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Constitutional Courts as Promoters of Political Centralization:

Lessons for the European Court of Justice

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Abstract:

A cross-section analysis covering up to 42 countries and including the usual control variables shows that central government outlays as a share of general government outlays are significantly larger if the judges of the constitutional or supreme court are independent of the central government and parliament and if the barriers to constitutional amendment are high. This evidence is consistent with the view that constitutional judges have a vested interest in centralization or that there is self-selection or both. These insights are used to draw lessons for the reform of the European Court of Justice which serves as an example. Self-selection should be reduced by requiring judicial experience – ideally with the highest national courts. The vested interest in centralization could be overcome by adding a subsidiarity court.

Keywords: Constitutional Courts, International Courts, European Integration

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1. Introduction

The European Court of Justice (ECJ) is often called an engine of integration. It has been a driving force of both market integration and political integration, i.e., centralization. The court is increasingly criticized for its centralizing bias[1] because a court should not propagate a political program – it ought to be an objective and neutral interpreter of the law. But that is a normative question. This paper addresses an entirely positive question: why do the ECG judges centralize?

The European Court of Justice is the supreme and quasi-constitutional court of the European Union. Do constitutional courts generally tend to centralize, and, if so, why?

In an earlier paper (Vaubel 1996), I found to my surprise that the most important constitutional characteristic explaining the centralization of government expenditure in federal states is the age of the constitutional court. The other constitutional aspects tested were the following:

1. How long has the federal state existed?
2. How old is the current federal constitution?
3. Do the provinces have to agree to constitutional amendments?
4. Do amendments to the federal constitution require a popular referendum?
5. Is there a second chamber at the federal level and who chooses its members?
6. Is there a constitutional court whose judges are mostly chosen by other union institutions?

My cross-section analysis had been based on 49 states in 1989-91 including 13 federal or quasi-federal[2] states (Argentina, Australia, Austria, Brazil, Canada, Colombia, Germany, India, Malaysia, Mexico, Spain, Switzerland, USA).

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[1] See, e.g., Schermers (1974), Stein (1981), Rasmussen (1986), Weiler (1991), Burley, Mattli (1993), Garrett (1993), Neill (1995), Bednar, Ferejohn, Garrett (1996), Garrett, Kelemen, Schulz (1998), Pitarakis, Tridimas (2003), Voigt (2003) and Josselin, Marciano (2007).

[2] Spain is, strictly speaking, not a federal state but some of its provinces are highly autonomous so that I

A closer look at the data indicates why I got this result. The share of central government expenditure in total government expenditure was lowest in Canada (49.4 per cent), and it still is as can been seen in table A.1 of the appendix. Canada did not have a constitutional court of its own until 1949. Constitutional issues were decided by the Privy Council of the House of Lords in London. The British were not interested in centralizing Canada. Their strategy has always been to "divide and rule".

The second but lowest share of central government expenditure was the Swiss (53.8 per cent, now 57.9 per cent). Switzerland does not have a fully-fledged constitutional court. The Bundesgericht may decide whether cantonal (provincial) legislation is compatible with the federal constitution but it is not entitled to review federal legislation. Federal legislation can be, and frequently is, reviewed by the citizens in popular referenda.

Another country with a relatively low share of central government expenditure is Germany (64.9 per cent in 1989-91, now 66.5 per cent). The German constitutional court dates from 1949. The Reichsgericht of 1879-1918 had not been a constitutional court at all. The first German constitutional court, a chamber of the "Staatsgerichtshof" of the Weimar Republic, was never fully implemented and existed for only twelve years (1921-33). The German constitutional court is not only relatively young. It also has the special feature that one half of the judges is nominated by the second chamber of parliament (Bundesrat) in which the governments of the provinces (Länder) are represented.

Other federal or quasi-federal states in my sample, which have established their constitutional courts fairly recently, are India (1950), Malaysia (1956), Australia (1968) and Spain (1978).

My results were also in line with the findings of legal scholars. In a comparative analysis of constitutional review in Western democracies, Alexander von Brünneck (1988, p. 236) reaches the conclusion that "constitutional courts predominantly tend to expand the power of central institutions in the economic sector". This seems to be especially true of the formative

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classify it as quasi-federal.

years of federations. In the U.S., where the Supreme Court acts as a constitutional court, the era of Chief Justice John Marshall (1801-35) is an outstanding example.[3] But the centralist bias of constitutional courts has also been noted by legal scholars for federal states like Australia, Austria, post-1949 Canada, Germany and India.[4]

All this evidence raises the question why constitutional judges tend to be political centralizers. That is the subject of this paper. Section 2 distinguishes between four hypotheses that might explain the centralist bias of constitutional courts. Section 3 uses new data to test these hypotheses. Section 4 uses the empirical results to draw lessons for reforming constitutional courts. I focus on the European Court of Justice because there is general agreement that it promotes political centralization at the EU level and because its reform has been discussed for years.

