Federalism disputes and the behavior of courts : explaining variation in federal courts support for centralization

FEDERALISM DISPUTES AND THE BEHAVIOR OF COURTS:

EXPLAINING VARIATION IN FEDERAL COURTS' SUPPORT FOR CENTRALIZATION

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Abstract:

This article, a pilot study, examines the behavior of courts in federalism disputes. It explores the circumstances that lead courts to take a centralist or, more interestingly, a non-centralist stance in disputes between national and subnational governments. Several hypotheses are tested, relying on a sample of eleven federations, with attention to institutional features such as the extent of subnational representation in federal policymaking, the degree of integration of the party system, the role of states in the appointment of judges and in the composition of the court, the extent of decentralization of the federal system, and the devolutionary and multinational nature of the federation. Courts seem more likely to take a non-centralist stance in the presence of a weak representation of subnational governments at the federal level, a low centralization gradient or, in particular, the context of a devolutionary multinational state. By contrast, low representation of the states in the selection of judges or the composition of the courts seem to encourage a more centralist stance.

A distinctive feature of federal systems is that powers are divided between the federal government and the states. A division of powers creates intergovernmental rivalry and consequently generates constitutional disputes, with political forces attempting to shift power in a centralist or a decentralist direction. Thus, an umpire is called for to interpret and apply the rules, a task which is usually consigned to a court. As a result, federalism and judicial review have mutually influenced each other in their development (Hueglin and Fenna 2006, 275).

The relationship between federalism and courts has been the object of several studies, and empirical work has been carried out by political scientists and law-and-economics scholars, mostly in single-country studies (Arlota and Garoupa 2014, 139). It has, however, rarely been the object of comparative legal scholarship that attempts to find, through empirical methods, causal inferences that explain observable phenomena (Hirschl 2014, 186, 225). Scholars nonetheless make assumptions concerning which factors may be influential. Building on such assumptions, this article considers several explanations for the attitude of courts in the adjudication of conflicts regarding the powers of national and subnational governments. The hypotheses are tested on a sample that covers eleven federations over five continents.

The article therefore analyses a broad variety of legal systems to test possible explanations for the centralist or non-centralist approach taken by courts in federalism disputes. In the first section, courts are categorized as centralist or non-centralist. In the second section, five hypotheses are tested to explain centralist or non-centralist behavior. The conclusions are presented in the final section.

Important methodological reservations should be noted. First, measuring the significance of correlations through statistical analyses requires a larger sample than is drawn on in this study. Moreover, testing the hypotheses implies in-depth knowledge of the legal system and the

jurisprudence of each court. This requires collaborative work with local experts and the establishment of databases with a coded set of judgments. The author's team has built a database for the Belgian Constitutional Court, but so far did not have access to possible similar datasets elsewhere. Such databases would, moreover, provide time-series data necessary to explain shifts in the Court's behavior over time within one legal system. For this article, it was inevitable to ignore such shifts to make general assessments. Consequently, this article does not aspire to give definitive answers. Its purpose is to explore which of several hypotheses suggested in the literature merit further empirical inquiry.

To this aim, and for reasons of feasibility, eleven countries were selected for this study. They differ as to historical background, political context, law system, and type of federalism. Hence, a 'most different cases' approach (Hirschl 2014) was chosen to see to what extent similar independent variables can explain phenomena of centralism apart from contextual factors. The results presented in this article, however, indicate that in follow-up studies a 'most similar cases' approach seems worthwhile, grouping countries with a multinational and devolving structure.

The starting point for the selection is the Forum of Federations website, which lists twenty-five federations world-wide. Some, like Ethiopia, do not have a court with the power to solve federalism disputes. The Swiss Federal Court has competence to review sub-state laws but not federal parliamentary laws. It remains interesting to see whether this reinforces a centralist tendency or not, but the asymmetry in the Court's review powers rules Switzerland out for this comparative pilot study. Nepal, with a new constitution passed in 2015, is not yet sufficiently established for inclusion in the database. For other countries, the collection of data might prove difficult, in the case of very small federations like the Comoros, Micronesia and St. Kitts and Nevis, or because insufficient sources were available in English, French or Dutch, e.g. in the case

of Malaysia, Russia, Pakistan or the United Arab Emirates. I also sought to ensure representation from as many continents as possible and avoid an over-representation of European countries. I settled on the following eleven countries: Australia, Belgium, Brazil, Canada, Germany, India, Mexico, Nigeria, Spain, South Africa and the United States of America.

Finally, it is difficult to give a preceding and all-embracing definition of what constitutes a 'federalism-related issue'. This is especially so as federalism can have different functions in different states. Where federalism aims at the protection of individuals by limiting government power, fundamental rights cases may become relevant for the development of federalism. Where federalism is a device for preserving a divided society within one state structure, disputes over any issue over which national groups are divided are federalism-related issues. For reasons of feasibility and uniformity, however, in this article disputes over the allocation of powers between federal and sub-state authorities are used as a proxy for 'federalism-related issues'. In follow-up country studies a broader definition can be used, appropriate for the specific country.

To preview the study's main conclusions, I find that the selection of judges, representation of subnational governments at the federal level, centralization gradient and the type of federation are promising factors to explain the behavior of courts. If subnational authorities are not involved in the selection of judges and courts do not represent the federal structure, courts seem more likely to take a centralist stance. By contrast, the presence of a weak representation of subnational governments at the federal level, a low centralization gradient or, in particular, the context of a devolutionary multinational state, seem to encourage a non-centralist stance.

AN EXPLORATIVE RANKING OF COURTS

The impact of courts on federalism

Dicey (1915: 95-96) argued that federalism necessarily implies a 'general willingness to yield to the authority of the law courts', denoting this as a weakness. Yet, while there is a consensus that federalism requires an impartial umpire to resolve conflicts of power, judicial review is not a necessary feature of federalism. In Ethiopia the resolution of conflicts of powers is assigned to political bodies, while the Swiss Supreme Court controls the legislative acts of the Provinces, but not the federal State.

