WHY MULTI-ETHNIC BELGIUM'S CONSTITUTIONAL COURT KEEPS MUM: THE CONSTITUTIONALIZATION OF ETHNICITY, JUDICIAL REVIEW, AND "PASSIVE VIRTUES"

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ABSTRACT

The recent decades have witnessed the constitutionalization of ethnicity in various multi-ethnic countries. From Spain to Ethiopia, this has mostly been along a federal path. This global trend has also coincided with what might be called the judicialization of politics and, in particular, the global spread of constitutional review. Multi-ethnic Belgium's federalization process follows the first global trend but not the second. The constitutionalization of ethnicity has happened without the Belgian constitutional court's involvement. This is thus the first international study of not when constitutional courts act but when they do not and why this matters. The article builds on the notion of "passive virtues" Alexander M. Bickel coined in 1961 to explain how the U.S. Supreme Court had found ways to avoid, decline, or delay judgment on controversial and essentially political matters upon which it was asked to rule. During Belgian federalization, politics led and the constitutional court followed.

KEYWORDS: *constitutional courts, judicial review, comparative federalism, constitutionalization of ethnicity*

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Detective: *Is there any other point to which you would wish to draw my attention?*
Sherlock Holmes: *To the curious incident of the dog in the night-time.*
Detective: *The dog did nothing in the night-time.*
Sherlock Holmes: *That was the curious incident.*
Sir Arthur Conan Doyle (1892), *Silver Haze*

The most important thing we do is not doing.
U.S. Supreme Court Justice Louis D. Brandeis in *Atherton Mills v. Johnston*[2]

I. JUDICIAL REVIEW AND "PASSIVE VIRTUES"

The recent decades have witnessed, in various forms and shapes, the constitutionalization of ethnicity in countries with multi-ethnic populations. Spain and Belgium are relative newcomers to this process in Europe, but both now have constitutions with federal characteristics recognizing ethnicity, territorial autonomy, and group rights. Through devolving power to Scotland, Wales, and Northern Ireland, the United Kingdom has also joined the list. Elsewhere, federal constitutions that were designed for other political purposes in the nineteenth century have become vehicles for the constitutionalization of ethnicity; Switzerland, and arguably Canada, are examples of this. Multi-ethnic countries that had been wrecked by civil war have also been experimenting with federal-type constitutional solutions; Bosnia Hercegovina and Ethiopia are the primary examples of this sort of constitutionalization, which might be labeled post-conflict federalism. In other places, former authoritarian political regimes have also remodeled their democratic future along the constitutionalization of ethnicity. Africa's two biggest countries, Nigeria and South Africa, lead this subgroup.[3] Parallel to this has been another development. The constitutionalization of ethnicity has gone hand in hand with a global embrace

2. Alexander M. Bickel collected, reviewed, and edited the unpublished material Brandeis had left with his colleagues on the bench after retiring from the U.S. Supreme Court. Brandeis's widely quoted assertion is in fact from one of his unpublished opinions in this volume (Bickel 1957; Franck 1958; Konefsy 1958). Incidentally, Bickel also happens to be the author of the notion of "passive virtues" (1961) guiding this article.

3. Nigerian federalism is more explicit in constitutionalizing ethnicity—particularly in terms of the so-called "federal principle" that calls for regional ethnic representation in employment and representation. Due to the apartheid practice of "ethnic homelands," in democratic South Africa the constitutional recognition of forms of ethnic/religious/cultural group rights and variations of ethnic quotas coexist with strong nationwide constitutional clauses on individual rights.

of judicial activism and the subsequent judicialization of politics (Tate and Vallinder 1995; Hirschl 2004; Hoennige 2011).

In most cases in which ethnicity has been constitutionalized, a constitutional high court acts as the defender of the constitution, an impartial arbiter among the various new subnational entities and the center and the final authority on the interpretation and application of the constitution. The Belgian constitutional court is formally one such institution. But the Belgian court has remained mostly absent from the country's debates over the essence of federalism, from jurisdictional issues over the competence of the new ethnic subnational entities, and indeed over the constitutionality of the state reforms that ushered in the recognition of ethnicity and subsequent federalization. This article is an examination of the potential reasons for the Belgian court punching below its weight. As ethnicity becomes constitutionalized in other parts of the world, it is imperative to learn from the experience of a country that underwent a gradual constitutionalization of ethnicity towards federalism.[4] From East Asia to Latin America, the lessons are particularly important for the developing world as new constitutions introducing judicial review—among other democratic reforms—have become the norm (Ginsburg 2003; Couso et al. 2010; Ingram 2015). In fact, many see close links between federalism and the global spread of constitutional review (Ginsburg 2008, 83–84; Halberstam 2008). It is for this reason that comparative constitutional law needs to make sense of why the Belgian court differs from the rest. But in order to explain the reasons behind the Belgian court's judicial (in)action, we have to first understand the political dynamics behind the constitutionalization of ethnicity in Belgium.

The Belgian state had started its life under a unitary constitution in 1831. After more than a century of containing the successive political challenges within this constitution, cracks within the unitary shell started to appear in the post Second World War years. Gradual federalization started in the 1960s with the creation of an internal linguistic border between the Dutch-speaking north and French-speaking south, while the capital Brussels in the middle of the country became officially bilingual. Until then, multi-ethnic Belgium had successfully continued its life

4. The constitutional recognition of ethnicity can take various forms that can be grouped under four general categories: (1) territorial autonomy in the form of federalism, devolution, or ethnic homelands; (2) non-territorial collective autonomy for ethnic groups in linguistic/cultural/religious/educational policy areas; (3) constitutionalized variations of consociational power sharing; and (4) constitutionalization of national and regional ethnic quotas in employment and representation. Constitutional recognition can also apply asymmetrically across different parts of a country. And it is not uncommon that forms of collective group rights for ethnic groups coexist with constitutionally entrenched individual rights.

within the unitary constitutional shell of 1831. For most of its constitutional history in the nineteenth century and early twentieth century, the main political cleavage of Belgium was between anti-clerical liberals (later joined by socialists as voting rights expanded to those without property and higher education) and conservative Catholics (later joined by the Christian labor movement similarly as a result of the expansion of suffrage). This cleavage did not have a clear territorial basis, so the unitary constitution was able to provide the rules of the game for political competition. By the late nineteenth century, Belgium had become the first country on the European continent to undergo rapid industrialization, with the consequences of urbanization, modernization, and indeed political competition for the electoral loyalty of the newly enfranchised working classes.[5] French was the language of the educated upper and middle classes, and the rest spoke various dialects; in the south of the country, these were various Walloon dialects of French, and in the north it was the Flemish dialects of Dutch. But notwithstanding such ethnolinguistic heterogeneity, it was social class and religiosity that defined the political identities and loyalties of the time. The political divide between the religious and the secular had congealed around the time of the introduction of universal suffrage in 1893 and continued to define Belgian politics well into the 1950s.