2. Hypotheses

The first hypothesis (I) is that the constitutional judges depend on the actors, usually politicians, who have chosen them ("dependency hypothesis"). A possible reason is that the judges wish to be reappointed. The politicians may also control the salaries and budgets of the judges. Usually, the constitutional judges are chosen by other union institutions. Only in Belgium, Germany and the Russian Federation is one half of the federal constitutional judges chosen by representatives of the states or provinces. Since the politicians active at the central government level are interested to concentrate power at that level, the dependency hypothesis implies that the constitutional judges are led to fulfill the wishes of their political principals by interpreting the constitution in a centralist fashion. By shifting competencies to the central government, they increase the weight of central government spending in total government

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[3] See, e.g., Sandalow (1982) and Hobson (1996, pp.111-149).

[4] See, e.g., Rydon (1993, pp. 234f.) for Australia, Funk (1981, pp. 26, 46f., 60, 64f.) for Austria, Bednar, Eskridge, Ferejohn (2001) for Canada, McWhinney (1986, pp.176-83) for Canada and India, and Kisker (1989, pp. 40f.) for Germany.

spending. The politicians at the central government level let the court do the centralization, because the judges can change the meaning of the constitution by one simple majority vote whereas constitutional amendment by the parliament usually requires a qualified majority or repeated simple majorities.

The second hypothesis (II) also suggests that the constitutional judges do what their political mentors want them to do. But dependence is not the reason. The explanation is that politicians choose judges who share their preference for centralization – members of the same party or political network ("shared preference hypothesis"). The distinction between dependence and shared preferences has been emphasized in recent empirical studies of central bank behavior (Vaubel 1993, 1997; McGregor 1996): even if the central bankers are independent, they may support the re-election of the government that has appointed them (and sabotage the re-election of their political adversaries). The empirical evidence for Germany and the U.S. shows that the shared preference hypothesis performs better than the dependency hypothesis. McGregor calls it "the loyalty hypothesis" but loyalty is just one possible cause of shared preferences.

While the first two hypotheses are demand-side explanations focussing on the wishes of the principals, i.e., politicians, the third hypothesis (III) is a supply-side explanation: the experts eligible for appointment to the constitutional court are lawyers who believe in centralization rather than subsidiarity. Or, in the European context, those specializing in the law of the European Community and Union do so, because they are enthusiastic about the goal of ever closer European integration. They have studied what they cherish. This is the "self-selection hypothesis".

Finally, European and national constitutional judges may have a centralist bias, because centralization increases their influence and prestige (IV)[5]. Constitutional courts are primarily called to adjudicate cases of union legislation and administration. The larger the powers of the central government relative to the lower-level governments and the larger, therefore, the body

[5] See also Vaubel (1994, 1996).

of union legislation and administration, the more important and interesting are the cases which the judges of the constitutional court will be entitled to decide. This is most obvious in the case of interinstitutional disputes at the same level of government. As long as the policy competence belongs, say, to the provinces, these interinstitutional disputes are not decided by the union constitutional court. Only if the policy competence is transferred to the union level, will the union constitutional court be in charge. If constitutional issues are decided by a Supreme Court which is also responsible for adjudicating non-constitutional cases, the shifting of powers from the provincial and local governments to the central government is all the more tempting. In short, the supreme judges have a supreme and vested interest in extending the competencies of the central government ("vested interest hypothesis").

Are the four hypotheses mutually exclusive or can they be combined? The dependency hypothesis and the shared preference hypothesis are meant to be mutually exclusive. Identical preferences explain conformity only if there is no dependence. But each of these two demand-side hypotheses may be combined with the self-selection hypothesis or the vested interest hypothesis or both, each explaining some part of the centralisation. If at least one of these hypotheses applies, it would also explain why the share of central government expenditure in total government expenditure depends on the age of the constitutional court.

3. Empirical analysis

In my 1996 paper, I tested not only for the age of the constitutional court but also for the way its judges are appointed. The results pertaining to these two variables are reproduced in Table 1. There are also some control variables. Sectionalism measures the share of the population that "identifies distinctively with a sizeable geographic region of the country" (Banks and Textor 1968). Political autonomy is represented by a dummy for federal and quasi-federal states, i.e., provincial autonomy. The independence of the constitutional court (from union politicians) is measured by the percentage of constitutional judges appointed by representatives of the provinces. The age and the independence of the constitutional court,

respectively, interact with the dummy for provincial autonomy. The interacting variables themselves are not included in the regression because the constitutional variables were only known for the eight federal or quasi-federal states in the (full) sample. In view of this data constraint, the analysis was confined to comparing the adjusted coefficients of determination for each of the constitutional variables interacting with the provincial autonomy dummy.