Conversely, federalism is said to be 'one of the most decisive factors' for the establishment of constitutional review (Auer 2005, 426). Nonetheless, Belgium is the only country in which a constitutional court was established with the sole purpose of resolving federal disputes (Popelier and Lemmens 2015, 196-197). Usually the resolution of disputes over the distribution of powers is only one of many tasks consigned to courts in federal systems. In Canada, the Supreme Court has historically been involved in federalism-related issues primarily due to the absence of a list of fundamental rights, but the proportion of cases has been decreasing since the 1980s (Brouillet forthcoming). Most courts are more concerned with human rights issues. Even in Belgium the original 'Court of Arbitration' has gradually transformed into a fully-fledged Constitutional Court. As a consequence, where initially (1985-1988) 100 percent of the cases before the Belgian Court concerned distribution of powers disputes, as this was its only competence, more recently (2000-2014) these disputes account for only 12 percent of its cases.[2]

Although federalism disputes do not make up the core of the activities of the supreme and constitutional courts, these courts nevertheless exert an important influence on development of federalism (Hueglin and Fenna 2006, 275). In Belgium, the Constitutional Court was established especially for resolving conflicts of power that arose when Belgium became a federal state. From

1985 to 1988 it was exclusively engaged in adjudicating this type of dispute, and found a violation in almost half of the cases.[3] At that time, the new federated entities were still exploring their boundaries and turned to the Court to provide a clear delineation (Popelier and Lemmens 2015, 197). However, in recent years, it has also been the Constitutional Court that unties the knot if the language groups that dominate the Belgian federal structure disagree as to the scope of each other's powers (Const. Court. Nos 51/2006 and 11/2009) or on the application of the territoriality principle (Const. Court No 70/1988). Additionally, scholars writing about Canada have emphasized that a number of changes in that federal system have been achieved through judicial decisions (Brouillet forthcoming). Some even suggested that in high-profile judgments, such as the *Québec Secession Reference* (1998), Canadian governments invited the Supreme Court to act as 'a positive legislator' (Roach 2011, 315). Similar conclusions have been rendered by scholars writing about the German Constitutional Court (Benz forthcoming). Even in Nigeria, where the Supreme Court has played a more limited role in Nigerian constitutional development (Suberu forthcoming), it has at the same time been portrayed as 'a prominent and independent adjudicator of intergovernmental disputes in this chronically conflicted federation' (Suberu 2008, 451) that has 'rendered several politically and economically significant decisions on the division of competencies between the central government and the states' (Abebe 2013, 63).

In other cases, although scholars may differ about the precise extent of the influence of a court in a given federation, they do not deny that the court played a role in the development of federalism. Focusing on the U.S., Griffin (2011, 363) has pointed to federalism issues in a selection of US Supreme Court decisions that actually made 'a permanent and structural difference to the constitutional order'. Some authors are more reluctant to recognize the US Supreme Court as an influential actor in the development of federalism. According to Tushnet

(2009, 40, 181, 242), Congress was the driver of the expansion of national power; the Supreme Court merely gave it judicial endorsement and did not develop a doctrine to limit the centralizing trend. Bzdera (1993, 10) detected phases where the Court followed the Congressional lead or more actively supported congressional expansion, but considered it to have become 'a dormant power'. Baier (2006, 63) agrees that 'the Court's implicit approval of congressional expansionism was such that by 1985 […] the court appeared to, at least unofficially, resign from the task of umpiring federalism conflicts'. He nonetheless names the Court 'a regular and active participant in the shaping of American federalism' and argued that it 'required generous judicial interpretation' for the interstate commerce clause to reach its wide scope, providing the federal government with 'the most important domestic power'. Kincaid (2013, 164), in turn, notes that the U.S. Supreme Court played a 'pivotal' role in the 1960s in expanding federal power in individual rights cases.

In contrast, there are only a few countries where the impact of the courts on the development of federalism has been insignificant. Brazil and South Africa are two examples. In Brazil, the Supreme Federal Court is said to be 'strongly committed' to the ideal of judicial self-restraint (Bustamante and de Godoi Bustamante 2011, 313) and is not credited with developing a particular approach to resolving federalism disputes (Rodrigues et al. forthcoming). In South Africa, the Constitutional Court did not have the opportunity to develop a federal theory. Only a few federalism-related cases have been presented to this Court (Abebe 2013, 68; Steytler forthcoming).

Centralism

If most courts in federal countries affect the development of federalism, the question is: In which direction do they shift power between national and subnational governments? While courts are viewed as constituting a 'principal device of centralized policymaking' (Shapiro 1981: 55; see also Bzdera 1993, 19), exceptions to this centralizing trend do occur. Before turning to possible explanations, we need to classify courts on a continuum from centralist to federalist. For reasons of feasibility, this current study relies on scholarly analyses of individual countries and the authors' appraisal of the courts therein. As scholars often use different criteria to define centralist or decentralist stances, it would be more sound to establish for each country how many federalism disputes were brought before the court in certain time slots and the percentage of cases in which the court invalidated subnational laws or federal laws; and then to reveal through qualitative analysis whether each Court uses constitutional narratives to broaden either the federal or subnational governments' powers beyond the constitution's verbatim text in the constitution or beyond the constituent's intent. This, however, requires datasets that are not available for this preliminary research.

Be that as it may, scholars express confidence in concluding that certain courts take a centralist stance. This does not seem to be contested for Australia, Brazil, Mexico and South Africa (Saunders 2011, 229; Saunders and Foster 2014, 91, 97, 101; Baier 2006, 35-55, 63-95, 97-121; Rodrigues et al. forthcoming, Govender 2014, 396-399; Canello 2014, 4, 19, 22). The same applies to the USA, even though in several eras the Supreme Court has assumed a more decentralist stance where it limited the growth of federal government power (see Dinan 2010, 166-167). The Indian Supreme Court has also taken a centralist stance for much of its history, although since the 1990s it has shifted towards a more federalist approach (Tewari and Saxena forthcoming; Saxena 2013, 366).

