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Judicial review and the basic architecture of federalism

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Federalism can be characterized as a mode of governance in which final decision-making powers are 'divided' across different levels (e.g., federal, provincial, and municipal). The relationship between federalism, so-defined, and judicial review is philosophically and practically important. It is also, with some notable exceptions, surprisingly under-theorized. Many federalism scholars assume that federalism requires judicial review without exploring how other mechanisms could play courts' intended roles. Many judicial review scholars assume that the justification for judicial review depends (at least primarily) on rights-based considerations. This work takes a different tack, offering positive reasons for judicial review in federal 'division of powers' cases largely independent of rights review. It argues that the basic commitments of and the incentive structure inherent in federal governance require a third party to play conflict resolution and border policing roles. It further argues that proposed non-judicial mechanisms are unlikely to fill those necessary roles. Well-designed, independent courts can do so, creating a strong defeasible case for judicial review in federal countries that is presently undefeated. This best case for judicial review's fundamental concern with maintaining a division of powers should, however, lead courts in multiple paradigmatically federal countries to take different approaches to interpretation.

Keywords: *Judicial review, Federalism, Federal theory, Constitutional theory, Constitutional law, Division of powers, Authority*

1 INTRODUCTION

Federalism is a mode of governance in which multiple entities (federal governments, provinces, cities, etc.) in a governance unit (most often countries, but possibly including regional bodies) have distinct formal final decision-making powers over particular subjects (defense, immigration, etc.). While some powers may be shared or formally overlap, this basic 'division of powers' is common to leading definitions of federalism.[1] However, even if one accepts this basic form, many questions remain. Scholars debate whether federalism requires further normative commitments (e.g., to a loyalty

* Email: m.da-silva@soton.ac.uk. The author thanks an audience at the Eurac Research Institute for Comparative Federalism and all anonymous reviewers of this piece for helpful feedback on previous drafts. Any issues with the text remain despite their insights.
1. See Section 2.

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principle requiring that parties attempt to arbitrate disputes) or institutional elements (e.g., a certain separation of executive, legislative, and judicial powers).[2]

One question concerns whether federalism requires judicial review of legislative actions. This work addresses that question. Judicial review of 'division of powers' cases (viz., those concerning whether legislatures act within areas in their constitutional jurisdiction) is common. Yet normative analyses of judicial review in federal countries often focus on features of particular constitutional histories/texts or on rights-based concerns that are just one aspect of questions about the legitimacy of judicial review.[3] The following furthers a smaller literature detailing positive reasons that federal entities should adopt *judicial* review particularly. Federalism requires some third-party arbiter of disputes and jurisdictional border police to ensure all parties stay within their constitutionally defined powers. Well-designed, independent courts traditionally play both roles better than other entities (if imperfectly). This creates a defeasible presumption of judicial review proposed alternatives fail to defeat. Most alternatives provide insufficient safeguards against incentives to deviate from constitutional texts and raise new problems.

Federalism, then, does not analytically require judicial review, but such review is needed absent new evidence that other institutions can play the same roles and judicial review should (defeasibly) be part of the 'basic architecture' of federal governance.[4] After providing definitions (Section 2) and background information (Section 3), I detail why the basic federal form requires some third-party review (Section 4). I then provide a defeasible case for judicial review particularly (Section 5). I next address persistent and plausible empirical concerns (Section 6). I finally explain how my arguments for and common concerns about judicial review present a revisionist account of how (at least many) judges should treat division of powers cases (Section 7). If, in short, the case for judicial review rests on courts' ability to protect the division of powers, courts should defer to the federal government and accept cooperative agreements less often than they do in at least several paradigmatically federal countries.

In each section, I follow my interlocutors in combining real and stylized cases, in focusing on a review of legislation, and in predominantly discussing countries, which are paradigmatic federal governance units.[5] I focus on relevant questions as a liberal-democrat and want to speak to (if abstract from some particulars of) debates about the role of judicial review in federal countries with explicit (preferably constitutional) human rights commitments. I accordingly further adopt assumptions common to

2. See e.g. philosophical works like Andreas Føllesdal, 'Federalism' in Edward N Zalta and Uri Nodelman (eds), *Stanford Encyclopedia of Philosophy* (Winter 2022) <https://plato.stanford.edu/entries/federalism/> and Michael Da Silva, 'Federalism: Contemporary Political Philosophy Issues' (2022) 17 Philosophy Compass e12820 as well as comparative federalism texts below.

3. See Section 3.

4. Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State* (OUP 2006) 106–107.

5. This scope minimizes treatment of adjacent separation of powers issues: analyzing the judicial–legislative relationship is hard enough without involving the executive. Compare Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (CUP 2019), which addresses both. See also Richard Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy' (1996) 44 Political Studies 436. Whether arguments below apply to entities like the EU requires analysis elsewhere. For a useful examination of the EU and federalism, see Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021).

parties to operative debates whereby relevant states are democratic and have functioning judicial bodies and parties who care about constitutional basics but disagree about their meaning.[6] I assume powers are enumerated in a constitution but, consistent with the best arguments against judicial review, admit multiple interpretations.[7] I also assume heterogeneity across and within sub-state units (henceforth 'provinces' but including US 'states', Swiss cantons, German lander, etc. and potentially extending to cities, etc. where they are relevant); one cannot assume unitary understandings of or views on policy issues. This avoids concerns about federal governance reflecting inapt divisions along, e.g., ethnic lines, and maintains possibilities of disagreement. Finally, I assume that at least federal and provincial governments have some functional autonomy and that, contrary to some real practices, all provinces have the same powers. I do not assume perfect symmetry of different federal actors' on-the-ground political power as that departs *too* greatly from realities.[8]

2 DEFINITIONS

'Judicial review' and 'federalism' admit multiple interpretations. Working definitions clarify the nature and scope of the present argument. I first adopt a basic understanding of judicial review to address the particular phenomenon at issue. I next outline competing definitions of federalism and commonalities between the competing definitions. I then explain how different definitions of federalism could impact the application of arguments below.

'Judicial review' here refers to a court's power to review the legality of an action and render it invalid (viz., of no legal force and effect). One may charge that this definition elides Tushnet's classic distinction between strong and weak forms of review. According to Tushnet, strong-form review provides courts with 'the power to invalidate primary legislation, and legislative responses to such invalidations are made quite difficult'.[9] Weak-form review provides 'an opportunity for judicial oversight of legislation without displacing the ultimate power of legislatures to determine public policy'.[10] The definition here focuses on judicial invalidity without answering questions about what further role(s) courts or legislatures may play. While one may find

6. See e.g. Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346; Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 Oxford J Leg St 1; Adrienne Stone, 'Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law' (2010) 60 UTLJ 109; Erin F Delaney, 'The Federal Case for Judicial Review' (2022) 42 Oxford J Leg St 733.
7. See e.g. Stone, 'Judicial Review' (n 6) and Stone, 'Democratic' (n 6).
8. Compare Delaney (n 6).
9. Mark Tushnet, 'Judicial Activism or Restraint in a Section 33 World' (2002) 53 UTLJ 89.
10. Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries' (2003) 38 Wake Forest LR 813, 831. See also Mark Tushnet, 'Forms of Judicial Review as Expressions of Constitutional Patriotism' (2003) 22 Law and Philosophy 353; Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2003) 82 Tex LR 1895; Mark Tushnet, 'Weak-Form Judicial Review and "Core" Civil Liberties' (2006) 41 Harvard CR-CL LR 1; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2009). See (n 14) on interpretations thereof.

this problematic, it permits us to address the contentious, analytically prior challenge of whether (and, to a significant extent, when) permitting judicial invalidity is apt in the first place. Interlocutors agree that some judicial pronouncements are acceptable but debate whether the judiciary can render something invalid.[11] Possible further legislative action inconsistent with a judicial decision is also contentious.[12] I focus on whether a judicial decision to which a legislature may respond should be possible.[13] Judicial pronouncements short of declaration of invalidity are also possible – and may further qualify as forms of 'weak' review.[14] But I focus on forms of review that permit enforceable declarations of invalidity. Those interested in balancing governmental powers should be interested in whether enforceable judicial decisions are possible regardless of what legislative responses are available. I initially leave open questions about whether and when those legislative responses should be available, though considerations below shed light on those broader but related separation of powers questions.[15]

'Federalism' here minimally requires the aforementioned commitment to two or more entities in a governance unit who each have distinct formal final decision-making powers over particular subjects. These commitments should be constitutionally protected to ensure that those who wield them genuinely have 'final' decision-making powers and to distinguish federalism from other forms of decentralized governance, such as devolution in which a unitary state provides legislative powers to sub-state bodies but can revoke powers that it delegates to others or substitute its decisions for those of delegated authorities. This basic constitutional division of powers has been considered 'an essential feature of federalism' since at least Dicey.[16] While many features of federalism remain contested, the basic form is common to leading accounts