Table 1 shows that, if provincial autonomy is interacted with the constitutional court's independence of union institutions, the coefficient of determination adjusted for degrees of freedom is higher than if provincial autonomy is not interacted. This is true for the full sample of 49 countries and for the 23 industrial countries. In the sample of industrial countries, the interaction of provincial autonomy and court independence even provides the highest R^2 adjusted of all constitutional characteristics (including the age of the constitutional court). This is consistent with either the "dependency hypothesis" (I) or the "shared preference hypothesis" (II). However, the evidence does not tell us whether, in addition, the court is a centralizing force of its own.

To test this I have used the new data set of Feld and Voigt (2003) which they kindly provided to me. While my 1996 paper allowed only for the constitutional characteristics of federal and quasi-federal states, their data also cover non-federal states. They distinguish between de jure and de facto characteristics of constitutional courts. The de facto characteristics measure such aspects as the effective average term length of judges, their turnover, income and budget as well as the frequency of successful and abortive constitutional amendments. However, the de facto data are quite incomplete so that the results might depend more on the varying composition of the sample than on the explanatory variable being considered. For this reason, I confined my analysis to those de jure characteristics which might have an appreciable impact on the centralizing tendencies of the constitutional court:

1. Is the term length of the judges specified in the constitution?
2. Is the number of judges specified in the constitution?
3. Is a supermajority required for amending the constitution?

4. How many branches of government have to agree to constitutional amendments?
5. Are majority decisions at different points in time required for amending the constitution?
6. To what extent are the constitutional judges chosen by the other branches of the union judiciary rather than the union legislature or the union executive?
7. How long is the legal term of the judges?
8. May the judges be reappointed?
9. How easily can the judges be removed from office?
10. Are the judges protected against real income reductions?
11. Does the constitution or the law establishing the constitutional court confer the power of constitutional review on the judges?
12. To what extent do the constitutional judges have to publish their reasons and dissenting opinions?

Note that all these variables relate to the court as a whole as I lack data about the characteristics of individual judges.[6]

The share of central government outlays in total government outlays is regressed on these variables in three types of cross-section equations. As quite a few court characteristics are collinear, and also as a robustness check, I start with simple regressions and a benchmark equation of control variables to which the court variables are added one by one. I then combine various court variables and test for interactions with them.

Before turning to the regressions, some further information about the dependent variable and the control variables ought to be provided.

The dependent variable is taken from the Government Finance Statistics of the International Monetary Fund. It includes net government acquisitions of non-financial assets, but it excludes the social insurance system. Whenever possible, the average share of central

[6] For a probit analysis of the federalism decisions of individual judges see Collins' study (2007) of the U.S. Supreme Court.

government outlays in general government outlays was calculated for the period 2001-04 (see Table A.1 in the appendix). Before 2001, the IMF uses a different definition. This is why I have not tried a panel data analysis. By choosing a four-year period, potential effects of electoral cycles are averaged out. The data for GNI per capita and area have been taken from the World Bank statistics. GNI per capita is always averaged over the period 2000-03. The sample includes all countries for which the IMF as well as Feld and Voigt (2003) provide the required data. As the dependent variable never takes the limiting values of 0 and 1, OLS rather tobit regressions have been estimated.

The control variables GNI per capita and area were selected for the benchmark equation, because they were the only ones surviving a stepwise elimination procedure. Initially, I also tried provincial autonomy[7], regional devolution[8] and a regional dummy for Scandinavia, but successive exclusion of insignificant coefficients left only GNI per capita and area in the regression equation. The linear specification provides a better fit than the log-linear specification. The benchmark equation containing only GNI per capita and area is entirely in line with the findings of earlier studies (Oates 1972, Pommerehne 1977, Wallis, Oates 1988, Vaubel 1996, Panizza 1999, Stegarescu 2006). As all these studies show, additional control variables are not needed.

The first three columns of Table 2 report the results of the simple regressions. Only one constitutional variable takes a coefficient that is significant at the 5 per cent level: the requirement that constitutional amendments have to be approved by simple majority at different points in time (variable 5). The dummy indicating that constitutional amendments require a supermajority (variable 3) would be significant at the 10 per cent level.

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[7] The dummy for provincial autonomy has been set equal to 1 for all countries which reported provincial government outlays in the IMF Government Finance Statistics: Argentina, Australia, Austria, Belgium, Canada, Germany, Malaysia, Mauritius, Peru, the Russian Federation, South Africa, Spain, Switzerland and the U.S.

[8] The dummy for regional devolution has been set equal to 1 for France, Italy and the U.K.