By contrast, no court takes an obviously marked decentralist stance. Rather, the courts in Belgium, Canada, Germany, Nigeria and Spain can be qualified as 'balanced'. The Belgian Constitutional Court takes the autonomy of the states and a broad interpretation of their competences as the starting point, but it is also concerned with cohesion within the federal state (Peeters and Mosselmans 2016). Overall, legislation from the states is more readily struck down than federal legislation for violating power-allocating provisions, but the difference is small: the Court found a violation in 38 percent of all federalism disputes concerning state legislation in comparison to 29 percent of all federalism disputes concerning federal laws.[4] According to Hueglin and Fenna (2006, 303) the German Constitutional Court has made some modest attempts to protect the powers of the *Länder*, but has 'notably failed to stem the tide of centralization'. Other authors nonetheless classify the German Constitutional Court's federalism jurisprudence as balanced (Aroney and Kincaid 2016a). It is notable that the Court repeatedly strikes down federal as well as Länder statutes for lack of competence (Adam and Möllers 2014: 249). Recent literature also characterizes the Spanish Constitutional Court's jurisprudence as balanced, although much lies in the eye of the beholder: Basque and Catalan nationalists in fact reproach the Court for taking an overly centralist stance (Aroney and Kincaid 2016a).

The Canadian judiciary's approach is more contested. Several authors have argued that while the former Judicial Committee of the Privy Council took an explicit decentralist stance, the Supreme Court has since taken a more centralist orientation (Bzdera 1993, 10-13; Hueglin and Fenna 2006, 296). More recently, Brouillet (2016 forthcoming) also notes an apparent centralizing trend. Baier (2006, 124) notes that, nonetheless, 'the net effect of the Supreme Court's intervention in Canadian federalism' as well as most decisions in themselves are

'balanced'. I therefore categorize the Canadian Supreme Court as 'balanced', emphasizing that this does not imply a consistent decentralist stance.

The Nigerian Court's stance is also difficult to classify. Suberu defines its jurisprudence as 'balanced' in one article (2009, 79) but views it as more centralist in a later analysis (Suberu forthcoming). Abebe (2013, 68) endorses the first categorization; according to him the Court does 'not show any kind of judicial restraint or preference to either level of government'. As the Court thus does not take a clear centralist stance, it is qualified as 'non-centralist'.

The conclusion is that while most courts take a centralist stance, this is not always the case. Australia, Brazil, India, Mexico, the USA and South Africa have centralist courts. Belgium, Canada, Germany, Spain and Nigeria have non-centralist courts. The following sections discuss explanations for this variation.

EXPLAINING A CENTRALIST OR NON-CENTRALIST STANCE IN FEDERALISM JURISPRUDENCE

In this section, five hypotheses are presented to explain the centralist or non-centralist stance of courts in federalism jurisprudence. They concern the participation of sub-national governments, the political party system, the appointment of judges, the extent to which the federation is centralized, and its devolutionary and multinational nature.

The political safeguards theory

In the U.S., scholars developed the theory of political safeguards to support the notion of a deferential Supreme Court where federal government powers are concerned (Choper 1977; Kramer 2000; Wechsler 1954). As the theory only opposes judicial limitation of federal government power, and supports a judicial role in limiting state government power, it serves as a theory that can explain the centralist stance in federalism jurisprudence,

In arguing that courts should not play a prominent role in reviewing federal legislation in order to resolve federalist conflicts, the political safeguards theory points to institutional and political safeguards that are considered superior alternatives for federalist dispute resolution. These safeguards concern the political representation of state governments in the federal government, the authority of centralized political parties, and political conflict-resolution mechanisms. Adherents to the judicial safeguards theory recognize the relevance of these alternatives but rely on judicial safeguards as an 'ultimate backstop' when political safeguards prove insufficient (Abebe 2013, 58; Gageler 1987, 197). Some authors convincingly argue that federal and state officials, motivated by their own political interests, are not reliable protectors of constitutional federalism (McGinnis and Somin 2004). Most participants in the debate, however, agree on the importance of political safeguards. Courts, at best, have a subsidiary role to play, which may explain the low number of disputes over the distribution of powers, even where courts have an explicit constitutional mandate (Benz forthcoming).

The political safeguards theory can explain why some courts take a centralist stance. The argument is that the participation of states in federal decisions ensures that the federal government does not overstep its boundaries, whereas no procedural guarantees secure the protection of federal government interests in the passage of legislation in subnational governments. Therefore, the court should, in principle, respect the outcome generated by the

federal legislature, but be more circumspect when reviewing the legislation of states. This is what Justice Harry Blackmun – relying on Wechsler (1954, 543-560) – also argued when delivering the opinion of the Court in the *Garcia* judgment: 'the principal and basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated' (*Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) at p. 556).

The theory, then, gives rise to the hypothesis that courts take a more centralist stance when political safeguards are stronger. Testing the hypothesis requires a full understanding of the political party system, the political process, and the position of the various federated entities in each country. For the purposes of this article, two aspects are highlighted, leading to two hypotheses: one concerns the participation of states in federal decision-making and the other concerns the party system.

Participation of states

The participation of states in federal lawmaking through the second chamber is used as a proxy for the political safeguards theory as first developed by Wechsler. Wechsler pointed specifically to the Senate's function as a forum of the states, preventing intrusion by the central government on state interests (Wechsler 1954: 546-548). This leads to the hypothesis that:

> H.1. Courts take a more centralist stance as the participation of subnational governments in federal decision-making grows stronger.

Two factors were taken into account in measuring representation: the institutional link between the members of the second chamber and the states, and the powers of the second chamber.

