Courts as Political Institutions with Legal Constraints: Evidence from Spain

DRAFT

Paper presented for presentation at the ECPR General Conference 2011
Reykjavik, August 2011
Do past rulings affect future judicial decisions? To what extent do extra legal considerations, such as attitudes, preferences and interests, permeate the decisions of the court? Does the institutional control of the court by national policy-makers translate into favorable rulings for the center? While legal scholars focus on the role of precedent in judicial decision-making, political scientists prefer to focus on the role of individual attitudes and institutional constraints on the choices that justices make. While communication between both disciplines is increasing, there have been very few attempts at reconciling both perspectives. This paper is a first attempt to find such reconciliation. Rather than asking which of these approaches is right, I look into the conditions under which one or another factor may be more relevant. The literature shows repeated evidence that precedent, attitudes and strategies are or have been present in judicial decision making, but it does not explain when one or another factor is more likely to be prevalent. This paper is an attempt at shifting the attention from what explains judicial decisions, to when it does, by looking at the decisional pattern of the Spanish Constitutional Court on federalism disputes.

Rather than characterizing courts as either judicial or political institutions, I argue that they are political institutions that operate under legal constraints. They are political in that their decisions affect the functioning of the political system, and vice-versa. But, unlike most other political institutions, courts operate according to certain procedures and rules of decision-making, from which they derive their legitimacy to participate in political processes. Those procedures therefore are bound to have an impact in the decisions they make. In the context of courts, it means that precedent matters because the court’s reputation depends on it. Does that leave room for political considerations to impact their decisions? It does, but rather than being all pervasive, the attitudes of
justices and the political interests of the court affect its decisions to the extent that the court’s legitimacy of the court is not at stake, or does not derive from using precedent.

This paper presents three main findings. First, I find that prior rulings affect future decisions. The chances that the Court rules for the center or the region in a federal dispute increase with the proportion of cases that they previously won in the same policy area. It is also more likely to side with the level of government whose expectations to win a case are larger when precedent is thick. Second, it shows evidence that the subjective preferences of the members of the Court intervene in judicial decision-making, but not in the way that most political scientists expect. While they usually expect extra legal factors to explain the choices justices make, I find that the justices’ attitudes towards federalism—whether they support greater central powers or increased regional autonomy—affect Court decisions only when precedent is weakest. As precedent becomes thicker, its binding effects are stronger. When prior rulings are vague or non-existent, the range of choices available to justices is wider and their attitudes and values are more likely to permeate into the decisions they make. Third, Court decisions do not seem to respond to political majorities or critical voices. While the data does not provide evidence of a non-political court, it certainly questions claims of its centripetal bias. If precedent impacts the Court’s decisions, attitudes matter only under constraints, and political forces are irrelevant, the argument that the Spanish Constitutional Court is biased towards the center looses strength.

The role of past rulings in judicial decision making

Political scientists may have broken the monopoly of the study of courts once enjoyed by law schools, but the analysis of judicial precedent is for the most part still left there. The role of past decisions on future judicial outcomes is almost exclusively
analyzed by legal scholars. They see the law as the main influence in the choices that judges make. Judicial interpretation is a guided process and follows certain rules that lead the judge’s search for “correct answers to hard legal questions” (Dworkin 1985, p. 119). *Stare decisis* guides this process. According to this perspective, judicial procedure eliminates interpretations based on personal preference and partisan affiliation, from the range of available choices. Political science views these arguments with skepticism and has focused on the role of ideological and strategic considerations on judicial decision making instead. In reaction to the legal model, it presents justices as promoters of their personal or institutional preferences, rather than as formal interpreters of the law.

On the one hand, behaviorist scholars advocate for the attitudinal model for judicial decision making, according to which judicial decisions reflect the attitudes, preferences or ideology of the majority of justices in the court. Justices vote according to their policy preferences and court decisions result from the sum of the justice’s individual positions (Segal and Spaeth 2002, Gillman 2001, Smith 1994). On the other hand, rational choice scholars perceive judicial outcomes as the result of the justices' strategic behavior to pursue the court's institutional interests. The political environment in which courts operate may impose constraints in their decisions. Court rulings thus reflect the relative position of the court vis-à-vis other political institutions, and its strategies to secure its position in the overall political system (Epstein, Knight and Martin 2001, Vanberg 2001, 2005, Helmke 2002, Iaryczower, Spiller and Tommasi 2002, Carubba 2008, Staton 2006, Staton and Vanberg 2008). Both perspectives consider reference to precedent in judicial rulings to provide a mere coat of formality to their decisions. The availability of jurisprudence to back their interests in any direction allows justices to
introduce their individual values or pursue institutional interests, and still back their rulings with precedent.¹

The legal, attitudinal and strategic models are often perceived as alternative approaches to judicial behavior. Scholars often focus their attention on one or another paradigm to explain judicial outcomes, with the purpose to determine which of the three best describes reality (Segal and Spaeth 2002, Epstein, Knight and Martin 2001). Much of the on-going dispute in the literature stems from the understanding that these different accounts are incompatible. Those who argue that precedent matters are considered to take a normative stand in order to minimize the role of courts in politics, while those who consider that attitudes and strategic interests solely explain judicial outcomes tend to magnify the political character of judicial institutions. Surprisingly, few efforts have been directed towards reconciling these approaches.² If each of these variables—precedent, attitudes and institutional interests—do play a role in judicial decision making, research should try to uncover the conditions under which each of them is more likely to affect judicial behavior.

