How Courts Decide Federalism Disputes: Legal Merit, Attitudinal Effects, and Strategic Considerations in the Jurisprudence of the Belgian Constitutional Court

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An urgent question in contemporary federal theory is how institutions impact upon the centralization grade of multi-tiered systems. This article focuses on constitutional courts as one of such institutions. It constructs a classification for measuring a court's position in federalism disputes and tests hypotheses about what determines variation across decisions within one court. The case study is Belgium, as a model of contemporary fragmenting systems. We find that if the defending party is the federal government, the probability of a centralist outcome increases compared to when a sub-state government is the defendant, and vice versa. Evidence suggests that legal merit plays a role to this effect. We further find that each state reform decreases the probability of a centralist outcome. This appears to be a consequence of strategic considerations. We finally find suggestive evidence that the organization of the court does not fully succeed in playing down judges' ideological preferences.

An urgent question in contemporary federal theory is how institutions impact upon the centralization grade of multi-tiered systems. Unlike traditional "coming together" federations, decentralizing dynamics of twenty-first century types of multi-tiered systems produce fundamental instability. This makes the balance between autonomy and integrity, inherent to federalism (Friedrich 1968), particularly delicate. Efforts to either secure unity or protect diversity, may stimulate decentralization dynamics to the point of secession. Insight in how federal institutions impact on these dynamics is crucial for securing the optimal balance between autonomy and integrity through constitutional engineering. This article focuses on constitutional courts as one of such institutions.

Scholars claim that courts impact the development of federalism (Hueglin and Fenna 2006) and that they do so in a centralist way, shifting powers from the

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sub-state to the federal government (Bzdera 1993; Shapiro 1981). Only a small number of courts were labeled as "non-centralist", including apex courts in Belgium, Canada, Germany, Nigeria, and Spain (Popelier 2017). There is, however, no generally applied method for measuring whether courts take a centralist stance in their decisions, or which factors influence these decisions.

This article aims to construct a classification for measuring the position of courts in federalism disputes, applicable to all federations. Next, it tests hypotheses about what determines variation across decisions within one court. The Belgian Constitutional Court (BCC) is used as a case study. Belgium being a multinational fragmenting federation, the stakes of finding an optimal balance are higher than in more stabilized "coming together" federations.

Utilizing a dataset of 621 federalism disputes adjudicated by the BCC, we provide a comprehensive assessment of factors affecting the probability of a centralist court decision. We construct a measure for identifying (predominantly) centralist, balanced and (predominantly) non-centralist decisions, enabling us to assess the position of courts in federalism disputes. Having applied this classification to the BCC, we take a more comprehensive approach than is usual to explain this Court's behavior, combining the legal, attitudinal, and strategic model.

We find some suggestive evidence of the legal model through a preference for a declaration of constitutionality, although mitigated when the case constitutes a political conflict. We further find evidence of the strategic model: a lower degree of centralist constitutional state structure decreases the probability of a centralist outcome, and the Court takes a more centralist approach in salient cases. Finally, in line with previous research, we find some suggestive evidence of the attitudinal model. Although the model is difficult to test because of per curiam decisions, we do find that a majority of Christian democratic (socialist) judges on the bench increases (decreases) the probability of an entirely centralist decision. We only find evidence of an effect of president and reporter party affiliation specifically when we restrict our sample to cases with high political stakes.

The article is structured as follows. A first section explains our theoretical framework in the light of the existing literature. We then discuss the Belgian political and institutional background. Next, we present the BCC's position in federalism disputes. The following section articulates our hypotheses to explain this position. We subsequently introduce the data and our variables, lay out the empirical approach and present the results, before discussing our conclusions.

Literature Review

The Definition of Federalism Disputes

While most scholars agree that courts take a centralist position in federalism disputes, there is no common methodology to measure this.

The disagreement starts with the definition of federalism disputes. Generally, scholars are interested to know whether the Court is deferential or not toward sub-state action, in itself or compared to its behavior toward the federal government. This encompasses three categories of cases: allocation of power disputes, review of sub-state acts, and review of federal acts (Dinan 1999). Ultimately, these studies reflect upon the capacity of the court to restrain government power, which the U.S. Supreme Court seems to do more readily regarding sub-states rather than the federal government (Eskridge and Ferejohn 1994; Howard and Segal 2004). Others define federalism as the system that upholds the division of powers between sub-state and federal governments (BaybeckArlota and Garoupa 2014; Dalla Pellegrina and Garoupa 2013; Scott 2008). They confine the selection to allocation of power disputes, sometimes restricted to a specific sub-set (e.g., Baybeck and Lowry 2000; Eskridge and Ferejohn 1994), a limited time period (Collins 2007; Scott 2008), or a specific type of lawsuit (Dalla Pellegrina et al. 2017). In divided societies, where federalism is a device for managing multinational conflict, disputes over any issue that divides national groups are federalism related. However, it is difficult to identify such cases, and impossible to squeeze them into a predetermined model that can be used in any federal country.

We use allocation of powers disputes as a proxy for federalism-related issues, because they "define the very structure of the federal system" (Schertzer 2016), are easily identifiable in any jurisdiction, and challenge the Court to take position between the federal government and sub-states. In this approach, each case outcome can be classified as centralist or non-centralist depending on whether the Court considers a matter a federal or sub-state power. This is the usual classification in empirical scholarship (Cross and Tiller 2000; Dalla Pellegrina and Garoupa 2013), but we present a more nuanced classification, to include partial or modulated invalidations, and we draw a more complete picture by taking pleas as units of analysis.

Models for Explaining the Behavior of Judges and Courts

While scholars are mostly interested in the influence of political preferences and focus on one attribute of decision making, others include a wider range of factors (Collins 2007), and only few test legal merit (Muttart 2007; Scott 2008; Segal and Spaeth 2002). Scholars point out that federalism concerns are mainly used to support policy preferences (Cross and Tiller 2000), but more recently scholars have emphasized the weight of doctrinal concepts of federalism (Muttart 2007; Scott 2008). In this article, we follow Scott (2008) in explaining judicial behavior in federalism issues by a combination of attitudinal and extra-attitudinal factors. However, unlike Scott, we do not give a normative account of how "federalist" judges should behave.

In the legal model, the use of legal sources and interpretation methods explains legal outcomes. In the attitudinal model, judges act according to their ideological preferences. According to the strategic model, judges seek to maximize the effectiveness and implementation of their decisions by anticipating and adapting to the potential reactions of political actors, other courts, litigants, and the general public (Vanberg 2005). Legal scholars readily assume that judgments are based on legal merit. Judges are trained to perform legal analyses, their decisions are scrutinized by legal communities, and the legitimacy of the court depends on the legal correctness of its reasoning and the predictability of its case law. This is especially important for constitutional courts that invalidate acts voted by representative parliaments: reliance on legal-technical expertise helps courts shape their image as neutral arbitrators rather than political actors. Legal analysis, however, is not a matter of pure science, with only one mechanically drawn and legally correct answer to each problem. Instead, different interpretation methods can lead to different outcomes. This also applies to federalism disputes. For example, the BCC had to decide whether the ban on tobacco advertisements was sub-state or federal competence. Plain text interpretation pointed to the sub-states, whereas original intent, chosen by the Court as method of interpretation, favored the federal government (BCC Nos 6/92, 102/99 and 36/2001). The key question is: what drives judges to choose one interpretation over the other? This choice can be based on legal grounds, for example, path dependency, the combination of interpretation methods (Fallon 1987), or adherence to supranational courts, but also on attitudinal or strategical motives.