The institutional link is strongest in Germany, where members are appointed by the governments of the *Länder* (Constitution of Germany, sec 51). Similarly, in South Africa (Constitution of South Africa, sec 60), the National Council of Provinces consists of delegates of the Provinces, including the Premier or its representative. The link is also strong where members are representatives of the state parliaments. This is the case in India, where the majority of members of the Council of States represent the States and the Union Territories and representatives of the States are elected by the elected members of the Legislative Assembly of each state (Constitution of India, sec 80).

The link is less strong in what is known as the 'Senate model' (Hueglin and Fenna 2006, 182), where representatives of the states are directly elected by the public, as is the case in Australia, Nigeria, the USA, the Canadian House of Commons and for the majority of members of the Mexican Chamber of Senators. The difference between protecting state interests and protecting state institutions is one of Kramer's (2000, 224-225) objections against Wechsler's reliance on state representation in Congress, leading him to deplore the 'Seventeenth Amendment's elimination of the one feature that really might have protected states, the power of state legislators to choose Senators'. Saunders (2011, 119-120), in turn, points to the declining significance of the Australian Senate as a representative of the States.

The link is weakest where the second chamber is not, or is only partially, representative of the states. This is the case in Spain, where the Senate is primarily composed on the basis of provincial districts; the Self-Governing Communities' Legislative Assemblies appoint only a small portion of the chamber (Constitution of Spain, art. 69; Casanas Adam forthcoming;

Ferreres Comella 2013, 96-97). This was also the case in the Belgian Senate until 2014, with only 21 out of 71 senators representing the federated parliaments, and they were chosen on the basis of federal rather than regional election results.[5] Canada has been named 'a case of pseudo-bicameralism' (Hueglin and Fenna 2006, 190), with Senators appointed for life by the Governor General (Constitution of Canada, sec 24 and 29) and not regionally representative (Webber 2015, 66). Table 2, however, takes into account the representation of the provinces in Canada's House of Commons, as Art. 37 of the Constitution explicitly allocates a number of seats to each province.

Belgium is a special case, because Belgian federalism revolves around two main linguistic communities that are strongly represented at the federal level: both houses in Parliament are divided into two language group with veto rights in certain matters, and the federal government is made up of equal numbers of Dutch- and French speaking ministers (Constitution of Belgium, sec 43 and 99). However, these linguistic communities do not represent the states as such. For example, the language groups do not represent the German-speaking Community or the Brussels Region. Therefore, representation of the linguistic communities is not taken into account at this point (although, it is of importance with respect to the final hypothesis, which concerns multinational federalism, as we will see below).

State influence via the second chamber is strongest when the chamber has an absolute right of veto, as is the case in Australia, Canada, Mexico and the USA. This power is less strong when the second chamber has a suspensory veto, with an absolute veto for specific matters. This is the case in Germany, and was also the case in Belgium until 2014. This power is weaker when the second chamber only has a suspensory vote, as is the case in Spain (Constitution of Spain, sec 90) and South Africa (Constitution of South Africa, sec 75 and 76 and Abebe 2013, 60). This

power is weakest when the second chamber has no vote in most matters, and at the very most a suspensory or absolute veto in some specific matters. This has been the case in Belgium since 2014. In Table 2, federal systems are categorized in a way that takes account of the link between states in the second chamber as well as the power of the second chamber, with countries categorized on a spectrum from weakest representation to weak representation to moderate representation to strong representation to strongest representation.

Table 1 reveals a correlation between representation of subnational governments in federal policymaking and a centralist stance of courts, but this is not conclusive. A strong representation of states in the second chamber is often coupled with a centralist court, but it does not exclude a non-centralist attitude, for example in Canada, Germany and Nigeria. However, where formal representation of the states is weak, as in Belgium and Spain, courts take a non-centralist stance. The tentative conclusion is that courts may be inclined to compensate for the weak representation of states by taking a less centralist stance.

Insert Table 1 about here

The political party system

According to Kramer (2000, 278-279, 284), state governments in the USA influence federal decision-making not through formal representation in the Senate but rather through informal mechanisms, with political parties the most important factor. He pointed in particular to the interlocking nature of decentralized and non-centralized parties. The idea is that state and federal officials – as well as the administrative bureaucracy – are politically dependent.

According to Kramer (2000, 284), this creates 'a broader political culture that in various ways favors the states in national politics.' This leads to the hypothesis that:

> H.2. Courts take a more centralist stance if the political party system ensures the protection of state interests by the governing national parties.

The difficulty is to discern the political party systems in which this occurs. While several scholars consider a decentralized party organization vital for preventing the encroachment of the national government on subnational governments (Kramer 2000, 278, Riker 1964, 91, Bednar 2009, 113-118), it is possible for centralized parties to internally incorporate state interests (Thorlakson 2009, 158). Most important, we need to identify political systems where state and federal party organizations are structurally linked in such a way that state parties have considerable influence over the federal party.

This type of vertical integration and influence was measured by Thorlakson (2009) in seven federations, five of which are included in my sample: Australia, Canada, Germany, Spain and the US. 'Vertical integration' denotes 'the organizational and strategic linkages that connect state and federal parties', and 'influence' refers to 'the extent to which the state party organizations exercise control in the governance of the federal party' (Thorlakson 2009, 160). The results show that integration and influence vary amongst political parties within one political system, but low levels of influence of state parties is rare. In the US, Germany, Australia and Spain all or most political parties are integrated, and most state parties have a high or moderate influence over the national party. The exception is Canada, where political parties are not integrated, and state and federal party organizations operate in a more isolated way (Thorlakson 2009, 166).

To this list two other, clear-cut cases are added. The first is Belgium, where, in the absence of national parties, the federal government consists of regionally-based parties that only stand for election in their own region (Popelier 2015, 223-224). As many of these regionally-based parties have also developed a regionalist agenda, the representation of regional interests is ensured to such an extent that the federal interest is defined as the sum of the interests of the two major language communities. This is reflected in the composition of the federal government, as the Constitution requires a language-based parity, resulting in a parity of French- and Dutch-speaking regional parties (Constitution of Belgium, sec 99). The other case is South Africa, where one-party dominance of the African National Congress (ANC) at the regional and central levels has a strong centralizing effect (Abebe 2013, 60; Hepburn and Detterbeck 2013, 86; Govender 2014, 393).