A way of reconciling the literature is to understand courts as distinct political institutions (Gillman 1993, Smith 1988, Stone Sweet 2000, Shapiro and Stone Sweet 2002). Realizing the politics involved in judicial decision-making should not lead to think of courts as just any other political institution in which preferences are laid out, voted on and implemented, just as they do in parliaments or senates (Ferejohn and Weingast 1992). Courts are institutions with specific procedures and raison d’être (Shapiro and Stone-Sweet 2002) and, as any other institution, both are purposefully linked. Courts derive their legitimacy from fulfilling the expectations assigned to them. To the extent that political systems rely on the notion of separation of powers and establish courts as

¹ As Segal and Spaeth (2002, 77) explicitly put it, “precedents lie on both sides of most every controversy”.
² Barry Friedman (2006) is one of few exceptions.
judicial controls of legislatures and executives, judges will use precedent and justify departures from it in order to protect their reputation. In that context, precedent is a source of legitimacy. From this perspective, the use of precedent is compatible with the understanding of courts as strategic actors. To the extent that the court’s reputation depends on its ability to justify their decisions, it is the court’s best interest to take precedent into account. Considering that precedent legitimizes judicial behavior is not so say that courts strictly apply old decisions onto new cases. But since the court’s reputation in the political system derives from its behavior as a judicial institution, prior rulings will at least be its first consideration. Precedent becomes the point of departure of every decision, and as such may constrain the court’s leeway to make a new decision.

The question then becomes when and how far courts can move away from their own doctrinal starting point. Following the logic above, I argue that the more defined precedent is on an issue, and the more a given appeal falls within the scope of an old decision, the lower the court’s discretion becomes. In this scenario, prior decisions effectively bound justices’ choices. To the extent that their reputation is at stake, they will be deterred from disregarding well-established precedent on an issue. The impact of prior judicial rulings in future decisions increases as the court’s doctrine and jurisprudence becomes more solid, and as the legitimacy of the court’s outputs depend on its behavior as a court rather than as politicians. If precedent is non-existing,

---

3 This account fits arguments that link judicial behavior with the appeal’s visibility (Vanberg 2005) and those that consider that the greater the legitimacy stock of a court, the greater is the ability of judges to depart from or even ignore precedent (Gibson and Caldeira 2006, Gibson 2007). If a court decision is likely to be unnoticed, justices will not need to justify it as formally as otherwise because its reputation will hardly suffer. Similarly, if the court enjoys a great deal of public support, it may actually be in a position in which it can afford to take a strong political stand every once in a while. In this case, precedent builds the court’s reputation and attitudes become visible when the court’s legitimacy stock is high or in cases where they may not critically affect its institutional position.

4 This account is compatible with scenarios where justices apply existing precedent in high profile cases even if they have strong policy preferences in the opposite direction, in order to avoid delegitimizing criticism (Dworkin 1980).

5 Stone Sweet (2002) differentiates between judicial decisions that distil principles and decisions that produce rules. The vague character of the former invites legislation and the former restricts it.
ambiguous, or when different case law can be applied to support opposite rulings, justices will be enabled to introduce their views, attitudes and preferences in their decisions. This is the context in which the attitudes of the members of the court become more prominent.

When the court’s status and legitimacy depend on its support to other political branches, majorities or public opinion, rather than on the consistency of its rulings, strategic considerations of the kind advocated by strategic and rational choice scholars may apply. Just as courts adhere to precedent to secure legitimacy, they may need to depart from it when consistency with past rulings may put at risk the court’s reputation. Courts may rule in favor of legislation that conflicts with past practices (and with their own policy views as well) as long as a sufficiently large political consensus exists that can previous understandings need to be replaced. Ackerman (1991) believes those events to be ‘constitutional moments’ that transform the constitutional status quo. Vanberg (2005) supports a similar claim, by which the court will ignore its own precedent if political majorities are in a position to damage the court’s reputation by ignoring unfavorable rulings. Similarly, Stone Sweet (2000, 2002) discusses the need to balance legitimacy from precedent and legitimacy derived from political expectations.

Note a key difference between the rational choice or strategic judicial decision making approaches and the one sketched here. The former expects judges to gravitate towards dominant political forces. When the powers that be are split or fragmented, their expectation is that judges make sincere choices that reflect their individual preferences. While I agree that a significant threat to the legitimacy or reputation of the court may induce to please political coalitions, a politically fragmented scenario would not necessarily enable judges to introduce their values and preferences in their decisions, but may create an incentive for them to hold on to legal precedent, in order to minimize
criticism from the losing party in a given dispute. If the court makes a decision that expresses the attitudes of its members, the losing party will accuse it of being biased and political. If it holds on to precedent instead, losers may complain but the court be able to justify its decision with judicial arguments.

According to this account, legal, attitudinal and strategic factors are all involved in judicial decision-making. Precedent matters to the extent that the reputation of the court as a judicial institution is at stake – that is, where the polity expects courts to adhere to principle and to show consistency in their rulings, rather than ad hoc political preferences, and their failure to do so could question the legitimacy of its decisions and ultimately of the court itself. The court’s reliance on prior rulings is not the result of an irrevocable expertise, but a strategic behavior itself directed at maintaining the legitimacy of the court. In turn, I expect attitudes to be more relevant in judicial rulings when precedent is weak. In this scenario, the constraining effect of prior decisions – having to justify a departure from them— is lifted and justices enjoy a wider range of options to choose from. The permeability of justices’ values in their decisions is contingent on the robustness of the body of jurisprudence built by the court case by case. Finally, institutional preservation strategies are more likely to develop when critical majorities and new but widespread understandings could question court decisions that oppose them, no matter how well-established its jurisprudence may be. In all, there are specific conditions under which each of these variables— precedent, attitudes and institutional strategies— gain relevance in judicial decision making.

