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DYNAMICS OF BELGIAN PLURINATIONAL FEDERALISM: A SMALL STATE UNDER PRESSURE

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Abstract: This Essay outlines the dynamics of Belgian plurinational federalism. It focuses on the major driving forces of Belgian federalism by identifying the sources of change and instability, which are reshaping the institutional and constitutional layers of Belgian federalism. It then analyzes the recent Reform of the State before reviewing the indirect and direct sources of change of Belgian constitutional law originating in European law.

INTRODUCTION

Belgium is a bipolar federal state “driven by a dynamic of dissociation” that rests on a complex system of multi-level powers.¹ Before 1970, Belgium was governed as a unitary state in which sovereignty rested solely with the central government—an arrangement that often pitted the two major language communities (Dutch and French) against each other in a contest for control over national policy. Since 1970, a process called the “Reform of the State” has been underway, transforming Belgium into a double-layered federal state in which sovereignty is shared between the central government and sub-national units delineated along cultural, linguistic, and territorial lines.² This transformation was gradual, with amendments to the Belgian Constitution and the adoption of a series of so-called “Special Institutional Reform Acts” demarcating each stage.³ The end result of this process was the creation of a double-layered governing structure consisting of a central federal state and

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¹ See Marc Verdussen, *La Belgique: Un Fédéralisme Bipolaire mû par une Dynamique de Dissociation*, in *LE FÉDÉRALISME MULTINATIONAL: UN MODÈLE VIABLE?* 211 (Michel Seymour & Guy Laforest eds., 2011); Wilfried Swenden et al., *The Politics of Belgium: Institutions and Policy Under Bipolar and Centrifugal Federalism*, 29 WEST EUR. POL. 863, 869, 870–71 (2006).

² See Swenden et al., *supra* note 1, at 865–68.

³ See *id.*; see, e.g., Loi spéciale de réformes institutionnelles [Special Law Reforming Institutions] of Aug. 8, 1980 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 15, 1980, 9434.

sub-national federate entities comprised of cultural and linguistic “communities” as well as territorial “regions.”

The two types of federate entities (communities and regions), each with its own legislative competency, coexist and overlap to a certain extent since they are defined according to different criteria—regions are defined by physical borders, whereas communities are defined according to a shared language and cultural tradition.⁴ The three regional federate entities (the Flemish Region, the Brussels-Capital Region and the Walloon Region) are empowered to legislate with respect to economic, environmental, planning, housing, and industrial issues in their territory.⁵ The three “communitarian” federate entities (the Flemish Community, the French Community, and the German-speaking Community) are empowered to legislate with respect to linguistic, cultural, and educational matters within their respective communities.⁶ Belgian constitutional law is very specific in defining the concept of “communities,” which encompasses both the people that form the community and the ties that bind them—the community’s language and culture—without regard to physical location.⁷ As a result, the decrees of the Flemish and the French Communities of Belgium apply not only to the Dutch-speaking and French-speaking regions but also to “those institutions established in the bilingual region of Brussels-Capital which, because of their activities or organization, must be considered as belonging exclusively to one [language] Community or the other.”⁸

In analyzing and explaining the contemporary pressures on Belgium, this Essay will focus on the system’s “dynamics.” For the purposes of this Essay, dynamics comprise the internal and external movements that animate Belgian federalism, specifically the pressures and driving forces existing in Belgian society, the political sphere, and even in the constitutional system itself. These dissociative forces are capable of either generating demands for constitutional reform or potentially threatening the entire constitutional system. Dynamics, therefore, refers not only to sources of change but also to sources of grave instability.⁹

Dynamics can also refer to sources of continuity when the forces at work result in a preservation of the *status quo*.¹⁰ Although particular sources

⁴ See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 240–41 (1990).

⁵ *Id.*

⁶ *Id.*

⁷ 1994 CONST. arts. 127–130 (Belg.); Lenaerts, *supra* note 4, at 241.

⁸ 1994 CONST. arts. 127, § 2, 128, § 2 (Belg.).

⁹ See Arthur Benz & Jorg Broschek, *Conclusions: Theorizing Federal Dynamics*, in *FEDERAL DYNAMICS: CONTINUITY, CHANGE AND THE VARIETIES OF FEDERALISM* 366, 366–67 (Arthur Benz & Jorg Broschek eds., 2013).

¹⁰ See *id.* at 367–68.

of change can theoretically be distinguished from the particular sources of continuity, the different sources of change and continuity usually interact within federal states, sometimes combining in ways that make distinguishing between the two classifications a matter of perspective.¹¹ Whether particular forces are sources of change or sources of continuity, it can sometimes depend on the timescale of one's observations.¹² According to Arthur Benz and Jörg Broschek:

At least three general patterns [involving the interaction of change and continuity] can be distinguished: (1) continuity may be achieved "through change," for example by institutional reform restoring a balance of powers or negative feedback mechanisms; (2) change may become continuous ("continuity of change" or evolution); [or] (3) a direction of a trajectory begins to change ("change of continuity"), leading to abrupt transformation or discontinuous evolution.¹³

It is important to note, however, the fact that federal systems are subject to change and continuity does not mean that those systems are necessarily unstable, "[r]ather it is dynamics, the ongoing dualism of continuity and change, which create a 'sustainable' federation."¹⁴ Sources of change are therefore not always sources of instability that can stress the federation and lead it to fail. Sources of instability are only those that are likely to lead to breaking down, disintegration or splitting of the federation or the expulsion of one of its constituents. Furthermore, change within a federal system is typically the result of a complex set of societal, institutional, and normative sources brought to bear by a "constellation of political actors."¹⁵ It is therefore difficult to isolate a particular source of change or continuity. Lastly, the description, explanation, and evaluation of federal dynamics must take into account the multidimensional and multidirectional features of federal regimes.¹⁶

Following an overview of this conceptual framework and the theoretical studies dedicated to the identification of sources of change and instability in federal systems, the aim of this Essay is to capture the actual dynamics of the Belgian constitutional system. As illustrated by Robert Lieberman, the dynamics of federal systems can be explained by driving forces existing in different layers of the federal systems.¹⁷ Sources of change and of instability

¹¹ See *id.*

¹² See *id.*

¹³ See *id.* at 368.

¹⁴ See *id.* at 382.

¹⁵ See *id.* at 367–68.

¹⁶ See *id.*

¹⁷ Jörg Broschek, *Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism*, 21 REGIONAL & FED. STUD. 539, 540 (2011); Robert C.

have various historical origins and carry varying logics that are not necessarily connected with one another.¹⁸ Tensions exist between the societal, institutional, and normative layers of the federal state; therefore, sources of change and instability can be explained by the interplay of those different layers of the federal state.¹⁹

This Essay first identifies the forces driving and contributing to the dynamics of the Belgian federal system. The Essay then examines the Sixth Reform of the State adopted in January 2014 and how it creates new sources of change in Belgian federalism. Lastly, in the final section, the Essay discusses the influence of European law on Belgium's federal dynamic.

I. BACKGROUND

A. The Linguistic, Social, and Political Bipolarity of Belgian Society

The major sources of change in Belgium within the societal layer of the federal system lie in the linguistic, social, and political bipolarity of Belgian society.²⁰ The main features of this layer of Belgian federalism are its linguistic and political bipolarity, which serves as the main source of change, as political demands for reforms are aligned with this bipolarity. In Belgium, two large Dutch and French communities as well as a smaller German-speaking community coexist within the same state.²¹ According to recent statistics, 6,251,983 individuals live in the Flemish Region (Dutch-speaking region) and 3,498,384 live in the Walloon Region (French-speaking region).²² Approximately 75,000 residents are German-speaking.²³ Currently 1,089,538 people reside in Brussels-Capital Region.²⁴ Brussels is officially a bilingual city, although a majority of its residents speak French.²⁵ Although the Dutch-speaking population is the majority in Belgium as a whole, it is the minority in Brussels.²⁶ In Belgium, therefore, the French and Dutch linguistic and communitarian poles dominate the political life of the country, even though

Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 703 (2002).

¹⁸ Broschek, *supra* note 17, at 540; Lieberman, *supra* note 17, at 703.

¹⁹ Broschek, *supra* note 17, at 540; Lieberman, *supra* note 17, at 703.

²⁰ See Swenden et al., *supra* note 1, at 869–70.

²¹ *A Statistical Overview of the Belgian Population*, BELGIAN FED. GOV'T, http://www.belgium.be/en/about_belgium/country/Population/ (last visited Apr. 10, 2015), archived at <http://perma.cc/3TLT-B7D9>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Patricia Popelier & Bea Cantillon, *Bipolar Federalism and the Social Welfare State: A Case for Shared Competences*, 43 PUBLIUS: J. FEDERALISM 626, 629 (2003).