Most empirical scholars focus on non-legal factors to explain judicial outcomes. Legal merit is considered to be ruled out as soon as non-legal factors are identified as explanatory factors (Garoupa et al. 2011). This burdens the legal model with an "unreasonably high standard" (Scott 2008). Conversely, one could argue that evidence for non-legal factors cannot rule out legal motives, unless additional evidence shows that decisions do not (also) rely on legal considerations (Gillman 2001). Indeed, in reality, decisions are often based on a mixture of law and policy. What makes these motives difficult to distinguish, is that what originally was a policy consideration, becomes a legal consideration once it has become a precedent or established case law (Muttart 2007).

Empirical scholars have argued that legal reasoning only serves "to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process" (Segal and Spaeth 2002). This blunt belief was also contested (Cross and Tiller 2000). Legal merit plays an important role, because it limits the number of legally possible outcomes: legal reasoning cannot be used to justify any preferred outcome. Otherwise, "constitutional amendment and legislative attempts to override court rulings would be pointless exercises" (Dyèvre 2010).

Scholars usually examine whether judges refer to precedent, text, or original intent irrespective of the outcome, or only to confirm their policy preferences. Precedents, however, do not apply in civil law jurisdictions, and constitutional courts use a more complex interpretation toolbox than text and original intent alone. We therefore look for other variables to measure legal merit. The legal technique for allocating powers is an option: We expect that the probability of a centralized decision increases with the importance of concurrent powers because they usually imply a priority rule in favor of the central government. However, this is difficult to measure in Belgium, because exclusivity has been the main device throughout the federalization process. Instead, we introduce other proxies to test legal merit further in this article.

Next, we construct hypotheses under the attitudinal model. This has proven to be an important factor to explain the U.S. Supreme Court's behavior (Cross and Tiller 2000). In contrast, the design and functioning of European-style constitutional courts are considered to guarantee political neutrality (Ferejohn and Pasquino 2004). Emerging scholarship reveals that political preferences influence their behavior as well, but generally not as strong as in the United States (Arlota and Garoupa 2014; Dalla Pellegrina and Garoupa 2013; Dalla Pellegrina et al. 2017; Garoupa et al. 2011; Magalhaes 2003).

Lastly, we construct hypotheses under the strategic model, which has proven useful to explain the BCC's general behavior (De Jaegere 2017).

Empirical Studies of the Belgian Constitutional Court

Our article is part of the literature that uses econometric models to explain judicial behavior. Although extensively researched in the U.S. context, European studies remain scarce. Particularly, the BCC has been understudied, although its multinational fragmenting features make it an interesting case study. Two important exceptions are Dalla Pellegrina et al. (2017) and De Jaegere (2017).

The first examined whether the likelihood of a Petitioner succeeding is influenced by the judges on the panel being affiliated with the Petitioner's coalition. Like ours, this article tests the existence of the attitudinal model, although on a different outcome. The authors find evidence that when judges (and particularly the President) are affiliated with the Petitioner's coalition, the likelihood of success of the Petitioner goes up. In this article, we advance the existing literature by looking at a different outcome. We are not studying the determinants of Petitioner success, but rather the court decision being centralist or decentralist. Therefore, our sample is necessarily different: we include all federal-sub-state disputes (including petitions by private actors and preliminary questions). As such, we do not limit the sample to annulment judgments petitioned by government parties, and exclude sub-state-sub-state disputes.

De Jaegere (2017) analyzed the entire population of BCC judgments until 2015 to test the Court's deliberative performance. The study reveals that the Court finds more violations in salient cases, but acts more prudently by modulating its decision and by better reasoning and citing international case law and scientific studies. We adopt the indicators used to identify salient cases, which is a more sophisticated method than the ones usually employed (see e.g., Collins 2007).

Political and Institutional Background

Belgium evolved from a unitary state, established in 1830, to a dyadic federation with confederal features. Federalism was a device for dealing with tensions between two major language groups, Dutch-speaking Flemings and French-speaking Walloons, which arose out of cleavages in ideological preferences and socioeconomic status (Popelier and Lemmens 2015). This resulted in a complex institutional framework with two types of overlapping sub-entities. Three Communities were created in response to the Flemings' demand for cultural autonomy, and have power over education, culture, use of language and "person-related matters". Three Regions were constructed following the Walloons' demand for economic autonomy and have competences in the fields of economy, energy, housing, and environment. Shared competences are the exception: competences are mostly allocated on the basis of exclusivity to ensure autonomy and equality of the sub-states toward the federal authority.

Nevertheless, Belgian federalism is in fact dyadic, revolving around two major linguistic communities (Popelier and Lemmens 2015). For example, the constitution requires linguistic parity in the composition of the federal government. Moreover, the regionalization of political parties and the absence of federal parties articulating federal interests have reinforced fragmenting dynamics (Verleden 2009). In fragile, divided countries such as Belgium, constitutional courts are deliberately assigned the function of arbitrating salient inter-community conflicts in order to secure stability (Graziadei 2016). This puts pressure on the BCC to protect stability and consensus between the language groups.

The BCC was established in the 1980s as a result of the federalization process. Initially called the Court of Arbitration, it pronounced its first judgment on April 5, 1985. At first, it was a one-issue court, its only mandate being the resolution of disputes over the allocation of powers between the federal government and the sub-states. Gradually, it transformed into a fundamental rights court. Today, allocation of power disputes account for 15 percent of the Court's final judgments on the merits.[1]

Only federal and sub-state statutes can be challenged before the BCC. Secondary legislation is reviewed by ordinary and administrative courts. Cases can be brought before the BCC through annulation requests or preliminary proceedings. Any person with an interest can file an annulation request within six months after

publication of the act; governments can do so without demonstrating a specific interest. Moreover, any court can refer a preliminary question to the BCC. If the Court declares that an act is unconstitutional, the referring court cannot apply that act in the dispute before it.

To secure acceptance of the Court's judgments in both language groups, the legislator has taken precautions to reduce the effect of attitudinal factors wherever possible. The main guaranties lie in the composition of the Court and collegial decision-making. The Court is composed of twelve judges and characterized by double parity. Linguistic parity combined with collegial decision-making and the absence of dissenting opinions is essential to ensure that neither major language group perceives the Court's judgments as partisan (Graziadei 2016). Professional parity means that half of the judges in each language group have legal backgrounds, whereas the other half have political backgrounds, having been members of federal or sub-state parliaments for at least five years (Art. 34 Law Const. Court).

Judges are selected by a two-thirds majority in, alternately, the House and the Senate and appointed by Royal Order (Article 32 Law Const. Court). In practice, political parties select judges according to a rotation plan within each language group, based on the proportional D'Hondt system (Bossuyt 2011; Graziadei 2016). As a result, the political ideologies represented in the Court balance each other out. Two presidents are appointed, one from each language group. During each case, two judges, one from each language group, are appointed as reporters to prepare the bench deliberations. They are appointed randomly, on the basis of a list of all judges in each language group (Article 59 and 68 Law Const. Court). Cases are decided in chambers of seven judges or plenary sessions of ten or twelve judges. As a rule, cases are decided by the regular bench but are referred to the full bench at judges' request (Article 56 Law Const. Court). Referral is optional when requested by one judge and obligatory if requested by two. In such cases, the judges believe that the case is important enough to require a decision from a larger panel, which includes more different perspectives. Linguistic parity is always guaranteed, with the remaining judge in a chamber of seven coming alternately from either the Dutch- or French-speaking language group. In plenary sessions, the tie-breaking vote rotates between the Dutch- and French-speaking presidents on a yearly basis. The knowledge that majority and tie-breaking positions shift every year encourages the reaching of compromises (Graziadei 2016).