---

Centripetal bias in federal courts

Skepticism about the legal model of judicial decision-making also comes from the literature on federalism. The court’s ability to be objective and systematic in the creation and application of precedent is considered to be undermined by their intrinsic bias in favor of the center (Shapiro 1981, Vaubel 2009). In Canada and in the United States, Supreme Court decisions have been critical state building factors, gradually expanding the powers of their respective federal governments on monetary policy, commercial regulation, welfare or rights (Scheiber 1980, Galligan, Knopff and Uhr 1990, Bzder 1993). The European Court of Justice is similarly considered to foster European integration (Weiler 1991, Burley and Mattli 1993, Garrett 1992, Bednar, Ferejohn, Garrett 1996, Stone-Sweet 2004, Tsebelis and Garrett 2001, Sandholtz and Stone Sweet 1998). What explains the intrinsic bias of federal courts? Their inability to produce impartial rulings derives from the nature of the court itself, and its institutional position vis-à-vis central and regional governments.

On one hand, centripetal tendencies result from the structural position of these courts in federal systems. Constitutional courts are not regional institutions, but federal institutions. As such they are to preserve obedience to the national constitution and the unity of the State. To the extent that constitutions embody national discourse and State-wide interests, federal governments hold a prevalent position in the court’s interpretations. General interest, interstate commerce or economic planning are generally perceived as the center’s wild cards before the court. Not only courts are biased for the center, but federalism as a whole is. The claim is that all federal

---

7 María Emilia Casas, Chief Justice of the Spanish Constitutional Court from 2004 to 2010, states it clearly when asked about the threat to Spanish unity posed by regional nationalists: “As long as the Constitutional Court exists, [constitutional justices] are here to avoid such threat. Therefore, the unity of Spain is not at risk” and adds “the high Court defends the Constitution, both in its wording and spirit. The unity of Spain is part of the Constitution” (ABC 2-22-2006).
institutions present such centripetal bias.⁸ Since they are to fulfill a national project, their
tendency is to reinforce the national government at the center.⁹ Note that these claims
rely on premises shared by the rational choice model of judicial decision making: courts
are biased because they interact with federal political institutions and their decisions are
constrained by the possible threats that they may be able to impose.

Second, the source of the court’s centripetal bias is most often found in its
institutional features. On one hand, only central government institutions are involved in
the selection of constitutional justices in most federal systems, as it is the case of Spain.
When regions are taken into account, their participation tends to be indirect.¹⁰ As a
result, court appointees are expected to reflect the preferences of national legislators.
Just as the attitudinal model discussed above, this argument assumes that the decisions
justices make reflect their personal policy preferences. On the other hand, only central
governments tend to be able to alter the institutional conditions of courts. Only they can
pass legislation on the extent of the court’s jurisdiction or the salary of justices, and they
could use such power to reward or punish their behavior. This institutional constraint
may create incentives for justices to behave strategically in favor of the center, just as
the rational choice model of judicial decision-making predicts.

Claims of a biased court are particularly salient in Spain. Only institutions at the
center are involved in selecting justices, and only the Spanish Parliament has the ability
to approve and amend the law that regulates the functioning and jurisdiction of the
Court, the Organic Law of the Constitutional Court (LOTC). Given qualified majority
requirements of three fifths of Parliament and the Senate to select members of the Court

---

⁸ William Riker (1964) goes as far as naming it centralized federalism.
⁹ This argument mirrors the one made about the centralizing tendencies developed by central
governments (Vaubel 1997).
¹⁰ Only in Belgium, Germany and Russia as many as half of the members of the Constitutional
Court are selected by representatives of the regions.
and of two thirds to amend the LOTC, the regions’ ability to influence its composition or jurisdiction is contingent upon whether regional parties manage to attain pivotal shares of the representation in the legislature, or dependant on the central government’s willingness to fulfill the implicit and ill-defined agreement to appoint one of the twelve justices among a pool of regional favorites.¹¹

Various nationalist parties and groups from different regions have reacted vehemently against the Constitutional Court in order to denounce its structural bias for the center. The Basque terrorist movement ETA went as far as assassinating former Chief Justice Francisco Tomás y Valiente in 1996, whose role in the specification of the Spanish federal arrangement was prominent. Drastic but less cruel is the strategy led by the Basque regional government since 1990, when it decided to stop taking cases before the Constitutional Court, in an effort to delegitimize its role as arbiter of federal conflict.¹² Catalan and Galician nationalist parties have denounced the court’s centralist bias and attributed it to the composition of the Court and its appointment procedures.¹³ These claims transpired into the 2006 Catalan Statute of Autonomy¹⁴ and the fact that the 2010 Court decision that assessed its conformity with the Spanish Constitution practically invalidated them further revived accusations of its bias for the central government (STC 31/2010, of June 28).

Can federal systems have unbiased courts? I argue that the literature introduced above ignores alternative mechanisms by which federal courts may not need to side with the center even if they are institutionally constrained by it and if justices are attitudinally

¹¹ Jesus Leguina, Viver Pi i Sunyer and (presumably) Eugeni Gay’s appointments aimed to confer the Court with regionalist sensibility.
¹² The Basque government has broken its commitment to refuse to be plaintiff before the Constitutional Court twice since.
¹⁴ Article 180 of the Catalan Statute of Autonomy specifically states that “the Generalitat [Catalan government] participates in the process of appointment of justices of the Constitutional Court (…) in the ways specified by the laws”.

pre-selected. First, parties governing at the center have strong electoral connections in the regions. They also use regional platforms to oppose one another’s policies at the center. Even where regional nationalist minorities with weak partisan or electoral ties to the center govern, their role as hinge parties in parliament and the strength of the regional constituencies often deters central governments to ignore their demands. Under such conditions, the center may not find incentives to press the court for systematic centripetal rulings.\textsuperscript{15} Second, some argue that, aware of the credibility problem that appointing procedures and the institutional set up endow the court with, judges may be induced to evenhanded rulings on the federal distribution of power (Russell 1985). The court may behave impartially for the sake of its own reputation.