Following the end of the Second World War, a so-called "education peace" (*pacte scolaire/schoolspact*) was negotiated between the two political camps. The anti-clerical alliance of liberals and socialists and their Catholic opponents agreed to separate the country's educational system into two halves in the form of a secular public system and a Catholic one, both subsidized by the Belgian state. Once this deep and divisive issue defining both camps was settled in 1958, it soon became manifest that the religious/secular division had in fact ethnolinguistic undertones to it. The Flemings of the north were overrepresented within the Catholic camp, and Francophones were more likely to support either liberals or socialists—the two parties defined by political secularism. In the meantime, modernization and compulsory education had led to the standardization of regional dialects around international French and Dutch in written form (while the dialects proved to be a little more resilient in spoken form). By the 1960s, the country had become one with two ethnolinguistic communities: French-speaking Walloons in the south together with the mostly French-speaking Brussels and the Dutch-speaking Flemings of the north (the country also has a tiny German-speaking community in the east of the

5. What was then called universal suffrage (*suffrage universel/algemeen stemrecht*) was limited to male voters. There was also a class element to this in the form of the practice of plurality of votes; that is, male voters were given an additional one or two votes based on education and property.

country). Once put in place, the language laws of 1962/1963 became a bridgehead for the further federalization of the country.

Belgians prefer the term "communitarization"—instead of federalization—to describe the process of gradually changing the country's defining constitutional organizing principle from a unitary state to one defined by a federal union between Francophones and Flemings. And communitarization is indeed a more accurate term for what has what happened in the early episodes of Belgian state reform. The territorial element of federalism in fact came later. Formal constitutional change started with the establishment of so-called "cultural communities" in 1970. National policies closely associated with language—like education, culture, and media—were devolved to these two new subnational entities in the form of the French cultural community and the Flemish cultural community. The following decades witnessed successive state reforms in the direction of federalization. All this happened while Belgian judiciary remained conspicuously absent from this process. This is the main explanatory goal the article pursues—Sherlock Holmes's "curious incident of the dog in the night-time" in other words. Elsewhere, federal systems have strong and active constitutional high courts combined with an increased international recognition of the notion of judicial supremacy; i.e., the court has the "exclusive" power to determine the meaning of the constitution (Friedman and Delaney 2001, 1138). Not in Belgium. The question is why.

Explaining why things do not happen is sometimes as important as explaining why they do—particularly if the explanation for such judicial inaction carries with it potential lessons for other places where ethnicity is in the process of being constitutionalized. This is thus not a study of how and why constitutional high courts act but a quest to explain when they do not and why this matters. But before examining why the constitutionalization of ethnicity has remained insulated from the Belgium's highest court, it is imperative to sketch out the contours and nuances along which the process of Belgian federalization unfolded. With the risk of losing narrative suspense, at this point it might be necessary to give away the main conclusion that emerges from the examination of federalization and the court's behavior that accompanied this examination.

During the early stages of the federalization process, under the 1831 constitution, the Belgium's highest court—called the Court of Arbitration at the time—simply did not have the power to act. And when it eventually acquired the constitutional power for judicial review, it either excused itself, kept mum, dismissed cases on technicalities, or buried its decisions in wordy verdicts open to different interpretations. The Belgian court thus seems to go against other examples around the world, as constitutional courts—not only in federal systems but throughout the

democratic world—have been given or have assumed the role of being the final authority on interpreting the constitution, deciding the constitutionality of legislative and administrative acts, and determining the reach of the jurisdictional spheres of the subnational entities (for overviews see Hirschl 2008; Vanberg 2015). In addition to active and activist constitutional courts, many observers see a rise in judicial activism in general around the world in the last couple of decades. One observer claims this represents the "fall of the political question doctrine and the rise of judicial supremacy" (Barkow 2002, 237). For others, the global expansion of judicial power signifies the "judicialization of politics" (Tate and Vallinder 1995). In light of these works highlighting the global rise of judicial supremacy, it seems then we either have an outlier in the form of a quiet Belgian court, or existing explanations for judicial activism might have left some relevant parts of the comparative picture out. This means that explaining why the Belgian court punches below its weight can help fine-tune the claims that the world is headed toward a "juristocracy" (Hirschl 2004).

While studying constitutional high court inaction with comparative references to federal countries where ethnicity has been constitutionalized is new, studying judicial restraint and passivity has a longer pedigree in law going back to medieval times (Hershkoff 2001, 1941).[6] The prelude to the civil rights movement in the United States had also begotten one such study. In the foreword he wrote to the overview of the 1960 U.S. Supreme Court, Alexander M. Bickel coined the term "passive virtues" in order to explain how the Court had found ways to avoid, decline, or delay judgement on controversial, and essentially political, matters upon which it was asked to rule (Bickel 1961). In his nuanced and thoughtful overview, the U.S. legal scholar traced the origins of the judicial restraint to the political philosophy of Abraham Lincoln or, more precisely, to the "Lincolnian tension between principle and expediency" (Bickel 1961; also in Kronman 1985, 1581–82). The expediency inherent in a political compromise did not equal unprincipled politicking. Bickel had the coming civil rights movement in mind and the legal challenge having to rule on issues that will bind, constrain, and influence voters and governments while foundational changes were unfolding in American politics: "It is not for the Court to work out or even approve such compromises. That would be incompatible with the function of principled judgement. Nor is it automatically

6. Political scientists have also looked at the notion of strategic self-restraint, mostly by employing game-theoretic models and focusing on the attitudes of individual judges (Vanberg 2001; Santoni and Zucchini 2004; Brourard 2009).

true, however, that such compromises nullify the validity of the effectiveness of principle" (Bickel 1961, 50).