If the constitutional variables are added to the benchmark equation one by one (columns 5-7), only the supermajority requirement for amending the constitution has a significant effect at the 5 per cent level.[9] If all three constitutional variables are added together, the coefficient of the supermajority variable is significant at the 5 per cent level, while the other amendment variable would be significant at the 10 per cent level (column 8). If all the other constitutional variables are added to this equation, they take insignificant coefficients, and only area and the requirement of several majority votes for constitutional amendments remain significant at the 5 per cent level.

The fact that the difficulty of constitutional amendment raises the share of central government outlays in general government outlays is consistent with the view that constitutional courts centralize more than the constitution-makers wish. However, the evidence might also be consistent with another explanation. Contrary to our original assumption, the union politicians in power may reluctantly try to decentralize, because a majority of voters wishes them to do so. In this case, the constitutional barriers to constitutional amendment would hinder them to decentralize.[10] The requirements for constitutional amendment cut both ways: they do not only restrain centralization but also decentralization.

It is not possible to measure the preferences of the union politicians directly. But if most of them had really tried to decentralize, we should observe some tendency of decentralization even though constitutional amendment is difficult. The barriers are not likely to be insurmountable everywhere. Has there been a tendency of decentralization?

Up to the 1970s, the secular trend has been strongly toward centralization (Pommerehne 1977, Krane 1988). However, as can be seen from Table A.1, this trend was temporarily

[9] This requirement exists in all countries contained in the sample except Iceland, Kazakhstan and Sweden. In Sweden, all constitutional judges are appointed by the national executive which is likely to be more centralist than Parliament and the electorate which decide about constitutional amendments.

[10] Recent experience in Germany is an excellent example.

reversed between the first half of the seventies and the second half of the eighties. Over this period, the national shares of central in general government expenditure (averaged over the 27 countries for which there are data in both periods) dropped from 81.13 per cent to 80.42 per cent. By 2004, the (unweighted) average had again risen somewhat – to 80.47 per cent.

The main centralizers since the late eighties have been Peru (+12.1 percentage points), Malaysia (+6.4 %), Greece (+5.1 %) and the U.K. (+4.6 %). The group of the decentralizing countries is led by Italy (-11.6 %), Belgium (-9.3 %), Romania (-8.9 %) and the U.S. (-6.6 %). Even Canada, the least centralized state of the world, has continued to decentralize (-3.6 %).

The substantial international differences demonstrate that there is no “iron law” of centralization as Lord James Bryce and Johannes Popitz had thought. Nor is there now a persistent trend of decentralization – not even in the aggregate. Thus, it seems unlikely that the constitutional barriers to constitutional amendment have on average been a significant barrier to decentralization rather than centralization. This means that the significantly positive coefficient of the difficulty of amending the constitution is not due to consistent pressures for decentralization but is likely to be explained by the self-selection and vested interest hypotheses.

In my 1996 paper, the effect of the constitutional court on expenditure centralization had been analyzed exclusively for federal and quasi-federal states. By contrast, the evidence of Table 2 relates also to non-federal states. But the role of the constitutional court may indeed depend on provincial autonomy as well. For this reason, the eleven constitutional variables have also been interacted with provincial autonomy (Table 3).

If the constitutional variables are interacted with provincial autonomy one by one, only two of them have a significant effect on the share of central government: the constitutional protection of the judges’ real income (column 1 of Table 3) and the repeated majority requirement for constitutional amendments (column 3 of Table 3). Both have a positive coefficient.[11]

[11] According to the data, the real income of the judges is protected by the constitution in the following federal

The protection of the judges' income (variable 10) may capture many other effects of court independence as well. A constitution explicitly protecting the real income of the constitutional judges is likely to value the independence of the constitutional court very highly. Its significantly positive effect on government centralization is inconsistent with the dependency hypothesis (I) as applied to federal and quasi-federal states and clearly consistent with the self-selection hypothesis (III) and the vested interest hypothesis (IV). But what about the shared interest hypothesis (II)?

It is conceivable that the politicians who appoint the judges prefer judges who are independent but share their preferences – just as politicians who appoint central bankers may prefer candidates who are independent but prefer the same party, because actual or perceived central bank independence maximises the unexpected component of monetary acceleration before the next election (Vaubel 1993, 1997). By analogy, the politicians may prefer centralization by an independent constitutional court, because they do not want to be held responsible for the centralization, in particular because the centralizing decisions of the constitutional court might be more acceptable to the public if the court is seen to be independent. Thus, the significantly positive effect of income protection (column 1) is not necessarily incompatible with the shared preference hypothesis.

Column 4 of Table 3 combines all variables. Owing to collinearity, all interactions now take insignificant coefficients. However, the supermajority variable and provincial autonomy keep their significant regression coefficients (as do the benchmark variables).