**Hypotheses and data**

From these two frameworks, several questions arise. Do past rulings affect future judicial decisions? To what extent do attitudes permeate in judicial decision making? Does the institutional control of the court by national policy-makers translate into favorable rulings for the center? In order to test the role of prior rulings, attitudes and political majorities in judicial decision making, I have collected information on every dispute on federalism that resulted in a decision by the Constitutional Court between 1980 and 2008.\textsuperscript{16} My data set amounts to 701 cases.\textsuperscript{17} In 320 cases, the Court’s decision sided with the center and the remaining 381 were in favor of the regions, regardless of whether they were plaintiff or

\textsuperscript{15} This reasoning follows the arguments about the role of political alternation on judicial independence (Landes and Posner 1975, Ramsayer and Rosenbluth 1993, Ginsburg 2003).

\textsuperscript{16} I focus on disputes on federalism to test my arguments because they involve questions of procedure rather than principle, which makes judicial outcomes more tangible. Generally speaking, decisions on what level of government does what are more specific than what the court thinks freedom is. À la Kelsen.

\textsuperscript{17} Data includes every case on federalism raised by either the central or regional governments and assemblies included in the compendium of conflict between territorial administrations provided by MAP-Lexter (2008). The few cases in which the information was incomplete or mistaken in the source where coded as missing.
defendant. This variation is captured in the dependent variable ‘winside’.\(^\text{18}\) Table 1 provides a description of all variables used in this paper. Several indicators were constructed to test the effect of precedent and the existence of centripetal bias in the Court’s decision to rule for one or another level of government.

Disputes over the federal distribution of power require the Court to decide which policy area falls within the scope of powers constitutionally granted to which level of government. If past rulings bound the choices courts make, the Court ought to continue to grant each level of government the powers that it deemed to fall within its jurisdiction in the past.

H1. If past decisions affect future judicial rulings, the more the court has ruled in favor of one level of government (the center or the regions) on a given policy area in the past, the more likely it is to rule in its favor on that policy area in the future.

In order to test this hypothesis I created two variables. The first one is ‘center winning rate’, a continuous variable that takes values between 1 and 0 and measures the proportion of prior cases won by the center in each policy area.\(^\text{19}\) The larger the proportion of cases won by the center in each given area, the more likely the Court would be to grant that power to the center again, and vice-versa.

This variable, however, does not take into account the number of cases behind those proportions. One would be inclined to think that precedent in favor of one or another level of government is stronger when the Court has ruled in its favor a greater

\(^{18}\) The values are 1 if the Court’s decision supports the center and 0 if it supports the region. The center and regions ‘win’ a case when they are plaintiff in cases that the Court declares to be unconstitutional or partially unconstitutional, or when they are defendant in challenges that the Court dismisses.

\(^{19}\) One may rightly argue that one case may involve more than one policy area. Indeed many policies and the federal conflict that derives from them often involve more than one issue. For simplicity I use the classification provided by MAP-Lexter (2008), the compendium of Spanish federal conflict I used to create my data base, that indicates the main government ministry or department involved in the case (‘Ministerio’).
number of times –while the proportion of wins may be the same, the chances of a favorable ruling are greater if one won 10 of 10 cases in the past, than if it won 1 out of 1 case. As the number of decisions on a given issue increases, those proportions are more reliable indicators of where precedent lays. This consideration creates the impossible need to decide how many cases are enough to consider that precedent is solid, and I will not try to attend to it. I can however address a related measurement problem. For cases on issues where there is no prior ruling, the proportion of wins for the center is 0 –thus wrongly implying that the center has no chances to win. When the case is only the second to be brought to court on that issue, the prior proportion of wins is bound to be 1 or 0, if the center won the case or lost it respectively, as the proportion is calculated on one single prior case –implying that the center should have outmost confidence of winning or losing respectively, despite the fact that that information derives from a single case. Since these cases take the extreme values, we should wonder whether its effect on the court’s outcome may be driven by cases where precedent is weakest or non-existing, which is contrary to what this variable intends to measure.

To address this concern, I created the variable ‘center winning rate(2)’, which indicates whether the center has high, low, or unknown expectations to win a case by taking into consideration the proportion of past won cases when the court ruled on that topic at least twice prior to each case on the same policy issue. While there is no way to support that two prior rulings on an issue constitute precedent, this logic removes the potential bias embedded in ‘center winning rate’, as it removes extreme values from cases that have the lowest possible precedent –coding them as unknown-- and hopefully the bias that this may create. The Court is expected to rule in favor of the center as the values of both of these variables increase. Lower values are associated with decisions favoring the region.
If the attitudinal model of judicial decision making is right, the position of the members of the Constitutional Court on federalism would be reflected in the decisions they make. Similarly, if politicians exercise control over the Court and its outcomes by appointing justices that share their policy preferences, the greater the number of justices they have been able to appoint, the more likely they would be to obtain favorable rulings. But, as expressed above, judges make decisions in constrained environments. The reputation of the Court as a judicial institution and its need to show consistency with precedent is one such constraint. If prior rulings truly limit the choices justices make, their preferences would only be relevant (or more relevant) on areas where precedent is weak or non-existent.

H2a. If the attitudes and preferences of justices permeate the decisions they make, Court decisions supporting the central government should increase with the centralist profile of its members, and vice-versa. (Testing the attitudinal model)

H2b. The attitudes and preferences of the members of the court affect its decisions when precedent is weak. (Testing the constraints of prior decisions on attitudes).