²⁶ See Popelier & Cantillon, *supra* note 25, at 629; *A Statistical Overview of the Belgian Population*, *supra* note 21.

there are also other smaller regional and community units such as the Brussels-Capital Region and the German-speaking Community.²⁷ This linguistic bipolarity is strongly connected with the existence of a variety of opinions regarding national identity, particularly in multinational societies like Belgium.²⁸ These varying notions of national affiliation within the Belgian population are an important source of change.²⁹

Political asymmetry that “arises from the impact of cultural, economic, social, and political conditions affecting the relative power, influence and relations of different regional units with each other and with the federal government” is inherent to federalism.³⁰ It becomes “a particularly serious source of tension” in the political dynamics of federations when “a single unit has contained over half the federation’s population” and the political asymmetry becomes tantamount to political bipolarity.³¹ In Belgium, linguistic bipolarity goes hand-in-hand with political bipolarity.³² According to Robert Watts, this configuration becomes “almost invariably a source of instability” and of change when half the population is contained within a single political unit.³³ Dyadic federations are dynamic and particularly susceptible to change and instability, especially in the case of binational federations.³⁴ Watts contends that in these dyadic and binational federations, there is a problematic tendency to insist upon parity between the two major units in all matters because “there is no opportunity for shifting alliances and coalitions among the constituent units or their representatives varying with different issues.”³⁵ Moreover, the smaller entity invariably feels threatened when the larger one develops a “sense of grievance over the apparently undemocratic constraints imposed upon it in order to accommodate the smaller unit.”³⁶ Like every domain of the political life, questions related to the recent economic crisis and resulting financial pressure tended to be analyzed in Belgium through the lens of this bipolarity.

²⁷ See Popelier & Cantillon, *supra* note 25, at 628–30.

²⁸ Jaak Billiet, Bart Maddens & André-Paul Frogmier, *Does Belgium (Still) Exist? Differences in Political Culture Between Flemings and Walloons*, 29 WEST EUR. POL. 912, 914–16 (2006).

²⁹ See *id.* See generally John McGarry & Brendan O’Leary, *Federation and Managing Nations*, in MULTINATIONAL FEDERATIONS, 180, 197–98 (Michael Burgess & John Pinder eds., 2007) (discussing the importance of national identity).

³⁰ RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS IN THE 1990S*, at 57 (2d ed. 1996).

³¹ See *id.*

³² See Popelier & Cantillon, *supra* note 25, at 628–30; Billiet et al., *supra* note 28, at 913–14.

³³ WATTS, *supra* note 30, at 57.

³⁴ See Ronald L. Watts, *Multinational Federations in a Comparative Perspective*, in MULTINATIONAL FEDERATIONS, *supra* note 29, at 225, 233–34.

³⁵ *Id.* at 233.

³⁶ *Id.* at 233–34.

The wide institutionalization of bipolarity is another major source of change that occurs at the interaction of the societal and institutional layers.³⁷ National political parties have been divided into regional political parties, which have strengthened regional agendas.³⁸ The absence of national political parties, federal electoral district, and the organization of elections explains why representatives in the Federal Parliament only feel accountable to “their” French-speaking or Dutch-speaking voters.³⁹

The composition and organization of Belgian federal institutions manifests the institutionalization of linguistic bipolarity.⁴⁰ The members of the Federal Chamber of Representatives are divided in two “linguistic groups.”⁴¹ The Senate remains partly organized on the basis of linguistic and communitarian affiliations.⁴² The Council of Ministers is a joint body.⁴³ French-speakers and Dutch-speakers must be equally represented in the “Comité de concertation” (Consultation Committee),⁴⁴ the “Conseil supérieur de la justice” (High Council for Justice), and on the Constitutional Court.⁴⁵ Linguistic lines are clearly present in the public square because there is no national media outlet and the linguistic communities have been exclusively responsible for the media’s content since 1970.⁴⁶ This institutionalized polarization of the political life and the public sphere is a major source of change and instability and a fertile ground for nationalist movements.

³⁷ See Patricia Popelier & Dave Sinardet, *Stabiliteit en Instabiliteit in de Belgische Federale Staatstructuur*, in BELGIE, QUO VADIS? WAARHEEN NA DE ZESDE STAATSHERVORMING? 6, 8–9 (Patricia Popelier et al. eds., 2012); Billiet et al., *supra* note 28, at 913–15.

³⁸ See Billiet et al., *supra* note 28, at 913–14; Pascal Delwit & Jean-Michel De Waele, *Origines, Évolutions et Devenir des Partis Politiques en Belgique*, in LES PARTIS POLITIQUES EN BELGIQUE 7, 13–20 (Pascal Delwit & Jean-Michel De Waele eds., 1997).

³⁹ See Dave Sinardet, *Belgian Federalism Put to the Test: The 2007 Belgian Federal Elections and Their Aftermath*, 31 WEST EUR. POL. 1016, 1016–17, 1031 (2008) (discussing formation of language-specific political parties and the lack of any national party).

⁴⁰ See 1994 CONST. arts. 43, 67 (Belg.).

⁴¹ *Id.* art. 43.

⁴² *Id.* arts. 43, 67.

⁴³ *Id.* art. 99.

⁴⁴ Loi ordinaire de réformes institutionnelles [Ordinary Institutional Reform Act] of Aug. 9, 1980, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 15, 1980, 9451.

⁴⁵ See Loi spéciale sur la Cour d'arbitrage [The Special Institutional Reform Act] of Jan. 6, 1989, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, 315, *as amended by* Loi spéciale portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle [Special Law on Amendments to the Law of 6 January 1989 on the Constitutional Court] of Apr. 4, 2014, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Apr. 15, 2015, 32301; Marc Verdussen, *Il Federalismo Asimmetrico in Belgio*, in DIRITTO PUBBLICO COMPARATO ED EUROPEO 1172–81 (2007) (discussing “sectioning” of federal Belgian institutions).

⁴⁶ See DIDIER CALUWAERTS, CONFRONTATION AND COMMUNICATION: DELIBERATIVE DEMOCRACY IN DIVIDED BELGIUM, 59–74 (2012) (discussing processes of confrontation and communication and on empirical studies on the deliberative democracy in divided Belgium); Billiet et al., *supra* note 28, at 914; Popelier & Sinardet, *supra* note 37, at 9.

The institutionalization of Belgian bipolarity is also present in the educational system, which is run exclusively by the communities.⁴⁷ As a result, there is no bilingual education system as each community defines themselves by reference to a particular language.⁴⁸ This is not only a source of change but certainly of instability, as “no democracy can function, it seems, without enough people from all corners of the demos being capable of talking to each other.”⁴⁹

These assertions about bipolarity, however, must be qualified. In addition to the gap between Dutch-speaking and French-speaking groups, there are other identities and other common projects emerging, mainly in the Brussels-Capital Region and in the German-speaking Community. The aspirations and political projects of the Dutch and French-speaking groups, however, are sharply different. Thus, bipolarity remains a major source of instability in Belgian Federalism, mainly because it has been institutionalized and continues to entrench itself.⁵⁰ Bipolarity is still the key element dominating each step of the Reform of the State.

B. The Asymmetrical Nature of Belgian Federalism

Traditionally, Belgian federalism is classified as either “devolutionary federalism,”⁵¹ “federalism by dissociation,”⁵² or as a “holding together” federation.⁵³ The aforementioned institutionalized linguistic and political bipolarity has created a unique dynamic of dissociation.⁵⁴ Subsequently, this dynamic of dissociation has produced a highly asymmetrical constitutional structure.⁵⁵ As a result, great “differences in the status or legislative and ex-

⁴⁷ See 1994 CONST. arts. 127, 130 (Belg.).

⁴⁸ See *id.* arts. 129–130.

⁴⁹ Philippe Van Parijs, *On the Linguistic Territoriality Principle and Belgium's Linguistic Future: A Reply*, in THE LINGUISTIC TERRITORIALITY PRINCIPLE: RIGHT VIOLATION OR PARITY OF ESTEEM? 53, 72 (2011), available at <http://www.rethinkingbelgium.eu/rebel-initiative-files/ebooks/ebook-11/Re-Bel-e-book-11.pdf>, archived at <http://perma.cc/SU74-43BM>.

⁵⁰ See Jean Beaufays et al., *Fédéralisation et Structures Institutionnelles: La Belgique entre Refondation et Liquidation*, in LA BELGIQUE EN MUTATION—SYSTÈMES POLITIQUES ET POLITIQUES PUBLIQUES (1968–2008) 9, 22–23 (Jean Beaufays & Geoffroy Matagne eds., 2009); Billiet et al., *supra* note 28, at 913–14.

⁵¹ Lenaerts, *supra* note 4, at 206, 244.

⁵² Hugues Dumont, *Le Fédéralisme Multinational Belge se prête-t-il à une Mutation Confédérale ? Les Onze Leçons d'un Fédéralisme Immature*, in LE FÉDÉRALISME MULTINATIONAL, *supra* note 1, at 177; Verdussen, *supra* note 1, at 211.