Despite his thoughtful and nuanced articulation of what judicial restraint means and why this indeed should be seen as a passive virtue, Bickel is not an isolated figure in this intellectual tradition. Yet another legal scholar, and indeed a past justice of the Supreme Court, Felix Frankfurter had earlier written about the inherently political role judicial review can come to play in federal systems: "in view of our federalism and the Court's peculiar function, questions of jurisdiction in constitutional adjudications imply questions of political power" (Frankfurter 1931, 308). In his overview of Justice Frankfurter's record on the bench Louis H. Pollack informs us that Frankfurter's views on judicial restraint were indeed influenced by a fellow legal scholar and Justice Felix Brandeis (Pollack 1957, 308). It is thus noteworthy that Justice Frankfurter had passed Justice Brandeis's unpublished works on to Bickel, who then edited and published these works, including the assertion "the most important thing we do is nothing" opening this article (Bickel 1957). According to Bickel's Yale Law School colleague Anthony Kronman, there are various ways to exercise these "passive virtues" of exercising judicial restraint:

> [The Court] may deny that it has jurisdiction to hear a case or assert that the plaintiff lacks standing to bring it; it may dismiss a case for lack of ripeness or refuse to hear it on the grounds that it raises a political question; and it may decide a case on some narrower basis than that proposed by the parties and thus avoid reaching any of the constitutional issues it would otherwise have to address. (Kronman 1985, 1585)

As we will see in Section II, all of these tactics the U.S. Supreme Court had employed have also been put to use by the Belgian court. The debates and discussions that took place in the United States from the early to mid-twentieth century thus helps shed light on why the Belgian court behaves the way it does today. It seems the Belgium's Constitutional Court is indeed exercising something akin to Bickel's "passive virtues," as it has decidedly left politics to take primacy over the law during times of foundational changes for the country. While this article is certainly not the first study of a reticent court, it is the first that situates the debate within the two global trends of constitutionalization of ethnicity and the spread of constitutional review. Despite having the formal powers to do so, the court has refrained from lending its judicial review powers to the process of constitutional change. The studied silence and ambiguity often displayed by the court on matters of federalization is

not an accident; and once again comparative insights from the United States help us decode the Belgian court's behavior.

According to the American legal scholar Jan G. Deutsch, the appearance of neutrality of the U.S. Supreme Court is inseparable from its perceived legitimacy; this means that the court tends to behave in a way cognizant of "[the] need to preserve its institutional capacity by avoiding needless public controversy" (Deutsch 1969, 218). Deutsch's observation seems to hold for other constitutional courts as well. Arthur Dyevre's work, for example, shows how the German court's preference for judicial activism and restraint follows the ebb and flow of public attitudes to the court and its decisions:

> In Germany, the Federal Constitutional Court saw its popularity drop significantly in the mid-1990s in the wake of the controversy sparked by a series of ruling on sensitive issues. To contain the backlash, the Karlsruhe judges kept a low profile and exerted more restraint until the Court's approval ratings recovered and the Court could be restored to its status as the most respected political institutions of post-war Germany. (Dyevre 2010, 317)

The behavior of the Supreme Court of Canada also fits in with Deutsch's reasoning. The Canadian court is yet another example of a court carefully navigating public opinion in a federation defined by what Sujit Choudhry and Robert Howse call a "clash of constitutional visions" (2000, 166). The court's verdict on the divisive Quebec secession reference is a prime example of this: "The creatively non-committal and ambiguous verdict the Court produced was a sign of its prudent desire to maintain the balance without favouring either side's view of the nature of the Canadian political union" (Erk 2011, 530).[7]

Insights gained from comparing Belgium with other cases and the teachings of the past scholarly literature also expose the need to qualify some of the existing assumptions in the comparative literature on constitutional courts. One such assumption is that when deep disagreements between the different political camps

7. One does not need a federal setup for comparative insights. Without any form of constitutional recognition of ethnicity, and indeed without federalism, France's *Conseil constitutionnel* still provides interesting parallels—especially considering how much of the 1831 constitution of Belgium draws on the French legal tradition (Erk 2013). What differs in the Belgian case is that in France's civil law legal system a strict separation between constitutional powers exists, so the French judiciary in principle lacks supervisory control over the executive because administrative matters are within the jurisdiction of separate administrative courts (Peeters and Mosselman 2017, 77). Another difference is that neither a concrete review nor individual complaint mechanism exists for the French court (Dyevre 2013, 740–43).

constituting a polity exist, there will be more room for judicial activism (Vanberg 2015). Conversely, when the level of the disagreement between the constituent political camps is low, "one should expect the court to be deferential and to refrain from issuing rulings likely to trigger a political backlash" (Dyevre 2013, 305). Accordingly, consensus among political camps on the nature of the country's constitutional setup is likely to lead to a prudent and cautious court showing deference to politics according to this line of reasoning. And by contrast, the court will be more active in countries where consensus seems to be lacking. A variation of this argument posits that political systems based on a constitutional division or separation of powers will likely have an active judiciary (Vanberg 2015, 172). For Keith E. Whittington, in such politically fragmented settings, an activist court simply provides a way of "overcoming gridlock" (Whittington 2007, 124). A variation of this argument is Joseph Weiler's 1991 observation that the European court has been more active during times of political deadlock.[8]

The Belgian case shows the very opposite proposed by these observers: political fragmentation and the lack of overall national consensus have in fact not opened up a political playing field for judicial activism to fill in; it has influenced the Belgian court to chart a path of restraint and prudence instead. This exposes the need for some fine-tuning of the scholarly literature in order to incorporate the observations on why a court that has the power judicial review refrains from exercising its constitutional powers—especially within the context of political fragmentation, widely viewed in the literature to be the enabling factor for an activist court. Belgium has lessons to teach.

The next section gives an overview of the constitutionalization process taking Belgium from a unitary to a federal state and the evolving powers of the country's highest court that accompanied this process. This is followed by an examination of a number of key cases tracking the (in)action of country's highest court. What defines the fifty years of Belgian federalization is how politics leads and formal constitutionalization follows. Constitutionalization of ethnicity, it appears from the examination, is a political rather than legal/technical matter in Belgium. And the comparative lesson seems to be that when deep disagreements between the constituent ethnolinguistic communities exist over the nature of country's political order and its corresponding constitutional foundations, politics trumps law.

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8. It should be noted, however, that in a piece published three years afterward, Weiler predicts an end to this pattern because he expects the "court's pivotal role might come under strain." Consequently, "the Court will be unable to avoid trammelling on political sensibilities. . . . On a whole range of issues, any outcome is bound to anger certain constituencies" (Weiler 1994, 532).