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states: Australia, Austria, Belgium, Mauritius, Russia, South Africa and the U.S. The repeated majority requirement for constitutional amendments exists in all federal states except Argentina, Germany, Russia and Switzerland. The case of Switzerland, however, is difficult to interpret because the Bundesgericht's role in interpreting the constitution is quite limited and because constitutional amendments require a popular referendum. If Switzerland is omitted from the sample, the significance level is 10.6 per cent.

The significant coefficient of income independence could be due to reverse causation if "political unification makes independent tribunals possible" (Posner, Yoo 2005: 72) but the authors hesitate to apply this hypothesis to national rather than international courts.

The fact that high barriers to constitutional amendment raise the central government's share, may be explained by the "self-selection hypothesis" or by the "vested interest hypothesis". The evidence does not tell us whether both apply. However, if the vested interest hypothesis is correct, the share of central government is likely to be higher when constitutional cases are decided by a Supreme Court, i.e., by a court which is more than a constitutional court, because Supreme Court judges are more likely to decide about secondary national legislation and, therefore, gain more influence by taking centralizing constitutional decisions. Accordingly, I also tried a dummy for Supreme Courts in a slightly reduced sample.[12] The dummy does not take a significantly positive coefficient if added to the benchmark equation and/or the other three court variables nor if interacted with them. However, even though supreme courts cannot be shown to be more centralizing than other constitutional courts, the vested interest hypothesis may apply to both types of constitutional courts.

Finally, I have tried two additional control variables: constitutional review and legal origin. The data are taken from La Porta et al. (2004). The size of the sample is now much smaller – between 20 and 23 observations.

In many but not all countries, the constitutional court is entitled to annul secondary legislation on grounds of non-constitutionality. However, if an index measuring this power is added to the benchmark equation and/or the court variables or if it is also interacted with the latter, the coefficients are always insignificant. The constitutional judges do not need the power of constitutional review in order to centralize. There is little or no decentralizing legislation which they could declare non-constitutional. They rather interpret the existing law in a centralist spirit.

As for legal origin, the distinction is between case law and statute law. If the weight of case law is added to the benchmark equation, it takes a negative coefficient which is just about significant at the 5 per cent level ($p = 0.47$). If it is also combined with any one of the court variables, the coefficients of both variables turn insignificant due to collinearity. But is it

[12] The data were kindly provided by Stefan Voigt.

plausible that a common law tradition could significantly restrain the centralizing tendencies of constitutional judges? They are supposed to interpret codified law, the constitution, and they are not bound by precedent.

I summarize the results. Since salary independence raises the federal governments' share and has no significant effect in non-federal states, the centralist bias of constitutional judges is not due to their being dependent on government. The evidence is also inconsistent with the view that the constitutional judges share the preferences of the constitution makers because the difficulty of amending the constitution raises the central government's share. But my earlier finding that the federal government's share is higher if the constitutional judges are chosen by union rather than provincial institutions, indicates that the constitutional judges to some extent share the preferences of those who have appointed them. This means that in those federal states in which the judge-appointing and the constitution-making institutions are not identical, the judge-appointing institutions prefer more centralization than the constitution-making institutions do. All my evidence is compatible with the self-selection and the vested interest hypothesis.

4. Lessons for the European Court of Justice

In a social contract, the role of the constitutional court would be to ensure compliance with the constitution. Its role would not be to interpret the constitution in a centralizing fashion. The fact that the constitutional judges have a vested interest in centralization or that they are centralizers by conviction, possibly sharing the preferences of the politicians who have appointed them, would not count as a valid reason for misinterpreting the constitution adopted by the citizens. Thus, the evidence presented in this paper raises the question how constitutional courts might be reformed to avoid their centralizing bias. I shall return to the European Court of Justice (ECJ) as an example, because its centralizing tendencies are not disputed and its reform has been discussed since the 1990s at the latest. The ECJ has been

very successful in enforcing compliance with its judgements. What is doubtful is whether, in centralizing, the court itself has been complying with the Treaties.

4.1. Is the ECJ comparable?

Is the European Court of Justice sufficiently similar to the average constitutional court in the sample to justify inferences from our empirical results?

First of all, the European Court has no power over the centralization of public expenditure. The overall budget of the European Community is entirely and unanimously determined by the member states. The ECJ's influence relates to regulation. Public expenditure and regulation may be substitutes. However, if constitutional courts have a centralist bias, this should also be invisible in the field of regulation. The European Union has removed many national regulations, and the ECJ has played an important role in the process[13]. But the European Commission, Parliament and Court have tried hard to put European regulations in their place.