The Court's Position

Measuring Centralization

A classification for measuring the level of centralization was constructed on the basis of the case outcome. For each plea, we coded the extent to which the Court granted a competence to either the federal government or the sub-state.

We coded the outcomes as follows:

- In Category 1, the outcome was entirely decentralist. Either a federal act was invalidated or a sub-state act was considered constitutional in so far as it was challenged in the plea.
- In Category 2, the outcome was predominantly decentralist, but with some nuance. If (all or part of) a federal act was challenged, the Court invalidated most of it, but upheld a smaller part. If a sub-state act was challenged, the Court deemed it to be mostly constitutional, but invalidated a small part.
- In Category 3, the outcome was balanced. The sub-state or federal act was partly invalidated and partly upheld, in more or less equal proportions; or the Court invalidated the act when interpreted in one way, but considered it constitutional when interpreted in another way.
- In Category 4, the outcome was predominantly centralist, but with some nuance. If (all or part of) a sub-state act was challenged, the Court invalidated most of it, but upheld a smaller part. If a federal act was challenged, the Court deemed it to be mostly constitutional, but invalidated a small part.
- In Category 5, the outcome was entirely centralist. Either a sub-state act was invalidated or a federal act was considered constitutional.

Elsewhere, judgments are classified as pro sub-state as soon as one article of a federal act was judged to violate the constitution (Dalla Pellegrina and Garoupa 2013). However, if the Court refutes the majority of claims, upholding the entire act with the exception of some details in one single provision, the classification of the case outcome as decentralist misrepresents the Court's position. Therefore, we use pleas rather than judgments as units of analysis. Also, instead of the usual binary classification (Arlota and Garoupa 2014), Categories 2 to 4 enable the classification of modulated judgments, typical for European-style constitutional courts.

What exactly falls under these categories, depends on the particularities of each jurisdiction. In Belgium, we discern three groups. In the first group, the Court invalidates the act as interpreted by the referring court, but tries to save it by suggesting another interpretation in conformity with the constitution (e.g., BCC Nos 46/1988; 73/2016). The final decision is left to the referring court. For the second group, we compare what the Court invalidates with what was actually claimed. For example, in case No. 158/2013, the Court refuted the petitioners' claim that a federal act could not contain shipping traffic safety measures, and only invalidated part of one provision, that gave the federal Executive the power to delineate harbor borders. Compared to what was claimed, only a small detail was invalidated, so the judgment was classified under category 2 (predominantly centralist). The last group contains judgments that invalidate acts only "in so far as". For example, in judgment No 112/2008, a penalty clause in the Flemish Anti-

Table 1. Level of centralization of court outcomes

Level of centralization	Freq.	Percent
Centralist	266	42.83
Predominantly centralist	19	3.06
Balanced	20	3.22
Predominantly decentralist	15	2.42
Decentralist	301	48.47
Total	621	100.00

doping Code was considered unconstitutional, but only in so far as it could be interpreted as also referring to the possession of drugs outside the scope of sport activities. Under the disguise of invalidation, the Court is actually providing a constitution-conformable interpretation. It is therefore classified as category 4: part of the Act is invalidated, but not in a way that really affects the sub-state. Admittedly, the classification requires some interpretation, but this remains within the normal skills of a trained jurist and is essential to give a more realistic picture.

The Belgian Constitutional Court's Level of Centralization

Based on doctrinal appraisals, we expect the BCC to take a balanced position (Peeters and Mosselmans 2017).

Table 1 shows that 49 percent of the plea outcomes in our data set were decentralist, and 43 percent were centralist. Another 3 percent were predominantly centralist, while 2 percent were predominantly decentralist. Overall, the Court seems to have been balanced in the period 1985–2016, though with a slightly greater tendency to pronounce decentralist decisions. Individual decisions, on the other hand, are rarely balanced (3 percent of the outcomes). In most cases, the Court takes an extreme position: entirely centralist or entirely decentralist.

Figure 1 shows the percentages of (predominantly) centralist, (predominantly) decentralist, and balanced decisions in each year of our observation window. Although some caution is advised because of the small number of decisions per year (21 on average), the figure does show interesting evolutions: a decreasing trend in the portion of (predominantly) centralist decisions from 1985 to 2000, followed by an increasing trend. While the Court's decisions were mostly decentralist (49 percent of the outcomes) across the entire time span, in recent years there has been a trend toward a more centralist stance, with centralist outcomes reached in the majority of cases in the years 2013–2016.

In most years, none of the decisions were balanced. Notably, it seems that the Court has resorted to balanced decisions more often in the last 10 years, though this is still very rare.

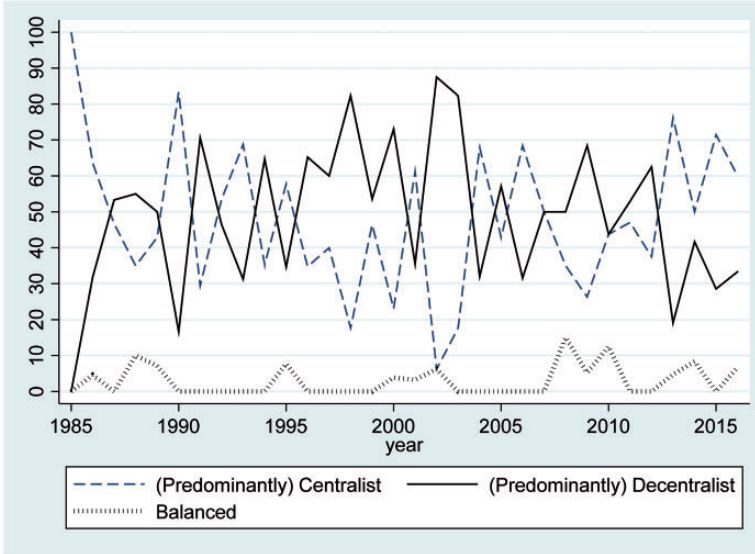

Figure 1 Evolution of percentage of centralist, decentralist, and balanced decisions.

The figure confirms the finding that courts in multinational states tend to be more balanced (Popelier 2017). The question, then, is how we can explain centralist tendencies in the Court's jurisprudence.

Theory and Hypotheses

The Legal Model

To measure legal merit, we use two proxies.

We first use the degree of centralization in the Belgian constitutional framework. The BCC is a guardian of the Constitution. Hence, we can expect that the more (de)centralized the constitutional framework is, the more legal steppingstones can be found for determining a (de)centralist outcome. A non-centralist stance then merely reflects a decentralist constitutional arrangement. In Belgium, each state reform has increased the degree of decentralization, so we hypothesize that, all else being equal, each state reform decreases the probability of a centralist outcome in federalism disputes (Hypothesis 1).

The hypothesis can also be explained by non-legal motives. Judges are loyal to the reformist appointers (evidence of the attitudinal model) or want to avoid creating a fuss by going against the changed constitutional framework (evidence of the strategic model). This is one of those cases where policy considerations are transformed to law. The Court might be adopting policy preferences of the

reformist majority, or implementing legal principles deriving from a reformed constitutional model.