II. FROM A UNITARY TO A FEDERAL CONSTITUTION AND THE NEED FOR A CONSTITUTIONAL COURT

All powers emanate from the Nation.
They are exercised in the manner established by the constitution.[9]

The secession of Belgium from the Kingdom of the Netherlands in 1830 rested on the idea of a single Belgian people as the *pouvoir constituant* of the Belgian Constitution. The parliament was where the nation's representatives sat, and the legislature was thus the embodiment of the general will of the nation. In such a constitutional order, there was no room for a high court to second-guess the supreme will of the nation represented through its representatives in the parliament. The highest court established by the 1831 Constitution was the so-called "Court of Cassation," which was established in order to ensure the uniform interpretation of laws in their application (Janssens 1977). The court's main role was to annul lower court decisions that failed to follow the letter of the statutes—hence the court's name that derives from the French verb *casser* (to break, to annul). There was, however, no high court above this one responsible for the judicial review of legislation. In a judgement delivered on July 23, 1849, the Court of Cassation itself added a legal endorsement to this constitutional setup, as it decided that it was not up to the courts to review the constitutionality of statutory legislation (Peeters 2005, 475). At a time when the legislature was at the center of Belgian politics and when it was deemed to represent the supreme will of the nation, there was of course no philosophical justification for reviewing the national will. In the constitutional architecture of 1831, legislation passed by the parliament was simply seen as the unadulterated true expression of the general will of the nation. According to Thomas Vandamme: "[I]n the old Belgian unitary state, a leading principle of Belgian constitutional law has always been that the legislator was infallible. . . . [N]o court was allowed to question Parliament's view on the constitutionality of statutes" (Vandamme 2008, 131).

For most of Belgium's nineteenth- and early twentieth-century history, things continued this way. The various political difficulties that the Belgian state faced—the challenges that accompanied the creation of a new state, industrialization and the subsequent class tensions, the expansion of suffrage that was in most part a response to these tensions, the secular versus religious conflict over education (known as the "school war"), questions over royal prerogatives and succession, and

9. Article 25, Belgian constitution of February 7, 1831.

even the early incidences of the ethnolinguistic conflict—were all tackled without a high court that examined and ensured the constitutionality of legislation. These political challenges and subsequent divisions were all addressed and contained within the confines of a unitary constitution.

The Flemings and Francophones cohabiting Belgium were able to live in a unitary setup as long as the country's political divisions were nationwide in terms of the religiousness and secularity of various social classes distributed throughout the country's territory. The extension of voting rights to those without property and higher education in 1893 and subsequent establishment of a workers' party and a Christian social movement affiliated with the Catholic party had been vehicles to address the class divisions. The school peace of 1958 guaranteeing recognition and state subsidies to both Catholic and public school systems had been the answer to the religious versus secular divide. Once school peace came into force and settled the long-simmering division in Belgian society, language emerged as the next national conflict; and this time, it came with a clear territorial character. In the north, the region of Flanders had become almost unilingual, adopting standardized Dutch, whereas in the south, in Wallonia, French had become the language through the standardization of various Walloon dialects and the integration of the successive waves of working-class migrants from the north of the country as well as from elsewhere in Europe.

The first formal recognition of two unilingual territories in the north and in the south came in 1962–1963 (while leaving the complex case of the mostly French-speaking city of Brussels situated in Flanders out). There was no explicit constitutionalization of ethnicity as the new organizing logic of the Belgian state, but it was a constitutional deviation from the foundational logic of 1831 nonetheless. In hindsight, it now appears that the language reform of 1962–1963 sealing most of the internal linguistic border in fact paved the future path for the constitutionalization of ethnicity. The state reform that followed in 1970 created two cultural communities: the Dutch cultural community that ran cultural policy areas such as education and media for Flemings—including the Flemings resident in Brussels—and the French cultural community for the Francophones of Brussels and Wallonia. A unilingual and Dutch-speaking Flanders in the north and a unilingual and Francophone Wallonia in the south would have made things very straightforward for state reforms, but Brussels proved to be the knot.[10] From the outset, the

10. The European Union plays an ever-present and seemingly irreversible role in the national laws of member states. As the host of a number of EU institutions, the presence of the European level of governance is particularly visible in Belgium's capital city. The impact of EU law and the European

capital city emerged as the main political hurdle to a quick solution, preventing a neat and symmetrical north-south division of the country in the form of a two-state solution. Geographically, within the region of Flanders, Brussels was a mostly French-speaking city with suburbs encroaching into Flemish rural communities in its periphery. While being the biggest city in Francophone Belgium, Brussels was territorially separated from Wallonia proper. What is more, Flemings also saw Brussels as their biggest city and indeed the capital of Flanders. The capital city and its constitutional fate was to remain one of the most contested points during the successive state reforms defining the rest of the twentieth century and the early twenty-first.

Once up and running, the cultural communities grew in political power and gradually assumed jurisdiction over areas that were no longer strictly cultural. With the 1980 state reform the formal titles of the cultural communities were shortened to the Flemish Community and the French Community of Belgium (there is also a much smaller third community for German speakers in the east of the country along the German border). The members of these constituent communities were initially drawn from within the ranks of Francophone and Flemish politicians in the national houses of parliament. That is, they had a double mandate: these politicians were directly elected to the country's two legislative bodies on a national mandate, but this was combined with an indirect subnational mandate to represent community interests. For more territorial matters, the 1980 state reform also established new constituent regions in the form of the Flemish Region (i.e., Flanders minus Brussels) and the Walloon Region—but constitutionally separate from the Flemish Community and French Community. The new regions were to have exclusive competence over regional economic development, employment, industrial restructuring, environment, land use, urban planning, road building, traffic, and agriculture, whereas the pre-existing communities continued to have exclusive competence over culture, language policies, education, health care, welfare, and family.

What had started with language laws in 1962–1963 and the communitization cultural policy areas in 1970 had soon afterward led to federalization and the establishment of new subnational entities with jurisdiction over a number of new issue areas in 1980. Even if one did not need a constitutional court to check the constitutionality of legislation under the 1831 Constitution, jurisdictional division of competences introduced the need for an umpire. A federal system—especially one that

Court of Justice on both national and subnational Belgian legislative politics is undeniable, yet this impact is applicable to all EU members states equally across the board.

has been in the process of constant change—inevitably came with the need to arbitrate the inevitable questions of jurisdiction between constituent units. The need to sort out the jurisdictional conflicts among the new subnational entities became particularly acute during the 1980 reforms that had empowered the three communities and regions with wide-ranging new competences. The first step toward creating a high court to adjudicate jurisdictional and technical issues accompanying federalization came in 1980. The state reform contained a constitutional amendment establishing a new court of arbitration (*Cour d'Arbitrage/Arbitragehof*) that was to rule on jurisdictional issues between the regions, the communities, and the central government. With the law of June 1983, the Court of Arbitration formally came into being the following year. Writing right after the establishment of the court, the Belgian constitutional law scholar and a member of the supreme administrative court (*Conseil d'État/Raad van Staat*) at the time, Francis Delpérée wrote a piece entitled "Supreme Court, Court of Arbitration, or Constitutional Court?" in which he pointed out how the process of federalization made such a constitutional court necessary: "[T]he moment when a real division of power was put place between the state and its components, it became clear that a new judicial entity, named the Court of Arbitration evoking its mandate, had to be created for settling the constitutional conflicts of jurisdiction between the state, its communities, and its regions" (Delpérée 1985, 207–8).