Although results are confined to only seven countries within the sample, Table 2 shows that the hypothesis is not sustained. While the evidence from Australia, Canada and the USA is consistent with expectations, an adverse effect is visible in Belgium, Germany and South Africa. However, if we only concentrate on courts with a non-centralist stance – all included in Table 2 – a higher but inverse correlation is visible, with Canada as the outlier. This seems to turn the hypothesis around, suggesting that courts are more likely to take a *non*-centralist stance if the political party system ensures the protection of state interests by the governing national parties.

Insert Table 2 about here

The appointment of judges

If courts are to adjudicate conflicts of power in an impartial way, they should be independent of both the federal and the state levels of government (Hueglin and Fenna 2006: 281-282). This raises the question of whether the procedure for the appointment of judges is dominated by the federal government or whether subnational governments are involved. Aroney and Kincaid (forthcoming), among other scholars, have placed particular emphasis on the potential importance of various aspects of the selection of judges for the resolution of federalism cases.

According to Somin (forthcoming), in the U.S., the President's dominant role in selecting federal judges makes it difficult for federal courts to play an active role in reviewing and invalidating federal legislation. In Brazil, empirical research pointed out that there is indeed some alignment between Presidential appointment and judicial behavior in federalism disputes, although not as strong as expected (Arlota and Garoupa 2014, 158). The hypothesis, then, is that:

> H.3. Courts will be more likely to take a non-centralist stance if states are involved in the selection procedure or if the composition of the court reflects the federal structure.

This hypothesis was tested by examining appointment procedures to determine the involvement of states in the judicial selection procedure and the extent to which the judges are representatives of the states.

State influence is weakest if the federal government or parliament controls the entire selection procedure or if state bodies other than state legislators or executives are consulted. For example, in Australia, judges of the High Court are appointed by the Governor-General in Council, after consultation with the state attorneys-general (Constitution of Australia, sec 72 combined with High Court of Australia Act 1979, sec 6), but these consultations are not

transparent and have not resulted in a balanced composition that is representative of the various states (Aroney forthcoming).

State officials are involved in the selection of judges in various ways that reflect different levels of influence in the process. State influence is strongest when state officials are involved directly and is not as strong when state officials are involved indirectly through a second chamber. State influence is also strongest when the second chamber has a decisive role in selecting judges and is not as strong when the second chamber is merely consulted or has a nominating role. If the second chamber is not representative of the states, then states are deemed not to wield influence on this dimension. For example, in Spain, two members of the Constitutional Court are appointed by the King after nomination by the Senate (Constitution of Spain, sec 159.1), but, as mentioned above, the Senate is not representative of subnational entities. A supermajority of three-fifths is required, further reducing the weight of the Self-governing Communities in this chamber. In Belgium, the Senate has only been representative of the states since 2014. Previously, a minority of Community senators, combined with the presence of language groups and the decisive role of regionally-based political parties, meant that state officials wielded more influence.

The table is based on the legal provisions. This explains a high ranking for Brazil: even though there is a 'general impression' that all depends on the will of the President in view of the deferential stance of the Senate (Arlota and Garoupa 2014, 141), formally the requirement that the Presidential choice is confirmed by the Senate implies a decisive influence.

The degree to which states are represented in the central court can also be assessed by considering a second factor: whether there are formal requirements or informal conventions to ensure that judges are entirely or partly representative of the states or the federal structure. State

representation is strongest when there are formal requirements for representation of states and is not as strong when there are only informal conventions along these lines. Meanwhile, state representation is strongest when these rules lead to judges on the court being entirely representative of the states and is not as strong when these rules result in judges being partly representative of the states.

Two federations have rules of this sort: Belgium and Canada. Strong requirements are stipulated for judges in the Belgian Constitutional Court, who belong to either the Dutch or the French language group. This, however, makes them representative of the linguistic groups of the multinational Belgian State rather than the federated entities. In the Canadian Supreme Court, requirements are limited to ensuring representation of judges from Québec (Supreme Court Act, sec 6) – although this is to ensure capacity to decide civil law cases coming from Quebec rather than regional representation (Webber 2015, 121).

Table 3 reveals that neither of these two considerations alone, that is, involvement of states in the selection process or existence of a representation requirement, is correlated with a centralist or non-centralist stance of the court. Only Belgium has a high ranking on both the selection and representation requirements, and this indeed corresponds with a non-centralist stance. In addition, three of the four countries with a low ranking on both selection and representation requirements have a centralist court. Low representation of states in the selection of judges or composition of the courts, then, may advance a more centralist stance. However, this is certainly not a conclusive factor, as the low ranking on both variables in Spain does not hinder the Spanish Constitutional Court from taking a non-centralist stance.

Insert Table 3 about here

Decentralized or centralized federations

Aroney and Kincaid (forthcoming(a)) suggest a correlation between the degree of centralization of a country and federalism jurisprudence, but find no convincing evidence in several case studies. The hypothesis nevertheless makes sense. We can expect courts to rely on the constitutional setting and thus federalism jurisprudence to reflect a centralist or decentralist constitutional arrangement. This leads to the following hypothesis:

> H.4. Courts will take a more centralist stance in highly centralized states and will be more likely to take a non-centralist stance in more decentralized states.

A difficulty arises in measuring the extent of centralization. The databases available that measure decentralization present different results.[6] The World Bank's decentralization index (Ivanyna and Shah 2014) was chosen, as it is the most comprehensive.