⁵³ Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY, 19, 22 (1999).

⁵⁴ See Verdussen, *supra* note 1, at 211; Billiet et al., *supra* note 28, at 913–14.

⁵⁵ See Min Reuchamps, *Structures Institutionnelles du Fédéralisme Belge*, in LE FÉDÉRALISME BELGE: ENJEUX INSTITUTIONNELS, ACTEURS SOCIO-POLITIQUES ET OPINIONS PUBLIQUES 29, 37 (Régis Dandoy et al. eds., 2013); Verdussen, *supra* note 1, at 211.

ecutive powers assigned by the constitution to the different regional units” exist in Belgium.⁵⁶

Asymmetry is horizontal—each federate entity presents unique features that distinguish it from others.⁵⁷ These distinct features have been created on account of the complexity and the diversity of each situation and in order to guarantee protections for certain minority communities.⁵⁸ In Belgium, communities are federate entities that were first established by Dutch-speaking groups and are mainly concerned with culture, education, and personal matters.⁵⁹ By contrast, regions, which were established in response to a Walloon claim for more autonomy in their economic policies and a fear they would be disadvantaged in the federal framework given the growing economic disparities favoring the North.⁶⁰

The resulting asymmetry is also reflected in the composition of the parliaments and the nature of the legislative norms each federate entity adopts—ordinances in Brussels-Capital Region and decrees in the other regions. The constitutive autonomy that certain federate entities enjoy invites a deepening of the asymmetry between entities and the possibility of transferring some competences from certain federate entities to other federate entities.⁶¹ Asymmetry between federate entities in the Belgian state is designed to allow the Brussel-Capital Region and the German-speaking Community to benefit from a higher degree of autonomy and protection.⁶²

Asymmetry is also vertical—there are some exceptional cases where the fundamental principle of equality between entities and of equipollence between the norms adopted by the federal and the federate entities is tempered by legal mechanisms which assume a kind of hierarchy between the different

⁵⁶ WATTS, *supra* note 30, at 60; *see* Reuchamps, *supra* note 55, at 37; Verdussen, *supra* note 1, at 211.

⁵⁷ *See* Verdussen, *supra* note 45, at 1172–81.

⁵⁸ *See* Francis Delpérée *La Complexité Fédérale*, in MÉLANGES EN L'HONNEUR DE PIERRE PACTET: L'ESPRIT DES INSTITUTIONS, L'ÉQUILIBRE DES POUVOIRS 117, 122 (2003); Francis Delpérée, *Les Figures du Fédéralisme*, 300 CAHIERS FRANÇAIS 93, 93 (2001).

⁵⁹ *See* Lenaerts, *supra* note 4, at 241; Jan Velaers, *Le Régime Linguistique en Belgique, Face aux Valeurs Constitutionnelles*, in LANGUAGES, CONSTITUTIONALISM AND MINORITIES 115 (André Braen et al. eds., 2006) (describing how the political movement of the North was not only a battle for a language, but also a social and democratic battle aiming to ensure respect for the middle and upper classes of society).

⁶⁰ *See* Wilfried Swenden & Maarten Theo Jans, 'Will It Stay or Will It Go?' *Federalism and the Sustainability of Belgium*, 29 WEST. EUR. POL. 878, 879–81 (2006).

⁶¹ *See* 1994 CONST. arts. 138–139 (Belg.); Raphael Born, *Bilan de L'Exercice des Compétences Transférées par le Communauté Française*, 1783–1784 COURRIER HEBDOMADAIRE DU CRISP 89–90 (2002).

⁶² Verdussen, *supra* note 45, at 1172–81.

levels of the Belgian federal state.⁶³ Such constitutional asymmetry is likely to produce a kind of “evolutive” and complex federalism, which will permanently transform itself, given that it is torn between different entities that compete with each other. Most of the time, the source of the asymmetrical constitutional structure is the belief that it is the “only way to accommodate the varying pressures for regional autonomy.”⁶⁴ This is the case for Belgium, where the two major political blocks do not share the same views on federalism.⁶⁵

C. The Consociational Process Existing Within Belgian Federalism

Another source of change lies in the fact that Belgium is a “consociational democracy,” grounded on the idea that “sharing power between segmental elites, instead of excluding minorities from power, is what turns centrifugal tendencies into constructive forces for democratic stability.”⁶⁶ In multinational societies where there is no *Staatsvolk*, theorists of federalism argue that the quality of the democracy instituted is often accompanied by the existence of a consociational federal form of government.⁶⁷ The consociational form of the federal government has been a contributory force to Belgian federalism. Belgian constitutional law contains numerous provisions requiring consultation, cooperation, participation, and negotiation between different segments of the state.⁶⁸ It also includes basic forms of federal loyalty, parity in the council of ministers, composition of the Senate, and some mechanisms of protection of minorities.⁶⁹ Moreover, Belgian constitutional law also includes “the alarm bell procedure” that suspends the usual decision making procedure by transferring decision making authority to the Council of Ministers whenever a linguistic group of the Federal Parliament or of the Parliament of the Brussels-Capital Region consider that its rights are or will be infringed. The Belgian constitution also includes a similar procedure for resolving potential conflicts of interests, under which decisions that are alleged to threaten the interests of another level of power, cooperation agreements, and inter-ministerial committees are resolved according to procedure adopted by majority vote of each linguistic group represented in the Federal Parliament.⁷⁰ These consociational processes authorize change but in a deliberative way,

⁶³ See Céline Romainville & Marc Verdussen, *The Enforcement of Federal Law in the Belgian Federal State*, in *THE ENFORCEMENT OF EU LAW AGAINST MEMBER STATES—METHODS AGAINST DEFIANCE* (Andras Jakab & Dumitry Kochenov eds., forthcoming 2015).

⁶⁴ WATTS, *supra* note 30, at 62.

⁶⁵ See Swenden & Jans, *supra* note 60, at 884–85.

⁶⁶ CALUWAERTS, *supra* note 46, at 59.

⁶⁷ See McGarry & O’Leary, *supra* note 29, at 198–99.

⁶⁸ 1994 CONST. arts. 23, 127–128, 130 (Belg.).

⁶⁹ *Id.* arts. 11, 67, 99, 143.

⁷⁰ *Id.* arts. 54, 143.

guaranteeing a certain form of stability and crisis prevention.⁷¹ The cooperative feature of Belgian federalism is also a source of constitutional change that is strengthened by the broad distribution of power and the recent rounds of “State Reform,” first initiated by the judiciary.⁷² The conclusion of cooperation agreements, whether compulsory or optional, helps to solve major political questions; however, cooperation agreements are not a neutral process because they reinforce the power of the executive, at the expense of legislative power.⁷³

D. The Permanent Reshaping of the Distribution of Powers Through the Constitutional Case Law

Judges of the Constitutional Court and of the Legislation Section of the Council of the State have more than once instituted constitutional change through case law, often frustrating legislative attempts to preserve constitutional norms that reflect delicate political agreements. The case of the electoral district of Brussel-Hal-Vilvoorde provides an excellent illustration of constitutional case law being a source of instability within the Belgian federal system.⁷⁴ This particular case is a major contributory force to political instability because the court’s decision has implicitly revised one of the major axioms of Belgian constitutionalism: the principle of exclusivity in the distribution of powers, namely—the power of one authority excludes the power of another.⁷⁵

As Jurgen Vanpraet illustrated it, the exclusivity principle has been somewhat relativized by the diffusion of the “double aspect doctrine,” which states that two federate entities can both regulate a field on the basis of two different competences without that one entity exceeding its power, a principle known as the “exclusive exercise of parallel competences.”⁷⁶ For Vanpraet, who developed the double aspect doctrine, two strict limits to the implementation of the doctrine should be established: (1) an indirect or direct link must

⁷¹ See *id.* arts. 11, 23, 54, 67, 99, 127–128, 130, 143; McGarry & O’Leary, *supra* note 29, at 198–99.

⁷² Sébastien Van Drooghenbroeck, *De la Révolution Copernicienne et des Nouvelles Forces Motrices: Considérations Diverses sur la Répartition des Compétences à l’aube de la Sixième Réforme de l’Etat*, in *BELGIE, QUO VADIS?*, *supra* note 37, at 231, 250–54.

⁷³ Johanne Poirier, *Layered Social Federalism: From the Myth of Exclusive Competences to the Categorical Imperative of Cooperation*, in *SOCIAL FEDERALISM: HOW IS A MULTI-LEVEL WELFARE STATE BEST ORGANIZED?* 16, 20–21 (Bea Cantillon et al. eds., 2011).

⁷⁴ See Sinardet, *supra* note 39, at 1018–19.

⁷⁵ See Patricia Popelier et al., *On the Division of Power and the Belgian Layered Welfare State*, in *SOCIAL FEDERALISM*, *supra* note 73, at 5, 7; Sinardet, *supra* note 39, at 1018–19.