A new constitutional architecture was now giving shape to a new state structure, but the 1980 state reform still could not settle the constitutional status of Brussels. While historically being the more developed and industrialized part of the country, in the post-war decades Wallonia's traditional heavy industries had faced a steady downturn, while formerly rural Flanders had become economically more vibrant during the same period. What is more, the French language had lost the social and cultural primacy it had once enjoyed in unitary Belgium, and three million Walloons and a million Brussels Francophones were no demographic match to six million Flemings. Physically cut off from each other, the Francophone linguistic minority of Wallonia and Brussels was on the defensive throughout most of the state reforms. Eventually, Francophones had to accept the limitation of the Brussels-Capital Region to the nineteen municipal boroughs, effectively ending their claims to the Francophone suburbs into the surrounding region. In return, Flemings agreed to provide minority linguistic services in French in public policies to these areas adjacent to the new Brussels-Capital Region. The state reform of 1988–1990 introduced a new formal constitutional architecture based on three communities (Francophone, Flemish, and German-speaking) and three regions (Flanders, Wallonia, Brussels-Capital).

Despite the formal symmetrical facade of three constituent regions and three communities in constitutional terms, the country was already approaching reforms as if it were in fact a union of two peoples. State reforms were discussed and debated—on the basis of parity—between Francophones (of all political colors, including residents of Wallonia and Brussels Francophones) and Flemings (of all political colors, including the Flemings of Brussels and residents of the rest of Flanders). All the constitutional changes on internal borders, language laws, and the establishment of new constituent entities were brought in by special laws requiring double majorities—i.e., majorities within the two constituent ethnolinguistic communities (Vandamme 2008, 131).

The Francophone-Flemish divide is not a neatly symmetrical one, but it was nonetheless the political dynamic that defined the constitutionalization of ethnicity. Despite the constitutional facade of six symmetrical regions and communities, Belgian federalization unfolded in a way that reflected this underlying dynamic. Pitted against each other and overriding political party affiliation, the reform negotiations over state reforms were, according to Delpérée, one of *le fédéralisme de confrontation* (confrontational federalism) (Delpérée 1999). Francophones and Flemings of Belgium are asymmetrical counterparts—they differ over relative strength, internal cohesiveness, self-designation, as well as how they see the other. While Flemings do not hesitate to use the Dutch word *volk* (nation, people) for themselves, both Walloons as well as Brussels Francophones are more likely to opt for the softer self-designation of *communuaté* (community). The different political priorities and the subsequent choices in terminology are also visible in how state reforms are portrayed. While Francophones call the bilateral negotiations *communauté à communauté*, Flemings prefer using the much stronger formulation of *volk tot volk*. The choice of words reflects the asymmetry in the degree of ethno-nationalist sentiment and internal cohesion, as well as differences on whether a commonly agreed *finalité politique*, i.e., the eventual political order that will emerge from the federalization process, exists for the country.

Despite the underlying asymmetry, 1988 brought in a recognition that the country rested on an uncodified political union of two peoples; but this recognition came through indirect means. The 1988 state reform consolidated the Court of Arbitration's position in the new constitutional order (Suetens 1995). Yet the court's mandate remained mostly one of an umpire; its role in reviewing the constitutionality of legislation was still unaddressed. As Patricia Popelier puts it, "according to official doctrine, primary legislation was still immune from judicial control" (Popelier 2005, 22). Both the 1980 and 1988 state reforms had deliberately avoided naming the court a constitutional court and instead highlighted the arbitration role it was expected to play between various constituent units of the reformed Belgian

state. The 1988 reforms, however, introduced an important but indirect political acknowledgment of an underlying union of two peoples into the court's setup.

According to Article 32 of the special act passed on January 6, 1989, appointments to the court require approval by at least two-thirds majority of both houses of the Belgian federal parliament. There is a requirement for linguistic parity; i.e., six judges have to be Dutch-speaking and six French-speaking (with some minimum requirement for German proficiency in the court in order to address the concerns of the German-speaking minority in the east of the country). Half of these positions on the bench are reserved for those with judicial background; the other half are for former politicians who have served at least a five-year term in one of the country's national or subnational legislatures. According to Patrick Peeters, "the introduction of the latter category reflects the opinion that the Court of Arbitration should also take into account the 'political reality' when deciding on requests for annulment or questions submitted for preliminary ruling" (Peeters 2005, 478). The former president of the Belgian Court of Cassation, Ivan Verougstraete, calls this composition a "compromise": "there would be a limited review by a court whose members were pro parte former members of the parliament and pro parte members of the legal profession acceptable to the political parties" (Verougstraete 1992, 100). Furthermore, the composition of the judges reflects the proportional strength of Belgian political parties. All of this seems to underscore the fact that the court is a political rather than legal entity. True, six of the constitutional court judges have to have technical expertise in law, but even those seats have tended go to those with known political leanings. This means that most of the legal/technical work of the court is carried out by court clerks (*référandaires*).

While Francophones and Flemings managed to negotiate successive state reforms and subsequent constitutional revisions, where all this was eventually headed was studiously sidestepped. That is, there was no discussion of what the final constitutional architecture that emerged from all these reforms would look like; questions around what Belgians would call the *finalité politique* were purposefully avoided. While there was yet no consensus over the details of what the eventual political order that will emerge from the federalization process would look like, the bilateralism of Francophones versus Flemings was the driving political dynamic underlying the process. The formal recognition of this uncodified union came with the 1993 state reform. The new Article 1 of the Constitution revised as part of the state reform now simply declared "Belgium is a federal state composed of communities and regions."[11]