Table 4 indeed reveals some correlation between the degree of centralization in the federal system and a centralist stance of the court, and vice versa, but this is not conclusive. The outliers are Brazil and the USA, where centralist courts operate in a non-centralized legal system, and Nigeria and Spain, where non-centralized courts function in a centralized system. It should be added, however, that within the African continent, Nigeria is considered the sole country where federalism is 'deeply entrenched' and subnational units are amongst 'the most powerful' (Suberu 2009, 67) – putting somewhat in perspective its centralization rate.

Insert Table 4 about here

Devolutionary multinational states

In attempting to explain the behavior of the courts in federalism jurisprudence, Aroney and Kincaid (forthcoming, (a) and (b)) point out two dimensions of federalism, without, however, specifying precisely how they influence the courts' position. One dimension focuses on whether the federal system was formed as an integriative or devolutionary act. Another dimension assesses the degree to which the federation can be characterized as homogenous or heterogeneous.

Examining the integration/devolution axis presupposes an ability to categorize the federations in the sample. Some legal systems, such as that in the US, are clearly integrative, with the sovereign states united into one federative legal system. Others, such as Belgium and Spain, are clearly devolutionary, as they evolved from a unitary state into a multi-tiered system. In other cases, this is more difficult to identify and often depends, as in the case of Germany, on the moment that is used as the starting point. This article relies on the classification by Aroney and Kincaid (forthcoming(a)), but they leave three cases undecided: Canada, Germany, and India. To resolve the question, more value was attached to dynamics than origin.

Germany evolved from an association of independent states into a federation in 1871, then went into a phase of further centralization until the creation of a totalitarian unitary state by the Nationalist Socialist Regime (Heun 2011, 51). After the Second World War, Germany returned to a federal structure. Thus, integrative dynamics were followed by devolutionary trends. Subsequently, unification marked a renewed integrative phase. Integrative dynamics, then, seem more characteristic of German federalism than devolutionary dynamics. Evidence for this is found in the pre-existence of *Länder* constitutions and in the country's notable centralist functioning. The literature defines Germany as 'a unitarian and cooperative federal state by

increasing centralization' (Heun 2011, 73-77). Therefore, Table 6 classifies Germany as an integrative federal state.

The Canadian federation was established in 1867 as a response to the difficulties within the United Province of Canada (Watts 2008, 21, Webber 2015, 19-20). Subsequently, new provinces joined the federation, adding integrative dynamics to the Canadian legal system (Brouillet forthcoming). In its functioning, Canada exhibits devolutionary dynamics. As Watts (2008, 22) states: 'Despite its originally centralized form, a century and a quarter of pressures to recognize duality and regionalism have made Canada a relatively decentralized federation'. Therefore, Canada is classified as a devolutionary system, consistent with the assessment of Aroney and Kincaid (forthcoming(a)).

Finally, the unitary Indian colony became independent in 1947 and became the Federal Union of India in 1950 (Watts 2008, 24), integrating several Indian 'princely states' in the process (Muni 1996, 187-188). Thus, India is both devolutionary and integrative in its origin. The Federal Union was established as a highly centralized federation, to protect the culturally diverse nation against disintegration, but, soon after, a devolutionary process was started establishing self-government on a linguistic basis. In turn, this enhanced the development of ethnic identity and its political expression (Muni 1996, 190). Therefore, in Table 5, as confirmed in the literature (Chinnappa Reddy 2008, 222), India is classified as a devolutionary federation.

Table 5 reveals no correlation between devolution and a centralist or non-centralist court. The two dimensions of federalism, however, are linked: the devolutionary nature of a federation is an important factor when linked to its multinational character. As is apparent in Table 6, not all devolutionary federations are multinational, but all multinational federations are devolutionary systems.

The hypothesis, therefore, concentrates on those federations that are both devolutionary and multinational. If a devolutionary process providing autonomy to multinational entities is deemed vital to the stability of a State, we can expect that courts will be more likely to be open to regionalist claims. However, multinational federalism is also a factor linked to instability, because it reinforces regional identity and, consequently, disintegrative forces. This may explain why none of the courts was shown to take a clear regionalist stance. The hypothesis is therefore that:

> H.5. Courts will be more likely to take a non-centralist stance if they operate in a devolutionary and multinational federal system.

Table 5 does not confirm the hypothesis, as courts in devolutionary multinational countries such as India and South Africa take a centralist stance. Nevertheless, four of the five non-centralist courts – Belgium, Canada, Nigeria and Spain – do operate in a devolutionary and multinational federal context. Moreover, we can expect that courts allow for a non-centralist outcome only in-so-far as this does not endanger stability in a divided State. This may explain the centralist stance of courts in a conflictual country such as India. It may also explain why in Nigeria, defined as 'violently divided' and 'headed for collapse or disintegration' (Suberu 2009, 68), the Court, while ultimately qualified as 'balanced', also shows some centralist tendencies. Therefore, the hypothesis should not be dispensed with too rapidly.

Insert Table 5 about here

CONCLUSION

This article presented five explanatory hypotheses to account for the centralist or decentralist behavior of courts in federalism disputes. Considering its exploratory nature, the article's purpose has been to determine which hypotheses have the potential for further inquiries and which can be dismissed.

The five hypotheses concerned i) the degree to which subnational governments are represented in federal lawmaking, ii) the degree of integration of state parties and national parties, iii) the representation of federated entities in the appointment of judges or the composition of the court, iv) the degree of decentralization of the federal system, and v) the devolutionary and multinational nature of the federation. No conclusive evidence was found for any of the hypotheses, but we can nevertheless draw four tentative conclusions. First, courts are more inclined to take a non-centralist stance when representation of subnational governments at the federal level is weak. Second, low levels of representation of the states in selection of judges or composition of the courts may be associated with a more centralist stance. Third, a centralist or non-centralist stance often (but not necessarily) reflects the centralization gradient of the federal system. Finally, there is some potential in the hypothesis that courts are more inclined to take a non-centralist stance in devolutionary multinational states, unless there is a risk to the stability of the country. These final considerations, regarding the extent of centralization and the devolutionary and multinational character of the federation, are particularly worthy of further study in terms of their influence on the centralist or decentralist approach of courts.