11. Slonim, for example, reads Brutus as only being concerned with judicial 'supremacy'. See Shlomo Slonim, 'Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy' (2006) 23 Constitutional Commentary 7. Even Stone accepts some forms of judicial review so long as opportunities for further legislative action are possible. See Stone, 'Democratic' (n 6). On readings of the Tushnet sources cited in nn 9 and 10 on which 'strong' review refers to 'finality', this would mean they are only debating whether strong review is required.
12. For example, other readings of the Publius/Brutus debate focus on whether legislatures can pass further legislation. Goldsworthy and Stone differ not only on when further action is required but even on the nature of their initial disagreement (e.g., whether it applies to only to 'strong' review). Compare Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' (2010) 60 UTLJ 137 and Stone, 'Democratic' (n 6).
13. Answers below nonetheless implicate debates about strong review on any interpretation.
14. 'Weak review' initially referred to review consistent with a legislative override of an invalidity declaration. Canada was the paradigm case. It then extended to a wider range of phenomena, including unenforceable declarations that a law should be invalid and even interpretative norms whereby courts should interpret laws consistent with the division of powers where possible. Compare, for example, Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22 Law and Philosophy 381 and Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"?: The Case of the UK Human Rights Act 1998' (2015) 13 ICON 1008. This arguably makes the distinction between forms of review less helpful for our discussion of whether courts can render laws invalid. Discussions of 'weak' and 'strong' review also obscure where enforced invalidity statements fall in both categories. Per Kavanagh, some 'weak' reviews can have 'strong' implications on what legislatures et al. can do.
15. Following n 5, general separation of powers questions remain beyond my scope of inquiry.
16. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan & Co. 1985/1959) 155–56.

across disciplines and time.[17] Of course, these minimalist commitments also invite some controversy.[18] But no definition is likely to avoid all controversies. Widespread support for our basics remains notable. And this definition can further serve necessary conceptual functions. The definition not only distinguishes federalism from unitary governance and other forms of decentralization.[19] It also captures a wide range of purportedly federal phenomena, including those adopting overlapping areas of jurisdiction or cooperation between entities.[20] This helps avoid concerns that any link between federalism and judicial review rests on a definitional game that is insensitive to federal realities.[21] If different kinds of federalism serve distinct ends, the approach on offer is also consistent with competing views on what federalism can or should do.[22]

I use the term 'federation' to describe states that include these basic commitments for simplicity's sake below. Federations are, after all, typically characterized by two or more entities who are each accountable to distinct electorates, are not subordinate to each other, and possess final decision-making authority over at least one subject.[23] Yet I recognize the well-known distinction between 'federalism' and 'federation' whereby the former is a particular idea – often defined in terms of a combination of 'shared rule and self-rule' – and the latter is one of several institutional forms that could fulfill it.[24] I take no strong stand here in the vexed debates concerning whether confederations or consociations are 'really' federal states.[25] While it may be desirable to consider them as

17. See KC Wheare, *Federal Government* (3rd edn, OUP 1946/1953); William H Riker, *Federalism: Origin, Operation, Significance* (Little, Brown 1964); Daniel Weinstock, 'Towards a Normative Theory of Federalism' (2001) 53 Int'l Soc Sci J 75; Jenna Bednar, William N Eskridge Jr. and John Ferejohn, 'A Political Theory of Federalism' in John Ferejohn, Jack N Rakove and Jonathan Riley (eds), *Constitutional Culture and Democratic Rule* (CUP 2001); Ronald L Watts, *Comparing Federal Systems* (3rd edn, McGill-Queens UP 2008); Francesco Palermo and Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Hart 2017).

18. Føllesdal (n 2), for example, states that says powers being divided *in a constitution* is only 'typical'. An anonymous reviewer rightly notes that one can reject the assumption that federal countries must have written constitutions. Constitutional protections short of entrenchment are technically possible. But a federal constitution will typically divide powers in a written text that requires *someone* to interpret it. And most works on judicial review and federalism assume the existence of at least some constitutional texts. I accordingly discuss interpretation of 'constitutional texts' throughout the arguments below. At least some of the arguments likely apply to unwritten constitutional norms too. But if they only apply to states with written constitutions, they apply to most federal states.

19. See Jacob T Levy, 'Federalism, Liberalism, and the Separation of Loyalties' (2007) 101 APSR 459 on the need to distinguish unitary governance, federalism and other forms of decentralized rule.

20. See e.g. Palermo and Kössler (n 17) 46.

21. Levy (n 19) also notes the need for theories of federalism to reflect institutional realities.

22. See Section 4 for a list of purported 'ends of federalism' (to borrow phrasing from Martin Diamond, 'The Ends of Federalism' (1973) 3 Publius 129).

23. Norman (n 4); Watts (n 17); Jenna Bednar, *The Robust Federation: Principles of Design* (CUP 2009).

24. The shared rule and self-rule formulation originates in Daniel J Elazar, *Exploring Federalism* (University of Alabama Press 1987). See also the discussion of 'ideological' and institutional approaches in Michael Da Silva, 'Federalism as an Institutional Doctrine' (2024) 55 Journal of Social Philosophy 81.

25. The present definition admittedly only applies to federal states where some distinct domains of authority exist. Those who believe that 'federalism' or 'federation' should have

distinct from paradigmatically federal modes of governance for reasons independent of the present argument,[26] my use of the term 'federation' here also does not commit me to the view that they cannot qualify as federal if they include basic commitments above. I simply use 'federation' as a catchall for any institutional form that adopts those commitments. This admittedly imperfect language is preferable to alternatives in this context.[27]

Further distinctions between kinds of federalism and debates about how to define the basic concept complicate, but do not defeat, the arguments below. Note, for instance, the distinction between cooperative federalism whereby 'in most areas, decision-making and implementation require action by both levels of government and thus their integration' and 'dual federalism, which provides each federal entity with at least one exclusive (traditionally non-overlapping) domain of authority in which the entity can act as it sees fit'.[28] Note further the distinction between 'vertical federalism' with distinct entrenched divisions of powers and 'horizontal federalism' whereby different actors are represented in each other's institutions.[29] Emphasizing a division of powers as constitutive of federal design may seem to unduly support dual and vertical federalisms.[30] However, the working definition of federalism here merely requires two or more distinct domains of authority. It need not preclude further requirements concerning how those who possess authority should interact and so does not beg questions concerning whether and when they can share some powers or whether federalism, properly so-called, must be 'cooperative' in the sense of requiring parties to act together where possible.[31] Cooperating parties must simply act within their defined powers, and some must be distinct.

Related differences in approaches to defining federalism present further complications but are likewise non-fatal to the account below. Fenna and Schnabel, for example, distinguish two main approaches to defining federalism: the codetermination approach and the autonomy approach.[32] Gamper provides a useful statement of the former:

> All theories agree that federalism is a principle that applies to systems consisting of at least two constituent parts that are not wholly independent but together form the system as a whole. Federalism thus combines the principles of unity and diversity. … The constituent units must have powers of their own and they must be entitled to participate at the federal level. There seems to be consensus to the extent of this minimal definition.[33]

wider application will accordingly find the arguments below limited. But the basic commitments here apply to many federal forms and limiting application can again be useful where one wishes to maintain the distinctions discussed in nn 28 and 29, surrounding.

26. Compare, for example Watts (n 17); Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (2nd edn, University of Toronto Press 2015); Palermo and Kössler (n 17); Da Silva (n 2).

27. See Watts (n 17) for an excellent discussion of the distinctions between federalism, federation, and federal states.

28. The definition of cooperative federalism here is in Palermo and Kössler (n 17) 46. The definition of dual federalism is in Da Silva (n 24) 83. The basic distinction appears in almost every comparative text above.

29. See e.g. Arash Abizadeh, 'Counter-Majoritarian Democracy: Persistent Minorities, Federalism, and the Power of Numbers' (2021) 115 APSR 742, 746.

30. I thank an anonymous reviewer for pressing this challenge.

31. See also Watts (n 17); Hueglin and Fenna (n 26); Palermo and Kössler (n 17).

32. Alan Fenna and Johanna Schnabel, 'What Is Federalism?: Some Definitional Clarification' (2024) 54 Publius 179.

33. Anna Gamper, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State' (2005) 6 German LJ 1297, 1299.

On this codetermination approach, federalism requires representation of sub-state units in the national government. On Fenna and Schnabel's preferred autonomy approach, by contrast, complete independence is required. They define federalism in terms of 'two constitutionally guaranteed orders of government, each enjoying a direct relationship with the people and exercising meaningful powers'.[34] This further requires 'a division of powers'; a 'direct relationship of each government with the people based on meaningful powers; and constitutional entrenchment'.[35] The approach adopted in this article may seem to unduly support their view. But the present view differs from that of Fenna and Schnabel as it does not require further commitments to democracy, particular amendment rules, or other norms.[36] And even Gamper requires that provinces have 'powers of their own' consistent with basic commitments above.[37]

With these definitional preliminaries in mind, we can move on to discuss the relationship between federalism and judicial review. The analysis below is important regardless of whether one finds the basic definition of federalism compelling. While some arguments appear easier to ground on autonomy-based approaches, the arguments for judicial review do not rely on the *complete* independence of a federal state's constituent parts and so need not rely on commitments to dual federalism or to an autonomy-based approach to federalism. I highlight places where codetermination or cooperation commitments complicate matters below. But I also provide reason to believe the (defeasible) case for judicial review succeeds even if one adopts codetermination or cooperation-based definitions of federalism. In short, even if the needs for border policing and conflict resolution are less pressing on codetermination-based approaches to federalism or in states adopting cooperative federalism, the needs remain on such approaches and in such states. That being said, if one rejects my claim that the present definition is consistent with multiple approaches or finds my arguments implausible from a codetermination-based perspective, one can read the following as an explanation of the plausible implications of adopting one of the more prominent definitional approaches. Findings that dual federalism or autonomy-based definitions support judicial review help to explain the implications of those approaches and why judicial review is desirable in existing dualist states. My primary claim is that if one accepts the definitional basics above, then one should likely accept a commitment to judicial review. My secondary claim is that the reasons to support judicial review are also plausible on competing definitions. One can accept the first claim and not the second one.

