing "in-house theories" and in setting up research associations for defining a European regime.[4] The conditions in which a legal counter-knowledge regarding the European project became formalized, on the other hand, remain largely unexplored.[5]

Our goal in drawing on the Foucauldian concept of the "archive" to examine the origins of this scholarly view of European integration is twofold. First, by showing how specialist knowledge about the state can be combined with a European *doxa*, we can draw together the simultaneous generation of a corpus of specialist knowledge about the EU with the above-mentioned legal counter-knowledge.[6] Furthermore, the concept of the archive allows us to understand how clusters of theorization about Europe can form while being removed from knowledge that was devoted to creating a transnational space and that became the subject of the initial work on forms of knowledge about Europe.[7] The concept of the archive may also be understood as an imperative to engage in a review of "discourse in its own volume,"[8] to use Michel Foucault's general formulation. Implementing this program when studying a decision made by a constitutional court undoubtedly consists of demonstrating what the production of such a document owes to the prior establishment of a *verification* device,[9] which requires the active participation of a range of actors representing both academics and laypersons. From a political science perspective, such a document cannot simply be the product of a strategic interaction between judges, who are protected by the secrecy of their deliberations.[10] As Bernard Lacroix explained, the effectiveness of constitutional discourse relies neither on scholars alone nor on judges, but on an expanded network of relationships between experts in describing politics.[11]

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1. Rebecca Adler-Nissen and Kristoffer Kropp, "A Sociology of Knowledge Approach to European Integration: Four Analytical Principles," *Journal of European Integration* 37, no. 2 (2015): 155-73; Yves Dezalay and Mikael Rask Madsen, "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law," *Annual Review of Law and Social Science* 8, no. 1 (2012): 433-52.
2. Guillaume Sacriste, *La République des constitutionnalistes: Professeurs de droit et légitimation de l'État en France (1870-1914)* (Paris: Presses de Sciences Po, 2011).
3. Sacriste, *La République des constitutionnalistes*, 14-15.
4. Bailleux, *Penser l'Europe par le droit*; Antoine Vauchez, *L'Union par le droit: L'invention d'un programme institutionnel pour l'Europe* (Paris: Presses de Science Po, 2013); Antonin Cohen and Antoine Vauchez, "Sociologie politique de l'Europe du droit," *Revue française de science politique* 60, no. 2 (April, 2010): 223-26.
5. But see Laure Neumayer, "Mobiliser la science' en investissant l'arène européenne: Les ressources paradoxales de l'euroscepticisme du Parti civique démocratique tchèque (ODS)," *Sociétés contemporaines* 80, no. 4 (2010): 113-32.
6. Michel Foucault, *The Archaeology of Knowledge*, trans. A.M. Sheridan Smith (London and New York: Routledge Classics, 2002), 133.
7. See Antoine Vauchez and Cécile Robert, "L'Académie européenne: Savoirs, experts et savants dans le gouvernement de l'Europe," *Politix* 89 (2010): 9-34 and Note 12.
8. Foucault, *The Archaeology of Knowledge*, 155.
9. See Judith Revel, "Vérité/Jeux de verité," in Revel, *Le vocabulaire de Foucault* (Paris: Ellipses, 2002), 64-65.
10. As per the neo-functionalist approach—despite its internal divergences—represented, for example, by Stone Sweet (*Governing with Judges*) and Alter (*Establishing the Supremacy of European Law*).
11. Bernard Lacroix, "Le politiste et l'analyse des institutions," in *Le président de la République: Usages et genèses d'une institution*, ed. Jacques Lagroye and Bernard Lacroix (Paris: Presses de Sciences Po, 1992), 13-77.

The key to an archaeological approach is to uncover the genesis of "spaces of dissension,"[1] where the value of the political expertise held by a specific type of professional is determined. In fact, these spaces where specialists in doctrine—law professors—disagree with one another are generally overlooked in the numerous monographs[2]—and collective works[3]—devoted to the FCC. Indeed, the "doctrine" remains the prerogative of public law historians—referring to the work of Frieder Günther[4] and Michael Stolleis.[5] *On the other hand, some rece*nt works, such as those of Bill Davies[6] and Michaela Hailbronner,[7] reject the division between the institutional history of the court and that of scholars, but these are few and far between.

In order to illustrate the changes affecting the domain of doctrine, I make use of two complementary approaches. The first of these draws on biographical work that allows me to follow the career paths of legal professionals. Of particular interest are those academic judges with a position at the crossroads of the scholarly domain and the constitutional court. The second approach involves analyzing academic controversies, which may be found, in particular, at the annual conferences of the Vereinigung der Deutschen Staastrechtslehrer (VDStrL) (Association of German Constitutional Law Professors). Although they constitute a second-hand source, the transcripts of the discussions that have taken place at these conferences reveal the various ways in which certain approaches to considering and expressing the law are either dismissed or requalified.

This article is divided into three sections. The first looks back at the issues surrounding the "return to the state," which began with respect to doctrine in the early 1960s, with a new generation of young scholars entering the university campuses. An analysis of the career paths of these jurists through their various institutional roles highlights the rise in statism as a benchmark for defining the legal expertise behind the policy. The second section deals with the requalification of *Staatsrecht* ("state law") as a political program and an academic discipline, and shows how its opposition to constitutional law (*Verfassungsrecht*) became entrenched in the field of doctrine. The third section illustrates the manifestation of this opposition in constitutional controversies around German reunification and the Maastricht Treaty. I shall return, in conclusion, to my opening hypothesis, according to which the Maastricht decision must be interpreted as a product of these conflicts at a professional level between producers of doctrine.

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1. Foucault, *The Archaeology of Knowledge*, 170.
2. Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford: Oxford University Press, 2015); Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge: Cambridge University Press, 2005).
3. Matthias Jestaedt *et al.*, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Berlin: Suhrkamp, 2011); Michael Stolleis, ed., *Herzkammern der Republik: Die Deutschen und das Bundesverfassungsgericht* (Munich: Beck, 2011).
4. Frieder Günther, *Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration, 1949-1970* (Munich: Oldenbourg, 2009).
5. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (Munich: Beck, 1988).
6. Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (Cambridge: Cambridge University Press, 2012); *Bill Davies*, "Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in Its Intellectual Context," *European Law Journal* 21, no. 4 (2015): 434-59.
7. Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press, 2015).