11. The new Article 1 came in to force on February 17, 1994.

The 1993 state reform was more than a declaration of a new federal label, however; a number of secondary changes constitutionalized the machinery necessary for the functioning of federalism. The reforms introduced direct elections to the community and the region parliaments—including the assemblies of the Brussels-Capital Region and the small German-speaking community along the German border. In a separate agreement, the three main Francophone political parties agreed to delegate certain competences of the French community of Belgium to other subnational regional entities. The agreement allowed the Walloon Region and the Brussels-Capital Region Commission of the French Community (*Commission communautaire francophone de Bruxelles*; Cocof) to exercise the constitutional competences of the French Community. To be legally precise, using its newly acquired powers to delegate its competences under Article 138 of the Constitution, the Council of the French Community passed two decrees which allowed the Walloon Region and Brussels' Cocof to exercise an important bulk of its constitutional competences.[12] This transfer was formalized by a separate agreement known as the Saint Quentin Accord signed between the Francophone subnational entities, which came to effect on 1 January 1994. During this process members of Cocof started meeting as a separate legislature under the name of the Assembly of the Brussels-Capital Region French Community Commission (*Assemblée de la Commission communautaire française*; ACCF). In the meantime, the Flemish Region and the Flemish Community had already been acting as one entity under the name of *Vlaamse Raad* (the Flemish Council) with a common assembly and institutions. In 1995, the name of the plenary meetings of the Flemish Region and Flemish Community legislatures was officially changed to the Flemish Parliament (*Vlaamse Parlement*).

Constitutionalization of ethnicity had formally arrived with the new Article 1 declaring the country federal, but what the country had already been experiencing in the preceding years meant that this was more than a change in nominal labels. Furthermore, a set of secondary changes introduced in 1993 ensured that the machinery of federalism was consolidated. After all, real political change is only possible if there are also changes in the mechanics of the legislative process in a way that reflects the new federal principles defining the new constitutional order. There is thus a comparative lesson for other countries pursuing the constitutionalization of ethnicity here. One can change constitutional labels, but without changes in the political operating system, this rarely translates into real change. While formal

12. Decree II of the Council of the French Community, July 19, 1993, *Moniteur Belge*, September 10, 1993; Decree I of the Council of the French Community, July 5, 1993, *Moniteur Belge*, September 10, 1993.

constitutional declarations like the new Article 1 matter in terms of setting the course for multi-ethnic federations, real changes on the ground require constitutional revisions of not only *who does what* but also changes in the political mindset of *who can do what*. Arguably, the most important legal milestone on the way to an ethnic federation was not the new Article 1 but the change in the constitutional residual clause that was part of the same state reform.

According to a country's constitutional division of power, various political institutions enjoy codified powers over the respective policy areas entrusted to them. But it is the fate of policy areas that are not clearly enumerated in the constitution that more accurately reveal the underlying political logic guiding the constitutional order. The 1993 reforms introduced the constitutional principle of residual powers for the communities and regions. That is, if a particular policy area is not explicitly under the jurisdiction of an order of government, then by default, subnational authorities are assumed to have jurisdiction in these so-called "residual" policy areas that are not explicit enumerated.[13] When residual powers lay in the national legislature, the philosophical assumption was that Belgian democracy rested on a nationwide *demos* and that the *pouvoir constituant* of the constitutional order was the Belgian nation. Through its representatives in the national parliament, the nation would deal with future policy areas not explicitly enumerated in the constitution when needed. By empowering the constituent communities and the regions, the new residual clause effectively reversed the democratic foundations of the constitutional order.

The change in the residual clause was accompanied by yet another secondary change that ensured the mechanics of federalism was in place. The 1993 state reform also removed the legal hierarchy between the center and the subnational entities. Federal law was no longer to enjoy supremacy over subnational legislation. Consequently, the powers of the central government were now delimited to national policies for foreign affairs, defense, and monetary policy. The combination of the federal declaration in the new Article 1 and these secondary changes consolidating the federal machinery turned the logic of the Belgian constitutional

13. One noteworthy point is that the residual clause introduced by the new Article 35 of the Constitution (giving the constituent entities jurisdiction over any policy area not explicitly listed as federal jurisdiction) has still not been implemented—mostly because of the inability to find a political consensus among the different political camps over what remains under federal jurisdiction (Van Drooghenbroeck 2012, 239). In a recent overview, Peeters and Mosselman predict that, due to a deeply fragmented political landscape, it is unlikely that a special majority legislation establishing areas of exclusive federal jurisdiction will be agreed upon in the immediate future, rendering Article 35 inoperative (Peeters and Mosselman 2017, 73–74).

order upside down. The constitutional order of unitary Belgium and its political legitimacy thus no longer rested on a single national *demos* bringing top-down democratic legitimacy to the constitutional order; now there were multiple *demoi* providing bottom-up democratic legitimacy. With the 1993 reforms the *pouvoirs constituants* of the formal Belgian constitutional order have become Flemings and Francophones. But there was still a lot more to be negotiated and divided.

The next state reform continued the path set in 1993. A political compromise had been reached in 2000, but the requirement of a two-thirds parliamentary majority for approval delayed the formalization of the reforms. The 2001 state reform was mostly a housekeeping affair to iron out the creases in the process of federalization. Flemish representation at the Brussels-Capital regional assembly as well as in the police and municipal boards of the capital city were increased, new funds for education were allocated the French Community, and the regions acquired new international competences. During this state reform the ACCF also adopted a new title as the Brussels Francophone Parliament (*Parlement francophone Bruxellois*), albeit without formal constitutional changes. Once the constitutional revisions were put in place, under the new Article 141 the court formally acquired the power to be the final authority on the division of competences and the respective jurisdictional spheres of the federal government and the constituent entities. The court was renamed the Constitutional Court (*Grondwettelijke hof/ Cour constitutionelle*) in 2007.

In summary, recognizing the constituent ethnic communities as the *pouvoirs constituants* of Belgium and empowering the court to review the constitutional process establishing this have gone hand in hand. As a result of the successive state reforms, the Belgian court indeed enjoys the powers to review the compliance of statutory legislation with the constitution. But this is a culmination of a longer process. The court was initially envisaged as an umpire to review conflicts of competence among the newly created constituent entities. It was only with the 1989 state reform that the court was given the jurisdiction to review the constitutionality of statutory legislation along the three constitutional principles of non-discrimination, equality, and freedom of education. The 2003 state reform extended the court's jurisdiction to other articles of the constitution.

The last fifty years of federalization and the subsequent constitutional setup it has brought into being is not easy to follow for most Belgians, let alone for outsiders reading about all of these state reforms for the first time. But this is not an accident. There is a reason for the bewildering institutional complexity and the absence of the constitutional court from the federalization process. At the core of it all remains an unresolved conflict over the eventual political order that is expected to emerge

from the federalization process, the *finalité politique* in other words. Is Belgium going to be a multi-ethnic federation in which individuals retain constitutionally guaranteed linguistic rights wherever they reside and in which the federation ensures some form of fiscal equalization across the county's regions (a view more common among Francophones); or is Belgium going to be more of a multi-ethnic federation where territorial constituent units are autonomous within a looser, almost confederal, union (a view more common among Flemings); or is all this going to go down in history as a very long divorce delayed because of disagreements over how to divide up the living quarters while living within the same European house?