The second hypothesis revolves around preference for a declaration of constitutionality. This is an explicit and long-standing principle in the jurisprudence of all Belgian courts and a leading guideline in other jurisdictions as well (see already Spanner 1966). Therefore, we expect from a legal perspective that the BCC has a preference for an interpretation that results in the validity of the act before it.

If a federal act is challenged (the federal government is the defending party) and declared constitutional, the outcome favors the federal government and therefore qualifies as centralist. If a sub-state act is challenged (a sub-state government is the defending party) and declared constitutional, the outcome is decentralist. Therefore, we expect that, if the defending party is the federal government, the probability of a centralist outcome is higher than when a sub-state government is the defendant, and vice versa (Hypothesis 2).

The preference for a declaration of constitutionality can also be explained as a strategic device, namely a response to the counter-majoritarian difficulty. This is a much-debated argument against the judicial review of parliamentary acts, claiming that constitutional adjudication is political in nature and should therefore be left to parliament—the best representative of the people's voice—instead of unelected courts (Bickel 1962). Therefore, courts are generally deferential toward Parliament. Constitution-conformable interpretation, however, does not necessarily lead to a status quo for the governing parties. As Ferreras Comella (2003–2004) points out, whether the Court invalidates an Act or not, is of secondary importance to measure judicial activism: more important is in how far the court's interpretation departs from what Parliament wants. For example, in Case No 73/2016, the Court refuted the argument of the Brussels Government that it had the power mandate expropriations in the absence of urgency; instead, it interpreted the Act as not deviating from the urgency requirement.

The hypothesis might still be explained by strategic behavior for another reason. According to the dependency-hypothesis (Vaubel 2009), courts can be expected to go along with the parliamentary majority that controls the judges' reappointment, salaries, and budget (Cross and Tiller 2000). In Belgium, judges are appointed for life, and their salaries, powers, and budget depend upon federal law. Such strategic considerations, therefore, would lead to a centralist outcome no matter who the petitioner is (Shapiro 2003). In contrast, from a legal merit perspective, the preference for upholding the statute should also manifest itself if it concerns a sub-state Parliament (in the same vein Scott 2008).

Further, we control for the mitigating effect of a political conflict between opposing government parties. We expect that judges will be sooner receptive to non-legal considerations when they are called upon to resolve political conflicts. If

the case places federal and sub-state governments in opposing roles, with one challenging the act and the other defending it, there is political disagreement as to which body has competence over the matter. This conflict does not arise if the defending party is the only government actor, or if other governments intervene in support of the defending party. This reveals political agreement as to the constitutionality of the act. Therefore, we hypothesize that the Court's preference for the interpretation that results in the validity of the act (Hypothesis 2) is stronger in the absence of a political conflict. The effect is expected to be smaller when there are two opposing governments (i.e., political conflict).

The Attitudinal Model

Under the attitudinal model, we assume that, while the decision-making is collegial, the president and reporters play a potentially decisive role: the president because of his tie-breaking vote, and the reporters because they write the drafts that structure the deliberations. Therefore, we use president and reporter characteristics to test whether judge characteristics matter.

We hypothesize that political party affiliation of the reporters and the president impacts court outcomes (Hypothesis 3 and Hypothesis 4, respectively). The green and extreme left parties on either side of the language barrier have always taken more pronounced unitary stances. Judge affiliation with these parties is therefore expected to increase the probability of a centralist decision. Flemish-nationalist parties, the Francophone Défi and the former Rassemblement Wallon movement historically take confederalist or even separatist positions. We expect that affiliation with nationalist parties decreases the probability of a centralist decision, all else equal. Liberal, Christian democratic parties and socialist parties cover both centralist and decentralist tendencies and have changed position over time. Therefore, we cannot predict ex ante in which direction affiliation with one of these parties will affect the case outcome.

Additionally, we test the impact of the bench having a majority of liberal, Christian democratic or socialist judges (there was never a majority of green or nationalist judges).

Finally, we analyze the effect of the judge's language group. Flemish presidents[2] should, *ceteris paribus*, take a more decentralist position than French-speaking judges, who we would expect to take a balanced or centralist position (Hypothesis 5). This is based on the fact that Flemish parties are usually the requesting party for new state reforms.

The Strategic Model

Maintaining stability is one possible strategy for enhancing compliance and creating legitimacy in the eyes of the public. As mentioned, this is especially important for the BCC, operating in the delicate context of a divided state. In multinational states,

securing autonomy and diversity can serve as a device for stability, yet only to a certain degree: excessive disintegration can constitute a threat to the country's stability. This might explain why courts in devolving multinational federations are non-centralist but not outspokenly decentralist. Therefore, we expect centralization trends in the Court's jurisprudence to reflect a pursuit of stability.

We operationalize this expectation in two ways. First, we select salient cases, defined as cases on which the court places particular weight. This includes politically salient cases that potentially raise major policy questions as well as legally salient cases that influence the development of the law (De Jaegere 2017). We expect the Court to be more careful and take a more centralist approach when the stakes are higher. Thus, the probability of a centralist outcome in federalism disputes increases, *ceteris paribus*, when the case is salient (Hypothesis 6). Second, we identify politically turbulent periods which might have led the Court to take a more careful and thus centralist approach. More specifically, we identify periods in which the federal executive resigned before the end of his/her term as a proxy for periods of political crisis. Our expectation is that in periods of political instability, the probability of a centralist outcome in federalism disputes increases when other factors remain constant (Hypothesis 7).

Data and Variables

Data

We collected data on all judgments related to federalism disputes pronounced by the BCC between 1985 (the first federalism dispute pronounced) and 2016.

We limited the analysis to judgments with a final decision on the merits of the case. We selected only those judgments in which the Court allocated a competence to the federal government or the sub-state and vice versa, excluding disputes between sub-states, as the latter do not reveal tensions in the power relations between federal and sub-state authorities. This resulted in a sample of 457 judgments. Since the Court sometimes replied to several pleas, we coded them separately, but only insofar they concerned federalism disputes. Different pleas grouped into one response were coded as a single plea. This resulted in a sample of 621 legal pleas. Table 2 describes all variables included in our dataset. Table 3 presents descriptive statistics.