The state versus the constitution: The *Staatsrechtslehre* as a professional battleground

The aim of this first section is to trace the paths of statism in the domain of public law. We start by situating the professional struggles that played out among the *Staatsrechtslehre*—the metonym that designates the collective of public law professors in the wider sense—in the context of a reconstitution of legal scholarship following the creation of the Federal Republic of Germany (FRG) in 1949.

The genesis of a scholarly division: Reconstruction of the German state

Although addressing the question of the historical conditions that presided over the emergence of specialist legal knowledge of the German state is beyond the scope of this article,[1] it is important, nonetheless, to look at the process of reconstitution that took place in this field of knowledge after 1945. As Frieder Günther sets out in his work on the field of public law during the decades following the war, this process gave rise to an opposition between one group of jurists under the wing of Carl Schmitt, who were skeptical, to varying degrees, about the new German state and its constitution, and another group around Rudolf Smend, who were bound by the common denominator of his "theory of integration."[2]

Skepticism over the Basic Law (*Grundgesetz*) was by no means confined to those academics who had actively supported the Nazi regime, such as Carl Schmitt, or to their students. On the contrary, this attitude appeared to be widely shared among the corporation of the *Staatsrechtslehrer*. It may be explained by a general decline in this specialist area, which, after its apogee in the inter-war period (the VDStrL having been founded in 1922), followed by Nazi control over the universities,[3] subsequently seemed largely irrelevant. This was illustrated in a speech given a few months after the Basic Law entered into force on May 23, 1949, by Hans-Peter Ipsen, a member of the VDStrL steering committee. Ipsen emphasized the transitory nature of the constitution's framework: while its promulgation brought clarity to the legal status of the territories that had been occupied by the Western allies, it would ultimately pose no barrier to the complete restoration of the German state.[4] The fact that the state that was founded under the Basic Law, the FRG, did not correspond with the German Reich created in 1871—the state carrying historical legitimacy—made it impossible to consider it as anything other than a temporary solution in legal terms.[5]

The first ten years after the war also featured the development of constitutional law, with the leading figure being Rudolf Smend, a professor exiled during the Nazi period who took up teaching again following the war at the University of Göttingen.[6] In bringing up to date

1. Elements of this may be found, however, in our thesis: Christophe Majastre, "Des oppositions savantes à l'Europe? Rapport au politique et pratiques d'intervention des juristes dans le débat allemand sur l'Union européenne de Maastricht à Lisbonne (1992-2011)" (doctoral thesis in political science, supervised by Florence Delmotte at the Université Saint-Louis-Bruxelles, 2018).
2. Günther, *Denken vom Staat her*.
3. Michael Stolleis, "Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and Post-1945," in *Darker Legacies of Law in Europe, ed.* Christian Joerges and Navraj Singh Ghaleigh (Portland: Hart Publishing, 2008), 1-18.
4. Hans Peter Ipsen, *Über das Grundgesetz* (Hamburg: Hamburger Universitätsreden 9, 1950).
5. See on this topic Michel Foucault, *Naissance de la biopolitique: Cours au Collège de France, 1978-1979*, ed. Michel Senellart, François Ewald, and Alessandro Fontana (Paris: EHESS/Gallimard/Seuil, 2004), 77-79.
6. Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003), 69-70.

a theory based on the values of the community (*Gemeinschaft*), the approach developed by Smend and his students sought to harness the fundamental rights contained in Title I of the Basic Law in a social integration program.[1] This approach quickly found success, with the emergence of an academic debate on fundamental rights, facilitated by the editorial board of the *Archiv des öffentlichen Rechts* (AöR) (Public Law Archive), the main publication in the field of public law. Furthermore, and despite Smend's criticism of the jurisprudence of the young FCC established in 1952, the court drew broad inspiration from his theories when it came to judgments on the protection of fundamental rights. The Lüth judgment of 1957 made explicit reference to them, through what the judges called "the hermeneutics of values."[2]

By way of comparison, the first grouping that Günther identified seemed to have a relatively marginalized position within the *Staatsrechtslehre*. Most of its members found academic positions during the 1950s (with the exception of Carl Schmitt himself), and some of them continued to enjoy access to the VDStrL's annual conferences, including Ernst Forsthoff, a former student of Schmitt's, who took part in a conference dedicated to the social state.[3] Forsthoff and Schmitt maintained their criticism of the new constitutional order, however, until the early 1960s, when these marginalized views were bound by a certain degree of confidentiality and were primarily pursued at the margins of academia. The Ebrach seminars, which Forsthoff organized on an annual basis starting in 1957 and which featured Heidelberg University students as participants, were specially devoted to discussing these views. These events developed a charismatic community around them, and became established as a veritable laboratory of statism. Forsthoff developed his criticisms of *Verfassungsrecht* there, stepping up his editorial output in the form of *Festschriften* (commemorative editions), in which he involved students who were still working on their *Habilitation* theses.[4]

Bringing the state back to center stage: Editorial strategies and entry strategies

Several pieces of research have highlighted the influence of these spaces at the margins of university education—the Ebrach seminars, and also the *Collegium Philosophicum* of Münster, set up around the same time with an overlapping membership[5]—on post-war German political thinking. It was these groups that effectively educated academics born around 1930 as they attained their habilitation, the qualification allowing them to become university professors,[6] from 1960.

It was also around this time that a break took place with the confidentiality of the sealed communities that had formed around the Ebrach seminars. This rupture manifested itself when two young participants in the seminars, Ernst-Wolfgang Böckenförde and Roman Schnur, set up a new publication with the evocative title of *Der Staat* (*The State*). Their opening editorial presented it as a "forum where the important questions of statehood shall be discussed [and which should] provide a stimulus for these questions to be addressed at

1. Werner S. Landecker, "Smend's Theory of Integration," *Social Forces* 29, no. 1 (1950): 39-48.
2. Hailbronner, *Traditions and Transformations*, 58-61.
3. Ernst Forsthoff *et al., Begriffe und Wesen des Sozialen Rechtstaats* (Berlin: De Gruyter, 1952).
4. See Dirk Van Laak, *Gespräche in der Sicherheit des Schweigens: Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik* (Berlin: Akademie Verlag, 2002).
5. Jens Hacke, *Philosophie der Bürgerlichkeit: Die liberalkonservative Begründung der Bundesrepublik* (Göttingen: Vandenhoeck & Ruprecht, 2008); A. Dirk Moses, *German Intellectuals and the Nazi Past* (Cambridge: Cambridge University Press, 2007); Van Laak, *Gespräche in der Sicherheit des Schweigens.*
6. In the German university system, the habilitation, or *venia legendi*, is the second doctoral thesis, the obtaining of which grants permission to take up a professorship.