3 BACKGROUND

The role of judicial review in federalism garners less philosophical attention than one might expect given the commonality of judicial review in federal countries and the centrality of judicial review questions in contemporary legal and political philosophy. This could be explained by federalism's broader peripheral status in philosophy. Yet philosophers should be more interested in examining these architectural issues where federal

34. Fenna and Schnabel (n 32) 179.
35. ibid 180.
36. Note that Fenna and Schnabel do consider judicial review to be a 'desirable adjunct' to federalism.
37. Gamper (n 33).

design impacts access to fundamental goods and at least 40 per cent of persons live in federal states.[38] Most federal countries provide courts with the authority to interpret the constitution, including the federal division of powers.[39] Claims that federal governance requires judicial review appear as early as Dicey, who considered '[c]omplete authority of the courts … necessary to the perfect federal system'.[40] They can arguably be sourced to debates about the 1789 US Constitution between 'Publius' (viz., the Federalist Founding Fathers Alexander Hamilton, John Jay, and James Madison) and anti-Federalist 'Brutus' (whose identity remains uncertain to this date).[41] At minimum, anyone interested in federalism's institutional 'architecture' should be interested in whether it requires judicial review.[42] Yet, with few exceptions above/below, philosophers rarely discuss whether and why federalism might entail a commitment to judicial review and what form it must take.[43] Discussions of how any justificatory reasons should guide judicial interpretation are rarer still.

Historical arguments for judicial review in the federalism literature are contestable. For example, Dicey argues that any constitutional division of powers requires an independent arbiter, that courts are 'the interpreters of the constitution', and that it follows that they will set the limits of the division of powers.[44] Yet Dicey largely just assumes the third point whereby *courts* will interpret the constitution.[45] For another, Duchacek's 'yardsticks of federalism' include 'two independent sets of courts' (focused on federal and state laws, respectively) and 'a judicial authority in the central authority but standing above the central authority and the component units to determine their rights'.[46] Yet Duchacek himself notes that the former only appears in a few states and the latter is

38. Da Silva (n 2).
39. Watts (n 17).
40. Dicey (n 16) 180.
41. Compare James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Penguin 1788/1987) and Ralph Ketchum (ed), *The Anti-Federalist Papers and the Constitutional Convention Debates* (New American Library 1789/1986). Slonim (n 11) persuasively argues that Federalist No 78, the locus classicus for this debate, must be read in response to the Anti-Federalist. See especially Nos 11, 12, and 15. Interpretations of Publius and Brutus remain contested. Compare, for example, Sotirios A Barber, 'Judicial Review and "The Federalist"' (1988) 55 U Chi LR 836 and Robert Reinstein, 'Anti-Federalism and Judicial Review' (1995) 4 Cornell JL & Pub Pol'y 515. The key is that debates persist. Compare also, for example, John C Yoo, 'The Judicial Safeguards of Federalism' (1997) 70 SCaLR 1311 and Larry D Kramer, 'Putting the Politics Back into the Political Safeguards of Federalism' (2000) 100 Colum LR 215.
42. For architecture language, see Dimitrios Karmis and Wayne Norman, 'The Revival of Federalism in Normative Political Theory' in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave Macmillan 2005); Norman (n 4).
43. Many works above/below are from political science or law. Most focus on the US.
44. Dicey (n 16) 144, 175.
45. His statements that all decisions must be based on *written* constitutions and non-appealable (146, 177) also do not reflect decades of observed federal practices. A written component will, again, likely be part of any decisions in the kinds of cases at issue here. But unwritten components are also possible. So are legislative responses to decisions.
46. Ivo D Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (Holt, Rinehart, and Winston 1970) 207. See also Cheryl Saunders, 'Comparative Conclusions' in Katy Le Roy and Cheryl Saunders (eds), *A Global Dialogue on Federalism, Volume 3: Legislative, Executive, and Judicial Governance in Federal Countries* (McGill-Queen's UP 2006) and Gabrielle Appleby and Erin F Delaney, 'Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony' (2023) 132 Yale LJ 2360.

not distinctive of federalism but applies to all states.[47] Duchacek suggests the need for impartial review is more 'acute' in federations where 'the meaning of the constitution includes … [the] original political agreement between territorial communities from which the whole federal system has issued'.[48] But his qualifier establishing why *federalism* should entail third-party review relies on controversial commitments to originalism and to a view of federal countries as a collection of states 'coming together' to form a new entity that is at odds with the development and recognition of forms of 'holding-together federalism' wherein federal governance occurs from a unitary country dividing some powers among its parts.[49]

Focusing on particular *kinds* of federal governance might, in turn, avoid challenges facing other arguments for judicial review. However, even Davis's exemplary statements that the 'US model' of federalism's minimal conditions include an understanding 'that jurisdictional disputes … will be settled by judicial arbitration' and 'national supremacy will prevail where two valid actions, national and regional', conflict cannot survive theoretical or empirical scrutiny.[50] The normative justifications for those features of the proposed US model of federalism still remain unclear. And, descriptively speaking, Davis's own analyses demonstrated how far many federal countries' political cultures already deviated from that model's apparent norms by the 1970s.

Many historical arguments that do not assume that federalism entails judicial review, then, adopt other contestable assumptions. They may also fail to establish judicial review's merits vis-à-vis other review mechanisms.[51] As Wheare notes, courts being responsible for applying a polity's 'supreme' law need not entail that they have 'the last word' on the division of powers: 'What is essential … is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers'.[52] Duchacek too concedes that federalism may only require *some* 'protector and interpreter of the federal compact and arbiter of possible' division of powers-based 'disputes'.[53] Courts are only one option for these protector and interpreter roles. Wheare and Duchacek's overlap here is notable given their other differences.[54] Their shared identification of second chambers and referenda as alterna-

47. See Duchacek (n 46) 258–62.
48. ibid 256.
49. See Alfred C Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10 Journal of Democracy 19.
50. S Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (University of California Press 1978) 121–22. Thomas Hueglin, 'Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union' (2013) 56 Can Pub Adm 185 suggests that the US model differs from that of Canada and the EU in its reliance on judicial review, rather than intergovernmental agreements, for resolving jurisdictional conflicts. However, Canada has an active judicial review process and intergovernmental agreements may not properly safeguard federalism. See below.
51. Delaney's (n 6) claim that most scholars assume courts will arbitrate federal disputes may be too strong, but her sources and other classics demonstrate the limits of extant arguments for judicial division of powers review.
52. Wheare (n 17) 64–66. Ursula K Hicks, *Federalism: Failure and Success* (Macmillan 1978) 7, likewise discusses the need for 'a Supreme Court *or watchdog of the constitution*, to prevent and circumvent perversions' [emphasis added]. But Hicks presents limited reasons for review (at 8–9, 175–76) and concludes that the arbiter must be a Supreme Court without further argument(s).
53. Duchacek (n 46) 256.
54. Duchacek explicitly develops his views in contrast to Wheare.

tive review mechanisms, a result repeated in Elazar's canonical work on federalism, is also notable.[55] However, even Wheare, Duchacek, and Elazar do not analyze the alternatives at much length.[56]

Criticisms of judicial review in other domains are noteworthy, though explicit treatment of federalism in judicial review scholarship is also rare. The most prominent recent scholarship concerns Wechsler's 'political safeguards of federalism',[57] which were developed for the US context. Wechsler contends that the 'extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of states and their political power'.[58] US state representatives' roles in national institutions, like the Senate and Electoral College, protect against federal interference with state authority. This provides reason to question when judicial review is apt. At minimum, protecting state powers is 'primarily a matter for congressional determination in our system as it stands'.[59] While Wechsler technically leaves 'open' whether Congress will more effectively protect states than courts at the end of his text, he clearly suggests national institutions are 'intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states' and that a court seeking to exercise review is 'on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states'.[60] Many thus read Wechsler as suggesting that 'congressional statutes that encroach on state power should not be subject to judicial review because the states' role in the composition of the federal government is sufficient to protect the institutional interests of the states from federal power'.[61] Choper then famously builds on Wechsler to develop a specific argument that political safeguards best protect US states from undue federal interference, making judicial review inapt there.[62] The political safeguards thesis remains prominent in American scholarship despite controversies about Wechsler and Choper's interpretations. Subsequent work identified other possible political safeguards that could render judicial review unnecessary.[63] Yet each argument focused on specific features of the US and maintained a role for judicial review of potential state intrusions on federal authority. Even Wechsler arguably provides some role for judicial review despite Congress being 'on the whole' vested with authority.[64] Further analysis of whether and when judicial review is thus desirable even if some political safeguards exist in the US or elsewhere.

55. See Elazar (n 24) 84.
56. I return to Wheare and Duchacek's brief remarks and recent work on alternatives below.
57. Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government' (1954) 54 Colum LR 543.
58. ibid 544.
59. ibid 559.
60. ibid 558–60.
61. Franita Tolson, 'Partisan Gerrymandering as a Safeguard of Federalism' (2010) 3 Utah LR 859. See also Kramer (n 41) (also steelmanning Wechsler at 220ff).
62. See e.g. Jesse H Choper, *Judicial Review and the National Political Process* (University of Chicago Press 1980).
63. Compare e.g. Yoo (n 41); Kramer (n 41); and Tolson (n 61). Kramer discusses decentralized political parties but also highlights 'the administrative bureaucracy, intergovernmental lobby; [and] states as recruiting and training grounds'. Tolson discusses partisan gerrymandering.
64. Wechsler (n 57) 549–60.