In order to test these hypotheses, I need to trace different court periods according to the preferences of its justices on federalism. I have divided the 28 years under study in ten natural court periods –Table 2. A natural court is a period during which there are no changes in the profile of its composition. Each natural period is given a de/centralization score, which reflects the average position on federalism of its members.20

---

20 Studies that test the attitudinal model of judicial decision making use each individual justice as a unit of analysis and his or her vote as their dependent variable. Some relevant examples on the case of Spain are del Castillo (1987), Garoupa, Gómez-Pomar, Grembi (2010) and Hanretty (2010). I choose to analyze the overall decision of the Court instead –rather than its individuals’— because I am not so interested in knowing how justices make choices, as in the factors that explain the Court’s outcomes.
How can we find out the average preferences for centralization or decentralization for each court period? Unfortunately for our purpose, the majority of constitutional justices in Spain are law professors in different areas of specialization and no open record of their position on federalism exists for a majority of them. But if politicians are expected to appoint friendly judges, we can use the position on federalism of the political party that promoted each justice’s appointment as a proxy. Federalism is a salient issue in Spain and political parties take significantly different positions on it. Differences are palpable even among the nation-wide parties that compete for a majority at the center and that usually select constitutional justices. Given the Court’s relevant role in the definition of the federal division of powers, we know that political parties take into consideration each candidate’s position on the de/centralization spectrum.

The ‘de/centralization score’ for each natural court helps us test H2a. The index is created from the average position on decentralization by members of each party (Benoit and Lever 2005). The highest the score, the most prone to centralization the members of a given party are. Each justice is assigned the score on decentralization of the party that appointed him or her. Each natural court scores the average of its members. The Court reaches its lowest de/centralization score (the most regionalist Court composition) from 1992 to 1995, when the Socialist party negotiated with

---

21 The Socialist party PSOE is generally more prone to decentralization than the conservative PP. Such distinction is not only based on the ideological profile of these parties, but also has an electoral motivation. The strongest electoral feuds of the PSOE are regions with strong regionalist attitudes. In order to compete for votes where peripheral nationalism is strong, the regional branches of the party have adopted strong regionalist stands. As a weaker voice in these regions, the PP has not had to follow the same trajectory, capturing instead lesser regionally affected voters (Astudillo 2010, Roller and Van Houten 2003, Pallarés, Montero and Llera 1997).

22 Hanretty (2010) suggests that the left-right wing behavior of individual justices of the Spanish Constitutional Court may actually mask their (and their party’s) preference for centralization or regionalization.

23 Benoit and Laver (2005) data set do not include scores for UCD, the coalition that led the transition to democracy and which appointed several constitutional justices in the early years. Given its position at the center of the political spectrum I assigned it a value half way between PP and PSOE. Justices who have been appointed by agreement between two parties are assigned the mean value of both parties.
peripheral nationalist parties and the left to select new justices in order to exclude the conservative and rather centralist PP from the process –Table 2. The higher scores (most centralizing attitudes) are found in the latest natural court periods, when the conservative PP held government and was able to appoint justices as former socialist members of the court retired and when the representation of regional parties at the center was weakest. If proponents of the attitudinal model are right and if the center does exercise control over the Court’s decisions through its appointments, as critics suggest, the higher the de/centralization score is, the more likely the Court is to rule for the center.

While justices may introduce their preferences in the decisions they make, they may not be equally likely and able to reflect their personal positions at all times. If my argument holds and past rulings constrain the court’s ability to imprint the values of its members on its decisions, we would expect the preferences of justices and of the parties that appointed them not be always visible. Only when precedent is weak would they be relevant. The variable ‘court_id_center*n2’ measures this scenario and allows us to test hypotheses H2b. It is an interaction term that indicates that the Court’s composition has a centralist profile and the number of prior decisions on a given policy area is smallest – when 0 or only 1 prior decision on a given topic exist. The expectation is for this variable to have a positive and significant relationship with the dependent variable ‘winside’.

A third set of hypothesis and variables help test whether the Spanish Constitutional Court behaves strategically, trying to prevent the backlash from those political majorities and institutions that could potentially harm it. If the center can use its prevalent institutional control over the Court, we should expect a strategic court to side more often with the center than with the regions. The data does not immediately reflect
such profile. The Court has backed the center in 46% of its decisions on federalism, and supported the regions in the remaining 54%.

A more relevant analysis would require that we test the presence of such bias under conditions that may make the court more susceptible to those institutional controls. The main premise of the literature that present courts as strategic actors vis-à-vis other branches of government is that the stronger or more critical the political majority supporting a particular policy, the less likely courts are to strike it and vice-versa (Vanberg 2005, Rios Figueroa 2007, Stanton 2006, Staton and Vanberg 2008, Carubba 2008, Epstein and Knight 1997, even Ackerman 1989). From this perspective, if the Constitutional Court’s behavior is strategic, it should present a centripetal bias when the center holds a strong majority. The more dependent the center becomes on support from regional parties, the Court should make a regionalist shift. Similarly, regional parties that have insufficient support to ever become a nation-wide majority ought to find Court rulings less favorable than regions that are governed by national parties.

H3a: The stronger the political majority at the center, more likely the Court will be to side with it.

H3b. Regions that are governed by regional parties are less/more likely to obtain favorable rulings than regions where nation-wide parties (capable of becoming the ruling party at the center) are a majority.

The variables created to test these hypotheses are the following. First, ‘majority strength’ measures the strength of the governing party at the center at the time that each decision was made. It is considered to be strong when it enjoys an absolute majority. This situation took place during the Socialist governments from 1982 to 1993 and during the 2000-2004 conservative government. If the Court behaves strategically, the parliamentary and electoral strength of the majority party at these times could place the
Constitutional Court in a vulnerable position vis-à-vis public opinion and the other branches of government, and induce it to side more often with the center. The center is considered to be weak when the majority holds a simple majority and makes stable pacts with peripheral nationalist parties from different regions in order to obtain parliamentary support for its policies. This situation took place from 1993 to 1996, when the Socialist PSOE pacted with the Catalan nationalists CiU in order to be able to hold its minority government, and from 1996 to 1998 when the conservative PP negotiated with the Catalan CiU, the Basque PNV and the Canary Islands CC. At times when the center needs to be most receptive to the demands of regional parties, the Court would be less likely to be show its centripetal bias, either because the fragility of the party in government makes it less likely to press for favorable rulings or because justices, even if they are sympathetic to the center, do not want to disrupt partisan alliances.