On the basis of these results, further research is recommended. This requires the collaborative work of a network of local experts and the building of coded sets of databases. In a second stage, in-depth studies should be undertaken for separate countries, to explain variation that follows from country-specific factors. Particularly interesting in this respect is the study of

fragmenting multinational states – still too often overlooked in the formation of federalism theory. Again, a coded database of judgments in federalism disputes is required to achieve this goal.

Table 1. Representation of states in federal decision making

Country	Court's stance	Representation
India	Centralist	Strongest
Australia	Centralist	Strong
Brazil	Centralist	Strong
Mexico	Centralist	Strong
South Africa	Centralist	Strong
USA	Centralist	Strong
Germany	Non-centralist	Strongest
Canada	Non-centralist	Strong
Nigeria	Non-centralist	Strong
Belgium	Non-centralist	Weak
Spain	Non-centralist	Weakest

Table 2. Integration of state parties and national parties

Country	Court's stance	Influence of state parties
Australia	Centralist	Meaningful
USA	Centralist	Meaningful
South Africa	Centralist	Negligible
Belgium	Non-centralist	Meaningful
Germany	Non-centralist	Meaningful
Spain	Non-centralist	Meaningful
Canada	Non-centralist	Negligible

Table 3. Role of states in selecting judges:

Country	Court's stance	State influence in selection	Representation requirements
Brazil	Centralist	Modest	No
Mexico	Centralist	Modest	No
USA	Centralist	Modest	No
Australia	Centralist	No	No
India	Centralist	No	No
South Africa	Centralist	No	No
Belgium	Non-centralist	Modest	Yes
Germany	Non-centralist	Modest	No
Nigeria	Non-centralist	Modest	No
Canada	Non-centralist	No	Yes
Spain	Non-centralist	No	No

Table 4. The degree of centralization of the federation

Country	Court's stance	Degree of centralization	World Bank 2012 ranking with 1 = most decentralized
Australia	Centralist	More centralized	55th
India	Centralist	More centralized	76th
Mexico	Centralist	More centralized	81st
South Africa	Centralist	More centralized	47th
Brazil	Centralist	More decentralized	13th
USA	Centralist	More decentralized	9th
Nigeria	Non-centralist	More centralized	48th
Spain	Non-centralist	More centralized	46th
Belgium	Non-centralist	More decentralized	23rd
Canada	Non-centralist	More decentralized	12th
Germany	Non-centralist	More decentralized	20th

Table 5. Devolutionary federalism and Multinationalism

Country	Court's stance	Devolutionary	Multinational
India	Centralist	Yes	Yes
South Africa	Centralist	Yes	Yes
Brazil	Centralist	Yes	No
Mexico	Centralist	Yes	No
Australia	Centralist	No	No
USA	Centralist	No	No
Belgium	Non-centralist	Yes	Yes
Canada	Non-centralist	Yes	Yes
Nigeria	Non-centralist	Yes	Yes
Spain	Non-centralist	Yes	Yes
Germany	Non-centralist	No	No

References

Abebe, Adem Kassie. 2013. Umpiring Federalism in Africa: Institutional Mosaic and Innovations. *African Studies Quarterly* 13 (4): 53-79

Adam, Jürgen and Christoph Möllers. 2014. Unification of Laws in the Federal System of Germany. In *Federalism and Legal Unification.* 237-254. Dordrecht: Springer.

Arlota, Carolina and Nuno Garoupa. 2014. Addressing Federal Conflicts: An Empirical Analysis of the Brazilian Supreme Court, 1988-2010. *Rev of Law & Economics* 10 (2): 137-168

Aroney, Nicholas. Forthcoming. The High Court of Australia: Textual Unitarism vs. Structural Federalism. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Aroney, Nicholas and John Kincaid. Forthcoming. Introduction. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Aroney, Nicholas and John Kincaid. Forthcoming. Comparative Conclusions: Federalists or Unitarists?. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Baier, Gerald. 2006. *Courts and Federalism.* Vancouver: UBC Press.

Bednar, Jenna. 2009. *The Robust Federation: Principles of Design*. Cambridge: Cambridge University Press.

Benz, Arthur. Forthcoming. The Federal Constitutional Court of Germany: Guardian of Unitarism and Federalism. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Brouillet, Eugénie. Forthcoming . The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effects on the Balance of Power. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Burgess, Michael. 2006. *Comparative Federalism: Theory and Practice.* London: Routledge.

Bustamante, Thomas and Evanilda de Godoi Bustamante. 2011. Brazil. Constitutional Courts as Negative Legislators: the Brazilian Case. In In *Constitutional Courts as Positive Legislators*, ed. A. Brewer-Carías. 283-313. Cambridge: University of Cambridge Press.

Bzdera, André. 1993. Analysis of Federal High Courts: A Political Theory of Judicial Review. *Canadian Journal of Political Science* 26 (1): 3-29.

Caballero Juárez, José Antonio. Forthcoming . The Supreme Court of Mexico: Reconfiguring Federalism through Constitutional Adjudication and Amendment after Single Party Rule. In *Courts in Federal Countries: Federalists or Unitarists?*, ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Casanas Adam, Elisenda. Forthcoming . The Constitutional Court of Spain: From System Balancer to Polarizing Centralist. In *Courts in Federal Countries: Federalists or Unitarists?*, ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Chinnappa Reddy, Ontethupalli. 2008. *The Court and the Constitution of India*. Oxford: Oxford University Press.

Choper, Jesse. 1977. The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review. *Yale L.J.* 86: 1552-1621.

Dinan, John. 2010. Review Essay. The Rehnquist Court's Federalism Decisions. *Publius: the Journal of Federalism* 41 (1); 158-167.

Elvira, Ascensión. 2011. Spain. In *How Constitutions Change. A Comparative Study*, ed. D. Oliver and C. Fusaro, 281-302. Oxford: Hart.