Most recent works on judicial review and federalism outside that context focus on concerns in parallel arguments about judicial review of rights, not federalism itself.[65] Stone set the terms of debate with a parity of reasoning argument holding that one cannot accept Waldron's critique of judicial review of rights *and* 'structural judicial review' (viz., review of the constitutional order's fundamental features).[66] Per Stone, key commitments undergirding Waldron's critique also apply to the 'most important' structural questions, namely, those concerning the division of powers.[67] Stone notes that a constitutional division of powers also implicates moral concepts; that one cannot answer questions about those concepts by pointing to texts since constitutional terms admit multiple interpretations; and that judges have 'no special' insight into how to answer them.[68] Stone additionally believes that judicial determinations on structural questions are less legitimate than those by other entities since (most) courts are not democratically accountable.[69] Judicial review proponents Goldsworthy and Delaney largely adopt Stone's terms for debate in their work on the topic.[70] Goldsworthy focuses on whether the parity holds and Delaney on courts' ability to protect rights. Aroney's focus on federalism's 'internal logic' provides one exception to this trend.[71] But that 'logic' is itself controversial.[72]

Positive normative arguments for judicial review of the division of powers on non-rights-based grounds that do not rely on other highly contested claims about federalism or specific features of particular countries remain (with some exceptions above/below) rare.[73] The following provides such arguments. It restates the argument that the nature of federalism requires some form of third-party review on less contestable terms and explains why courts remain best-placed to fulfill that role, creating a(n admittedly defeasible) case for *judicial* review particularly. Such a review in the division of powers case is normatively acceptable where the case remains undefeated.[74] This supports the legitimacy of judicial review in the many federal states that recognize it. It also provides reason to include judicial review powers in any written federal constitution.[75]

65. I discuss exceptions, like Erin F Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 Northwest ULR 543 and Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017), elsewhere.

66. Stone, 'Judicial Review' (n 6) 3, 6, 17, 29, 31 and Stone, 'Democratic' (n 6) 122 build on Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 Oxford J Leg St 18; Jeremy Waldron, *Law and Disagreement* (OUP 1999); and Waldron (n 6).

67. Stone, 'Judicial Review' (n 6) 4.

68. ibid.

69. ibid.

70. Goldsworthy (n 12); Delaney (n 6). Delaney (n 65)'s earlier text does not do so but commits to some uniform policies across provinces.

71. Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism' (2008) 27 UQLJ 129.

72. See the critique in Stone, 'Democratic' (n 6).

73. Yoo (n 41) 1398 suggests the US Founding Fathers would not separate questions concerning the division of powers and questions concerning rights. One can do so today.

74. This helps establish the institutional legitimacy of courts who can serve this role. Whether it further establishes the 'sociological legitimacy' (viz., public acceptance) discussed by Appleby and Delaney (n 46) is a further query.

75. The legitimacy of judicial review is easier to establish where it is explicitly permitted under a written constitution. The following presents reasons why judicial review is advisable in federal

The following can thus help explain existing practices and guide future constitutional decisions.

4 THE BASIC CASE FOR (JUDICIAL) REVIEW

The basic positive argument for judicial review flows from the need to protect the division of powers characteristic of even minimalist conceptions of federalism and the present lack of other bodies well-placed to effectively play roles necessary to safeguard that division. The basic federal form requires some third-party review in division of powers cases. *Judicial* review is best absent new evidence that another form of review will safeguard the division of powers.

The division of powers requires a third party – someone who lacks formal legislative powers or responsibility to bodies with legislative functions – to play two roles: conflict resolution and border policing. The best cases against judicial review assume institutional protections for the division of powers. Yet this begs the question by ignoring the best case for judicial review: independent courts are best, if not uniquely, placed to play both necessary roles. Unlike other bodies, courts lack incentives to and face formal restrictions on their ability to deviate from the constitution on review. They also do not raise identified issues with alternatives. I first set out the case for some third-party arbiter/police before more strongly arguing for judicial review particularly (while granting other bodies play necessary supplementary roles).

Regarding the conflict resolution role, the federal form inevitably leads to disputes between levels of government about the scope of their respective legislative domains. Basic legitimacy and fairness entail that neither federal nor provincial governments resolve such conflicts: no party should unilaterally set the terms of its constitutional authority. Recall Wheare's federal principle requiring 'the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent'.[76] To be federal is to have multiple parties with equal claims to authority in their respective jurisdictional domains. Parties disagree on the scope of their respective jurisdictional powers and even on how to resolve jurisdictional conflicts.[77] Even if, for example, a state's federal or provincial governments (or both) are otherwise best-placed to interpret constitutions, providing those governments with de facto abilities to set *some* contours of their authority, as Waldron and Stone each claim,[78] disagreements on how to interpret their respective constitutional powers will still arise. Fairness dictates that a third party resolve *those* conflicts: the governments should remain formal equals.[79]

This argument neither entails that federalism structures relationships between 'peoples', rather than individuals, nor controversial commitments to pluralism.[80] It merely requires that federalism be committed to multiple levels of government being sovereign

states. I take no further stand here on whether judicial review is all-things-considered legitimate absent express constitutional provision for such review.

76. Wheare (n 17) 11.

77. Delaney (n 6).

78. Waldron (n 6); Stone 'Judicial Review' (n 6).

79. While some view the US federal government as subordinate to state government, Wheare's (n 17) reading of the US as fundamentally committed to a formal division of powers among equals remains a standard one.

80. Compare Goldsworthy (n 12).

in their respective domains.[81] If the respective governments are each equal, none should be able to unilaterally resolve conflicts. They likely should not even decide who will resolve conflicts or how. A third party is required to resolve conflicts even if one otherwise desires wide deference to legislative authority. As Wheare writes, 'since it is a criterion of a federal government not merely that there should be a division of powers, but that this division should not be dependent on the general or regional governments alone, it follows that the last word must not rest' with either.[82]

Jurisdictional disputes and conflicts are inevitable in any federal country. Internal 'checks and balances' within and between federal and provincial bodies are likely necessary but insufficient to address such disputes. Not every dispute will make it to court. Constitutional oversight by Ministers of Justice or intergovernmental commissions may help address disputes without judicial involvement. However, it cannot resolve all disputes. And relying on regular politics to resolve matters is likely to favor the more politically powerful party, rather than the one with the best claim to rule. Federal and provincial bodies alone are thus unlikely to adequately fulfill the necessary conflict resolution role even if the last paragraph is unpersuasive.

The need for third-party conflict resolution is not confined to dualist federal states or autonomy-based accounts of federalism. If there are areas of overlapping jurisdiction, disputes regarding which level of government's rules should apply in cases where rules at each level cannot be simultaneously enforced will also arise. Persistent disagreement can plausibly even arise where states codetermine the federal form.[83] Parties can disagree on whether and when particular powers or aspects thereof should remain with the provinces and on which should belong to the central government that they can help compose. Cooperation- or codetermination-based accounts of federalism suggest that parties to a federal agreement should first attempt to resolve their disputes on their own. If a constitutional text includes a loyalty principle whereby executive or legislative actors at different levels of government must attempt to negotiate disputes prior to judicial review, directly appealing to judges to resolve disputes will be constitutionally illegitimate.[84] A third party is still required for cases where disagreement persists. Constitutional norms meant to support cooperation and codetermination already appear to recognize this possibility. It is, for instance, notable that the loyalty principle maintains a role for judicial review to resolve persistent agreements.[85] At most, then, commitments to cooperative federalism or the codetermination thesis make the need for third-party conflict resolution less pressing. Considerations below raise questions about the efficacy and desirability of forms of federalism that make the executive or

81. This also does not require strong views on debates about constituent authority central to Kramer (n 41); Jenna Bednar, 'The Dialogic Theory of Judicial Review: A New Social Science Research Agenda' (2010) 78 Geo Wash LR 1178; Aroney and Kincaid (n 65); Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (OUP 2022); et al., though positions in those debates implicate issues here.

82. Wheare (n 17) 60.

83. Some level of distinct authority should exist. But this, again, appears in most real-world states.

84. See Anna Gamper, 'On Loyalty and the (Federal) Constitution' (2010) 4 ICL Journal 157 on loyalty. See Erika Arban, 'Exploring the Principle of (Federal) Solidarity' (2017) 22 Rev Const Stud 241 on the related principle of solidarity.

85. ibid. See also Michael Da Silva, 'Federal Loyalty and the "Nature" of Federalism' (2020) 24 Rev Const Stud 207.

legislature the primary conflict resolution bodies. Yet if one still prefers negotiations prior to third-party review, some third-party review remains necessary.

Regarding the border policing role, in turn, someone must ensure all parties act within their constitutional authority. Federal and provincial governments alone are unlikely to do so. As detailed below, both face incentives to deviate from the constitution proper, including incentives to work together to deviate through intergovernmental agreements that functionally serve as unconstitutional, and thus illegitimate, amendments to the federal order. A federal or provincial government left to its own devices is likely to interpret its powers in ways that expand the scope thereof. The ability to expand these powers is growing as areas of jurisdiction offer multiple, seemingly overlapping interpretations. Consider, for instance, how a 'carbon tax' proposal could be part of an environmental regulation power, a trade and commerce power, a taxation power, or as part of a general issue of national concern. If a federal government seeks to expand its authority, provincial bodies may not always be able to keep them in check (or vice versa). Political power may limit this role. A coalition of minority provincial governments is, for one, unlikely to be able to stop a very popular federal government promoting a very popular environmental policy that does not fit within the federal constitutional authority's defined boundaries.

In other equally constitutionally suspect cases, federal and provincial interests may align in ways contrary to the constitutional division of powers. In such cases, neither will have incentives to limit the other's constitutional overreach. Consider a case where federal and provincial governments seek to work together to create a national securities regulator or firearms registry where each topic would otherwise fall under provincial powers only. These circumstances reflect major developments in a paradigmatic real-world federation.[86] Aforementioned political incentives may also lead parties unduly to cede authority to others. Provincial governments may, for instance, cede authority to the popular federal government in the last paragraph to share their popularity via allyship. Yoo accordingly suggests that: '[j]udicial review provides an important check on the temptation to surrender state sovereignty voluntarily'.[87] Governments at any level may also seek to avoid responsibility for politically risky decisions by ceding their authority.[88] Some federal governments arguably adopted narrow understandings of their public health powers during COVID-19 to avoid politically risky decisions.[89] I will not take a substantive stand on securities regulation, firearms, COVID-19, etc. here as doing so is unnecessary for my purposes. I offer the examples only to highlight the challenges of maintaining borders and the consequent need for some border policing body. A third party lacking incentives to alter constitutional powers and facing institutional constraints on their ability to do so is necessary in many cases even if one finds these examples problematic.