Key Variables of Interest

State reforms (Hypothesis 1)

To test Hypothesis 1, we divided the time span of our data set into periods characterized by a certain level of centralist constitutional state structure. The process that gradually turned Belgium into a federal system with confederal traits,

Table 2. Variable description

Variable name	Description
Dependent variable	
Centralization level	Categorical variable = 1 if entirely decentralist outcome, = 2 if predominantly decentralist outcome, = 3 if balanced outcome, = 4 if predominantly centralist outcome, = 5 if entirely centralist outcome
Party characteristics	
Federal gov defendant	Dummy = 1 if federal government is the defending party
Salience	
Participation	Dummy = 1 if case involved ≥ 5 individuals and/or more than two types of litigants
Full bench	Dummy = 1 if case resolved by full bench (i.e., 10 or 12 judges)
Media	Dummy = 1 if case was covered by the news media
Conflict	
Political conflict	Dummy = 1 if case brings federal and sub-state governments in opposing roles, one challenging and the other defending the act
President characteristics	
Flemish president	Dummy = 1 if president is Dutch speaking
Liberal president	Dummy = 1 if president is from a liberal party
Socialist president	Dummy = 1 if president is from a socialist party
Christian democratic president	Dummy = 1 if president is from Christian democratic party [Reference category]
Reporter characteristics	
≥1 green reporter	Dummy = 1 if at least one of the reporters is from a green party
≥1 liberal reporter	Dummy = 1 if at least one of the reporters is from a liberal party
≥1 socialist reporter	Dummy = 1 if at least one of the reporters is from a socialist party
≥1 nationalist reporter	Dummy = 1 if at least one of the reporters is from a nationalist party
≥1 Christian democratic reporter	Dummy = 1 if at least one of the reporters is from a Christian democratic party [Reference category]
Instability	
Instability	Dummy = 1 if date of judgment is in period of instability

(continued)

Table 2. Continued

Variable name	Description
State reform dummies	
State reform 1	Dummy = 1 if date of request is before 1980 state reform [Reference category]
State reform 2	Dummy = 1 if date of request is before 1988 state reform, but after 1980 state reform
State reform 3	Dummy = 1 if date of request is before 1993 state reform, but after 1988 state reform.
State reform 4	Dummy = 1 if date of request is before 2001 state reform, but after 1993 state reform
State reform 5	Dummy = 1 if date of request is before 2012 state reform, but after 2001 state reform
State reform 6	Dummy = 1 if date of request is after 2012 state reform

can be divided into seven stages: 1830–1970; 1970–1980; 1980–1988; 1988–1993; 1993–2001, 2001–2012 and 2012–present (Popelier and Lemmens 2015).

The BCC pronounced its first judgment in the middle of the third phase. We therefore divided our data set into six periods (table 2), taking into account the five state reforms that occurred after 1985. Our hypothesis was that the Court's jurisprudence exhibited an increasingly decentralist trend with the implementation of every state reform.[3] We used the request date rather than the date of the judgment, because in disputes over the allocation of powers, the Court must apply the rules in force when the act was adopted.

Federal government defendant (Hypothesis 2)

To take into account whether the defendant was a federal or a sub-state government, we constructed a dummy variable. Table 3 shows that in 38 percent of the pleas, the federal government was the defending party.

To determine whether the dispute constituted a political conflict, we used a dummy that equals 1 if at least two government parties opposed each other in the case and 0 where a non-government party and the defendant government were opposed and other government parties did not intervene or only in support of the defendant party. Such a political conflict arose in 50 percent of the cases.

Reporter and president characteristics (Hypotheses 3–5)

First, we control for judge ideological affiliation. Dalla Pellegrina et al. (2017) used a variable indicating the president's and reporters' affiliation with the petitioner's coalition as a measure of judge ideology. This is not useful for our study, since we

Table 3. Summary statistics

Variable	No. obs.	Mean	Std. dev.	Min.	Max.
Dependent variable					
Centralization level	621	2.89	1.92	1	5
Party characteristics					
Federal gov defendant	621	0.38	0.49	0	1
Salience					
Participation	621	0.97	0.16	0	1
Full bench	621	0.48	0.50	0	1
Media	621	0.17	0.38	0	1
Conflict					
Political conflict	621	0.51	0.50	0	1
President characteristics					
Flemish president	621	0.53	0.50	0	1
Liberal president	621	0.37	0.48	0	1
Socialist president	621	0.34	0.47	0	1
Christian democratic president	621	0.29	0.45	0	1
Reporter characteristics					
$\geq$1 green reporter	621	0.16	0.37	0	1
$\geq$1 liberal reporter	621	0.48	0.50	0	1
$\geq$1 socialist reporter	621	0.60	0.49	0	1
$\geq$1 nationalist reporter	621	0.01	0.11	0	1
$\geq$1 Christian democratic reporter	621	0.51	0.50	0	1
Instability					
Instability	621	0.19	0.40	0	1
State reform dummies					
State reform 1	621	0.00	0.06	0	1
State reform 2	621	0.13	0.34	0	1
State reform 3	621	0.12	0.32	0	1
State reform 4	621	0.32	0.47	0	1
State reform 5	621	0.33	0.47	0	1
State reform 6	621	0.10	0.30	0	1

include judgments requested by individual parties or courts. Instead, we take into account whether an influential member in the panel, such as the president or the reporter, is affiliated with a specific political party. In identifying the judges' political affiliations, we relied on Moonen's (2015) specifications.

As shown in table 3, 37 percent of the decisions were taken by a judge panel with a liberal president. Presidents are a little less often from a socialist (34

percent) or Christian democratic (29 percent) party. There never was a president from a green or nationalist party.

At least one of the reporters was from a socialist party in 60 percent of the decisions. At least one was from a Christian democratic or liberal party in 51 and 48 percent of the decisions, respectively. Only in 16 percent of the decisions, at least one reporter was from a green party. A reporter from a nationalist party is rare (1 percent), which is not surprising since only recently the first judge nominated by a nationalist party has been appointed.

Additionally, we coded for each of the cases whether the bench had a majority of liberal (in 7 percent of the cases), Christian democratic (2 percent), or socialist (6 percent) judges.

We also controlled for the president's language background, but not for that of the reporters as one from each language group is appointed to each case. In our data set, 53 percent of the decisions were made by judge panels with a Flemish president.

Salience (Hypothesis 6)

Following De Jaegere (2017), we used three proxies for case salience. First, we used participation to measure whether a large number of individuals (more than five) was involved and if there was party diversity (i.e., more than two types of litigant were involved; e.g., governments, individuals, industry, NGOs, and local authorities). In our data, 97 percent of the cases had either a large number of individuals or party diversity (or both).

Second, we looked at whether the decision was taken by a full bench (10 or 12 judges) or a regular bench (7 judges). In our data set, just under half of the decisions (48 percent) were taken by a full bench.

Third, we controlled for media attention. Using data gathered by the BCC's media office (see Théry 2006), we were able to verify how many articles appeared in the newspapers on a certain case before the pronouncement of the judgment. As Table 3 shows, only 17 percent of our cases were covered in the media.

Political instability (Hypothesis 7)

Since the Court's first judgment, three periods of political crisis have occurred

1. 1987–1988: The coalition Martens VI fell after two years, on October 2, 1987. A transitional government was succeeded, a year later, by a new coalition (Martens VIII).
2. 1991–1992: After the resignation of Martens VIII, Martens IX was briefly in power, until he was ousted to make room for a new coalition under Prime Minister Dehaene.
3. 2008–2011: After 194 days of negotiations following the elections in 2007, four coalitions were formed in quick succession. When Leterme II resigned after five

months, formation negotiations advanced with difficulty. Consequently, the outgoing Leterme II government stayed on for another 541 days. On December 6, 2011, Di Rupo II kicked off.

We consider each of these three periods to be politically instable. Of the judgments included in our data set, 19 percent fell during a period of instability.

Empirical Strategy

Our dependent variable C is the centralization classification that we constructed in the Section on the Court's Position. The underlying, unobserved, continuous latent variable C^* can be thought of as the propensity to identify the case outcome as being centralist. This results in the following model:

$$C_i^* = \alpha + V_i\beta + W_i'\gamma + X_i\delta + (V_i{*}X_i)\zeta + \kappa_P + \lambda_{R1} + \mu_{R2} + \theta_t + \nu_l + \varepsilon_i \quad (1)$$

where dummy V_i equals one if the defendant is the federal government. Vector W consists of dummies that measure case saliency: $Participation_i$ (equals one if case involved more than five individuals and/or more than two party types), $Full\ bench_i$ (equals one if case resolved by full bench), and $Media_i$ (equals one if case was covered by news media). X_i takes into account whether there is a political conflict. We add an interaction term $V_i{*}X_i$ to test whether the impact of the defendant is dependent on whether a political conflict arises.