⁷⁶ JURGEN VANPRAET, *DE LATENTE STAATSHERVORMING: DE BEVOEGDHEIDSVVERDELING IN DE RECHTSPRAAK VAN HET GRONDWETTELIIK HOF EN DE ADVIESPRAKTIJK VAN DE RAAD VAN STATE* 287, 297 (2011).

exist between the regulation and the issuing entities' legislative competence, and (2) a cumulative application of both regulations must be possible.⁷⁷ The influence of the double aspect doctrine on the Belgian judiciary is constantly reshaping the competences of each entity.⁷⁸

Most of the time, the application of the double aspect doctrine will favor the stronger federate entities on the political and economic level.⁷⁹ The driving force is thereby clearly directed to those federate entities, in a centrifugal process. Moreover, the activation of the double aspect doctrine will almost automatically lead to conflict between Belgian norms, whose conflict restate the question of the hierarchy between the norms and of the efficiency of the conflict settlement procedures.⁸⁰ Finally, the double aspect doctrine has transformed the *Kompetenz-Kompetenz* question, the construction of which seems to have been transferred to constitutional judges.⁸¹ Indeed, Belgian constitutional judges are, through the most recent Reform of the State, reshaping deeply the distribution of powers and some of the constitutional balances between federate and federal regional entities. Of course, the Constituting Chamber and the Federal Parliament, by way of "Special Laws," retain the final word in this matter given that they can overrule to the constitutional modifications induced by the creativity of the constitutional judges.⁸² Based on these mechanisms, one could argue that the failure of these bodies to overrule the court signifies a tacit approval of the court's "creative" actions, thus lending an air of democratic legitimacy to the Constitutional Court's actions.⁸³ The obvious problem, however, is that the possibility of such a reaction by the democratic legislature is conditioned upon a certain degree of clarity in the changes initiated by the case law. The exact scope, however, of the latest judge-led state reform remains often uncertain as the Constitutional Court does not seem to follow a clear path.⁸⁴

⁷⁷ *Id.* at 241.

⁷⁸ *See id.* at 168.

⁷⁹ *Id.*

⁸⁰ Van Drooghenbroeck, *supra* note 72, at 252–53.

⁸¹ *See id.* at 243–51.

⁸² *See, e.g.*, Cour Constitutionnelle [CC] [Constitutional Court] decision no. 73/2003, May 25, 2003, 2003 RECUEIL DE ARRETS DE LA COUR [ACC] 33 (Belg.) (2010 elections moved forward despite court's ruling on unconstitutionality of electoral districting).

⁸³ *See* MARC VERDUSSEN, LES DOUZE JUGES: LA LÉGITIMITÉ DE LA COUR CONSTITUTIONNELLE 88 (2014).

⁸⁴ *See, e.g.*, Cour Constitutionnelle [CC] [Constitutional Court] decision no. 67/2012, May 24, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 17, 2012, 48,437 (Belg.) (illustrating how case law of the constitutional court remains unclear about the double aspect doctrine and the extent to which it tempers the exclusivity principle in cases regarding educational subsidies in Brussels-Capital Region).

*E. Federalism, "Perfect Federalism," and Confederalism:
Ideas for Change*

At the federal normative layer, we find three different ideas mobilized by different political actors whose support change or destabilize federalism: federalism, "perfect federalism," and confederalism.

The first concept is simply federalism itself as a notion of shared sovereignty, which was achieved in Belgium in 1993 according to the Walloon political world, after the reforms of 1970, 1980, and 1988 initiated the reform process.⁸⁵ Pressures for dismantling the vestiges of the unitary state in favor of full devolution to the communities and regions have not ceased with the adoption of the Fifth Reform of the State.⁸⁶ In 1999, centrifugal forces in the North explain why five resolutions were adopted by the Flemish Parliament expressing the desire for stronger communities and a less powerful federal state.⁸⁷ The Fifth Reform of the State of 2001 did not respond to all Flemish demands.⁸⁸ Obviously, the idea that the Fifth Reform of the State achieved a politically satisfactory form of fully-fledged federalism, which was broadly accepted in the South, was totally disputed by the political elites of the North. Following 2001, the Flemish Parliament expanded its demands, specifying the competences and the main types of State Reform it required. In addition to those differences regarding the degree of federalism in Belgium, there are also great differences on the nature of federalism. The primary debate is whether federalism should be based on the two main communities, known as "federalism at two," or on the three regions and the German-speaking Community, known as "federalism at four."

The invocation of a "perfect federalism" has also been an argument for deepening the Belgian federal system by reference to other federal systems such as those in Germany, Canada, the United States, and Switzerland. Under this conception of federalism, social security should not be in the hands of the federal authority because a model of "perfect federalism" implies that this field should be in the hand of federate entities. Even if one doubts the existence of a single or true federal model, the idea has had a powerful impact on Belgian political life.⁸⁹ Another argument about "perfect federalism" relates to the implementation of Article 35 of the Constitution, which provides that "residual" powers should be accorded to the regions and communities but implementation of those powers should depend upon the adoption of a Spe-

⁸⁵ See Swenden et al., *supra* note 1, at 865–68.

⁸⁶ Jérôme Sohier, *Le 'Plan B,' in LA SIXIÈME RÉFORME DE L'ÉTAT (2012–2013): TOURNANT HISTORIQUE OU SOUBRESAUT ORDINAIRE?* 531, 537 (Marc Uyttendaele & Joelle Sautois eds., 2013).

⁸⁷ See BEA CANTILLON, *BELGIAN SOCIAL FEDERALISM: QUO VADIS?* 6 (2013).

⁸⁸ See *id.*

⁸⁹ Verdussen, *supra* note 1, at 211.

cial Law enumerating the powers of the Federation—a law that still does not exist.⁹⁰ The notion is that a genuine federal state would transfer residual competences to its federate entities.⁹¹

Since 2003, the main demands for constitutional changes in Belgium relate to the concept of confederalism. The political parties in the North give priority to this concept.⁹² From analyzing the 2010 election results, 66 percent of the Dutch-speaking population support political parties with confederalism in their agenda.⁹³ Deepening Belgian federalism in this way is connected to implementing Article 35 of the Constitution because the enumeration of the powers of the federal state constitutes a confederalist feature.⁹⁴ Uncertainty remains, however, whether the confederalist structure created in the Belgian Constitution will resemble classic theories of comparative constitutional law or refer to something else.⁹⁵ Within those theories, a confederalist system is an association of independent sovereign states that conclude an international treaty establishing a confederation to manage some limited questions in common.⁹⁶ A classic example is the Commonwealth of Nations. Another feature of confederations, according to the classic theories of comparative constitutional law, is the lack of a clear political link between citizens and the common structure.⁹⁷ A last feature of most confederations is the existence of veto rights and a secession right for the members of the confederation. This last feature, however, is not shared by all confederations.⁹⁸

⁹⁰ See 1994 CONST. art. 35 (Belg.); Willem Verrijdt, *De Omkering van de Residuaire Bevoegd henden: Sleutel of Slor?*, 8 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT 503, 504 (2011).

⁹¹ See Van Drooghenbroeck, *supra* note 72, at 234–35; Jan Velaers, *Artikel 35 van the Grondwet: Het 'Begin van het Einde' of 'Tet Einde van het Begin*, in SCHARNIER—OF SLEUTELELEMENTEN IN HET GRONDWETTELIJK RECHT: HET BEGINSSEL VAN CONSTITUTIEVE AUTONOMIE, DE ARTIKELEN 35 EN 195 VAN DE GRONDWET 155 (Alexander De Becker & Emmanuel Vandebossche eds., 2011); Verrijdt, *supra* note 90, at 504.

⁹² See Régis Dandoy et al., *L'avenir du Fédéralisme Belge: Une Analyse des Programmes Électoraux et des Accords de Gouvernement*, in LE FÉDÉRALISME BELGE: ENJEUX INSTITUTIONNELS, ACTEURS SOCIO-POLITIQUES ET OPINIONS PUBLIQUES 87–109 (Régis Dandoy et al. eds., 2013).

⁹³ Jan Velaers, *Quel Avenir pour la Belgique*, in LA SIXIÈME RÉFORME DE L'ÉTAT, *supra* note 86, at 567, 568.

⁹⁴ See Van Drooghenbroeck, *supra* note 72, at 234–35; Velaers, *supra* note 93, at 568.

⁹⁵ See 1994 CONST. art. 35 (Belg.); Fred L. Morison, *Confederations of States*, OXFORD PUBLIC INT'L L. (May 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1385#>, archived at <http://perma.cc/W685-PQAF>.

⁹⁶ See Morison, *supra* note 95; see also Giorgio Malinverni, *The Classical Notions of a Confederation and of a Federal State*, in THE MODERN CONCEPT OF CONFEDERATION 39, 40–41 (1994).