the level required both by the current political situation and by the great German tradition of the theory of the state."[1]

The journal's editors were hence directly calling for the hierarchy of proper subjects for the legal analysis of politics to be overturned. In highlighting the need to put the state back at the center of this analysis (this being in line with the positions taken by the French constitutionalist Georges Burdeau, whose article on the obsolescence of the concept of constitution appeared in the fourth issue),[2] they were taking aim at the Smendian domination of the AöR board. This strategy adopted a dual approach that was both retrospective and prospective. On the one hand, in accordance with the program formed in the course of the Ebrach seminars, the state was envisaged in its historical dimension, as the guarantor of peaceful internal social relations within the boundaries of a political community. On the other hand, the consideration given to the state was meant to be in tune with immediate political issues. To defend the specificity of the state and its functions meant opposing any reconsideration (as represented by the Smendian approach to constitutional law) of the separation between state and society. The emphasis placed on values by the *Verfassungsrecht* theorists was thought to present a threat to the neutrality of the state that guaranteed its pacifying role.[3]

The inception of *Der Staat* was just one example of the entry strategies deployed in the doctrinal field by that generation of academics—strategies that also included the organization of an *Assistententagung* (session for academic assistants) at the VDStrL's official gatherings in 1962 by Roman Schnur and Helmut Quaritsch.[4] An analysis of articles published in *Der Staat* during its early years reveals that its main contributors—in addition to those such as Forsthoff and Schmitt who represented the Weimar era—were lawyers of the 1930 generation.[5] Among them were specialists in international law (such as Otto Kimminich, Karl Doehring, and Helmut Quaritsch), administrative law (including Roman Schnur), and constitutional law (Ernst-Wolfgang Böckenförde and Hans-Hugo Klein).

From university to court: The paths of statism

The entry strategy described above proved all the more effective because it took place at a time of expansion in West German higher education during the 1960s, with an increased number of professorships available, not least in the newly created universities and other higher education institutions.[6] However, the acquisition of university posts by these lawyers was only one among several developments in the generation of constitutional discourse—developments that also affected how constitutional expertise was exercised in the medium term. This was a key consequence of the changes in the constitutional court's composition.

The procedure for nominating constitutional judges—an "election" process *par excellence*—was, and is still, marked by the obscurity and informality of the rules governing it.

1. Various, "Zum Geleit," *Der Staat* 1, no. 1 (1962): 1-2, here 1.
2. Georges Burdeau, "Zur Auflösung des Verfassungsbegriffs," *Der Staat* 1, no. 4 (1962): 389-404.
3. See Ernst Forsthoff, "Der lastige Jurist" (1955), in *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlung 1954-1973, ed.* Forsthoff and Klaus Frey (Munich: Beck, 1976) 221-32; Ernst-Wolfgang Böckenförde, "Das Ethos der modernen Demokratie und die Kirche," *Hochland* 50, no. 1 (1957): 4-19.
4. Helmut Schulze-Fielitz, *Staatsrechtslehre als Mikrokosmos: Bausteine zu einer Soziologie und Theorie der Wissenschaft des Öffentlichen Rechts* (Tübingen: Mohr Siebeck, 2013), 58-59.
5. Karl Doehring, the eldest among *Der Staat*'s post-war qualified academics, was born in 1919, and was the only one among them to have been born before 1927. Hans-Hugo Klein, the youngest member, was born in 1937.
6. See Hans-Ulrich Wehler, *Deutsche Gesellschaftsgeschichte*, vol. 5 (Munich: Beck, 2008), 380-81.

With its requirement for agreement between the two main parties, the Sozialdemokratische Partei Deutschlands (SPD) (Social Democratic Party of Germany) and the Christlich Demokratische Union Deutschlands (CDU) (Christian Democratic Union of Germany), this appointment process could be likened to the conclaves of the Vatican.[1] An analysis of the appointments reveals some overall trends. Until 1975, aside from the three places reserved for magistrates in each of the two senates that form the FCC, most of the nominated judges were senior civil servants or former research associates at the court.[2] Only from that year onward were chairs regularly allocated to academic lawyers.

Table 1 shows how the increasing relative weight of the *Staatsrechtslehrer* at the FCC reflected developments in the area of doctrine, while highlighting a set of specific social characteristics. As regards the doctrinal developments, the distribution of places tended to show a balance between the two leading approaches of *Verfassungsrecht* and *Staatsrecht*. Konrad Hesse, a student of Smend and a member of the First Senate, and then his successor Dieter Grimm, were proponents of *Verfassungsrecht*. While Helmut Steinberger, a graduate of the Max Planck Institute at Heidelberg, the country's most prestigious institution for international law, doesn't clearly fit into one of these two camps, the three judges who were nominated in 1983, Ernst-Wolfgang Böckenförde, Roman Herzog, and Hans-Hugo Klein, represented the *Staatsrecht view*. While marking the importance of statism in the field of doctrine, the careers of these three judges also illustrate the emphasis on a specific capital stemming as much from academia as from political expertise. These three examples demonstrate how constitutional judges occupy a truly key position at the crossroads of the academic and political worlds.

On the advice of Adolf Arndt, a lawyer and major figure in the SPD, Böckenförde joined the party in 1962 from his secure university position.[3] He offered the SPD his expertise in a number of endeavors, notably for the parliamentary committee tasked with proposing reforms to the Basic Law.

Like Böckenförde, Klein was a member of the inner circle of jurists formed around *Der Staat*, and he was the youngest among them. He took editorial control of the journal in 1967, the year he completed his *Habilitation*. Elected to the *Bundestag* in 1972 (he kept his seat practically without interruption until his nomination to the FCC in 1983), Klein sat on various parliamentary committees dealing with constitutional matters.