Secondly, the European judges may seem to enjoy less personal independence than the national constitutional courts do. They are appointed for a limited period of time, their term of office is short (six years), and reappointment is not a matter of course. The mean term length has been 9.3 years (Voigt 2003). However, the national governments probably do not know how their appointees have voted, because the Court does not publish its voting record. Thus, the dependency hypothesis is not likely to apply to the ECJ either.

Thirdly, the difficulty of reversing court decisions by new legislation is much greater at the European than at the national level.[14]

ECJ decisions may, in theory, be overturned either by secondary legislation or by amending the Treaties. Secondary legislation requires, first, a proposal from the Commission which,

[13] The most important example was the so-called Cassis de Dijon decision (1979).

[14] On this point see especially Weiler (1991).

however, shares the Court's vested interest in centralization, second, depending on the issue, a qualified majority vote (73.9 per cent) or unanimity in the Council and, third, also depending on the issue, the assent or co-decision of the European Parliament, which shares the Court's vested interest as well. Thus, legislative override by secondary legislation is practically impossible.

Reversal by Treaty amendment requires agreement among the member governments at an intergovernmental conference and ratification by all member parliaments. This means that the European judges are free to decide as they wish, as long as they enjoy the support of at least one national government or one national parliament. As a consequence, the Court's decisions are hardly ever reversed by treaty amendments.[15]

As Garrett (1993) has emphasized, the Court's judicial activism is constrained by the (expected) willingness of national governments and parliaments to implement its decisions.[16] But up to now, this constraint has not prevented the Court from centralizing.

Thus, as a supplier of law, the ECJ enjoys more market power than the national constitutional courts do because the barriers to amendment prevent its main competitors – the national governments and parliaments – from supplying substitutes.

Fourth, the ECJ and the national constitutional courts also differ with respect to the demand for adjudication which they face. Two factors raise the demand for adjudication by the European Court as compared with national constitutional courts. The first is the preliminary reference procedure by which each national court can ask for an ECJ opinion in matters of European Law. It accounts for about two thirds of the Court's decisions (Voigt 2003). This is quite unusual by international standards. The second is the striking heterogeneity of the member countries. It leads to fuzzy legislative compromises, which need to be interpreted.

[15] A rare counter-example is the so-called Barber case of 1989 (262/88, ECR I-1889). The Court's ruling that sex-based differences in pensionable ages had to be eliminated was overturned by the so-called Barber Protocol of the Maastricht Treaty.

[16] For an econometric analysis of the enforcement problem see Vanberg (2005, Ch. 4).

In summary, the ECJ judges are even more influential than national constitutional judges. If it is true that most constitutional courts are biased toward centralization, the need for reform is even stronger at the European level. How can the court be reformed to counter its centralizing bias?

4.2. Proposals

The empirical analysis has shown that centralization by constitutional courts is not due to their dependence on other union institutions. On the contrary, political independence leads to centralization. The judges of the ECJ are independent of the European Parliament and the Commission. They are selected by the member states. The centralist bias of the ECJ, therefore, is not due to dependency on union institutions.

My earlier study (1996) had shown that the share of union expenditure is smaller if half of the judges are chosen by representatives of the member states. Since all ECJ judges are appointed by the member states, the ECJ should suffer from a smaller centralist bias than the national constitutional courts do.

The ECJ could be made even more dependent on the governments of the member states by requiring publication of the voting record. However, the optimal solution is not to introduce new and better biases but to get rid of all biases. Courts ought to be neutral interpreters of the law.

What lessons can be drawn from our empirical result that the central government's expenditure share rises with the difficulty of amending the constitution? The Court would have less of a centralizing effect if its decisions could be overruled by the member states more easily. As Posner and Yoo (2005, p. 56) argue, independent courts "can be effective only in an institutional setting where external agents such as executive and legislative branches of government… correct their errors". The parliaments of the member states could be enabled to use their treaty-making powers more easily if the Court has reinterpreted the treaties in a centralizing fashion. For example, they might wish to reverse such Court decisions without an

intergovernmental conference and possibly even by majority. If the Court's centralizing reinterpretation concerned secondary EU legislation, the Council could be entitled to override the Court's decision more easily – for example, without a proposal from the Commission and possibly even without the assent of the European Parliament as both institutions share the Court's vested interest in centralization.[17]

However, curbing the influence of the Court is merely trying to control the damage. The alternative is to tackle the roots of the problem: the self-selection bias and the vested interest of constitutional courts.