Second, ‘nationalists’ indicates whether a constitutional dispute involves peripheral nationalist parties (CiU, PNV, CC) or if conflict takes place between state-wide parties both at the center and the region. Two outcomes are plausible from a strategic perspective. On the one hand, one could argue that the Court is more prone to be biased against regions whose parties are not likely to be in government at the center, and therefore are not expected to have significant input in selecting justices or in regulating the Court’s jurisdiction or salaries. If this is the case, the Court would be more prone to side with the center when regions governed by peripheral nationalist parties are involved in the conflict. On the other hand, we could expect the opposite result if we think that nationalist parties place stronger demands for decentralization and are able to mobilize dissatisfaction with the Court’s decisions and with the *Estado de las Autonomías* as a whole. If the Court takes into account public opinion and political legitimacy into account in its decisions, it would show more lenience with regions where
national identities are strongly mobilized.\textsuperscript{24} The Court would then be more prone to side with the regions when nationalists are involved in the dispute.

Certain members of the court may carry more weight than others. The Spanish Constitutional Court makes collegiate decisions among its twelve members but the President of the Court is \textit{primus inter pares}. As chief justice he or she holds a qualified vote in split decisions, and most importantly organizes the Court’s agenda. As such, they may affect what the Court decides. Given that Court Presidents only serve as such for a short period of time—three years— they may not be able to shift constitutional doctrine. But they may be able to give preference to cases that they care about and that existing jurisprudence may support. Justices with clear regionalist preferences may give priority to cases that they know will be decided favorably for the regions, and vice-versa.

H4. Court decisions are more likely to support the center when the President of the Court has a centralist profile, and vice versa.

Just as we do not know where each justice stands on the federalism issue, the views on federalism held by each chief justice are also hard to discern. The clearer profiles are those of chief justices Pedro Cruz Villalón (1998-2001) known for his willingness to empower the regions, and of Manuel Jiménez de Parga (2001-2004), who repeatedly expressed his concerns to strengthen the center.\textsuperscript{25} Note that the two chief justices with most opposite views on the \textit{Estado de las Autonomías} held consecutive

\begin{flushright}
\textsuperscript{24} Garoupa, Pómez-Gomar and Grembi (2010) find that the Spanish Constitutional Court tends to support the demands of peripheral nationalist parties more often than nation-wide parties in other regions and provide a similar argument to explain it. Their analysis however, only looks at the presence of nationalist parties as plaintiffs, hence they are unable to distinguish whether the effect results from judicial deference to their demands, as they suggest, or to the fact that these parties strategically take to Court cases that they know they are more likely to win.

\textsuperscript{25} In a public discourse he made as President of the Court, Cruz (2001) discussed ways in which the “regionalist sensitivity” of the Court could be made “possible and even convenient”. Newspaper headlines were filled with Parga’s remarks that sarcastically ridiculed the demands and arguments for greater autonomy by national peripheries and discussed the need to strengthen the Spanish nation (De la Cuadra 2001, ABC 11-17-2001, El País 11-17-2001, El País 1-21-2003, El País 1-22-2003).
\end{flushright}
terms as Presidents of the Court. We expect court decisions to be favorable to the center during Parga’s tenure and the opposite during Cruz’s.

An additional variable is included in the models in order to address a possible selection bias in our data. Since the Court’s involvement in a case only takes place by invitation, plaintiffs ultimately control the Court’s docket. The Court only decides on what politicians choose to take to court. Therefore, its decisions may reflect the strategies of politicians as to what they choose to litigate and what they prefer to keep in the political arena, rather than the Court’s position on an issue in prior rulings, the attitudes of its members, or the threats of dominant coalitions once the case is in the docket. One would expect plaintiffs to win more often because they have calculated their chances of winning the case before they took it to court.

H5. The government that initiated litigation (plaintiffs) should obtain favorable Court rulings more often.

The variable ‘plaintiff’ differentiates between central and regional plaintiffs, and aims to control for the strategic choice to litigate on judicial outcomes.

Results

The logistic regression models in Table 3 show the effect of the variables presented above on the probability that the Constitutional Court rules for the center or the region. Positive regression coefficients indicate that the effect of that variable increases the likelihood that the Court decision sided with the central government or the region in conflict. A negative coefficient implies the opposite effect, that the Court supported the region’s position. The table presents four models. Each one excludes variables that are collinear or that test the same effect with different variables.
The results confirm our first hypothesis. Prior decisions seem to have a “gravitational force” on Spanish constitutional judges (Dworkin 1981, 38). Politicians use precedent to anticipate judicial outcomes because, indeed, what the Court said in the past affects what it is likely to say in the future. Model 1 shows that the chances of a ruling for the center or the regions increase with the proportion of cases that they previously won in the same policy area. Model 2 tests the same hypothesis with a different variable in order to add robustness to this finding. Rather than measuring precedent by looking only at the proportion of cases previously won, we now measure the expectations to win a case when there are at least two prior rulings on the issue in question.