86. See e.g. Reference re *Securities Act*, 2011 SCC 66; *Quebec (AG) v Canada (AG)*, 2015 SCC 14; Reference re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; and Reference re *Pan-Canadian* Securities *Regulation*, 2018 SCC 48. While one may critique those decisions, they exemplify how federal and provincial governments alone do not police borders. Even a critical reading of judicial decisions in each will not defeat the case for judicial review absent some explanation of how another body is likely to produce better results. I prefer an alternative interpretative tack below.

87. Yoo (n 41) 1402.

88. Bednar, Eskridge Jr. and Ferejohn (n 17).

89. See e.g. Michael Da Silva and Maxime St-Hilaire, 'Towards a New Intergovernmental Agreement on Early Pandemic Management' (2021) 41 NJCL 76.

If, in turn, one questions the preceding incentive-based arguments, cases where apparent political safeguards suffice to resolve disputes yet do not adequately police borders highlight the need for third-party review. Single-party dominance of governments at all levels led to dispute resolution via internal party processes throughout decades of *Partido Revolucionario Institucional* dominance in Mexico.[90] However, these internal processes did not safeguard constitutionally defined domains of authority. For instance, regional governments largely dictated municipal policies even in areas of constitutionally defined municipal jurisdiction.[91] The end of single-party rule led to the development of a federalism jurisprudence that reduced these trends, with court decisions consistently favoring 'local governments, provided that their competences are clearly stated in the constitutional text'.[92] One should not, of course, draw overly strong conclusions from such an example. After all, judicial review too did not adequately protect borders when single-party rule minimized the number of cases reaching Mexican courts. However, this example further demonstrates that entities can and do agree to solve (or even avoid or otherwise bypass) jurisdictional disputes by violating the original division of powers.

The need for border police follows from basic conditions for legitimate federal rule. All parties to a federal constitutional arrangement derive their authority, and thus legitimate claim to pass legislation, from a constitution. As Dicey noted over a century ago, no one 'can legally exercise a single power which is inconsistent with the articles of the constitution'.[93] The rule of law and federal constitutionalism accordingly require that all parties to any federal constitution act only when granted the authority to do so under such a constitution.[94] As Wheare writes:

> if a government is to be federal, its constitution … must be supreme … [T]he terms of the agreement which establishes the general and regional governments and which distributes powers between them must be binding upon the general and regional governments. This is a logical necessity from the definition of the federal government itself. If the general and regional governments are to be co-ordinate with each other, neither must be in a position to override the terms of their agreement about the powers and status which each is to enjoy.[95]

Constitutional supremacy further underscores the need for a conflict resolution body and border police. Federalism again necessitates a third party that ensures parties act within their authority.[96]

90. José Antonio Caballero Juárez, 'The Supreme Court of Mexico: Reconfiguring Federalism through Constitutionalism Adjudication and Amendment after Single-Party Rule' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).
91. ibid.
92. ibid 287.
93. Dicey (n 16) 144.
94. I again focus primarily on written constitutions here. Yet even unwritten constitutional agreements are not self-executing. Where those agreements allocate powers, the need for border policing remains. The Wheare quote here notably does not directly appeal to written texts (though Wheare does adopt a commitment to a written constitution on independent grounds elsewhere). Recall also nn 28, 45, and 75 on related issues.
95. Wheare (n 17) 55.
96. This too is most obvious in the typical case where constitutions encompass a written component that includes the constitutional division of powers. Absent written text, it will be more difficult to identify areas of clear agreement that can submit to interpretation. This argument accordingly relies on general constitutional supremacy without requiring that the constitution be

Border policing is also functionally necessary to fulfill federalism's purported ends. Those ends remain contested but purportedly include concerns related to efficiency, policy experimentation, protecting against undue centralization, and pluralism.[97] Each depends on the maintenance of distinct domains of authority and is unlikely to be realized absent assurances that the domains will be respected. This point is partly analytic: if the ends of federalism depend on a division of powers, that division must be protected. It also points to a practical concern: parties are unlikely to commit to the federal order absent assurances that they will reap its benefits. Border police must provide such assurances. Per Bednar, Eskridge Jr., and Ferejohn, 'the advantages of decentralization are realizable … only if there are good reasons for the players … to believe that others will generally abide by the terms of the federation'.[98] Parties to federal constitutions accept limits on their authority for various reasons. Yet it is irrational for parties to accept limits if they reasonably expect others will not respect corresponding constitutional limits on others' authority. Border police must maintain the federal constitutional order and its benefits.

Federal and provincial governments could, again, theoretically police each other, but incentive structures highlight the need for a third party. Federal and provincial governments have clear incentives to expand the boundaries of their jurisdiction to pass laws that they desire, irrespective of the formal constitutional authority to do so and, as noted above, to interpret their own constitutional powers in ways that leave responsibility for necessary but difficult or politically costly programs to others.[99] This can lead to reluctance to stay within the constitutional order, undermining state stability.[100] Recall securities regulation or firearm registry cases. Even where parties stay in one country, deviating from its formal constitutional rules undermines the federal order. Parties incentivized and able to deviate from rules will do so.

The lack of strong political support for 'federalism' as such in many countries also undermines claims that political safeguards will consistently play the necessary border policing role. McGinnis and Somin provide evidence that individual voters, interest groups, politicians, and political parties' first-order political preferences (for lower taxes, against abortion, etc.) swamp any interests in federalism such that they do not care which level of government fulfills their first-order preferences.[101] Politicians and government entities are thus incentivized to understand powers in ways that permit them to fulfill such preferences. Individual voters' lack of interest in federalism undermines any ballot box-based incentives to take another tack. This incentive structure is not merely theoretical. Per Devins, the structure even applies where political safeguards theory is supposed to be strongest: stakeholders throughout US history change

wholly written. One can accept this much and still delimit the constitutional domain in general and the division of powers in particular. The need for some areas of agreement remains. In reality, many constitutional arrangements include multiple texts and unwritten norms. Even the paradigmatic 'unwritten' constitution of the UK has written components, like the Magna Carta. And the paradigmatically 'written' constitution of Canada appears in multiple texts and has unwritten components. See also Richard Albert, 'Multi-Textual Constitutions' (2023) 109 Va LR 1629.

97. Compare e.g. Weinstock (n 17); Føllesdal (n 2); and Da Silva (n 2).

98. Bednar, Eskridge Jr. and Ferejohn (n 17) 223.

99. Bednar (n 23).

100. Bednar, Eskridge Jr. and Ferejohn (n 17) 228–29.

101. John O McGinnis and Ilya Somin, 'Federalism vs. States' Rights: A Defense of Judicial Review in Federal Systems' (2004) 99 Northwestern ULR 89. I am not aware of more recent evidence to the contrary.

their views on federalism to secure first-order preferences such that 'willingness of lawmakers and interest groups to manipulate federalism in order to secure substantive policies is the rule'.[102]

These results can also undermine federalism's purported ends. For example, the relative size of most federal and provincial governments easily leads to federal actors in many states controlling policy agendas absent constraints on their authority. The distinction between federal and unitary governance, in outcomes if not formal structure, then becomes difficult to parse. This is undesirable where federalism is predicated on the need for multiple levels of governance.[103] For another example, note how growing federal legal and political influence in the US undermines state incentives and capacity to create policy experiments: the federal government can override state decisions, negating any political gains it would bring about, and states can free-ride on others' experiments where one proves politically acceptable.[104] Governments seeking to expand their authority or share blame for necessary but controversial policies also face incentives to work with others to deviate from formal constitutional power allocations. This too may explain agreements on securities, firearms, or the environment. Canadian federal and provincial governments entering seemingly unconstitutional intergovernmental agreements is accordingly unsurprising.[105] Even de facto constitutional amendments via intergovernmental agreement, contra formal amendment requirements, should not surprise us where governments can get away with them.[106] Unconstrained incentives undermine the common ends of federalism.

The need for border police is not unique to dualist federations or autonomy-based definitions of federalism. If the foregoing is correct, border policing is also necessary within cooperative federal arrangements. Given constitutional supremacy, any exercise of cooperative federalism must ensure that cooperating parties act within the boundaries of their respective powers. The existence of overlapping jurisdiction does not eliminate this need. Indeed, even if all decision-making powers were shared between federal and provincial governments, the scope of each level of government's components of the relevant jurisdiction should be reasonably determinate and there should be means of ensuring each party acts within those boundaries. Parties alone cannot be trusted to interpret their powers in a constitutionally compliant manner. The requirement for third-party border policing accordingly need not be premised solely on an understanding that all constitutional actors must be fully autonomous within all aspects of their respective jurisdictions. It can also be generated if one accepts that all actors

102. Neal Devins, 'The Judicial Safeguards of Federalism' (2004) 99 Northwest ULR 131.
103. Another minimalist conception of federalism views it as a mix of shared-rule and self-rule. Recall n 24. Undue centralization undermines both. Centralization is also problematic on views whereby the need for bulwarks against central tyranny justifies federalism. See, e.g., Levy (n 19). Hicks (n 52) 7–9, 172, 178–85 thus grounds her case for the necessity of review by a 'Supreme Court' in federal states in concerns about centralization and power imbalances (though Hicks appeals to US empirics questioned below).
104. Charles W Tyler and Heather K Gerken, 'The Myth of the Laboratories of Democracy' (2022) 122 Colum LR 2187.
105. Johanne Poirier and Jesse Hartery, 'Para-Constitutional Engineering and Federalism: Informal Constitutional Change through Intergovernmental Agreements' (2022) 20 ICON 758.
106. Hueglin (n 50) 195ff likewise admits that governments in Canada and the EU often agree to deviate from the formal division of powers. He takes this to be a good thing for stability reasons, among others. I am less sanguine.

have constitutionally defined limits on their authority and should not themselves set the limits thereon.