Lastly, Roman Herzog represented a type of statism that was relatively far removed from the heterodox strategy of the editors of *Der Staat*. A young legal assistant in the early 1960s who had taken part in the first *Assistententagung*, Herzog's career took him from university to politics to the FCC, and culminated in the honorary roles of a statesman: he was president of Germany from 1994 to 1999, and later chaired the European convention tasked with drafting the Charter of Fundamental Rights. Prior to his political career,

1. Uwe Kischel, "Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective," *International Journal of Constitutional Law* 11, no. 4 (2013): 962-80.
2. From the court's inception in 1952, when three of its judges were professors (two in the First Senate and one in the Second Senate) until 1975, no new *Staatsrechtslehrer* were appointed to the court.
3. Ernst-Wolfgang Böckenförde and Dieter Gosewinkel, *Wissenschaft, Politik, Verfassungsgericht* (Berlin: Suhrkamp, 2011), 408.

Table 1. Appointment of academic lawyers to the FCC from 1975[1]

	Konrad Hesse	Helmut Steinberger	Ernst-Wolfgang Böckenförde	Hans-Hugo Klein	Roman Herzog	Dieter Grimm	Paul Kirchhof
Date of birth	1919	1931	1930	1937	1934	1937	1943
Date habilitation attained, university	1955, Göttingen	1971, Heidelberg	1964, Münster	1967, Heidelberg	1964, Munich	1979, Frankfurt am Main	1974, Heidelberg
VDStrL conference report	1958	1993	1969	1978	1965	1983	
Chairs	Freiburg im Breisgau (1956)	Mannheim (1971), MPI Heidelberg (1987)	Heidelberg (1964); Bielefeld (1969); Freiburg im Breisgau (1977)	Göttingen (1969)	FU Berlin (1965); Speyer (1969-1973)	Bielefeld (1979)	Münster (1975); Heidelberg (1981)
Party affiliation[2]	Nominated by FPD	Nominated by SPD	SPD	CDU	CDU	Nominated by SPD	Nominated by CDU
Political posts			Member of commission of inquiry on constitutional reform (as outside expert) (1973-1976)	Member of Bundestag (1973-1982) Secretary of state in Justice Ministry (1982) Member of commission of inquiry on constitutional reform (as member of Bundestag) (1973-1976)	Regional secretary of state (1973-1978) Regional minister for religion (1978-1980) Regional parliamentarian and interior minister (1980-1983)		
Editorial posts	*Grundzüge des Verfassungsrecht der BRD* (1967) *Archiv des Öffentlichen Rechts* (editor, 1964)		*Der Staat* (founder, 1962)	*Der Staat* (editor, 1969)	*Maunz/Durig* (commentary on Basic Law) *Evangelisches Staatslexikon*	*Rechtswissenschaft und Nachbarwissenschaften* (vol. 1, 1973; vol. 2, 1976)	*Handbuch des Staatsrechts der BRD* (co-editor)
Start date and roles at FCC	1975: First Senate judge	1975: Second Senate judge	1983: Second Senate judge	1983: Second Senate judge	1983: First Senate judge, vice-president of FCC 1985: president of the court	1987: First Senate judge	1987: Second Senate judge

1. Sources: *Kürschners Gelehrter* (1992 edition) and Munzinger Online (www.munzinger.de), personal research.
2. If no affiliation was declared, the party responsible for the judge's nomination is shown.

Herzog had been a prolific scholar. He took on editorial responsibilities early on at the well-known *Maunz-Durig*, a commentary on the Basic Law set up by his habilitation supervisor, Theodor Maunz, and also at the *Evangelisches Staatslexikon*. In 1968, his contribution to the *Staatslexikon* drew praise from Ernst Forsthoff, who described him as "a lone crier [...] who raises his voice to pledge allegiance to the power of the state that guarantees liberty."[1] In 1973, he renounced his chair at the German University of Administrative Sciences in Speyer in order to embrace a political career in various CDU-administered *Länder*, but nevertheless maintained some of his academic responsibilities during his various political tenures.

The requalification of statism: The law between political mobilization and scholarly requalification

These judges were nominated in a wider context where certain aspects of this discourse on the state were made readily available for political use. One example of this is provided by the reaction of academics to the student movements in the late 1960s, when calls for the state to maintain neutrality were presented in answer to the chaos that threatened to cause a breakdown in social order.[2] A second is that of the opposition to social-democratic Chancellor Willy Brandt's policy of openness toward the states of the Eastern Bloc. Led by the Bavarian Christlich-Soziale Union (CSU) (Christian Social Union) and the Bund der Vertriebenen (Federation of Expellees),[3] this opposition, starting in 1973, mobilized a number of statist jurists, such as Martin Kriele[4]—and Otto Kimminich,[5] who advocated the historical rights of the FRG over the entire territory of the former Reich, suggesting that the Bonn government should work toward the reunification of the German people as a whole.

There is one particular case that illustrates the dual development of the academic discourse on the state, which, in one respect, displayed an increasingly clear militancy in favor of reunification, with an affirmation of German identity, and in another way embodied a scientific method of interpreting the constitutional text. Josef Isensee, a CDU advisor who was assigned to various constitutional matters during the 1980s, had played an active role in a number of projects in the late 1970s with the Munich-based Carl Friedrich von Siemens Foundation, led at that time by Armin Mohler. Along with other academics, including the *Staatsrechtslehrer* Dieter Blumenwitz and Peter Lerche, Isensee contributed to several works on the theme of German identity edited by Lerche.[6] In one of his contributions in 1986, devoted to "German repression of the state," Isensee's statism took the form of a romantic

1. Ernst Forsthoff, "Von der Staatsrechtswissenschaft zur Rechtsstaatswissenschaft," *Studium Generale* (1968), reproduced in *Rechtstaat im Wandel: Verfassungsrechtliche Abhandlungen 1954-1973, 2nd edition,* ed. Forsthoff and Klaus Frey (Munich: Beck, 1976), 185-91, here 190.
2. Nikolai Wehrs, *Protest der Professoren: der "Bund Freiheit der Wissenschaft" in den 1970er Jahren* (Göttingen: Wallstein, 2014).
3. Joost Kleuters, *Reunification in West German Party Politics: From Westbindung to Ostpolitik* (Basingstoke: Palgrave Macmillan, 2012).
4. Andreas Grau, "Urteil des Bundesverfassungsgerichts zum Grundlagenvertrag zwischen der BRD und der DDR," accessed March 13, 2020, www.kas.de/wf/de/191.5738/.
5. Ingo von Münch, "Nachruf Otto Kimminich," *Archiv des Völkerrechts* 35, no. 3 (1997): 253-54.
6. Armin Mohler, ed., *Der Ernstfall* (Berlin: Propyläen-Verlag, 1979); Anton Peisl and Armin Mohler, eds., *Die Deutsche Neurose: Über die beschädigte Identität der Deutschen* (Frankfurt/Berlin/Vienna: Ullstein, 1980); Armin Mohler, ed., *Wirklichkeit als Tabu* (Munich: R. Oldenbourg Verlag, 1986).

exaltation of a German identity that ought to be restored in the face of all kinds of renunciation, and in particular against "constitutional patriotism."[1]

In parallel with these publications, Isensee edited the *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Constitutional Law Manual for the Federal Republic of Germany), together with Paul Kirchhof. Volume 1 was published in 1987.[2] The *Handbuch* differed from comparable works in several respects. First, unlike an article-by-article commentary on the constitutional text, it offered definitions of various concepts in a way that allowed for coherence to be brought back to the whole. What is more, all of its contributors were academics, whereas legal publications tended to offer some space to lay commentators such as politicians and magistrates.