Despite the complexity, once we take a closer look at the last fifty years of constitutional reforms, we see two broad patterns emerging. The first one is the mismatch between the constitutional facade and the political workings of federalism. Despite attempts at constitutional symmetry in terms of creating six constituent entities in the form of three communities and three regions, the underlying political dynamics render the practice incongruent with this neat formulation. Federalization has led to the constitutional coexistence of eight different legislatures in the form of the Belgian Senate, the Belgian House of Representatives, the Walloon Region Parliament, the Flemish Region Parliament, the Flemish Community Parliament, the French Community Parliament, the Brussels-Capital Region Parliament, and the German Community Parliament. In political practice, however, things are more asymmetrical because the Flemish Community and the Flemish Region parliaments sit together under the name of the Flemish Parliament, while the Francophone members of the Brussels-Capital Region Parliament have their own assembly. Furthermore, the French Community of Belgium has delegated most of its competences to the Walloon Region and the Brussels-Capital Region French Community Commission. Underneath all this lies an uncodified union of two peoples, but one's capital speaks another language, while the other is united by language but divided by territory. This prevents a neat territorial split of the country into two constituent entities, a two-state solution in other words. As asymmetrical counterparts, Flemings and Francophones have been unable to agree on an appropriate constitutional embodiment reflecting the underlying union in a way that solves the fate of Brussels in a way that is acceptable to both sides. Furthermore, piecemeal and gradual reforms that often have an additional party politics layer of conflict and compromise to them have rendered the whole federalization process something akin to building a ship at sea. The second broad pattern—following closely from the first—is when politics leads and constitutionalization follows, the court either follows or keeps mum.

III. THE "PASSIVE VIRTUES" OF THE BELGIAN COURT

Belgian constitutional lawyers acknowledge that the court owes its existence to the federalization process (Claes and de Visser 2012, 87; Feyen 2012, 392), but the comparative reticence of the court is usually not picked up in comparative studies that set the Belgian court in a comparative context. Comparative studies by Belgian constitutional lawyers usually cover issues pertaining to the role of the court within a multilevel Europe, emphasizing the court's jurisdiction in the effect and applicability of European law in Belgian law and questions pertaining to individual rights, particularly in terms of equality and non-discrimination (Popelier et al. 2012). However, what is often acknowledged is that there is something similar to Bickel's "passive virtues" at play, as the court has found ways to avoid, decline, or delay judgement on controversial and essentially political matters; and when these options have been unavailable, it has tended to bury decisions in wordy and ambiguous judgments or has plainly acknowledged the fact that politics takes precedence and has come up with extra-constitutional principles justifying the political compromises. One of the current judges currently on the bench, and a scholar of Belgian constitutional law, André Alen, has written about how these tensions and ambiguities were an inevitable part of the gradual and uneven political processes of that defined federalization (Alen 1991, 155–81).

Some of the institutional characteristics of the court's composition and its decision making seem to underscore the tacit acknowledgment that the court is secondary to politics. One is the requirement of the linguistic parity of six Dutch-speaking and six French-speaking judges that was introduced with the 1988 state reform. The same state reform also brought in a distinction between the six judges on the bench who have legal backgrounds and six who are former politicians. It often falls on the shoulders of the law clerks to compile the legal basis of the court's decisions, but these reports are not made public. Furthermore, the deliberations of the court itself are not made public, which means dissenting opinions are not revealed. This seems to underscore once again the driving political logic and the need to preserve the fragile compromises the various political parties representing the various segments of Belgium have reached. In many ways, this is a reflection of the consociational political culture of Belgium that defined the relationship between different political camps and their political party representatives throughout the country's history. Liesbet Hooghe draws attention to the preference Belgian decision makers have for informal contacts over institutionalized exchange (Hooghe 1985, 143). However, what is different from the traditional practice of consociational compromises between political parties honed during Belgium's constitutionally unitary and

stable past is now this has to take place within an evolving constitution. The stability of political institutions and constitutional continuity that defined the earlier political episodes of Belgium are no longer a given. According to Wilfried Swenden, the dominance of political parties in the whole process of federalization has made the role of judiciary secondary: "broad, inclusive and congruent coalitions at the federal and regional levels of government facilitate the creation of compromises and have minimized the need for competence adjudication by judicial means" (Swenden 2005, 198). A combination of a number of factors therefore seems to explain the court punching below its weight and letting politics set the course.

When politics is in the driver's seat, and when the constitutional principles enshrined in the 1831 Constitution and the original intent of the founding fathers seem no longer valid (but without an agreed upon new constitutional spirit), constitutional review cannot bring the clarity and consistency expected of it. In their contribution to Bloombury's "Constitutions of the World" series, Patricia Popelier and Koen Lemmens examine the Belgian court in comparative context and acknowledge the underlying politics behind the court's (in)action:

> The clerks' (*référandaires*) reports are not published and the law requires that the deliberations are kept secret. Consociational arguments explain why the judgments do not reveal votes or dissenting opinions: the Court is composed of Dutch- and French-speaking judges who seek consensus in order for their decisions to find acceptance in both linguistic communities. Similar arguments may explain why judgements sometimes lack clarity as to their reasons or effects. (Popelier and Lemmens 2015, 212)

Explaining why something does not happen, or what some label "negative cases," is a challenge for all scholarly fields (Mahoney and Goetz 2004). This is particularly pressing for single-country studies because the general scholarly tendency in all disciplines is to explain what has happened and why. But once juxtaposed against the two global trends of constitutionalization of ethnicity and the spread of judicial review, it becomes clear that a reticent constitutional court cannot be an accident and that there has to be an active reason behind the Belgian court's inaction. One way to look at this is how the court declines to act.

The Belgian Constitutional Court often employs elaborate ways of arguing that the question it is supposed to rule on is irrelevant or it declares cases inadmissible. To this end, the court frequently uses a filtering process known as "preliminary proceedings." Preliminary proceedings are tests of admissibility where, instead of the full bench, the court sits as a smaller bench. Very often this filtering process

results in a decision stating that the court has no jurisdiction over the case. In one such case brought against the Flemish Region (concerning local authorities), the court declined jurisdiction, stating that to rule on this application would lead to judgment being passed on the drafters of the constitution (*Court of Arbitration No 11/2006*, 18 January 2006).