The need for third-party review does not, in turn, abate where a constitutional text includes cooperation requirements (as in Germany or Belgium). Such provisions instead offer another area where third-party review appears necessary, namely, the evaluation of whether and when cooperative duties have been fulfilled.[107] Third parties must assess whether powers were properly wielded in a cooperative fashion. Likewise, if federalism in general should be understood as committed to a loyalty principle, third parties can assess both whether central and sub-state governments engaged in negotiations and the product of any such negotiations.[108] Constitutional supremacy again requires that some actor, judicial or otherwise, ensure that executive and legislative bodies act within the boundaries of their respective powers.

Federalism, then, requires an entity other than federal and provincial governments to resolve disputes and police the constitution's terms. This alone does not justify *judicial* review of division of powers cases, as authors from Wheare to Stone note.[109] But courts lacking incentives to deviate from constitutional texts are well-placed to serve this function. Even Dicey noted that protecting constitutions is part of their basic function.[110] While any court unduly beholden to another level of government will also face incentives to permit deviations from the constitution,[111] this merely highlights the importance of independent review, which the judiciary can provide under our stylized conditions (subject to institutional requirements discussed below). As Bednar, Eskridge Jr., and Ferejohn, note, courts too 'must be adequately motivated to draw and enforce federal boundaries' to serve this function.[112] However, widespread beliefs that border policing is a primary judicial role should at least provide some necessary incentives.

Courts that are well-suited to and otherwise incentivized to fulfill the present tasks then face institutional constraints on their ability to permit deviations from the constitution.[113] Curial procedures in particular states likely impact the extent to which particular courts will fulfill their intended functions. Yet the leading comparative analysis suggests differences in curial procedures do not produce substantially different results regarding whether judicial review as such is warranted; they instead raise questions about *what kinds* of judicial review are desirable when.[114] Institutional constraints in

107. I further discuss review in those states below. See also Jutta Kramer, 'Judicial Federalism in Germany' in Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds), *Judge Made Federalism?: The Role of Courts in Federal Systems* (Nomos 2009) 93–95 and Patrick Peeters and Jens Mosselmans, 'The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and Regions' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 99–100.
108. Recall nn 84 and 85, surrounding. I bracket questions concerning whether cooperation or negotiation is part of the 'division of powers' here. However, if courts are best placed to resolve *those* issues, then judicial review should presumptively be part of the basic architecture of institutional design in states adopting cooperative federalism.
109. Wheare (n 17); Stone, 'Judicial Review' (n 6).
110. Dicey (n 16) 175.
111. Bednar (n 23).
112. Bednar, Eskridge Jr. and Ferejohn (n 17) 230.
113. Delaney (n 6).
114. Nicholas Aroney and John Kincaid, 'Comparative Observations and Conclusions' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).

different legal systems help ensure that courts therein can play the roles above. For instance, if one is concerned that courts in common law systems will deviate from the constitution, canons of common law interpretation require fidelity to the text and structure of any constitutional text that should limit the scope of judicial discretion.[115] The law of precedent then establishes (clearly imperfect) limits on courts' decisions and provides a public criterion on which parties can judge the legitimacy of judicial results. Precedential constraints at least partly offset any incentives to deviate.[116] Precedents can create path dependencies; many attribute centralization of authority in common law states to particular precedents.[117] But judicial review does not always lead to centralization even in common law states.[118] And centralization can result from courts maintaining adherence to the constitutional text, which is unproblematic. Civil law systems, in turn, typically place premiums on institutional commitments to their more codified constitutions that further limit judicial opportunities to deviate from texts and tend to produce better border policing.[119] While some civil law systems are centralized too, this is largely a function of commitments to constitutional texts such that this result does not evidence judicial inability to play the necessary roles at issue here.[120] While no system perfectly protects federal goals,[121] then, norms in common and civil law systems alike limit judicial deviations from a country's basic constitutional division of powers.

These considerations provide a defeasible presumption of judicial review in division of powers cases. Cases against judicial review often assume institutional protections for federalism, but courts appear best (if not uniquely) placed to provide those protections. Real-world examples above/below complicate matters and may require different approaches to judicial review than presently exist. Yet a court focused on constitutional texts (or, absent such a text, other clear rules establishing federal and provincial powers) as a starting point for all analyses should serve the necessary roles well. If another body were suitably independent, incentivized to protect the division of powers, and constrained from acting on incentives to deviate from that division, it could serve the same roles. But, as detailed below, no existing bodies do so and proposals for new bodies raise both many problems with federal/provincial resolutions and new concerns. The defeasible case for judicial review succeeds absent new evidence supporting an alternative.

Some of the best predecessors of these arguments notably appear in criticisms of judicial review or work on non-(/quasi-)federal countries, like the UK, but most saddle federalism and judicial review with implausible additional commitments. Dicey, for

115. ibid 502.
116. The recent history of the USA will, for example, lead some to question whether courts are properly incentivized to follow precedent or to worry that separation of powers cases undermine rights. I understand these concerns. Yet precedent provides *some* incentives and institutional design suggestions above/below should minimize issues.
117. Aroney and Kincaid, 'Comparative Observations' (n 114) 497ff.
118. ibid.
119. Nicholas Aroney and John Kincaid, 'Introduction' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 21.
120. See e.g. Arthur Benz, 'The Federal Constitutional Court of Germany: Guardian of Unitarism and Federalism' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).
121. See e.g. Wechsler (n 57) 543.

instance, offers building blocks for my arguments. But he also connects Parliamentary sovereignty and the rule of law in controversial ways that make any judicial review requirements appear like reasons to reject federalism rather than accept judicial review.[122] In this way, Dicey follows Brutus, who took courts' constitutional *supremacy* in federal states for granted but said it was reason not to adopt a federal constitution.[123] If we accept other reasons for federalism, Dicey can instead help us see why judicial review is desirable in federal states.[124] Indeed, Delaney's earlier work suggests the importance of resolving boundary disputes favors judicial review in the UK system in which Dicey's arguments initially arose (and that Delaney views as quasi-federal).[125] Stone actually grants the plausibility of the need for a third party to resolve conflicts but does not discuss the border policing role and frames her arguments in terms of a parity of reasoning with the rights review case in ways that obscure the judicial conflict resolution *and* border policing roles' standalone value.[126] The need for some third-party conflict resolution alone may not uniquely establish the need for judicial review, but courts' relative ability to serve both necessary roles provides a presumptive case therefor judicial review skeptics now bear the burden of defeating.

This is the core argument for judicial review of division of powers cases in federal states. The next section provides further arguments bolstering this primary functional one. It may not fully defuse Stone-style concerns stemming from democracy-based critiques of rights review. However, parallel reasoning is not the only available argumentative form. My positive arguments for third-party review generally and judicial review particularly operate on their own terms.

5 FURTHER REASONS FOR JUDICIAL REVIEW

One cannot, again, move directly from the need for some third-party arbiter to a presumptive case for any particular response. However, several additional reasons suggest judicial review particularly is (at least) presumptively desirable as part of federal

122. Dicey (n 16).
123. Ketchum (n 41).
124. JS Mill likewise identified the importance of judicial review for federal governance. See Katja Stoppenbrink, 'Representative Government and Federalism in John Stuart Mill' in Dietmar Heidemann and Katja Stoppenbrink (eds), *Join, or Die – Philosophical Foundations of Federalism* (de Gruyter 2016). But Mill ultimately contended that centralized governance is preferable to federalism in most cases. See, e.g., Jacob T Levy, *Rationalism, Pluralism, and Freedom* (OUP 2014) ch 8.
125. Delaney (n 65). Delaney's second reason for judicial review appeals to the importance of ensuring a sufficient level of uniformity of laws across a polity and particularly emphasizes the importance of rights protections across all provinces (596, 604). Neither commitment is central to the present topic and border policing does not feature prominently in Delaney's work (which nonetheless remains an important predecessor for the present argument). Sociological legitimacy questions in Delaney are, again, related but distinct. See also Bednar (n 81). Other works above/below identify the dispute resolution element alone or only focus on policing provincial boundaries. Some assume that policing 'federal' boundaries requires that courts decentralize authority, which is questionable. Even Aroney and Kincaid, 'Introduction' (n 119) 14 distinguish 'unitary' and 'federal' approaches where 'federal' means non-centralizing/pro-states. Their primary goal is to explain judicial behavior, rather than make normative claims.
126. Stone, 'Judicial Review' (n 6) 28.

institutional architecture. They stem from features of independent judiciaries and issues with alternatives.

5.1 Stability

The need for stability of/in federal states provides additional support for judicial review. The endurance of a legal regime is generally recognized as a goal of any constitution.[127] Judicial review in federal states should not fracture a country or its federal structure (and likely aims to maintain both).[128] The preceding suggests judicial review should increase the odds of state stability by providing parties with assurances that their powers will be protected.[129] Judicial review alone cannot secure state stability. The extent that judicial review contributes to constitutional stability is an empirical question.[130] However, judicial review should at least support federal state stability where the incentives to fulfill necessary roles above operate.