κ_P are president fixed effects, while λ_{R1} and μ_{R2} are reporter 1 and reporter 2 fixed effects, respectively. θ_t represent judgment year fixed effects, and capture factors that vary over time but affect all cases. ν_l consists of a full set of legal domain fixed effects. Since each observation consists of a Court decision, standard errors are clustered at the judgment level.

To test Hypothesis 1, we modified specification (1) and replaced the judgment year fixed effects by dummies that reveal whether the date of request occurs after the first, second, third, fourth, or fifth state reform.

To test Hypothesis 3, we dropped λ_{R1} and μ_{R2} (reporter fixed effects) from Equation (1). Instead, we included a vector Y, which consists of reporter political affiliation dummies (green, liberal, socialist, and nationalist) that indicate the party affiliation of at least one of the reporters of decision i, where affiliation with a Christian-democrat party is the reference category.

Similarly, to test Hypotheses 4 and 5 we dropped president fixed effects and instead included vector Z, which consists of president ideological affiliation dummies (socialist and liberal) that indicate party affiliation of the judge who was president at the time decision i was taken, where affiliation with a Christian democratic party is the reference category. Vector Z further also controls for the president being Flemish (rather than francophone).

Finally, we re-estimated specification (1) by replacing the judgment year fixed effects by a dummy that reveals whether the case was resolved in a period of instability, in order to test Hypothesis 7.[4]

The observed categories were tied to the latent variable by this model:

$$C_i = \begin{cases} 1\ (\textit{entirely decentralist}), & \textit{if } C_i^* \leq a_1 \\ 2\ (\textit{predominantly decentralist}), & \textit{if } a_1 < C_i^* \leq a_2 \\ 3\ (\text{balanced}), & \textit{if } a_2 < C_i^* \leq a_3 \\ 4\ (\text{predominantly centralist}), & \textit{if } a_3 < C_i^* \leq a_4 \\ 5\ (\textit{entirely centralist}), & \textit{if } C_i^* > a_4 \end{cases}$$

where $a_1 < a_2 < a_3 < a_4$.

That is, we observed a case outcome C_i in one of the five ordered categories, these categories being separated by the threshold parameters (the a's).

We estimated a proportional odds model and obtained marginal effects on an entirely centralist outcome (Category 5). This allowed us to observe the change in the probability of an entirely centralist decision as a consequence of a one unit change in a particular independent variable. We will first obtain estimates from the ordered probit model, and consequently from the ordered logit model as a robustness check.

We choose to measure our outcome as a ranked category variable, rather than a dummy because we do not only have to categorize the (entirely) decentralist and (entirely) centralist decisions, but also the balanced decisions. As such, we would have to categorize balanced decisions in either the "centralist" or "decentralist" category. An ordered estimation model does not necessitate making that arbitrary choice, of which both options are suboptimal. Furthermore, an ordered probit estimation also allows us to use a more nuanced classification, by separately coding partial or modulated invalidations.[5]

Results

Column (1) of table 4 shows the results of our basic specification. Columns (2) and (5) drop year fixed effects to test Hypotheses 1 and 7. Columns (3) and (4) show the estimations for reporter characteristics (Hypothesis 3) and president characteristics (Hypotheses 4 and 5), respectively.

The Legal Model

We hypothesized that a higher degree of centralist constitutional state structure increases the probability of a centralist outcome (Hypothesis 1). All state reform dummies are statistically significantly different from zero (Column (2) of table 4).

Table 4. Regression results

	(1)	(2)	(3)	(4)	(5)
Federal gov defendant	0.5666***	0.5482***	0.5573***	0.5555***	0.5669***
	(0.0508)	(0.0483)	(0.0501)	(0.0529)	(0.0483)
Participation	−0.0183	−0.0531	−0.0904	0.0014	−0.0925
	(0.1243)	(0.1282)	(0.1222)	(0.1257)	(0.1284)
Full bench	0.0688*	0.0737**	0.0756**	0.0765**	0.0790**
	(0.0358)	(0.0372)	(0.0365)	(0.0356)	(0.0373)
Media	0.0204	0.0154	0.0183	−0.0012	0.0189
	(0.0427)	(0.0431)	(0.0454)	(0.0440)	(0.0424)
Political conflict	0.1081**	0.1112**	0.1148**	0.0925**	0.1264***
	(0.0452)	(0.0447)	(0.0449)	(0.0464)	(0.0454)
Defendant × conflict	−0.3062***	−0.2625***	−0.3022***	−0.2908***	−0.2848***
	(0.0733)	(0.0706)	(0.0723)	(0.0756)	(0.0702)
State reform 2		−0.9101***			
		(0.1434)			
State reform 3		−1.1982***			
		(0.1717)			
State reform 4		−1.3520***			
		(0.2271)			
State reform 5		−1.5014***			
		(0.2385)			
State reform 6		−1.4185***			
		(0.2535)			
Flemish president				0.0782	
				(0.0734)	
Liberal president				0.0257	
				(0.0624)	
Socialist president				0.1263	
				(0.0983)	
≥1 green reporter			−0.1432**		
			(0.0567)		
≥1 liberal reporter			−0.0103		
			(0.0378)		
≥1 socialist reporter			−0.0130		
			(0.0384)		
≥1 nationalist reporter			−0.1210		
			(0.1588)		
Instability					−0.0450
					(0.0455)

(continued)

Table 4. Continued

	(1)	(2)	(3)	(4)	(5)
Observations	621	621	621	621	621
Pseudo R^2	0.2902	0.2601	0.2640	0.2728	0.2501
Legal domain FE	Yes	Yes	Yes	Yes	Yes
Year FE	Yes	No	Yes	Yes	No
President FE	Yes	Yes	Yes	No	Yes
First rapporteur FE	Yes	Yes	No	Yes	Yes
Second rapporteur FE	Yes	Yes	No	Yes	Yes

Notes: Centralization level is the dependent variable. The table shows marginal effects on an entirely centralist outcome (Category 5). Heteroscedasticity robust standard errors clustered at judgment level in parentheses. $^{***}P < 0.01$, $^{**}P < 0.05$, $^{*}P < 0.1$.

If a request was lodged before the 1988 state reform (but after the 1980 reform) the probability of an entirely centralist decision decreases statistically significantly with 91 percent compared to decisions with requests dated before the 1980 state reform. This effect becomes larger with every subsequent state reform, but the impact of the last state reform, while still significant, is smaller than the fifth one.

In an attempt to distinguish legal merit and strategic considerations, we subdivide our sample. We find the hypothesized effect in a subsample of political conflicts, but not in cases without such conflict, which suggest that state reforms have increased the probability of decentralist decisions not because of legal merit, but strategic considerations.