Ferreres Comella, Victor. 2013. *The Constitution of Spain: A Contextual Analysis.* Oxford: Hart.

Gageler, Stephen. 1987. Foundations of Australian Federalism and the Role of Judicial Review. *Fed. L. Rev.* 17 (3): 162-198.

Govender, Karthy. 2014. Federalism and Legal Unification in South Africa. In *Federalism and Legal Unification*, ed. D. Halberstam and M. Reimann, 391-416. Dordrecht: Springer.

Griffin, Stephen. 2013. The United States of America. In *How Constitutions Change. A Comparative Study*, ed. D. Oliver and C. Fusaro, 357-378. Oxford: Hart.

Hepburn, Eve and Klaus Detterbeck. 2013. Federalism, regionalism and the dynamics of party politics. In *Routledge Handbook of Regionalism and Federalism*, ed. J. Loughlin, J. Kincaid and W. Swenden, 76-92. London: Routledge.

Heun, Werner. 2011. *The Constitution of Germany. A Contextual Analysis.* Oxford: Hart.

Hueglin, Thomas and Alan Fenna. 2006. *Comparative Federalism. A Systematic Inquiry.* Toronto: Broadview Press.

Hirschl, Ran. 2013. *Comparative Matters.* Oxford: Oxford University Press.

Ivanyna, Maksym and Anwar Shah. 2014. How Close is Your Government to its People? Worldwide Indicators on Localization and Decentralization. *Economics* 8 (3): 1-61.

Kincaid, John. 2013. The United States of America. From dualistic simplicity to centralized complexity. In *Routledge Handbook of Regionalism and Federalism,* ed. J. Loughlin, J. Kincaid and W. Swenden, 157-171. London: Routledge.

Kramer, Larry. 2000. Putting the Politics Back into Political Safeguards of Federalism. *Col.L.Rev.* 100 (1): 215-293.

McGinnis, John O. and Ilya Somin. 2004. Federalism vs States' Rights: A Defense of Judicial Review in a Federal System. *Northwestern University Law Review* 99 (1): 89-130.

Muni, S.D. 1996. Ethnic conflict, federalism, and democracy in India. In *Ethnicity and Power in the Contemporary World,* ed. K. Rupesinghe and V.A. Tishkov, 179-198. Tokyo: United Nations University Press.

Peeters, Patrick and Jens Mosselmans. Forthcoming . The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Popelier, Patricia. 2015. Secessionist and Autonomy Movements in Flanders: The Disintegration of Belgium as the Chronicle of a Death Foretold? In *States Falling Apart? Secessionist and Autonomy Movements in Europe,* ed. E.M. Belser et al. 215-246. Bern: Stämpfli Verlag.

Popelier, Patricia and Koen Lemmens. 2015. *The Constitution of Belgium. A Contextual Analysis.* Oxford: Hart.

Rodrigues, Marcos Antonio et al. Forthcoming . The Supreme Federal Court of Brazil: Protecting Democracy and Centralized Power. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Saunders, Cheryl. 2011. *The Constitution of Australia. A Contextual Analysis.* Oxford: Hart.

Saunders, Cheryl and Foster, Michelle. 2014. The Australian Federation: A Story of the Centralization of Power. In *Federalism and Legal Unification.* 87-102. Dordrecht: Springer.

Saxena, Rekha. 2013. India: A Hybrid Federal-Unitary State? In *Routledge Handbook of Federalism and Regionalism,* ed. J. Loughlin, J. Incaid and W. Swenden, 353-370. London: Routledge.

Shapiro, Martin. 1981. *Courts: A Comparative Analysis.* Chicago: University of Chicago Press.

Somin, Ilya. Forthcoming . The Supreme Court of the United States: Promoting Centralization More than State Autonomy. In *Courts in Federal Countries: Federalists or Unitarists?,* ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Steytler, Nico. Forthcoming . The Constitutional Court of South Africa: Reinforcing South Africa's Hourglass System of Multilevel Government. In *Courts in Federal Countries: Federalists or Unitarists?*, ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Suberu, Rotimi. 2009. Federalism in Africa: the Nigerian Experience in Comparative Perspective. *Ethnopolitics* 8 (1): 67-86.

Suberu, Rotimi. Forthcoming . The Supreme Court of Nigeria: An Embattled Judiciary that is More Centralist than Federalist. In *Courts in Federal Countries: Federalists or Unitarists?*, ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Tewari, Manish and Rekha Saxena. Forthcoming . The Supreme Court of India: The Rise of Judicial Power and the Protection of Federalism. In *Courts in Federal Countries: Federalists or Unitarists?*, ed. N. Aroney and J. Kincaid. Toronto: University of Toronto Press.

Thorlakson, Lori. 2009. Patterns of Party Integration, Influence and Autonomy in Seven Federations. *Party Politics* 15 (2): 157-177.

Tushnet, Mark. 2009. *The Constitution of the United States of America. A Contextual Analysis.* Oxford: Hart.

Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany.* Cambridge: Cambridge University Press.

Watts, Ronald. 2008. *Comparing Federal Systems.* 3rd ed. Montreal: McGill-Queen's University Press.

Wechsler, Herbert. 1954. The Political Safeguards of Federalism. *Columbia Law Review* 54 (4): 543-560.

Webber, Jeremy. 2015. *The Constitution of Canada. A Contextual Analysis.* Oxford: Hart.

Endnotes

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[2] Data from our own database, which was built for an FWO-funded project, supervised by the author and X and carried out by Y.

[3] Data from our own database.

[4] Data from our own database. Federalism disputes concerned federal laws in 30.5 percent of the cases, in the other cases laws of the states were challenged.

[5] By 2014, representation of the federated parliaments had become stronger, but the powers of the Senate had diminished. Table 5 refers to the former election procedure.

[6] Compare the World Bank index used here with Hooghe et al. (2010).