The orthodoxy of *Staatsrecht*

In publishing the *Handbuch*, Isensee and Kirchhof proclaimed *Staatsrecht* as the only method by which the Basic Law could be interpreted scientifically. Through an exercise in "academic closure,"[3] this meant both defining a canonical *corpus* and creating a community of professionals with the authority to interpret it. By lending themselves the appearance of autonomy, they were able to claim for themselves the privilege of a disinterested interpretation of the law.

It would be appropriate to qualify this as *academic law*, inasmuch as it was the preserve of qualified interpreters, and also in the sense that it engendered an opposition between the claim of scientific rigor and spontaneous or literal lay interpretations of the constitutional text. The qualification of competing interpretations as *deviant* interpretations—likening *Verfassungsrecht* to "political law,"[4] for instance—draws on the same logic.

In other words, this orthodox definition can apply only if the competing interpretations are dismissed, as was played out in the debate between Isensee and the constitutional judge Dieter Grimm at the VDStrL conference in Hanover in 1989. Isensee effectively proclaimed victory for *Staatsrecht*: "At the many conferences that I have been able to attend up until now, the only question has been that of 'constitution.' Today, however, it is 'the state' that finds itself placed at the center."[5] The law of the state entailed "an orientation toward the community in state and constitutional form," whereas *Verfassungsrecht* was said to have adopted "a substitute for patriotism, an orientation toward a constitution no longer rooted in the soil of the German people, but floating in the realm of the cosmopolitan ideal."[6] Hence, *Verfassungsrecht* became defined as a deviant form of interpretation, incapable of

1. This publication appeared at the same time as the op-ed signed by Jürgen Habermas in *Die Zeit,* in which he promoted the concept of *Verfassungspatriotismus* in a polemic against the revisionist historian Ernst Nolte. Rudolf Augstein *et al., Devant l'histoire: Les documents de la controverse sur la singularité de l'extermination des Juifs par le régime nazi* (Paris: Éditions du Cerf, 1988).
2. Paul Kirchhof and Josef Isensee, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschland (HBDStr)*, vol. 1 (Heidelberg: C.F. Müller, 1987).
3. Bastien François, "La constitution du droit? La doctrine constitutionnelle à la recherche d'une légitimité juridique et d'un horizon pratique," in *La doctrine juridique, ed.* Yves Poirmeur and Alain Bernard (Paris: PUF, 1993), 210-29.
4. Josef Isensee, "Verfassungsrecht als politisches Recht," in *HbdStr*, vol. 12, ed. Paul Kirchhof and Josef Isensee (Heidelberg: C.F. Müller, 2012), 514.
5. Josef Isensee quoted in Heinz-Christoph Link *et al., eds., Staatszwecke im Verfassungsstaat: Nach 40 Jahren Grundgesetz. Die Bewältigung der wissenschaftlichen und technischen Entwicklungen durch das Verwaltungsrecht* (Berlin: De Gruyter, 1990), 136.
6. Ibid.

establishing its own legality and only able to be defined in a derived sense, in a negative relationship to the law of the state. Isensee described it as *Staatsrecht ohne Staat* (a law of the state without the state), leading to an interpretation of it as "the Basic Law without considering the actual state that it presupposes."[1]

The law of the constitution could thus ultimately be described as a downgraded law of the state. As a consequence, reformist positions could only be maintained by questioning the very principle on which the domination of academic law was based: that of its autonomy with respect to the actual transformations of its subject matter. This was the strategy that Grimm adopted in criticizing his peers' "lack of modernity" when it came to their notion of the state, going so far as to ask, "Is this still the same state that we lawyers are in the habit of discussing? And is it still subject to the classic doctrine of missions of state and traditional constitutional law?"[2]

The positions taken on *Staatsrecht* and *Verfassungsrecht* have been represented schematically in Table 2. While the vertical axis represents the domains reserved to each discipline, it is the division along the horizontal axis that sets out the structure of the doctrinal field, contrasting the dominant area of academic law with the disciplines of the subordinate sub-field, referencing their heteronomy and their proximity to non-legal matters.

Table 2: Hierarchy of disciplines within the doctrine

	Academic law/Autonomy	**Political law/Heteronomy**
Internal order	*Staatsrecht*	*Verfassungsrecht*
External order	*Völkerrecht*	*Europarecht*

The alliance between the traditional approach of the international institutions (*Völkerrecht*) and *Staatsrecht* is shown in particular by their recognition of the legal effects of the pre-constitutional reality of the *Staatsvolk*—the people of the state. This convergence has been illustrated through the work of Karl Doehring, former director of the Max Planck Institute at Heidelberg, who maintained that, for the FRG, the goal of reunification was a "goal of the state" of a pre-constitutional nature, taking precedence over the obligations of international cooperation set out in Article 24 of the Basic Law.[3]

Although the developments in *Staatsrecht* might appear paradoxical at first glance, torn between political usage and the claim of constituting a scientific method for interpreting the constitutional text, it is clear in the end that these two tendencies are complementary. Moreover, the production of a scholarly discourse on the state makes it possible to free *Staatsrecht* from the contingencies of its political content and to present it as the sole legitimate interpretation of the Basic Law.

1. Ibid.
2. Isensee quoted in Link *et al.*, *Staatszwecke im Verfassungsstaat*, 135-36.
3. Isensee quoted in Link *et al.*, *Staatszwecke im Verfassungsstaat*, 155.