The self-selection hypothesis seems to be highly relevant for the ECJ. Most experts of European law are ardent supporters of political integration. Self-selection could be limited by requiring judicial experience. In the past, only a small minority of the lawyers appointed to the European Court had previously served in a judicial function in their home country (Kuhn 1993, p. 195). According to the Treaty (EC art. 223), they shall "possess the qualifications required for appointment to the highest judicial offices in their respective countries or (be) jurisconsults of recognised competence". But when making their choices "governments have tended not to be overly worried about the judicial qualifications or experience of their nominations" (Nugent 1999, 272f.). To narrow the choice further, the judges should have to be drawn from the constitutional courts of the member states – provided that the latter had judicial experience before being appointed to the national constitutional court. This would minimize self-selection and maximize the judicial competence of the ECJ judges. It would also lead to a better integration of EU and national constitutional law..

Finally, what remedies does the vested interest hypothesis imply? The Court's vested interest in centralization is due to the fact that, by shifting powers from the member states to the Union, the judges can increase their influence and prestige in interpreting secondary Union law. The judges have an incentive to centralize, because they are responsible for two tasks at the same time: (i) the task of allocating powers between the member states and the

[17] As the European Representation Study has demonstrated, the members of the European Parliament prefer far more competencies for the European Union than the citizens do (Schmitt, Thomassen 1999, Table 3.1).

Union, and (ii) the task of interpreting secondary Union law. The solution, therefore, is to separate these tasks and to have two European Courts: one court which has no other power than to adjudicate cases concerning the division of labor between the member states and the Union (call it the Subsidiarity Court), and one court which adjudicates all other cases. The Subsidiarity Court would decide whether a case concerns the allocation of powers between the Union and the member states. Such a separation of powers between two different European Courts has repeatedly been proposed by the European Constitutional Group (1993, 2004, 2006). According to their proposal, the judges of the Subsidiarity Court would be delegated by the highest courts of the member states, to which they would return when their term is over. Thus, self-selection would not be a problem for the Subsidiarity Court. If these proposals were put into practice, the publication of the voting record or an easier legislative override would not be necessary. The first-best solution is not to deprive the constitutional judges of their independence and influence but to correct their incentives. That is the economic approach.

Neither the Constitutional Treaty (2004) nor the Treaty of Lisbon (2007) contains any of these proposals. Instead, they provide for a panel of seven persons, among them at least one member of a national supreme court, who shall give an opinion on candidates' qualification for the European Court of Justice (CT Art. III-357 and ATEC Art. 255, respectively). This would not make much of a difference, but it indicates that the governments of the member states have sensed the pressure for reforming the European Court of Justice.

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TABLE 1

The share of consolidated central government expenditure in total consolidated government expenditure, international cross-section, 1989-1991

	all countries			industrial countries		
	(1)	(2)	(3)	(4)	(5)	(6)
GDP per capita	-2.3*** (6.31)	-2.1*** (6.09)	-2.0*** (5.61)	-3.0*** (3.19)	-2.7*** (3.12)	-2.2** (2.54)
area	-0.8 (1.56)	-1.2** (2.45)	-2.0*** (4.41)	-0.5 (0.53)	-0.8 (1.06)	-1.8** (2.60)
population	-4.9 (0.40)	-6.4 (0.54)	-9.8 (0.85)	-7.8 (0.18)	-20.9 (0.51)	-4.7 (0.12)
sectionalism	-1.9 (0.07)	a	a	-0.8 (0.17)	a	a
provincial autonomy	-12.1*** (3.94)			-12.7** (2.34)		
provincial autonomy/ (1 + age of constitutional court) exp 1/5		-22.5*** (4.42)			-21.3*** (2.93)	
provincial autonomy *constitutional court's independence of union institutions			-26.9*** (4.16)			-25.7*** (3.22)
intercept	97.4*** (55.50)	97.0*** (60.92)	96.4*** (67.00)	101.9*** (17.06)	100.9*** (18.33)	97.8*** (18.10)
R^2 (adj.)	0.68	0.70	0.69	0.56	0.61	0.64
n	49	49	49	23	23	23

source: Vaubel (1996)
***/**/* indicate significance at the 1, 5 and 10 per cent level, respectively.
t-statistics in parentheses (absolute values).
[a] - omitted because regression coefficient would take sign that is inconsistent with theory and be insignificant.

TABLE 2

The share of central government outlays in general government outlays, international cross-section, 2001-2004, no interactions, OLS

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
income of constitutional judges is protected by constitution	0.71 (0.17)				2.78 (0.95)			1.99 (0.68)
constitutional amendments require supermajority		12.9* (1.72)				10.6** (3.01)		12.59*** (3.82)
constitutional amendments require several majority votes			43.9** (2.09)				23.05 (1.45)	28.28* (1.79)
GNI per capita				-0.49*** (3.82)	-0.51*** (3.86)	-0.48*** (3.82)	-0.47*** (3.55)	-0.44*** (3.25)
area				-2.02*** (4.82)	-2.08*** (5.33)	-2.01*** (4.87)	-1.83*** (3.59)	-1.90*** (3.53)
intercept	81.1*** (27.8)	69.3*** (9.6)	71.7*** (15.2)	91.1*** (44.2)	90.2*** (37.3)	80.9*** (20.7)	85.3*** (21.5)	71.6*** (12.9)
R^2	0.00	0.07	0.11	0.52	0.54	0.59	0.56	0.64
n	41	41	37	42	41	41	37	36

***/**/* indicate significance at the 1, 5 and 10 per cent level, respectively.
t-statistics in parentheses (absolute values), robust standard errors in columns 4-8.