The Court’s support for the center or the regions does not seem to respond to the average position on federalism of its members. While the coefficient for the Court’s de/centralization score is positive, as expected, it is not significant. However, the justices’ average attitudes on federalism do play a role in the decisions they make when precedent is weakest. The significance of the variable ‘court’s profile<2’ indicates that, when the overall position on de/centralization by the members of the Court becomes relevant when the court has only ruled once or less prior to the dispute in question. Note that the models in which this variable is included produce a higher percentage of correct predictions. These findings provide evidence for the interaction between precedent and judicial preferences that I proposed earlier in this paper. We should not ask which of the two factors explain judicial decisions best, or whether one has a greater impact than the other, but under what conditions each is more likely to matter. Both variables are relevant under specific conditions. As the decisional body of the Court increases, justices seem to leave their preferences aside. When precedent is weak, they enjoy more decisional leeway.
Variables that attempt to capture the strategic behavior of the Spanish Constitutional Court do not fare so well in our models – hypothesis H3a and H3b. The Court’s decisions are not affected by the strength of the governing majority at the center that potentially could put it in a vulnerable position. Unlike Garoupa, Gómez-Pomar and Grembi (2010), I do not find evidence either of the Court’s consideration for the weakness of regionally-based parties to affect the composition or jurisdiction of the court or its concern for the ability of nationalist parties to question the integrity of the state or the value of the Constitution or the legitimacy of the Court’s rulings. The coefficients for both ‘majority strength’ and ‘peripheral nationalists’ are not significant in all four models. These results do not imply that the Constitutional Court in Spain does not behave strategically, but that the effect of strategic considerations is not as systematic as the role of prior decisions and of attitudes when precedent is weak. These findings also question the argument that the Court is intrinsically biased towards the center.

Regarding the role of the preferences of the President of the Court we find, as expected, that the Court significantly sides with the regions more often during Cruz Villalón’s leadership than in any other period. Not only is he known for his stands in favor of greater regional autonomy, but he formed a ‘tandem’ on federalism issues with the Court’s vice-President Carles Viver Pi-Sunyer, the most regionalist justice the Court has had so far.26 Since the members of the Court select who will occupy both leadership positions among its exiting justices, it seems that a majority of the Court agreed or respected these two justices’ views and expertise. Jiménez de Parga, however, was less successful in turning his preference for a strong central government into Court outcomes. Only in one of the models is the coefficient for this variable significant. This result may be a surprise to many, since Jiménez de Parga was the most visibly and

26 ‘Tandem’ is the word that is colloquially used in the Court’s circle to refer to situations when the President and vice-President of the Court share similar views.
flamboyantly partial chief justice the Court has had. As mentioned above, his personal views on the territorial division of powers often made headlines. Yet this result seems less striking when we realize that, in fact, Jiménez de Parga often expressed his understanding of the *Estado de las Autonomías* in dissenting opinions.\textsuperscript{27} Whatever his strategy, he was unable to gather the support of a majority of his colleagues in a number of important decisions.

Last, but certainly not least, the variable ‘plaintiff’ proves to be a positive, significant and robust relationship with the decisions of the Court. Judicial decisions side more often with the level of government that referred the case to the Court. This finding indicates that central and regional governments make calculated decisions as to what to litigate and what to keep in the political arena. They anticipate what the court is likely to do and behave accordingly.

**Conclusions**

Political scientists, in their effort to get the study of courts out of law schools, have underlined the political character of courts and the role of extra legal factors in the judicial decision making. Rather than precedent, original intent or textual meaning, they emphasize the role of attitudes and strategic considerations in the choices judges make.

The analysis of judicial decisions on federalism in Spain shows that Court’s rulings are consistent with past decisions. The chances that the Court sides with one or another level of government increases as the proportion of cases won by that particular government grows. This results are congruent with the notion that courts are political institutions, but of a different kind. Unlike parliaments and senates, their decisions are legitimate to the extent that they provide their rulings with legal reasoning and some

degree of continuity. Precedent matters, even if only to provide legitimacy to what courts decide. Courts are political institutions that follow different decision-making rules. As in any institution, those rules have an effect on their outcomes.

Does that mean that the attitudinal and strategic models of judicial decision making are wrong? They are not, but in their effort to test who is right and wrong, they forgot to answer when one model is more applicable than another. This paper contributes to clarify the conditions under which attitudes matter. It shows that the preferences of the members of the court affect its outcomes when precedent is weak. When the body of jurisprudence is vague, chances are that there are no ready answers to new questions. As such, the decisional leeway of judges expands and the court can choose its preferred option. If, instead, precedent is well defined, choosing on preferences may undermine the Court’s legitimacy and its role in the political system.

Chief justices may be able to print their preferences in the Court’s decisions more than any other justice. The probability of the Court siding with the region in a dispute increases significantly when its leaders are the most region-friendly justices the Constitutional Court has ever had. However, the when the most open supporter of the powers of the central government is President of the Court, his impact on its decisions is not as consistently significant. Such contrast may imply that the effect of the chief justice in Court decisions does not only derive from his or her ability to shape the courts agenda, as I anticipated. The rest of justices’ support for his or her views on federalism may also be necessary.