From reunification to Maastricht: Academic clashes and constitutional controversy

One effect of the imposition of *Staatsrecht* as an orthodoxy was to bolster the monopoly exercised by a specific group of professionals on the interpretation of the constitutional text. It also restricted the space available for any legitimate alternative interpretations. This contraction in the scope of constitutional discourse was clearly visible in the controversy over reunification that was triggered by the collapse of the Communist regime in the German Democratic Republic (GDR) on November 9, 1989, a few weeks after the VDStrL's Hanover conference.

In many respects, this controversy was a prologue to that which would be triggered by the signing of the Maastricht Treaty. Statist jurists saw reunification as the end of a transitional period in which the Basic Law had played a central role in maintaining the existence of the German state. Law professors close to the CDU such as Isensee and Klein proposed the option of a simple *Beitritt* (accession) of territory from the GDR to the FRG, inasmuch as the federal republic carried the historical legitimacy of the German Reich.[1] For Helmut Quaritsch, reunification was above all a "victory for the law of the state over the law of nations" (*Völkerrecht*).[2] In other words, it was confirmation that the unity of the German *Staatsvolk* and their right to self-determination had primacy over the international treaties signed by the FRG with the allied powers.

Some of those who opposed this "restoration" of German unity, such as Jürgen Habermas, called for a referendum to be held on it and on the constitutional framework governing it.[3] The two professors who had been nominated to the FCC by the SPD, Dieter Grimm and Ernst-Wolfgang Böckenförde, took to the columns of *Der Spiegel* to call for a reunification in stages, which would initially retain two distinct constitutional frameworks for each of the German states.[4] Other jurists highlighted the opportunity to give the "constituent power," that is, the people, the right to express their view on a new constitutional framework.

The arguments in favor of this latter option went on for some time.[5] At a symbolic conference organized in Berlin in April 1990, the *Staatsrechtslehrer* demonstrated their unity on the matter by lending their almost unanimous support to reunification under the aegis of the Basic Law.[6] Josef Isensee was a rapporteur at the event. Those few discordant voices within the profession only expressed their opinion in a modest petition published in *Kritische Justiz*.[7]

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1. Josef Isensee, "Wenn im Streit über den Weg das Ziel verlorengeht," *FAZ*, April 12, 1990; Hans-Hugo Klein, "'. . . die Einheit und Freiheit Deutschlands zu vollenden.' Geltung und Bestand des Wiedervereinigungsgebots," in *Verantwortlichkeit und Freiheit. Die Verfassung als Wertbestimmte Ordnung (Festschrift für Willi Geiger zum 80. Geburtstag)*, ed. Hans-Joachim Faller *et al.* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1989), 132-44.
2. Helmut Quaritsch, quoted in *Deutschlands aktuelle Verfassunglage, ed.* Josef Isensee *et al.* (Berlin: De Gruyter, 1991), 129.
3. Jürgen Habermas, "L'identité des Allemands, une fois encore," reproduced in Habermas, *Écrits politiques. Culture. Droit. Histoire* (Paris: Éditions du Cerf, 1990), 245-63, here 255.
4. Ernst-Wolfgang Böckenförde and Dieter Grimm, "Nachdenken über Deutschland," *Der Spiegel* 10 (1990): 72-77.
5. Jürgen Seifert "Verfahrensregeln für Streitkultur: Ein Plädoyer für eine Verfassungsdebatte," *Kritische Justiz* 23, no. 3 (1990): 362-68; Ulrich K. Preuss, "Der Entwurf der Arbeitsgruppe 'Neue Verfassung der DDR' des Runden Tisches für eine Verfassung der Deutschen Demokratischen Republik," *Kritische Justiz* 23, no. 2 (1990): 222-25.
6. Isensee *et al., Deutschlands aktuelle Verfassunglage.*
7. Various, "Öffentliche Aufrufe für eine verfassunggebende Versammlung," *Kritische Justiz* 23, no. 2 (1990): 263-65.

The moment of reunification, which was sealed between the two German states on November 10, 1990, demonstrated *Staatsrecht*'s capacity to bring a constitutional meaning to political events. Yet reunification also brought about a noticeable inversion to statist discourse through opposition to a people's referendum: the Basic Law became the guarantee of the unity of the German state, which had to be preserved in the face of attempts by reformers or the agitators of political minorities to distort it.

Maastricht: A matter of state

In acknowledging this inversion, we can understand how the controversy around the signing of the Maastricht Treaty and the project to create a European Union took shape. According to the dogmatic interpretation expressed in the *Handbuch in particular*, the pre-constitutional nature of German statehood manifested itself in the Basic Law through the protection accorded to the "essential characteristics" of the law under Article 79, paragraph 3.[1] The judge Paul Kirchhof, who took on the role of dealing with European questions, as well as having authored doctrinal material (see Table 1), set out the consequences of this protection at a conference marking the anniversary of the journal *Europarecht* in 1990. While rejoicing in response to the end of any "doubts over German statehood"[2] and maintaining that "the abstraction of a statehood reduced to the constitution [constitutional patriotism] has become superfluous,"[3] he indicated that the creation of the EU could lead to a process of "de-statification" (*Entstaatlichung*) in the FRG.

While they did not represent the FCC's official view, Kirchhof's various interventions prior to the signing of the treaty raised a number of contentious issues that had been widely anticipated by the German government. After the European heads of state and government had signed the treaty on February 7, 1992, Helmut Kohl's administration steered a constitutional amendment to Article 23 that explicitly mentioned the preservation of the *Grundsätze* (essential characteristics) of the Basic Law within the framework of European integration, along with the law assenting to the treaty, through the two chambers of Parliament.[4]

Kirchhof's views may be compared with those of the experts enlisted by those opposing the treaty—the *Staatsrechtslehrer* Dietrich Murswiek, Karl-Albrecht Schachtschneider, and Hans-Heinrich Rupp.[5] Aside from the diversity of the political viewpoints that they represented,[6]—proceedings in court came to highlight the similarities among their strategies, which, as with the arguments proposed by Murswiek, were based on a distinction between *constituent power* and *constituted power*. The plaintiffs argued that the adoption of the treaty by a two-thirds majority in both chambers of the German legislature, as required in order