Another passive virtue of the court is to excuse itself out. When asked on the compatibility of a decree of the Dutch cultural community (later to be renamed Flemish Community) dated 19 July 1973 with the subsequent French Community decree of 30 June 1982, the court ruled that it was up to the lower court to decide which legal rule was applicable and that the Court of Arbitration would not interfere with the decision the lower court takes on the applicable legal rule (*Court of Arbitration No 12/86*, 25 March 1986). Once again, the court found the case inadmissible during the preliminary proceedings.

On some occasions the court is forced to admit its political *raison d'être*. When the impartiality of the three former Flemish politicians on the bench were questioned and were asked to withdraw from a case (concerning the constitutionality the Flemish decree of 2 July 1981 on waste management) on the grounds that they had participated as politicians and voted on the very legislation whose constitutionality they were now asked to review, the court decided that according to the legislation establishing the Court of Arbitration there were no sufficient grounds to challenge judges on the basis of whether or not in their previous capacity as politicians they had participated and voted on legislation they were later asked to assess (*Court of Arbitration No 32/1987*, 29 January 1987).

In other instances, the court has come up with extra-constitutional principles justifying political compromises. A year after the waste management case cited previously, the court invented the notion of the "global concept of the State" in order to limit the regions from unilaterally expanding their new competences to the fullest (*Court of Arbitration No 47/88*, 25 February 1988). The court reasoned that there was an unwritten assumption of a Belgian economic and monetary union that formed a global concept of the state, and this prevented the unilateral imposition of regional taxes on the transfer of water (Peeters and Mosselman 2017, 98). The invention of this extra-constitutional principle ensured that the delicate political negotiations underway were not derailed. Yet another judgement upholding the primacy of politics was delivered the following year. Asked to rule on the principles of individual equality and non-discrimination in light of recent community competences over education, the court ruled that these principles did not preclude differences in treatment provided there are objective and reasonable grounds for differentiation (*Court of Arbitration No 23/89*, 13 October 1989). The court went further in

acknowledging the primacy of politics by stating that it had to first ascertain what objective the legislature was pursuing when passing the said legislation in order to rule on its constitutionality.

One way the court has avoided being dragged into political debates over the constitutionality of legislation is by explicitly stating that legislators have acted in public interest and that it is not for the court to second-guess them. In its decision on the request to annul the 1988 legislation containing the special arrangement of Dutch-language requirements for the Walloon municipality of Comines-Warneton along the linguistic border, the court found that the constitutional principles of equality and non-discrimination did not preclude such differences since these were justified by the intention to protect a higher public interest (*Court of Arbitration No 18/90*, 23 April 1990). The legislation in question, the law of 9 August 1988, was also known as the "pacification" law because it aimed to pacify relations between Flemish and Francophone communities as a whole. Comines-Warnerton along the linguistic border was within the Walloon Region but had Dutch speakers; in contrast, the other border municipality Fourons/Voeren was in the Flemish Region but had French speakers. Together with the six municipalities in the Flemish Region around Brussels, these had special bilingual arrangements. In light of this so-called "higher public interest," in the same judgment the court acknowledged that it did not have jurisdiction over a choice made by a body that is empowered to amend the constitution, i.e., the national legislature. The 1988 pacification law came under scrutiny again following the 2001 state reform that placed municipalities under the jurisdiction of the regions. The court once again invoked higher public interest for the continuation of the different linguistic requirements for the municipalities included in the 1988 law (*Court of Arbitration No 35/2003*, 25 March 2003). This time linguistic requirements of the bilingual Brussels-Capital Region were also part of the challenge of constitutionality. In the same judgment, the court justified the special linguistic arrangements by the need to achieve a balance between Belgium's constituent entities.

As the previous section outlined, throughout successive state reforms the fate of Brussels had remained the barrier to a neat territorial solution of two states. One of the most complex issues in Belgian politics concerns the Brussels-Halle-Vilvoorde electoral district, which includes bilingual Brussels and Dutch-speaking Flanders. The presence of French speakers in Brussels' suburbs spilling into the surrounding Flemish Region and Flemings residing in Brussels bring in intractable complexities for both sides. The presence of a single electoral district containing both bilingual and monolingual regions creates differences in the application of electoral laws because Belgian political parties compete in linguistically separate lists. In its 1994

judgment, the court acknowledged that this combination brought in potential, but limited, violations of the constitutional principles of individual equality and non-discrimination; however, these measures were justified by the need to secure the general political compromise that allowed institutional reforms in Belgium (*Court of Arbitration No 90/94*, 22 December 1994). Moreover, the court admitted the primacy of the politics by stating that it was not competent to express a view on the composition or the functioning of the parliament.

IV. CONCLUSION

The previous section summed up the various ways the Belgian Constitutional Court exercises its passive virtues. In comparative terms, the Belgian court's reticence sets it apart from its international counterparts. The constitutionalization of ethnicity, especially when combined with the jurisdictional division of competences inherent in federalism, creates challenges for many countries around the world. The need for an arbiter among the various subnational entities and the center and the need to review the compliance of legislation with the constitutional division of powers, combined with the need for an impartial final authority on the interpretation and application of the constitution, calls for an active constitutional high court. All of these challenges are present in Belgium, but the country's constitutional court has let politics take primacy over the law.

Political compromises between Francophones and Flemings, or more precisely between the linguistically separate political parties representing the various political colors of the country, have first set the course of federalization; legislative and constitutional reforms necessary to this end have followed. All of this has taken place without a clear *finalité politique* for future Belgium. Moreover, the difficult and fragile political compromises between the political parties have caused the federalization process to unfold in a gradual, piecemeal, and often uneven fashion. For these reasons, Belgium seems to be so far immune to the global trends of "judicialization of politics," "the spread of constitutional review," and the "rise of judicial supremacy" toward some form of "juristocracy" identified by a number of scholars (Tate and Vallinder 1995; Barkow 2002, 237; Hirschl 2004; Ginsburg 2008, 83–84). The main reason why the Belgian court is an outlier is that there is still an unresolved conflict over the country's eventual political order—i.e., the nature of the federal union between the country's constituent ethnolinguistic communities—at the heart of the Belgian constitution. The court seems to be very careful to nurture a legal atmosphere that understands the difficult compromises necessary for the country's future, and in turn, lends constitutional legitimacy to this process by endorsing the

complex, and sometimes contradictory, political choices. This is not merely rubberstamping what politicians do but rather helping to legitimize the constitutional process of building the ship at sea. This must be the Lincolnian path between principle and expediency about which Alexander M. Bickel had written.

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