Judicial review further contributes to the necessary stability of understandings of the content of federal and provincial powers. A government must be confident that its authority in a domain is secure to plan long-term. Such assurances can also bolster political actors who seek to use their authority to pass good laws, helping secure the legitimacy of their actions and minimizing blowback for otherwise politically dangerous decisions. Stable understandings of constitutional powers can also minimize opportunities to offload governance responsibilities on others. If provincial primacy over health is well-established, for example, provinces cannot point to federal responsibilities to justify provincial legislative failures in health policy. Even Stone finds these considerations persuasive.[131] While Stone argues that they do not differentiate structural and rights review, parity of reasoning is non-dispositive here. Positive reasons support the present proposal.

Canadian constitutional law provides another notable example. Canadian courts view the need for stable understandings of constitutional powers as central to their review and use the need for stability as a guidepost for division of powers decisions. Wright's influential study suggests the Supreme Court of Canada (SCC) prefers to leave jurisdictional issues to the federal and provincial governments, only intervening when necessary to resolve conflicts or address serious threats to the constitutional division of powers.[132] The latter interest is important for border policing and maintaining distinct spheres of jurisdiction such that each entity knows what it can and cannot do and acts accordingly. If, for instance, a federal securities scheme interfered with provincial powers too greatly, the court would intervene.[133] This stability too may not be safeguarded in real cases. The SCC arguably has not maintained this balance in

127. Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (CUP 2009).
128. Appleby and Delaney (n 46).
129. See Bednar, Eskridge Jr. and Ferejohn (n 17).
130. For an excellent recent discussion of empirical data and theoretical concerns, see Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar 2018). For complications in the particular case of post-conflict societies, see Dawn Walsh, *Territorial Self-Government as a Conflict Management Tool* (Springer 2018).
131. Stone, 'Democratic' (n 6).
132. Wade K Wright, 'Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada' (2010) 51 SCLR 625.
133. ibid (at, for example, 65–66). See also the 2011 securities reference cited in n 86.

subsequent cases expanding federal environmental regulation powers.[134] Others believe that the federal government should do more in Canada's healthcare system despite long-established provincial primacy over health.[135] Yet courts in Canada and other federal liberal-democracies have long helped maintain stable power divisions and (at least largely) shared understandings thereof.[136]

A case for judicial review of division of powers cases cannot rest on stability concerns alone, particularly given controversies in real-world cases above/below. However, an interest in stability adds pragmatic reasons for judicial review. A constitutional division of powers should be action-guiding over time. Well-designed courts can help establish this outcome.

5.2 Expertise

Expertise-based arguments for judicial review likewise do not succeed on their own but support the presumption that the judiciary will play necessary dispute resolution and border policing roles in federal states grounding a stronger case for judicial review. Critics of judicial review question whether the judiciary can have the right kind of expertise in 'moral' interpretive exercises. Yet even if *most* constitutional interpretive exercises are value-laden in some way, there is a need for a specialized understanding of which interpretations have been considered authoritative and the processes by which the community agrees interpretations can be made. This partly follows from the just-mentioned need for stability and more general legitimacy constraints. Only the most absolutist democratic theorist would suggest parties to an agreement at a given time should be able to agree on the scope of their powers unconstrained by other norms. At minimum, the process of setting powers must be one citizens view as legitimate but can scrutinize. A plausible process will require that decisions be based on reasons citizens cannot reasonably reject and indexed to past decisions functionally equivalent to precedent. Otherwise, the constitution will be too malleable to serve as the basis for legitimate decision-making.

These concerns require a body with the ability and incentives to address established, accepted rules when faced with conflicts or possible actions outside set constitutional authority. Stone notes that the judiciary need not play this role.[137] But attending to these concerns is the kind of thing judges already do. This undergirds Dicey's above-mentioned assumptions that courts will interpret the separation of powers between executive and other bodies and that federalism requires judicial review.[138] If the relevant legal materials are particularly specialized, expertise may favor review by a Constitutional Court, rather than a supreme court of general jurisdiction. Yet either court-type appears well-placed to develop specialized knowledge.[139]

134. Recall n 86 cases (also complicating the securities story).
135. See Michael Da Silva, *The Pluralist Right to Health Care: A Framework and Case Study* (University of Toronto Press 2021).
136. One should not overstate this point given the nascent and mixed empirical record, but they do contribute. Compare Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds), *Judge Made Federalism?: The Role of Courts in Federal Systems* (Nomos 2009) and Aroney and Kincaid (n 65).
137. Stone, 'Judicial Review' (n 6) 3.
138. Dicey (n 16).
139. Existing courts likely have a better record of interpreting constitution texts than unwritten constitutional norms. If so, this part of the case for judicial review may only support review

Constitutional courts and supreme courts of general jurisdiction also face fewer of the barriers to developing necessary specialized knowledge that undermine other, non-judicial entities' claims to being preferable or even adequate review bodies. Tyler and Gerken highlight the substantial resources required to understand whether a piece of legislation is within one's competence and its potential impact on the division of powers and wider society.[140] This leads federal and state governments in the USA to outsource policy-making features to others. That undermines claims that policies result from strictly 'democratic' processes: given resource constraints, legislators do not develop laws or even set the terms of discussion thereon.[141] If one accepts that result, concerns that federal and state governments faced with fulfilling many other roles will lack the time, personnel, etc. or incentives to develop essential expertise of constitutional norms raise questions about whether those non-judicial bodies can play necessary roles.

Whether other third parties that are not explicitly focused on legal interpretation can lay necessary roles is also questionable. Criteria for membership in and scope of responsibilities of members on such bodies will need to be defined in ways that promote expertise development. Comparative law provides reasons to question whether this can be done well. For instance, the Ethiopian constitution provides a second chamber without legislative authority, the House of Federation, with supreme authority to interpret Ethiopia's constitution. However, drafters recognized that House members may lack constitutional expertise – many lack *any* legal expertise[142] – and created a Council of Constitutional Inquiry (CCI) to interpret relevant laws.[143] CCI interpretations are non-authoritative.[144] But the non-expert House also meets only periodically, providing little time to develop expertise or engage in debate to set the terms, and the 118-member House is too large to discuss complex issues.[145] The CCI thus does the bulk of the interpretive work in practice.[146] This combines the worst of two worlds: The CCI includes Supreme Court members, so purportedly 'non-representative' bodies still set the terms for many discussions. Yet those with neither election-based bona fides

where the division of powers is in a written part of a state's constitution. Yet other entities do not have obviously stronger claims to relevant expertise. If this argument is neutral between different entities, arguments above/below provide other supports for judicial review. And even if the argument does not apply to federal states without a written division of powers, such cases are sufficiently rare as to maintain the presumption of judicial review in federal states. If, in turn, purported unwritten constitutional norms are not the subjects of widespread agreement, there is reason to question whether stable norms even apply. Third-party review may be useful for conflict resolution even absent identifiable borders that someone could police.

140. Tyler and Gerken (n 104).

141. ibid.

142. Yonatan Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review' (2006) 14 African J Int'l & Comp L 53, 74–76.

143. ibid; Assefa Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' (2005) 52 Neth Int LR 1; Getahun Kassa, 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System' (2004) 20 Afrika Focus 75.

144. Fiseha (n 143) 18–19.

145. The House should rule within 30 days of a CCI recommendation, but regular meetings only occur twice per year and extraordinary meetings are rare and sparsely attended by regional representatives. See Legesse Tigabu Mengie, 'The House of the Federation of Ethiopia: Unfit for Federalism' (2023) 27 Rev Const Stud 129.

146. Fessha (n 142) 53, 75–76. Formally, the CCI is only meant to put questions to the House. See Mengie (n 145) 152.

nor expertise play a significant role, as many members are non-lawyers appointed by federal and state governments and subject to removal by the House.[147] Empowering an expert House interpretive committee would repeat CCI work,[148] again challenging assertions that such a quasi-judicial body is preferable to courts.[149]

5.3 Problems with Alternatives

The preceding points to a broader reason to support a presumption of judicial review in division of powers cases: other third-party review bodies proved ineffective while presenting new issues and proposed alternatives do not appear promising. Stone contends that 'there are institutional structures that would allow for the resolution of federal disputes without begging the question at the heart of federalism'.[150] Yet alternatives discussed to date appear problematic. Delaney rightly notes that 'definitively concluding whether judges or legislators would be able to determine whether something is better regulated at the state or federal level seems largely aspirational, in part because of the difficulty of identifying a single ground upon which to base the decision', like efficiency or subsidiarity. That being said, proposed alternatives to judicial review raise issues along several evaluative dimensions suggested by analyses outlined above.[151]

Prior discussions of judicial review and federalism highlight two real-world alternatives: referenda, like those in Switzerland,[152] and the aforementioned Ethiopian model.[153] It is impractical to hold referenda whenever conflicts prove irresolvable. Regular referenda undermine stability. Even referenda that resolve conflicts do not police borders. Indeed, Wheare suggests referenda on divisions of powers effectively amount to constitutional amendments, not interpretations of the existing order.[154] He further warns that they could alter a federal principle by providing a method of passing laws that the original constitution would not countenance.[155]

The Swiss model more broadly may not offer a genuine alternative to judicial review as a means of resolving disputes and policing borders within a federal constitutional order. Even if the referenda are not amendments, they still only apply to limitations on central authority. Per Lienhard et al., 'where the interpretation and application of cantonal statute law are concerned, the Federal Supreme Court has the power only to sanction the arbitrary application of law by a canton. However, where federal