1. Jürgen Schwarze, "La ratification du traité de Maastricht en Allemagne, l'arrêt de la cour constitutionnelle de Karlsruhe," *Revue du Marché commun et de l'Union européenne* 378 (1994): 293-303.
2. Paul Kirchhof, "Deutsches Verfassungsrecht und Europaisches Gemeinschaftsrecht," in *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht* 1, ed. Paul Kirchhof and Claus-Dieter Ehlermann (1991): 11-26, here 12.
3. Kirchhof, "Deutsches Verfassungsrecht und Europaisches Gemeinschaftsrecht," 13.
4. Schwarze, "La ratification du traité de Maastricht en Allemagne."
5. The first complaint to be lodged against the Maastricht treaty was that of the Green MEPs, on December 17, 1992, with those of Manfred Brunner and Hans A. Stöcker lodged on December 18. See Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 77, 102, and 613.
6. Manfred Brunner, former chief of staff of European Commissioner Martin Bangemann, and Hans Stöcker both adopted positions well to the right of those taken by the Green MEPs.

to amend the Basic Law, went beyond the powers to amend the Basic Law that had been granted to the Parliament, in that it "effectively grant[ed] Germany a new constitution but without declaring it as such."[1] The only recourse against this "silent coup d'état," as deprecated by *Der Spiegel* columnist Rolf Lamprecht, would be to hold a popular referendum.

The adoption of these positions could only be understood in relation to those opposing them within the world of doctrine. Those academics who defended them in offering their expertise to political causes appeared, in fact, to be more militant users of legal discourse. It may be said, in a sense, that this recourse to *constituent power*—that is, to the people—was the preserve of these prevailed-upon academics, precisely because of the proximity that they maintained to minority political causes.

From doctrine to the court: Integration with a scholarly view of Europe

In contrast, the entire strategy of those who were able to define the legitimate method of interpreting the constitutional text for their own benefit consisted of keeping their distance from these non-academic causes. This act of exclusion was liable to engender academic controversy by replicating the problem posed by European integration within categories that had been approved by the community of jurists. In an interview with *Die Zeit,* Helmut Simon, a former constitutional judge, stated, "We are not clear about the character of the international law [*Völkerrecht*] or domestic public law [*Staatsrecht*] of this new Europe."[2] As was explained, however, by Ulrich Everling, a former judge at the European Court of Justice, the ability to describe the EU under these categories conditioned the capacity to consider the phenomenon in a legal light:

> [The EU] is not, however, a state, or therefore a federal state–lacking as it does the traditional attributes of a people, a territory, or public authorities, nor does it have a conscience common to its citizens or a general competence. Yet it is still [...] more than a traditional international organization.[3]

In concluding the public hearing for constitutional complaints, Paul Kirchhof, the judge-rapporteur for the proceedings, insisted on the need to "develop the discipline's imagination."[4] This call to mobilize the science of the law was echoed by the *Staatsrechtslehrer* gathered at the VDStrL conference in the autumn of 1993, a few days before the Maastricht decision: "If today we are discussing whether the state is already on shaky ground, and is hence liable to slip and lose its statehood, then it must be time to get a clear understanding of what needs to happen."[5] There were two opposing strategies for how to achieve this. The first of these entailed identifying the constituent elements of a heterodox strategy whereby this demand was interpreted as an injunction to reform the traditional categories. One contributor at the conference declared that "the narrow categories of constitutional law and its concepts have become useless for understanding these processes [...]. We must stop dealing with Europe through the concepts of state, federal state, or alliance of states."[6]

1. Quoted by Rolf Lamprecht in "Staatsstreich von oben," *Der Spiegel* 51 (1992): 32.
2. Helmut Simon, quoted in Hanno Künnert, "Wir wollen kein undemokratisches Europa," *Die Zeit*, June 26, 1992.
3. Ulrich Everling, "Zurück zum Staatenverein," *FAZ*, October 15, 1992.
4. Quoted in Heribert Prantl, "Finis Germaniae oder das Ende Europas?," *Süddeutsche Zeitung*, October 9, 1993.
5. Eckart Klein, quoted in Meinhard Hilf *et al., eds., Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?* (Berlin: De Gruyter, 1994), 113.
6. Klein, quoted in Hilf *et al., Europäische Union,* 95-96.

The contrasting, orthodox strategy was to stick to the established alternatives, in particular to the genuinely academic dichotomy between the concepts of *Bundesstaat* (federal state) and *Staatenbund* (alliance of states) in reference to the European Union:

> The so-called professionals of Europe want a federal state, but they do not yet have the courage to express that clearly. Someone said that the categories of alliance of states and federal state were out of date [...] I think that's wrong and that not to take them into account is European navel-gazing.[1]

The expression "professionals of Europe" is used here by Doehring with a pejorative connotation to highlight the self-serving nature of European law experts.

Called upon to "build their own legitimacy"[2] in describing the European project, these legal experts hence restoked the tensions between the definitional poles of constitutional law and state law. The legal discourse around state law clearly had to be built up from within its own categories, bridging the strictly academic gulf between a federal state and an alliance of states.

Issuing a ruling; building a doctrine

On October 12, 1993, Ernst Gottfried Mahrenholz, vice-president of the Second Senate of the FCC, issued the court's opinion. Bearing the signatures of the eight judges comprising the senate, among whom were three former federal magistrates and the three *Staatsrechtslehrer,* Hans-Hugo Klein, Ernst-Wolfgang Böckenförde, and Paul Kirchhof, it authorized the president of the republic to promulgate the act of assent to the Maastricht Treaty, which it declared to be in compliance with the Basic Law. The grounds for the judgment reflected the predictable and circumscribed nature of the new powers granted to the EU. It was said, in particular, that the EU's creation should not automatically lead to a transition toward a federal state, as some of the plaintiffs had argued. The creation of a true political union, like the building of a united German polity, could not take place without a new political decision, which, as advised in the ruling, would have to remain "in the context of what is constitutionally permissible."[3]

It was the issue of the "democratic principle" guaranteed under the Basic Law that lay at the center of the judgment. In the same ruling, the judges effectively recognized that one of the plaintiffs, Manfred Brunner, had been justified in opposing the act of assent in that it might call into question his right to democratic participation and to take part in collective decision-making within the national democratic framework through elections to the *Bundestag*. On this point, the judges affirmed their exclusive competence to define the conditions for democratic participation. In accordance with the prevailing view of the doctrine, as expressed in the controversies over reunification and in the contributions contained in the *Handbuch des Staatsrechts*, such participation could only take place among a *Staatsvolk*:

1. Klein, quoted in Hilf *et al., Europäische Union,* 134. On the history of this distinction, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2: *Staatsrechtslehre und Verwaltungswissenschaft, 1800-1914* (Munich: Beck, 1992), 365-68.
2. Dominique Memmi, "'Demande de droit' ou 'vide juridique'? Les juristes aux prises avec la construction de leur propre légitimité," in *Les usages sociaux du droit, ed.* Danièle Lochak *et al.* (Paris: PUF, 1989), 13-31.
3. Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 794.