Next, we hypothesized that if the defending party was the federal government, the probability of a centralist outcome would be higher than if a sub-state government was the defendant (Hypothesis 2). Furthermore, we expected this effect to be more important when the political stakes are low. These hypotheses are confirmed by our results. If a federal act was challenged in the absence of a political conflict, the probability of a validation—qualified as a centralist outcome—increases by 57 percent all else equal (see Column (1), table 4). This means that what we qualify as (de)centralist outcomes, partly reveals the concern of the Court to interpret the act as constitutional out of respect for Parliamentary sovereignty. As expected, this effect is mitigated when government parties oppose each other (i.e., there was a political conflict). In this case, the probability of an entirely centralist outcome increases by only 26 percent when the federal government is the defendant, compared to when a sub-state government was the defendant.[6] Hence legal merit is more important in daily practice, but not the only decisive factor in cases of political conflict.

We also estimate our model using petitioner victory as a dependent variable (see also Section "Robustness Checks") to see whether the effect is a consequence of Shapiro's conjecture that constitutional courts favor central government petitioners for strategic reasons. If it is, the variable Federal Gov Defendant should be statistically significant (i.e., when the federal government is involved, the petitioner who is contesting the federal law should be less likely to win the case). We do not find this effect, however. Furthermore, we find (results available on request) that if the defendant is a sub-state government, the probability of a *decentralist* outcome increases with 60 percent compared to when the defendant is the federal government. This is again evidence against the dependency-hypothesis explanation: if the result we find would be explained by the Court going along with the parliamentary majority that controls the judges' reappointment, we would only find a preference for a declaration of constitutionality when the federal government is defendant. Therefore, we believe that the preference for a declaration of constitutionality is a consequence of legal merit, rather that strategic motives.

The Attitudinal Model

We hypothesized that judge affiliation impacts the probability of an entirely centralist outcome (Hypotheses 3 and 4). We further expect that Flemish judge presidents decrease the probability of an entirely centralist outcome compared to Francophones (Hypothesis 5).

When it comes to the reporters, ideological affiliation only matters to a very limited extent. If there is at least 1 reporter from a green party, the probability of a centralized decision decreases on average with 14 percent (see Column 4, table 4). This is counter-intuitive, considering the green parties' views on the Belgian state structure. However, there have been only two judges from a green party. In this case, our result can reflect the personal preference of two particular judges rather than party affiliation.

Column (3) of table 4 shows that president affiliation and language do not impact the centralist stance of the Court in a particular case, either.

Of course, these results need not indicate that the attitudinal model has no explanatory power whatsoever. It might be a consequence of the lack of variation in these variables. To better disentangle the effect of party ideology, we necessitate more judges in our data set so that each political party is represented by a sufficiently large number of judges. This problem cannot be solved at this point, given that we used all federalism disputes.

Furthermore, one might expect that the attitudinal model only plays a role when political stakes are high. Therefore, we re-estimate our model, but only for those cases in which a political conflict arose (where two governments oppose each other). Unreported results show that a liberal president now significantly increases

the probability of a centralist decision with almost 23 percent. Having at least one green reporter on the bench is now marginally insignificant (*P*-value is 0.1096), but the results suggest that at least one nationalist reporter does significantly impact the outcome (by decreasing the probability of a centralist decision).

As an alternative of our initial strategy to test the attitudinal model, we also coded party affiliation of the entire bench to see if a majority of judges was affiliated with the same party. The results, omitted for space considerations but available on request, show that if the majority of judges in the panel is Christian democratic, the probability of an entirely centralized decision increases by 17 percent, compared to when a minority of the panel is Christian democratic. In contrast, the probability of an entirely centralized decision decreases with 20 percent when a majority of judges in the panel is socialist, compared to a panel without such a majority. A majority of liberal judges has no significant impact on the outcome.

Using this alternative estimation strategy, we do find evidence of the attitudinal model. However, apart from the nationalist judge, it is difficult to align the results with specific party positions regarding state reform, considering that they mostly host different trends and standpoints evolve over time. Apparently, the judges belong to a specific trend within each party. This may explain the centralist impact of Christian democrat judges, although the Flemish Christian democrat party currently aspires confederalism.

The Strategic Model

We expected the probability of a centralist outcome in federalism disputes to increase when the case was salient (Hypothesis 6) and in periods of political instability (Hypothesis 7).

Hypothesis 6 is partly confirmed. Column (1) of table 4 shows that panel size matters: when a case was decided in a plenary session, the probability of a centralist decision increases by 7 percent. We find no statistically significant impact among the other salience proxies (participation and media attention). Neither do we find evidence to support Hypothesis 7. Political instability has no significant impact on the Court's position in federalism disputes (see Column (5) of table 4).

In sum, we conclude that our hypothesis that centralization trends in the Court's jurisprudence reflect a pursuit of stability cannot be confirmed in a convincing manner. The results do demonstrate that salience increases the probability of centralist outcomes, but only when it comes to panel size (referral to the full bench). The fact that more cases are now sent to the plenary session may therefore partly explain the increase in centralist decisions in recent years. As the other variables of salience do not produce significant results, we may assume that it is the dynamics of deliberation in a plenary session, rather than the salience of the case itself, that leads to more centralist (or "conservative") decisions.

Table 5. Robustness checks

	(1)	(2)	(3)	(4)	(5)	(6)
Federal gov defendat	0.5620***	0.5470***	0.5505***	0.5530***	0.5629***	0.5666***
	(0.1403)	(0.0442)	(0.1069)	(0.0765)	(0.0541)	(0.0501)
Participation	−0.0066	−0.0343	−0.0847	0.0131	−0.0781	
	(0.1382)	(0.1483)	(0.1265)	(0.1423)	(0.1431)	
Full Bench	0.0730*	0.0819**	0.0774*	0.0849**	0.0847**	
	(0.0415)	(0.0395)	(0.0401)	(0.0389)	(0.0397)	
Media	0.0204	0.0109	0.0141	−0.0068	0.0167	
	(0.0433)	(0.0443)	(0.0464)	(0.0447)	(0.0430)	
Political conflict	0.1224**	0.1200**	0.1238**	0.1040**	0.1327***	0.1042**
	(0.0567)	(0.0470)	(0.0531)	(0.0499)	(0.0482)	(0.0448)
Defendant × conflict	−0.3115***	−0.2683***	−0.3017***	−0.2962***	−0.2884***	−0.3058***
	(0.1136)	(0.0746)	(0.0948)	(0.0928)	(0.0759)	(0.0725)
Medium salient						0.0590*
						(0.0357)
Highly salient						0.0914*
						(0.0501)
State reform 2		−1.7613***				
		(0.2108)				
State reform 3		−2.1036***				
		(0.2216)				
State reform 4		−2.2722***				
		(0.2656)				
State reform 5		−2.4203***				
		(0.2670)				
State reform 6		−2.3429***				
		(0.3053)				
Flemish president				0.0874		
				(0.0794)		
Liberal president				0.0368		
				(0.0666)		
Socialist president				0.1304		
				(0.1053)		
≥1 green reporter			−0.1441**			
			(0.0641)			
≥1 liberal reporter			−0.0083			
			(0.0386)			
≥1 socialist reporter			−0.0109			
			(0.0400)			

(continued)

Table 5. Continued

	(1)	(2)	(3)	(4)	(5)	(6)
≥1 nationalist reporter			−0.1170			
			(0.1764)			
Instability					−0.0453	
					(0.0462)	
Observations	621	621	621	621	621	621
Pseudo R^2	0.2914	0.2618	0.2628	0.2732	0.2505	0.2899
Legal domain FE	Yes	Yes	Yes	Yes	Yes	Yes
Year FE	Yes	No	Yes	Yes	No	Yes
President FE	Yes	Yes	Yes	No	Yes	Yes
First rapporteur FE	Yes	Yes	No	Yes	Yes	Yes
Second rapporteur FE	Yes	Yes	No	Yes	Yes	Yes

Notes: Centralization level is the dependent variable. The table shows marginal effects on an entirely centralist outcome (Category 5). Heteroscedasticity robust standard errors clustered at judgment level in parentheses. $^{***}P < 0.01$, $^{**}P < 0.05$, $^{*}P < 0.1$.