⁹⁷ See ETIENNE ARCQ ET AL., FÉDÉRALISME ET CONFÉDÉRALISME 46 (2013); Marc Uyttendaele & Marc Verdussen, *Confédéralisme*, in DICTIONNAIRE DE LA SIXIÈME RÉFORME DE L'ÉTAT, (Marc Uyttendaele & Marc Verdussen eds., forthcoming May 2015).

⁹⁸ See generally OLIVIER BEAUD, THÉORIE DE LA FÉDÉRATION (2007). Seeing the variety of confederation features, Beaud defends the idea as extending beyond a purely statehood framework

Most of the Belgian political parties do not refer to the classical concept of confederalism.⁹⁹ The Christen-Democratisch en Vlaams (Christian Democratic and Flemish Party) (CD&V), which controls the Flemish Parliament, rejects the idea of an outright secession.¹⁰⁰ It argues for an extreme form of federalism under the term of confederalism.¹⁰¹ The other major Flemish party, the Nieuw-Vlaamse Alliantie (New Flemish Alliance) (NVA), has a more fundamental conception of confederalism that borders on separatism.¹⁰² Some of its member famously expressed the theory of the “virtual second,” of two separate states that would exist immediately before the creation of a Belgian Confederation.¹⁰³ In any case, it remains clear that a genuine confederal hypothesis would necessarily imply an “exit process out of the Belgian State”¹⁰⁴ and the death of the Belgian state: “een staat kan niet confederaal zijn” or, a state cannot be confederal.¹⁰⁵

F. The Centrifugal Forces Existing Among the Political Elites

The most important sources of instability in Belgium act upon and through the political elite at the federal level, principally: the centrifugal forces; the distrust between political parties of both communities; and the absence of commitment to the primary goal of the federation.¹⁰⁶ The centrifugal forces, using an institutionalized linguistic and political bipolarity which led to a

to include the separation between federalism and confederalism, domestic law and international law so as to assume the existence of a category that he named “federation” which would be a mixed category. *Id.* According to Beaud, federations have varying degrees of interdependence (legal systems in which “members of the federation” are not totally strangers to each other, their relationships being regulated by the law of the federation) and of independence (each “member” has independent authority and the common structure benefits from a relative autonomy) with its members, depending on the situation. *Id.*

⁹⁹ See Wouter Pas, *Confederale Elementen in de Belgische Federatie*, 64 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT 67, 67–84 (2009); Velaers, *supra* note 93, at 568–69.

¹⁰⁰ See *Onze Viste*, CHRISTEN-DEMOCRATISCH EN VLAAMS, <http://www.cdenv.be/ons-verhaal/onze-visie> (last visited Apr. 10, 2015), archived at <http://perma.cc/XN9T-HTZX>.

¹⁰¹ See *Confederalisme Volgens CD&V—Le Confederalisme Selon Le CD&V*, UNION BELGE (Mar. 12, 2014), <http://www.unionbelge.be/?p=8178>, archived at <http://perma.cc/VDB3-JEA9>.

¹⁰² See *About the N-VA*, NIEUW-VLAAMSE ALLIANTIE, <http://english.n-va.be/en/about/faq> (last visited Apr. 10, 2015), archived at <http://perma.cc/6JND-9KYM>.

¹⁰³ See Matthias Storme, *Confederalisme voor Dummies en de Logische Seconde van Onafhankelijkheid Daarn*, VLAAMSECONSERVATIEVEN (June 8, 2010), <http://vlaamseconservatieven.blogspot.com/2010/06/confederalisme-voor-dummies-en-de.html>, archived at <http://perma.cc/4LT3-S2EY>.

¹⁰⁴ Hugues Dumont & Sébastien Van Drooghenbroeck, *Le Statut de Bruxelles dans L'Hypothèse du Confédéralisme*, 10 BRUSSELS STUD. 4, 4 (2007).

¹⁰⁵ Wouter Pas, *Confederale Elementen in de Belgische Federatie*, in CONFEDERALISME? 20 (Godfried Geudens & Frank Judo eds., 2007).

¹⁰⁶ See KRIS DESCHOUWER, *THE POLITICS OF BELGIUM: GOVERNING A DIVIDED SOCIETY* 247–48 (2d ed. 2012) (discussing distrust).

compartmentalization of culture and educational systems,¹⁰⁷ are clamoring for more autonomy¹⁰⁸ and are the major sources of change in Belgian federalism.¹⁰⁹

The centrifugal forces are imbued with widespread distrust between the two poles of political life and are thus working towards separation.¹¹⁰ Belgian federalism does not proceed from the will to manage some matters together or to receive guarantees against the central power but on the contrary from the unwillingness and inability to work together. This is self-evident at each stage of the competences transfer from the federal state towards federate entities.¹¹¹ This dynamic has continued to act upon Belgian politics, as illustrated by the recent Sixth Reform of the State.¹¹² As a result of the centrifugal forces in Belgium, commitment to common fundamental values, or *affectio societatis*, is particularly hard to find in the political elites of Belgium who sometimes simply do not seem to share a common project.

Theorists of multinational federalism, however, have shown that another major source of instability is the lack of “positive political or ideological commitment to the primary goal of the federation *as an end in itself*” among the political elite.¹¹³ The absence of such commitment “makes success improbable, if not impossible” and, on the contrary, for a federation to succeed, “the leaders, and their followers, must ‘feel federal’—they must be moved to think themselves as one people, with one common self-interest—capable, where necessary, of overriding most other considerations of small-group interest.”¹¹⁴ Will Kimlycka similarly identifies an erosion of the sense of solidarity needed to promote justice and a common project as a source of instability.¹¹⁵

¹⁰⁷ Robert Mnookin & Alain Verbeke, *Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium*, 72 L. & CONTEMP. PROBS. 151, 166 (2009) (“Although Belgium is a small country, Flemish and Walloons interact socially surprisingly little.”).

¹⁰⁸ See Marc Verdussen, *Les Paramètres de la Fragmentation de l’Etat Belge*, in L’UNITÉ ET LA FRAGMENTATION DES FÉDÉRATIONS MULTINATIONALES (Jean-François Caron ed., forthcoming 2015).

¹⁰⁹ Thomas M. Franck, *Why Federations Fail*, in WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM 167, 173 (Thomas M. Franck ed., 1968).

¹¹⁰ See DESCHOUWER, *supra* note 106, at 247; Popelier & Sinardet, *supra* note 37, at 9.

¹¹¹ See Popelier & Sinardet, *supra* note 37, at 10.

¹¹² JACQUES CHEVALIER, L’ETAT POSTMODERNE 81 (2004); Popelier & Cantillon, *supra* note 25, at 629.

¹¹³ See Franck, *supra* note 109, at 173.

¹¹⁴ See *id.*

¹¹⁵ See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 173–76 (1995). This does not refer to a “national feeling” that would be required (in the sense of Ernest Renand, for instance) but of a sense of solidarity that could exist beyond national framework resting on common constitutional values (as developed by Habermas, for instance) and on a pragmatic vision of subsidiarity.

Moreover, it is quite striking to observe the dramatic expansion of the “communitarianisation” of all matters in cases referred to the Constitutional Court. This communitarianisation of all policies and questions appears to be a major source not only of change but also of instability. It also impacts economic and financial questions, which are automatically read through a bipolar lens in terms of which party is the wealthier or the motor of the growth, instead of analyzing questions in terms of cooperation. As such, the dynamics of “confrontation federalism” extends into economic questions.

This political distrust in a context of centrifugal forces led to the Sixth Reform of the State.¹¹⁶ As usual, a single issue based upon political distrust became the focal point of the political debate, despite the limited nature of its impact on the territory. The Dutch-speaking political demands regarding a new State Reform and a separation of the electoral district of Brussels-Halle-Vilvoorde (B.H.V.) faced a categorical denial from the French speaking political elites for almost a decade.¹¹⁷ This prolonged impasse between French-speaking and Dutch-speaking political elites regarding the B.H.V. case led to the longest political crisis of the history of Belgium after the elections of June 2010 and ended only in December 2011, with the formation of the Di Rupo government.¹¹⁸

B.H.V. was an electoral district that did not follow the delimitation in provinces, unlike the other electoral districts.¹¹⁹ This electoral district was the result of a complex compromise provided by law on December 13, 2002, that reorganized elections on the principle of the division in provinces.¹²⁰ This reform aimed to keep the Brabant province divided into two electoral districts, authorizing French-speaking inhabitants of the Brussels suburb, Flemish Brabant, to give their voice to French-speaking candidates in Brussels and Dutch-speaking candidates to run for election not only in the province but also in Brussels.¹²¹ In Case 73/2003, the Constitutional Court, declared that the 2002 law treats candidates that run for election in the province of Brabant differently than candidates running for elections in other provinces.¹²² Nonetheless, the court decided to maintain the effects of the law for four years.¹²³ Dutch-speaking scholars unanimously read the case as requiring a separation

¹¹⁶ DESCHOUWER, *supra* note 106, at 247–48; Popelier & Cantillon, *supra* note 25, at 629.