> The states need sufficiently important spheres of activity of their own in which the peoples of each [state] *[das jeweilige Staatsvolk]* can develop and articulate in a process of political will-formation which it legitimates and controls, in order to give legal expression to what-relatively homogeneously-binds the people, spiritually, socially, and politically together.[1]

As various commentators have noted, this is a key passage in that it acknowledges the community of interpreters of the law. On the one hand, the conceptual vocabulary of homogeneity indeed refers to the theories of Ernst-Wolfgang Böckenförde, who signed the decision, regarding the "democratic principle" of the Basic Law.[2] On the other hand, although this homogeneity may recall the words used by Carl Schmitt, the judgment attributes it to another jurist, Hermann Heller, who was an opponent of Schmitt's. It is hard to imagine, therefore, that this reference appeared by chance—although it need not be seen as a deliberate intention to smuggle in a Schmittian concept. What is more, Heller's usage seemed to draw on references from the doctrine in order to demonstrate their interchangeable—and hence anonymous—nature.

A further formal reference is made to Hermann Mosler's note on "transfers of sovereignty" in volume 7 of the *Handbuch*.[3] This confirms that the treaties concluded within the scope of the EU retain their nature of international law and that these transfers must satisfy a certain number of formal conditions of predictability. As we have seen, the limited nature of these transfers of competence prevents the EU from evolving to become a federal state without a political decision being taken for it to do so.

This analysis in terms of legal instruments is accompanied by an objection of principle, however: in the absence of a European people, the EU cannot constitute a state. The term *Staatsvolk* does not just refer to a legal community of citizens; it also designates a community that existed prior to popular participation in politics. In taking up this definition, which affirmed a naturalistic vision of the political community that could only be based on "pre-legal" elements, the judgment sealed the court's approval of the prevailing view within the doctrine: "If it is not to remain as merely a formal principle of accountability, democracy is dependent on the existence of certain pre-legal conditions."[4]

The judges thus invalidated the constructivist option, which had been defended, in particular, by the First Senate judge Dieter Grimm, from the perspective of *Verfassungsrecht*, according to which the constituent process could itself form the basis for political solidarity.[5]

In the end, it was by using genuinely academic terms to categorize the EU that the judges set out a point of view on Europe. Some of their formulations, such as that which qualified the EU as a *Staatenverbund*, demonstrated all the creative power of which legal language was capable, through the simple use of neologisms. Without being defined a single time, this neologism, as offered by Paul Kirchhof, was presented as an alternative to the competing

1. Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 778.
2. Ernst-Wolfgang Böckenförde, "Demokratie als Verfassungsprinzip," in *HBDStr*, vol. 1, ed. Josef Isensee and Paul Kirchhof (1987), 887-952.
3. Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 779.
4. Ibid., 777.
5. This was regardless of Dieter Grimm's skepticism about the chances of such a process at the European level, which he notably expressed at the VDStrL conference in 1993. See also Thorsten Thiel, "Braucht Europa eine Verfassung? Einige Anmerkungen zur Grimm-Habermas-Debatte," in *Demokratie, Recht und Legitimität im 21. Jahrhundert*, ed. Mandana Biegi *et al.* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2008), 163-79.

Bundesstaat and *Staatenbund*. The Maastricht decision may hence be viewed as a collective work, whose strength lies in the collective and anonymous authority of the community of interpreters of the Basic Law.

Conclusion

I have shown, in various steps, how the Maastricht decision cannot be explained purely as a result of struggles waged by the law, with jurists playing intermediary roles for political agents from outside the legal sphere; it was also the product of battles over the law among constitutional experts. The competition between several principles of constitutional interpretation throws into sharp focus a decision that, far from being the product of some disembodied tradition, entailed a proper piece of applied work by the professionals of the doctrine.

One aspect of this work consisted of placing to one side or even dismissing alternative points of view—whether academic or otherwise. The comparative research on constitutional courts would undoubtedly benefit from further investigation of the different social characteristics of constitutional judges that may or may not provide them with a certain degree of autonomy from political actors, in particular by refusing to abandon the field of strictly legal reasoning.[1] The Karlsruhe court is undoubtedly a different case in this regard from other constitutional courts. The strict division of labor in shaping the law, between legal theorists (academic jurists) on the one hand and practitioners on the other is reflected in the magisterium vested in the *doctrine* on the formulation and wording of court decisions. In other words, a comparative study could show how morphological differences in national "legal fields" influence the form and functioning of constitutional courts.

A second potential line of research could examine the use of the law by different political actors, whether individuals or opposition parties. In order to make an analysis of the constitutional process from the angle of political sociology, it would be necessary to go beyond Yves Dezalay's assertion that doctrine is "a political and professional battlefield"[2] in order to show that the struggles that are played out on the battleground of doctrine are largely definitional of the relationship of political actors with the law. One might say, on this point, that the degree to which political actors have recourse to the law (referred to by a whole tradition of research as the "judiciarization of politics")[3] equally depends on the forms taken by this struggle among legal experts.

From the perspective of a political history of forms of knowledge of Europe, the Karlsruhe judges' decision relates to a mode of European integration that, paradoxically, renders it unthinkable without the attributes of a state. Without the instruments and, in particular, the legal forms of a state, the EU cannot be the subject of firm legal understanding, since all such understanding is based on the existence of a specific state with its accompanying legal instruments, such as a constitution. This article reminds us that this history must also be a history of the various forms of (voluntary) ignorance of Europe.[4]

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1. On this subject, see Christian Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration," *European Law Journal* 2, no. 2 (1996): 105-35.
2. Yves Dezalay, "La production doctrinale comme objet et terrain de luttes politiques et professionnelles," in Poirmeur and Bernard, *La doctrine juridique*, 231-39.
3. Jacques Commaille, Laurence Dumoulin, and Cécile Robert, eds., *La juridicisation du politique* (Paris : LGDJ, 2000).
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