Robustness Checks

The ordered logit model

To test the robustness of our results, we re-estimate our specification using an ordered logit model. The results, shown in Columns (1)–(5) in table 5 are qualitatively the same as those reported in table 4. The most notable difference is that the state reform dummies increase in magnitude.[7]

Alternative measure of case salience

In a final analysis, we constructed a different proxy for case salience rather than using participation, full bench, and media. If a case had none of these three characteristics of case salience, we defined it as "not salient". If the case had one, two or all three of the salience characteristics, we defined it as having a low, medium, or high degree of salience, respectively. Since only eleven cases exhibited no salience whatsoever, we used cases with both no salience and low salience as a reference. In medium salient cases the probability of an entirely centralist outcome increases on average by 6 percent compared to cases that were not salient or low salient, *ceteris paribus*. This effect is even larger (9 percent) for highly salient cases. Both effects are statistically significant at the 10 percent level.

Explaining petitioner success

To address whether we are merely showing whether the Court is favorable or unfavorable to whoever the petitioner is, rather than explaining why the Court is

centralist or decentralist, we re-estimate the specification used in table 4, but use as a dependent variable whether the petitioner wins the case. The unreported results, available on request, show that only Political Conflict remains statistically significant. The other variables that were significant in table 4 (Federal Gov Defendant, Defendant X conflict, State reform 2 to 6, $\geq$1 green reporter) are here statistically insignificantly different from zero, which adds to the credibility of our results that these variables explain the centralist/decentralist behavior of the court, and not just its tendency to favor whoever the petitioner is.

Conclusion

We constructed a classification for the position of courts in federalism disputes, which enables a nuanced qualification in jurisdictions where constitutional courts tend to modulate their decisions. Applying this approach to the Belgian Constitutional Court, we find that this Court pronounces a substantial number of both centralist and decentralist decisions. This confirms the expectation resulting from a previous cross-country study that courts are more balanced in multinational states (Popelier 2017).

Second, our empirical evidence reveals that a mixture of factors determines variation in the BCC's centralist stance across case outcomes.

In the legal model, explanatory power comes from the Court's desire to uphold Acts of Parliament while enforcing the constituent's choices. This is evidenced by the highly significant and large in magnitude effect of the defending party on case outcome. This effect is mitigated when government parties oppose each other, indicating that legal merit is more important in daily practice, but not the only decisive factor in cases of political conflict. Our results show that this effect is not driven by the dependency-hypothesis explanation, evidence in favor of the legal model.

Ideological preferences and party affiliation, which have proven to be important factors in explaining the behavior of the U.S. Supreme Court and in explaining the petitioner's likelihood of success (Dalla Pellegrina et al. 2017), also seem to influence the BCC's centralist position. In our full sample, we find little evidence of the attitudinal model when focusing solely on party affiliation of the President and Reporters. However, when we focus on a subsample of political conflict cases, or when we take into account the affiliation of the majority in the bench, this reveals more evidence for the attitudinal model, in line with Dalla Pellegrina et al.'s (2017) findings on the BCC. The system, nonetheless, secures variation in the composition of the bench. This means that, overall, the balanced design and functioning of the court keeps the impact of political preferences limited and outweighs linguistic differences.

Future research should clarify whether the limited evidence of the impact of President and Reporter affiliation is a consequence of a lack of variation in judge

affiliation, or, alternatively, of the absence of observed individual votes and the fact that we, as a result, have to rely on per curiam decisions.

We finally find that strategic considerations play a role. The probability of a decentralist outcome increases with every state reform while a case decided in plenary session increases the probability of a centralist decision. Although panel size matters, we find no statistically significant impact of participation and media attention. It is therefore unclear whether the effect of panel size is due to the salience of the case, or the result of the dynamics of deliberation in plenary sessions. However, when using alternative measures of case salience, we found that the probability of a centralist outcome is higher in medium and high salience cases. This is evidence of the hypothesis that centralization trends reflect a court's pursuit of stability.

This article aligns with recent scholarship that proves that policy preferences are an explanatory factor for courts' behavior in European-style constitutional courts, but not as dominant as in the United States. It shows that the tendency to focus on attitudinal effects is one-sided and ignores other influential factors. In particular, the salience of a case is a variable that matters, but is not usually taken into account in empirical scholarship on federalism disputes. Moreover, this article introduced new proxies to measure legal merit in federalism disputes to revive the legal merit model, but at the same time points to the importance of institutional design. In countries functioning under the rule of law, it is vital for the courts' credibility and legitimacy that their decisions rely and are perceived to rely on legal analysis. Institutional design, with regard to the composition of the court, the selection of judges, and the deliberation process, is the crucial factor needed to bring this about.

Notes

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1. Based on our own database, built by Josephine De Jaegere under supervision of Patricia Popelier and Jan Beyers, including all judgments on the merits from 1985 to 2015. We added new data and updated with federalism disputes in 2016.
2. Given that there is always one Flemish reporter and one French-speaking reporter, and given the closed and consensual deliberations (we have no information on individual judge votes), this hypothesis is only relevant for the president.
3. A double difference framework using another country's court decisions would be the optimal strategy but there is no suitable control group. Our strategy is a commonly used alternative in similar situations (e.g., Grembi and Garoupa 2013). The disadvantage is that the dummies partly reflect other circumstances that are characteristic of those particular periods.

4. To control for unobserved heterogeneity, in our baseline models we prefer to control for year, president, first reporter and second reporter fixed effects. In model (2), however, we want to test the impact of state reforms, which are dummies based on different periods in time. As such, we cannot control for year fixed effects in this specification. The same reasoning applies for model (5), in which we divide the data set into two periods: a period of stability and a period of instability. Each year fixed effect would thus fall in either of these two categories. In models (3) and (4), we examine the effect of specific president (reporter) characteristics. As a consequence, we cannot control for president (reporter) fixed effects, since the president (reporter) characteristics are time-invariant and therefore subsumed in the fixed effects.
5. Unreported estimation results when using a dummy are qualitatively the same as those from the ordered model. We ran two models, coding balanced decisions as either centralist of decentralist. The only result that is not robust is the effect of the instability variable, which is statistically significant in these models. However, this is likely an artifact of balanced decisions being assumed to be either centralist or decentralist (which is fundamentally wrong).
6. The unreported marginal effects on an entirely decentralist outcome (Category 1) show that in the absence of a political conflict, when the federal government was defendant, the probability of a decentralist outcome decreases by 60 percent compared to when the sub-state government was defendant. The decrease is smaller (27 percent) when two governments opposed each other. For space considerations, we do not report these results. The tables are available on request.
7. We also estimated a probit model in which the dependent variable equals 1 if the outcome is centralist or predominantly centralist and zero if the outcome is balanced, decentralist, or predominantly decentralist. Again, results are qualitatively the same.

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