The paper does not show evidence that the Court behaves strategically to please dominant political coalitions. Neither does it show a centripetal bias. These results however, do not provide evidence of the opposite either. We cannot therefore conclude that the Court is free from centripetal bias or unaffected by its political environment.
If different factors affect how judges make decisions under different conditions, are certain courts more likely to be subject to legal, attitudinal or strategic considerations than others? To the extent that courts in all democratic systems want to make sure that their decisions are abided by, to have an impact in the political system, they should all be equally likely to develop a consistent body of jurisprudence. The binding effect of precedent should be similarly perceived across systems. However, certain systems of judicial review have institutional features that may facilitate the development of a more solid body of jurisprudence than in other places. According to the logic outlined in this paper, we would expect the attitudes and preferences of justices to be more prevalent in newer than in older courts. As precedent grows with time, so does its constraining effect on the judges’ preferences. Similarly, less accessible courts should be more likely to express judicial preferences, than those that are more likely to take on new cases. Accessible courts will have larger dockets and the court will eventually have built well-defined jurisprudence, narrowing the window for attitudes to permeate their decision. If the court has the ability to set its docket by accepting or refusing to decide on the cases brought to it, justices can decide how layered or vague the body of jurisprudence is on any given policy area. In addition, courts that exercise concrete judicial review may have a tendency to make narrower (rule-setting rather than standard-setting) decisions. As such, prior rulings may be less applicable to future cases, maintaining a more open door for decisions to reflect the preferences of the court. These propositions remain to be tested. If proven, not only would they provide further evidence to the argument defended in this paper, but also they would suggest that European Constitutional Courts are more likely to be constrained by prior rulings than in American-style courts, while the judges’ attitudes should be relatively speaking more prevalent in the latter.
| Name of Variable                     | Characteristics                                                                 | Values                                                                 | Mean (SD) |
|-------------------------------------|--------------------------------------------------------------------------------|                                                                      |           |
| Winside (dependant variable)        | Dummy variable                                                                 | 1 if decision sides with the center. 0 if it sides with the region.  | .456 (.498) |
| center_wining_rate                  | Proportion of cases previously won by the center on each policy area             | Values range from 1 to 0.                                            | .545 (.181) |
| center_wining_rate(2)              | Ordinal variable Expectation to win given past proportion of wins when the number of prior decisions on the given issue is greater than 1. | 1 if favorable to the center -1 if favorable to the region 0 unknown | .160 (.916) |
| De/centralization score             | Average position for or against political decentralization of the justices seating in Court. | Values range from 8.97 to 10.6. The higher the value, the more prone to centralization the Court’s composition is. | 9.753 (.833) |
| Court_id_center*n2                  | Dummy variable 1 (centralist) if the Court’s de/centralization score is below the average and \( n_i < 2 \). 0 otherwise. |                                                                      | .068 (.253) |
| Majority strength (at center)       | Ordinal variable Strength of majority party at the center.                      | 1 if governing party at the center holds absolute majority. 0 if it holds a simple majority. -1 if nationalists are hinge for stable government at center. | .436 (.834) |
| Nationalists                        | Dummy variable 1 if regionalist parties are involved in the dispute either as plaintiff or defendant. 0 otherwise. |                                                                      | .451 (.498) |
| Cruz Villalón                       | Dummy variable 1 if Cruz Villalón is chief justice 0 otherwise                  |                                                                      | .071 (.257) |
| Jiménez de Parga                    | Dummy variable 1 if Jiménez de Parga is chief 0 otherwise                       |                                                                      | .064 (.245) |
| Plaintiff                           | Dummy variable 1 if the center is plaintiff 0 if the region is plaintiff         |                                                                      | .328 (.469) |

Notes: \( n_i \) indicates number of prior decisions on policy area \( i \).
Table 2. Natural court periods and de/centralization scores

<table>
<thead>
<tr>
<th>Natural court</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
<th>V</th>
<th>VI</th>
<th>VII</th>
<th>VIII</th>
<th>IX</th>
<th>X</th>
</tr>
</thead>
</table>

| Acronyms: CiU, Convergència i Unió (Catalan nationalist party); IU, Izquierda Unida (left/green party); PNV, Partido Nacionalista Vasco (Basque nationalist party); PSOE, Partido Socialista Obrero Español (Social-democratic party); PP, Partido Popular (conservative party); UCD, Unión de Centro Democrático (center party). |
Table 3. Determinants of judicial decisions on federalism

Dependent variable: ‘Winside’
(value is 1 if the Court’s decision sides with the center, 0 if it sides with the region)

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>center winning rate</td>
<td>.981* (.453)</td>
<td>.988* (.462)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Center winning rate(2)</td>
<td>.235** (.089)</td>
<td>.237** (.090)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>court’s de/centralization score</td>
<td>-.041 (.123)</td>
<td>-.019 (.124)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>court_id_center*n2</td>
<td></td>
<td>2.075* (.900)</td>
<td>1.948* (.899)</td>
<td></td>
</tr>
<tr>
<td>court_id_center</td>
<td>.305 (.239)</td>
<td>.314 (.240)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>n2</td>
<td></td>
<td>2.016* (8.09)</td>
<td>1.972* (.807)</td>
<td></td>
</tr>
<tr>
<td>majority strength (at center)</td>
<td>.067 (.098)</td>
<td>.078 (.099)</td>
<td>.018 (.099)</td>
<td>.030 (.100)</td>
</tr>
<tr>
<td>peripheral nationalists</td>
<td>.028 (.164)</td>
<td>.019 (.165)</td>
<td>.004 (.170)</td>
<td>.012 (.171)</td>
</tr>
<tr>
<td>Cruz Villalón</td>
<td>-.934** (.359)</td>
<td>-.945** (.360)</td>
<td>-.851* (.362)</td>
<td>-.838* (.362)</td>
</tr>
<tr>
<td>Jiménez de Parga</td>
<td>.581 (.413)</td>
<td>.467 (.413)</td>
<td>.325* (.152)</td>
<td>.255 (.383)</td>
</tr>
<tr>
<td>Plaintiff (center)</td>
<td>1.351*** (.174)</td>
<td>1.333*** (.175)</td>
<td>1.373*** (.177)</td>
<td>1.361*** (.178)</td>
</tr>
<tr>
<td>Constant</td>
<td>-.774 (.1207)</td>
<td>-.486 (.184)</td>
<td>-.125*** (.283)</td>
<td>-.750*** (.140)</td>
</tr>
<tr>
<td>N</td>
<td>701</td>
<td>701</td>
<td>701</td>
<td>701</td>
</tr>
<tr>
<td>Pseudo R²</td>
<td>0.089</td>
<td>0.092</td>
<td>0.099</td>
<td>0.099</td>
</tr>
<tr>
<td>% of correct predictions</td>
<td>63.3</td>
<td>68.0</td>
<td>68.2</td>
<td>67.7</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
Significant coefficient in bold.
*/**/*** indicate significance at the 90%, 95% and 99% level, respectively.
Bibliography


ABC (2006) “Casas asegura que la unidad de España no peligra mientras existan la vigente Carta Magna y el TC” ABC 2-22-2006