¹¹⁷ Jan Valaers, *De Zesde Staatshervorming, Eerste Fase: BHV, de Randgemeenten, Brussel en de Democratie—Deel I*, 76 RECHTSKUNDIG WEEKBLAD 1002, 1007–08 (2012).

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 1007.

¹²⁰ *See id.* at 1007–08.

¹²¹ *See id.*

¹²² *See* Cour Constitutionnelle [CC] [Constitutional Court] decision no. 73/2003, May 25, 2003, 2003 RECUEIL DE ARRETS DE LA COUR [ACC] 33 (Belg.); Valaers, *supra* note 117, at 1007–08.

¹²³ *See* Valaers, *supra* note 117, at 1007–08.

of the electoral district of B.H.V. and a respect for the separation in provinces whereas French-speaking scholars reject the assertion of unconstitutionality and interpreted the extreme prudence in the vocabulary used as an obligation to justify the measures adopted.¹²⁴

Political negotiations to find a solution failed and elections of 2007 were organized according to the 2002 law. On November 6, 2006, the Dutch-speaking MP's of the Commission of Internal Affairs voted to separate the B.H.V. district but French-speaking political parties successfully suspended the adoption of the contested law by using constitutional tools: the alarm-bell process under Article 54 of the Constitution and the "conflicts of interests" procedure. In June 2010, elections were organized but their constitutionality remains questionable in light of the Constitutional Court judgment.

II. CONSTITUTIONAL CHANGE & THE SIXTH REFORM OF THE BELGIAN STATE

The first step of the Sixth Reform of the State was to find a solution to B.H.V.—a "false problem" that became the focal point of exacerbated bipolarity and distrust. The Sixth Reform, however, goes far beyond the simple pacification of these exacerbated tensions. Based on a revision of the constitution and on the revision of the Special Institutional Act, this reform brings major changes to the constitutional structures of Belgium. The revision, however, does not address certain crucial elements of federalism such as constitutive autonomy, a coherent distribution of power, or new mechanisms of cooperation and participation between federate entities.¹²⁵

To illustrate the paradox of the Sixth Reform of the State, this Essay focuses on the creation of a new source of change originating in the addition of a new constitutional amendment process by the Sixth Reform of State. Second, the Essay focuses on the reform of the Senate, which could have brought new positive dynamics into Belgian federalism, but which remains deeply unsatisfactory. Third, the Essay analyzes the reform of the system of distribution of powers.

A. *The Implicit Addition of a New Constitutional Amendment Process*

To address the political crisis and to carry out the institutional and constitutional reform, the eight Belgian political parties chose to distort Article 195 in order to initiate an unusual constitutional amendment process. In the

¹²⁴ See generally PAUL MARTENS, *THÉORIES DU DROIT ET PENSÉE JURIDIQUE CONTEMPORAINE* 248–49 (2002) (discussing generally a theory on the existence of a bipolarity effect regarding methods of legal interpretation).

¹²⁵ See Quentin Peiffer & Joelle Sautois, *L'Autonomie Constitutive après la Sixième Réforme de l'Etat*, in *LA SIXIÈME RÉFORME DE L'ÉTAT*, *supra* note 86, at 108 (describing the poor development of the question of "constitutive autonomy").

name of securing the stability of the Belgian Constitution, the latter provision provides for an exceptionally rigid process.¹²⁶ It implies the adoption of a “Declaration of Revision of the Constitution,” the dissolution of both chambers, and the possibility for the newly elected chambers to adopt the revision, with each adoption subject to a double quorum of votes and of presence by each assembly.¹²⁷ This rigid process aims to ensure the legislative chambers cannot modify a constitutional provision if it is not listed in a declaration of revision adopted by the previous legislative chambers, where each revision is also conditioned to a special quorum.¹²⁸ This process has been heavily criticized by the political elites and by the constitutional literature because it has the potential to obstruct political agreements that could not be anticipated by the previous legislature. Despite the fact that, in multinational federations, the temporality and quality of the responses to expressed demands for minority self-government is clearly an important source of change, Article 195 remained exceptionally rigid.¹²⁹

In 2010, Article 195 was one of the constitutional provisions that could be amended by the previous legislature.¹³⁰ The new parliament elected in 2010 could thereby amend the revision process developed by Article 195 of the Belgian constitution.¹³¹ Yet, they chose another path. The political agreement concluded by the eight political parties of the Di Rupo government required the modification of constitutional provisions that were not included in the declaration of revision of the previous legislature.¹³² To face this problem, the eight political parties of the majority inserted into Article 195 of the constitution a “transitional provision” that authorized them to modify *a posteriori* the declaration of revision or, more precisely, to add a new amendment pro-

¹²⁶ See European Commission for Democracy Through Law (Venice Commission), *Opinion on the Revision of the Constitution of Belgium*, Opinion No. 679/2012 (June 15–16, 2012), available at <http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD%282012%29010-e>, archived at <http://perma.cc/9A6R-2Y32> [hereinafter Venice Commission Report].

¹²⁷ See 1994 CONST. art. 195 (Belg.). This procedure has four main functions: legitimating function, inhibitory function, constitutional function, and sensitizing function. See Patricia Popelier, *De Truc met Artikel 195: Een Lapje voor het Bloeden met de Zegen van Venetië*, 6 CHRONIQUES DE DROIT PUBLIC/PUBLIEKRECHTELIJKE KRONIEKEN 421, 423–26 (2012). Even if an observation of the electoral debates shows that there are not proper constitutional debates following the election, Marc Verdussen estimates that the requirement of the organization of new elections after each adoption of a Declaration of Revision draws the attention of the people to the “high importance” of this constitutional moment and is hereby “foundational moment.” See Marc Verdussen, *We the People*, in LA PROCÉDURE DE REVISION DE LA CONSTITUTION 180 (Francis Delpérée ed., 2004).

¹²⁸ See Venice Commission Report, *supra* note 126, at 2, 6.

¹²⁹ NOEL COX, CONSTITUTIONAL PARADIGMS AND THE STABILITY OF STATES 87–119, 234–35 (2012); McGarry & O’Leary, *supra* note 29, at 202–03.

¹³⁰ Venice Commission Report, *supra* note 126, at 2–5.

¹³¹ See *id.*

¹³² See *id.*

cess to the existing one, which would be limited to the present legislature and to the content of the revision that could be made.¹³³ The transitional provision enumerates a list of fifteen matters that can be revised at a qualified majority of two-thirds of the voters and on the condition that two-thirds of the members of the chambers are present.¹³⁴ Finally, this transitional provision established that “the present transitional provision is not to be considered as a declaration in the sense of Article 195, second paragraph.”¹³⁵

This transitional provision has attracted varied responses. Pierre Vandernoot considers that if this provision is all but transitional, it remains constitutional because the formal requirements of Article 195 have been respected.¹³⁶ Article 195 was enlisted in the declaration of revision and the double quorum of vote and of presence was respected.¹³⁷ Further, Jan Velaers contends that the transitional provisions are not unconstitutional, even if they are unusual and not an example of beautiful logistics.¹³⁸ The Venice Commission shares Velaers’ position, stating that the process did not violate international law or the rule of law.¹³⁹ On the other hand, Popelier argues that the transitional provision is problematic because the object of the provision has been betrayed.¹⁴⁰ Marc Verdussen shares Popelier’s opinion and points out the risk of a delegitimation of the notion of “constitution.”¹⁴¹ Moreover, for a minority of constitutional scholars, this transitional provision violated Article 187 of the Belgian Constitution, which forbids any suspension of the constitutional text—an opinion that clearly does not stand up to rigorous analysis.¹⁴² There has not been any suspension, but rather a revision, and the prohibition on suspending constitutional text does not apply to the parliament tasked with amending that very text.

¹³³ See *id.* at 3–4; Pierre Vandernoot, *La Révision de L’Article 195 de la Constitution du 29 Mars 2012: ‘Ceci (n’)est (pas) une Révision,’* in LA SIXIÈME RÉFORME DE L’ÉTAT, *supra* note 86, at 13, 60.

¹³⁴ See Venice Commission Report, *supra* note 126, at 3–4.

¹³⁵ See *id.*

¹³⁶ See Vandernoot, *supra* note 133, at 56.

¹³⁷ See *id.* at 54–56.

¹³⁸ See Jan Velaers, *Artikel 195, Overgangsbepaling: Een Tijdelijke Versoepeling van de Procedure voor de Herziening van de Grondwet*, in DE ZESDE STAATSHERVORMING: INSTELLINGEN, BEVOEGDHEDEN EN MIDDELEN 1, 1–17 (Jan Velaers et al. eds., 2014).

¹³⁹ See Venice Commission Report, *supra* note 126, at 14–15.

¹⁴⁰ See Popelier, *supra* note 127, at 430, 431, 442.