TABLE 3

The share of central government outlays in general government outlays, international cross-section, 2001-2004, interactions, OLS

	(1)	(2)	(3)	(4)
provincial autonomy	-8.10* (1.80)	-3.37 (0.96)	-10.66** (2.05)	-14.07*** (3.16)
income of constitutional judges protected by constitution	-1.76 (0.51)			-2.83 (0.78)
provincial autonomy *income of constitutional judges protected by constitution	13.46** (2.47)			12.77 (1.67)
constitutional amendments require supermajority		11.92*** (3.21)		12.18** (2.53)
provincial autonomy *constitutional amendments require supermajority		b		b
constitutional amendments require several majority votes			-1.76 (0.11)	6.16 (0.41)
provincial autonomy *constitutional amendments require several majority votes			47.29* (1.87)	21.50 (0.74)
GNI per capita	-0.49*** (4.02)	-0.46*** (3.62)	-0.47*** (3.77)	-0.42*** (3.28)
area	-2.21*** (6.62)	-1.80*** (4.06)	-1.69** (2.68)	-1.90*** (3.79)
intercept	93.0*** (34.7)	80.2*** (20.2)	91.0*** (23.2)	79.9*** (10.5)
R^2	0.61	0.60	0.59	0.72
n	41	41	37	36

see notes to Table 2
[b] – STATA rejects this interaction due to extreme collinearity.

TABLE A.1

Shares of central government outlays/consolidated expenditure in total government outlays/consolidated expenditure[a]

Country	Period	Share of outlays	Period	Share of consolidated expenditure	Period	Share of consolidated expenditure
Argentina	02-04	65.7	86-88	61.2	72-74	71.6
Armenia	03-04	96.9				
Australia	01-04	74.2	89-91	69.7	72-74	75.4
Austria	01-04	78.8	89-91	75.7	73-75	72.8
Belgium	00-03	85.5	89-91	94.8	78-80	93.3
Bolivia	01-04	86.2	89-91	83.4	80,81,83	87.4
Bulgaria	01-04	90.9				
Canada	01-04	45.8	89-91	49.4	71,73,74	55.0
Costa Rica	02-04	97.3	88-90	97.3	72-74	94.3
Croatia	02-04	92.0				
Czech R.	01-04	85.9				
Denmark	01-04	63.1	89-91	68.3	72-74	71.8
Finland	01-04	73.0	88-90	70.2	72-74	75.0
France	01-04	88.6	89-91	88.0	72-74	89.9
Georgia	03-04	74.0				
Germany	01-04	66.5	89-91	64.9	72-74	60.2
Greece	98-00	97.9	89-91	92.8	72-74	96.3
Hungary	01-03	87.3	88-90	88.3		
Iceland	00-02	73.5				
Israel	01-04	93.3	89-91	91.9	74-76	95.2
Italy	00-03	82.2	87-89	93.8	73-75	92.1
Kazakhstan	01-04	69.6				
Lithuania	01-04	88.6	91	86.4		
Malaysia	01-04	90.7	89-91	84.3	72-74	83.0
Mauritius	02-04	98.5	87-88	99.1	74-76	99.0
Netherlands	01-04	88.6	89-91	92.6	74-76	93.1
New Zealand	03-04	91.4				
Norway	01-04	79.6	88-90	77.8	72-74	70.4
Peru	02-04	95.4	87-89	83.3	81-82	85.1
Poland	02-04	81.8	86-88	83.5		
Portugal	99-02	91.6	89-91	95.4	74-76	98.2
Romania	02	81.9	89-91	90.8	72-74	85.6
Russian Fed.	01-04	63.3				
Slovak R.	01-03	93.8				
Slovenia	01-04	90.2				
S. Africa	01-04	82.9	89-91	88.8	77-79	85.4
Spain	00-03	82.8	89-91	83.6	72-74	94.7
Sweden	00-03	64.8	89-91	69.1	72-74	67.3
Switzerland	99-02	57.9	82-84	53.8	72-74	51.0
Ukraine	02-04	82.2				
UK	02-04	91.8	89-91	87.2	72-74	83.3
USA	02-04	57.6	89-91	64.2	72-74	64.1

[a] – The consolidated expenditure shares are taken from Vaubel (1996).