¹⁴¹ Marc Verdussen, Op-Ed., *Réviser la Constitution à n’importe quel Prix?*, LA LIBRE (Feb. 11, 2012), <http://www.lalibre.be/debats/opinions/reviser-la-constitution-a-n-importe-quel-prix-51b8e54fe4b0de6db9c56798>, archived at <http://perma.cc/X4JA-7VWB>.

¹⁴² See Hendrik Vuye, Op-Ed., *De Grondwetsfraude van de Regering Di Rupo*, DE MORGEN (Feb. 14, 2012), <http://www.demorgen.be/binnenland/de-grondwetsfraude-van-de-regering-di-rupo-a1394252/>, archived at <http://perma.cc/4SJ2-8CSN>; Filip Reyntjens, Op-Ed., *Zappen met een Vodje Papier*, DE STANDAARD (Jan. 10, 2012), <http://www.standaard.be/cnt/bs3kj7b5>, archived at <http://perma.cc/46AE-SRDQ>.

The insertion of the transitional provision in Article 195 of the Belgian Constitution nevertheless demonstrates that, when tensions between the federal societal and political layer on a constitutional rigid structure became irresolvable and threatening, innovative and flexible solutions are found to resolve those tensions within constitutional constraints. To face the societal, political, and institutional driving forces, the political elites conjured up a legal trick to circumvent one of the most rigid constitutional provision rather than revising it properly. This is an instructive lesson on the specific current dynamic of the Belgian constitutional system.

B. The Reform of the Senate

Where extreme political asymmetry exists in a federation, it has often induced efforts for corrective measures and the establishment of a “federal second legislative chamber with representation weighted to favour smaller regional units, and assisting less wealthy regional units by redistributive equalization transfers designed to assist those units.”¹⁴³ The Belgian federal system designed in the Fifth Reform of the State functioned with two federal chambers, neither of which could be said to represent the interests of smaller regions.¹⁴⁴ Since 2003, the successive declarations of revision of the constitution that were adopted have all referred to the possibility of reforming the powers and the composition of the Senate.¹⁴⁵

Indeed, the Sixth Reform of the State could have been the chance to reinforce cooperation and participation through the creation of a genuine federal second chamber. The reform of the Senate provided by the revision of January 6, 2014, and a complex set of ordinary and “Special Laws,” however, remains frustrating. Indeed, the new Senate will be unable to fulfill the function of representing the different federate entities.

One of the reasons the new Senate will not be able to adequately represent the different federate entities is the chamber’s unsatisfactory composition. The Belgian Senate is composed of sixty senators, none of whom are directly elected.¹⁴⁶ Fifty are community or regional senators.¹⁴⁷ Of those fifty,

¹⁴³ WATTS, *supra*, note 30, at 59–60.

¹⁴⁴ See 1994 CONST. art 42 (Belg.). However, in both chambers, mechanisms were settled to protect the French-speaking minority at the federal level, especially in questions linked with bipolarity where “Special Laws” must be adopted. See *id.* art 4. In such cases, the majority of each of those linguistic groups plus a majority of two-thirds of each assembly is required. See *id.* Beyond “Special Laws,” other protective processes were put into places such as the “alarm bell” (which obliges communities to discuss) or the “interest’s conflict” process (which has the same impact) See *id.* arts. 54, 143.

¹⁴⁵ See Claire Fornoville, *De Vlinder-Senaat*, in DE ZESDE STAASTHERVORMING: INSTELLINGEN, BEVOEGDHEDEN EN MIDDELEN 17, 18–28 (Velaers et al. eds., 2014) (reviewing institutional context and previous tentative efforts at Senate reform).

¹⁴⁶ See 1994 CONST. art. 67 (Belg.).

twenty-nine are appointed by the Flemish Parliament or from the Dutch language group of the Parliament of the Brussels-Capital Region.¹⁴⁸ Ten members are appointed by and from the Parliament of the French Community, eight are appointed by and from the Walloon Parliament, two senators appointed by and from the French-language group of the Parliament of the Brussels-Capital Region, and one senator is appointed by and from the Parliament of the German-speaking Community.¹⁴⁹ The remaining ten senators are “co-opted senators,” meaning they are chosen by their elected peers in the Senate.¹⁵⁰ This composition does not guarantee an adequate representation for the smaller communities: German-speaking and the inhabitants of Brussels.¹⁵¹

The Senate was designed as a weak institution because of its non-permanent status and the limitations of its evocative power, therefore cannot guarantee participation and solidarity of all federate entities to the federal decisions.

C. Distribution of Powers

The Sixth Reform of the State organizes the transfer of powers to federate entities and the deepening of the federal structure of the Belgian state by the creation of “homogeneous” package of competences transferred to regions and communities, thus reinforcing the autonomy of those entities.¹⁵² Communities received extensive powers in the matters linked with persons.¹⁵³ Parts of social security, one of the flagships of the Belgian federal state, are transferred to regions.¹⁵⁴

The Sixth Reform of the State, however, still follows the traditional distribution of powers. This feature will certainly reinforce the latent reform of the constitutional system that is being led by the Constitutional Court and by the Council of State. The Sixth Reform of the State increases the extent of overlapping competences, resulting in potential ambiguities that could be future sources of tensions. For example, the Sixth Reform of the State transfers

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* This means that, at a minimum, one of the six “Brussels” members of the Flemish Parliament or one of the seventeen members of Dutch-speaking group of the Brussels-Capital Region Parliament will be appointed as senator. *See id.*

¹⁴⁹ *See id.* It is striking that both the Flemish Parliament and the Parliament of the French Community of Belgium can henceforth appoint a senator who is not a member of this Parliament but who is a member of the Parliament of the Brussels-Capital Region of Brussels. *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See Contexte*, BRUSSELS GEWEST, <http://be.brussels/a-propos-de-la-region/6eme-reforme-de-l2019etat-1/contexte> (last visited Mar. 22, 2015), archived at <http://perma.cc/D9CW-QYWC>.

¹⁵³ *See id.*

¹⁵⁴ *See id.*

the control of the unemployed to the regions but keeps the legislation on unemployment at the federal level.

Finally, in general, the Sixth Reform of the State left untouched the inconsistency and uncertainties of the distribution of power in some areas. It reaffirms the principle of exclusivity and of verticality in the distribution of powers. The permanent constitutional tinkering on the question of the distribution of powers is likely to produce change but also instability, especially when there will be great differences between the political sensibilities between federal and federate governments. This tinkering also shows the importance of judges in the Belgian constitutional system. Judges are a source of change who can adapt mechanisms to endogenous pressures and can interpret constitutional rules to authorize changes.

III. EUROPEAN LAW AS A SOURCE OF CHANGE

In this part, this Essay aims to analyze the exogenous pressures exerted on the Belgian constitutional system by the economic and financial crisis in the Eurozone. The Essay will not discuss in detail the effects of the Europeanization on Belgian federalism, which are ambiguous and difficult to assess.¹⁵⁵ Instead, the Essay will focus on the effects of European reactions to the financial crisis on the Belgian constitutional system.

A. Neutrality of the European Legal Order: The Indirect Pressure Induced from European Obligations

The European legal order is said to be neutral towards the internal organization of its Member States. Indeed, the European Court of Justice stated in *Horvath v. Secretary of State for Environment, Food & Rural Affairs* that “where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different standards for good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003 does not constitute discrimination contrary to Community law.”¹⁵⁶ Advocate General Tsrtenjak confirmed that “each Member State is free to allocate powers, including legislative powers, internally as it sees fit and to

¹⁵⁵ See *infra* pp. 247–49. That topic is already well addressed in legal scholarship. See JAN BEYERS & PETER BURSSENS, *EUROPA IS GEEN BUITENLAND: OVER DE RELATIE TUSSEN HET FEDERALE BELGIE EN DE EUROPESE UNIE* (2006); Christian Franck, Hervé Leclercq & Claire Vandevievere, *Belgium: Europeanisation and Belgian Federalism*, in *FIFTEEN INTO ONE? THE EUROPEAN UNION AND ITS MEMBER STATES* 69, 69–91 (Wolfgang Wessels et al. eds., 2003); Kassim Hussein, *The Europeanization of Member State Institutions*, in *THE MEMBER STATES OF THE EUROPEAN UNION* 285, 285–316 (Simon Bulmer & Christian Lequesne eds., 2005).

¹⁵⁶ Case C428/07, *Horvath v. Sec’y of State for Env’t, Food & Rural Affairs*, 2009 E.C.R. I-06355, ¶ 58.

implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, as long as that allocation of powers enables the relevant Community legal measures in question to be implemented correctly.”¹⁵⁷ Under *Horvath*, the question as to which part of a Member State is to carry out a directive is not an issue of Community law, but is a matter that falls under the domestic allocation of competences.¹⁵⁸ The reverse of this European neutrality vis-à-vis the organizational structure of the Member States is, however, that “to the same extent as a Member State is entitled to allocate its powers internally as it sees fit and as prescribed by its constitutional order, it is prevented from relying on domestic circumstances in order to circumvent its obligations under Community law.”¹⁵⁹

Despite apparent neutrality, the European legal order does exert indirect pressure on its Member States regarding the non-circumvention of their obligation under Community law.¹⁶⁰ This indirect pressure has led to subtle changes in the Belgian constitutional system. The first change relates to the principle of equality between each federal and federate entities. This equality principle has been tempered by Article 16, Section 3 of the Special Law of August 8, 1980, which authorizes the federal state to substitute itself for federate entities that have been identified as failing to satisfy its European obligations.¹⁶¹ This repressive mechanism has a preventative dimension during Article 258 Treaty on the Functioning of the European Union (TFEU) proceedings.¹⁶²

The second change prompted by indirect pressure from the European Union concerns the distribution of the power to induce federal and federate entities to conclude cooperation agreements. The Constitutional Court has already recognized the obligation to conclude such agreements in cases where the correct implementation of a European regulation was at stake in a case regarding electronic communications.¹⁶³ Indeed, Jan Beyers and Peter Bursens state that “European integration encourages the federal level, the regions and the communities to install cooperation mechanisms within the mar-

¹⁵⁷ Opinion of Advocate General Tsrtenjak, C-428/07, *Horvath v. Sec’y of State for Env’t, Food & Rural Affairs*, 2009 E.C.R. I-06355, ¶ 95.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* ¶ 96.

¹⁶⁰ See *id.*

¹⁶¹ Loi spéciale de réformes institutionnelles [Special Law Reforming Institutions] of Aug. 8, 1980 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 15, 1980, 9434.

¹⁶² See Consolidated Version of the Treaty on the Functioning of the European Union art. 258, May 9, 2008, 2008 O.J. (C 115) 47; Loi spéciale de réformes institutionnelles, M.B. 9434.

¹⁶³ See Cour Constitutionnelle [CC] [Constitutional Court] decision no 112/2011, June 23, 2011, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Oct. 17, 2011, B.4, B.6.2.

gins of the constitutional provisions of Belgian dual federalism.”¹⁶⁴ Further, “Europeanization mitigates or softens the dual nature of Belgian federalism and it has stimulated a gradual development towards more cooperative forms of formal and informal governance.”¹⁶⁵

B. Eurozone Crisis and the Golden Rule: The Direct Pressure on the Belgian Constitutional System

The European responses to the economic and financial crisis applied a more direct pressure on the Belgian constitutional system. These mainly intergovernmental responses were led by a belief in the necessity to coordinate between governments on questions linked to redistributive policies, in order to implement an effective general austerity policy.¹⁶⁶ The major instrument of EU-mandated austerity policy is the Treaty on Stability, Coordination and Governance (TSCG or Fiscal Compact).¹⁶⁷ Article 3 of the TSCG creates the obligation for each European Union member state to respect the “golden rule” of a balanced budget each fiscal year.¹⁶⁸

According to Article 3, Section 2 of the TSCG, the last golden rule “shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.”¹⁶⁹ The national budgetary processes have the effect of reinforcing the powers of supranational institutions, representing clear exogenous pressure for change in the Belgian constitutional order.¹⁷⁰

¹⁶⁴ Jan Beyers & Peter Bursens, *The European Rescue of the Federal State: How Europeanisation Shapes the Belgian State*, in *THE POLITICS OF BELGIUM: INSTITUTIONS AND POLICY UNDER BIPOLAR AND CENTRIFUGAL FEDERALISM* 195, 213 (Marleen Brans et al. eds., 2009).

¹⁶⁵ *See id.*

¹⁶⁶ *See* Rémi Colliat, *A Critical Genealogy of European Macroeconomic Governance*, 18 *EURO. L. J.* 6, 6 (2012); Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 50 *COMMON MKT. L. REV.* 683, 685 (2013).

¹⁶⁷ *See* Paul P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 *EUR. L. REV.* 231, 231, 233–34 (2012).

¹⁶⁸ *See* Frederico Fabbrini, *The Fiscal Compact, the “Golden Rule” and the Paradox of European Federalism*, 36 *B.C. INT’L & COMP. L. REV.* 1, 6 (2013).

¹⁶⁹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union art. 3, Mar. 2, 2012, http://europa.eu/rapid/press-release_DOC-12-2_en.htm, archived at <http://perma.cc/9C3R-6ZET> [hereinafter TSCG].

¹⁷⁰ *See id.* *See generally* Fabbrini, *supra* note 168, at 8, 24–28 (discussing the influence of the golden rule on member state constitutional procedures). We may also ask whether this does not also contain an implicit revision of Article 33 of the Belgian Constitution, which states that “[a]ll powers emanate from the Nation. These powers are exercised in the manner laid down by the Constitution.” *See* 1994 CONST. art. 33 (Belg.).

The way Belgian federate entities handled that pressure is instructive of the internal dynamics in Belgium. Following the advice of the Council of State on this question, and having ratified the above mentioned Treaty under conditions that may be incompatible with the Treaty, Belgian entities concluded a cooperation agreement regarding the golden rule that aimed at sharing the budgetary efforts. This agreement is a good example of a response to exogenous pressures in a context of important endogenous tensions. It develops an incompletely theorized agreement because it reaches an agreement on certain principles while leaving other issues undecided, such as enforcement in case one of the parties to the cooperation agreement does not comply with its terms.¹⁷¹ It can also be subjected to many interpretations, sometimes diverging.¹⁷²

CONCLUSION

Since 2007, the economic and financial crisis has had a great impact in Belgium. The economic and financial difficulties caused by the crisis, however, cannot be considered the source of change in Belgium's constitutional structure. Rather, the bipolarized reading of those difficulties and the polarization of the debate on those questions (and many others) exert the major pressure on the Belgian constitutional system, in addition to a complex set of sources of change originating in European Union law.

This Essay advocates that the dynamic of Belgian federalism is multifaceted. The current state of Belgian federalism is the result of several contributory forces including the institutionalized societal and political bipolarity, through the asymmetrical nature of institutional architecture, through the constitutional case law on the distribution of power, and through the centrifugal forces existing amongst the political elites. Many advocates behind these driving forces push for change to the constitutional system so that it more closely resembles "perfect federalism" or confederalism. It is striking that

¹⁷¹ See Cass R. Sunstein, *Incompletely Theorized Agreement*, 108 HARV. L. REV. 1733, 1735–36 (1995).

¹⁷² See *Projet d'ordonnance portant sur l'approbation de l'Accord de coopération du 29 novembre 2013 entre l'Etat fédéral, les Communautés, les Régions et les Commissions communautaires relatif à la mise en œuvre de l'article 3, § 1er, du Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire et adoptant des dispositions régionales en matière budgétaire, adaptées à certaines dispositions dudit* [Draft ordinance on the approval of the Cooperation Agreement of 29 November 2013 between the Federal State, the Communities, Regions and Community Commissions on the implementation of Article 3, § 1, of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and Adopting Regional Budgetary Provisions Adapted to Certain Provisions of That Agreement], *MONITEUR BELGE* [M.B.] [Official Gazette of Belgium] Jan. 16, 2014. This ordinance establishes a new process of assessment of the budgetary efforts that could lead to conclusions contrary to the ones induced by the cooperation agreement. *See id.*

parliaments no longer serve as centers of gravity for the actual dynamic of Belgian constitutionalism, as the recent reform of the Senate illustrates. Instead, the importance of constitutional case law has increased as well as the use of cooperative agreements, political negotiations coping with centrifugal forces, and recent European intergovernmental responses to the crisis.

Moreover, it appears that neither the federal state nor the regions or the communities can qualify as a clear center of gravity of Belgian federal dynamic. As a result, there are multiple dynamics emanating from the regions, the communities and, sometimes, the federal state, mostly in response to the exogenous pressures of European Union law.

These complex sources of change give rise to the ever-changing nature of Belgian federalism.¹⁷³ The specific dynamic of Belgian federalism, however, will not automatically lead to a break.¹⁷⁴ Pressures exerted on Belgian federalism could lead to a deepening of the federal structure as well as a renewed dialogue on the ties that still bind it together: democratic values and the common projects Belgians still want to share.

¹⁷³ See Kris Deschouwer, *Belgium: Ambiguity and Disagreement*, in *DIALOGUES ON CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES*, VOLUME 1, at 10, 10 (Raoul Blindenbacher & Abigail Ostien Karos eds., 2005) ("Ongoing ambiguity and deep disagreement are basic ingredients of a federal structure that—surprisingly enough—continues to function quite effectively, without major conflicts.").

¹⁷⁴ See *id.* But see Olivier Bailly, *Quel avenir pour la Belgique?*, *LE MONDE DIPLOMATIQUE*, Aug. 2009, at 26.