147. Kassa (n 143) 82–83.
148. Fessha (n 142) 74–76.
149. Proclamation No 1261/2021, *A Proclamation to Define the Powers and Functions of the House of Federation of the Federal Democratic Republic of Ethiopia* did not substantially change this state of affairs as post-2021 scholarship, like Mengie (145), identifies and specifies similar challenges. Mengie (n 145) 147 further contends that the placement of the CCI's powers in the Constitution suggests it was meant to play a quasi-judicial role. Experts debate whether some judicial review was envisioned. See also, for example, Gedion T Hessebon and Abduletif K Idris, 'The Supreme Court of Ethiopia: Federalism's Bystander' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).
150. Stone, 'Democratic' (n 6) 109.
151. Delaney (n 6) 64.
152. Wheare (n 17) 67–69; Duchacek (n 46) 256–58.
153. Watts (n 17); Delaney (n 6). See also Aroney and Kincaid, 'Introduction' (n 119) 6.
154. Wheare (n 17) 67–69. Aroney and Kincaid, 'Comparative Observations' (n 114) 488 also use 'amendment' language when describing them.
155. Wheare (n 17).

or international law sets out clear (harmonization) requirements for the cantons, the Court unequivocally imposes those requirements'.[156] Courts can then resolve disputes between Swiss cantons and between the cantons and confederation, if only after negotiation procedures.[157] And setting the contours of sub-state authority implicitly helps establish the contours of central authority.[158] Indeed, the Swiss federal supremacy clause is commonly litigated; only specific federal 'laws' are insulated from direct judicial review.[159] Courts routinely rule on who has authority over subjects and if parties acted within their authority.[160] While Swiss governments must cooperate under the terms of their constitution, courts supervise them to ensure central participation is 'within the scope of its authority'.[161] Discussion of 'Judicial Balancing of Federalism without Judicial Review' in Switzerland may mislead those who do not examine the Swiss model's details.[162] Even that case largely raises questions regarding the scope and site of judicial review, not its general legitimacy/desirability.

The last section did not, in turn, exhaust problems with the Ethiopian model. Ethiopia is an odd choice for a model capable of securing stability given recent events. Yet even if such contingencies cannot fully undermine the model, other problems should provide pause. Grant, for charity's sake, the controversial claim that federal and provincial governments having members in the House of Federation does not undermine the independence and third-party status of the House, so the House can serve the necessary roles above.[163] Problems remain. For example, this concession comes at the expense of one form of representation democratic opponents of judicial review should otherwise favor. To secure third-party review consistent with democratic norms, the Ethiopian model created a supposed 'third-party' review chamber. In so doing, it also eliminated the second chamber as a mechanism for further representative process.[164] For another example, membership in the House is indexed to (ethnic) 'nations', not provinces, leading to members of national (and, in Ethiopia, ethnic) majorities having outsized vote shares in the House and to Ethiopia's major independent city-states lacking any representation.[165] Claims that House review is more 'democratic' than judicial review accordingly appear highly questionable.

Evidence from Ethiopia then suggests the House does not resolve disputes or police borders. Historically, the House provided 'very little federalism case law' partly due to single-party dominance akin to that observed in Mexico.[166] Only five cases reviewing legislation made it to the House in its first ten years.[167] The House did not release a

156. Andreas Lienhard et al., 'The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 405.
157. ibid 412.
158. See Yoo (n 41).
159. Lienhard et al. (n 156) 416, 427.
160. ibid 424.
161. ibid 427.
162. The quoted material here appears in ibid.
163. Fessha (n 142) 77–78 denies this claim.
164. See e.g. Tesfa Bihonegn, 'The House of Federation: The Practice and Limits of Federalism in Ethiopia's Second Federal Chamber' (2015) 9 J East Afr Stud 394, 402.
165. ibid 401; Fessha (n 142) 70.
166. Hessebon and Idris (n 149) 187. Per Mengie (n 145) 190, views of the House as a partisan body also explains why individuals do not lodge claims.
167. Kassa (n 143) 86.

division of powers (in the sense at issue here) decision in its first two decades.[168] Any protection of the division of powers only occurred absent the kind of transparency one would expect of a rule of law state. Extant literature suggests the House does not provide adequate protections. It famously did not even address, let alone resolve, recent border disputes among states that have produced sectarian conflicts.[169] The House did not safeguard literal borders there or resolve conflicts. It also fails to address jurisdictional borders. The federal government began administering land grants, 'which is expressly a power given to the states by the Constitution', without review by the House.[170] Practical politics divide legislative powers in Ethiopia contrary to express written allocations.[171]

While courts could theoretically fill this interpretive gap,[172] any need to do so would support the present arguments. And the House's supreme interpretive authority has made courts reluctant to interpret the constitution at all.[173] This judicial reluctance historically enabled legislators to act free of any meaningful constitutional constraints. This was true of both the division of powers and rights review. While Ethiopia's constitution formally creates rights protections,[174] the lack of constitutional issues referred to the House forestalled application of rights provisions to particular contexts and left Ethiopia without rights case law or functional equivalents establishing the rights' contours.[175] Where ethnic groups each control a state under the constitution, members of ethnic minorities in each state face challenges protecting their rights.[176]

Some issues with the Ethiopian model are superable, but they jointly suggest alternatives to judicial review will require attending to far more institutional difficulties, and controversies, than critics of judicial review claim. These are not even exhausted by the simple observation that political safeguards likely require a bifurcation of political power among different parties.[177] Experiences in several countries highlight institutional challenges for non-judicial bodies.

Stone may grant this much, but Stone's proposed alternatives also present issues. Stone presents two: (i) cooperative agreements and other forms of voluntary transfers of powers and (ii) legislative overrides.[178] Both are silent on the reasons requiring third-party conflict resolution and border policing. (i) raises many incentive- and legitimacy-based problems above: agreements to deviate from the constitution are still deviations, and parties unconstrained by a third party will act on incentives to deviate. Goldsworthy accepts some cooperation,[179] as Stone notes,[180] but the terms of cooperation still must ensure that each cooperating actor operates within the boundaries of

168. Hessebon and Idris (n 149) 185–87.
169. Mengie (n 145) 153–55.
170. Hessebon and Idris (n 149) 175.
171. ibid.
172. Kassa (n 143) 98.
173. Fessha (n 142); Hessebon and Idris (n 149); Mengie (n 145).
174. Kassa (n 143) 84.
175. Fessha (n 142) 80.
176. Mengie (n 145) 137. Public questions about the legitimacy of the Constitution identified in that text are accordingly understandable.
177. Further case studies appear in Schneider, Kramer and di Toritto (n 136) and Aroney and Kincaid (n 65). Compare also Kramer (n 41).
178. Stone, 'Democratic' (n 6) 133–35.
179. Goldsworthy (n 12).
180. Stone, 'Judicial Review' (n 6); Stone, 'Democratic' (n 6).

their domains of authority, requiring review. De facto concurrency rules do not lead to real-world cooperation absent many other institutional and political safeguards.[181] If those rules often cannot ensure any cooperation, they are even less likely to ensure cooperation *within constitutional boundaries*. Indeed, existing research suggests that parties are more likely to cooperate (when they do) to limit their political costs or backlash,[182] again producing incentives to move outside formal powers to minimize threats. Judicial review remaining integral to maintaining the division of powers even where concurrent jurisdiction is possible or cooperation is required, like Germany and Belgium,[183] is thus unsurprising. Each party must still act within its own authority. A third party remains necessary to ensure they do so. Courts can do this well.

(ii) Acknowledges some judicial review is required and raises further issues. Traditional overrides permit legislative bodies to pass laws explicitly opposed to judicial interpretations of the constitution (subject to constraints).[184] This grants that judicial review is necessary and requires a way around it. This may be all Stone desires: Stone eventually accepts 'weak' judicial review.[185] However, no strong case against judicial review then applies. Even override terms must be constrained by laws subject to third-party review. This becomes an argument for judicial review as part of a broader structure of 'dialogue' between bodies and not a strong argument for legislative supremacy in constitutional interpretation. Stone also suggests that overrides should be exercised by a cooperative federal-state government or 'a states' house within a national parliament' composed of representatives from the states different from those with legislative powers.[186] It is again unclear how these would avoid incentives to deviate. Others now bear the onus of establishing that they will. Given the needs for dispute resolution and border policing (and stability and expertise) and the problems with alternatives outlined above (and in the following paragraphs), the presumption of judicial review of division of powers stands.

'Political safeguards' are also unlikely to provide a generalizable solution to the problem. Much of the work on political safeguards focuses on historical and textual issues specific to the US constitution.[187] The protection of rights within US states is particularly important in that literature, with a strong emphasis on whether the Rehnquist Court adequately protected rights.[188] Much of the relevant work further assumes that the protection of 'federalism' primarily concerns the protections of state authority such that 'political safeguards' only exist to insulate federal legislation from review and queries about whether a large federal administrative state is acceptable.[189] Neither the

181. Christa Scholtz and Andrei Munteanu, 'How Cooperative Is "Cooperative Federalism"?: The Political Limits to Intergovernmental Cooperation under a De Facto Concurrency Rule' (2023) 34 Const Polit Econ 111.
182. ibid.
183. Kramer (n 107) 93–95; Peeters and Mosselmans (n 107) 99–100.
184. Recall the works of Tushnet cited in nn 9 and 10. But see Sigalet, Webber and Dixon (n 5) for nuanced discussion of different dialogue mechanisms, including overrides.
185. Stone, 'Judicial Review' (n 6) 130–31.
186. ibid 133–34.
187. Recall nn 57–64, surrounding.
188. Devins (n 102) and John Kincaid, 'The US Supreme Court's Federalism Revolution: In Search of Constitutional Viagra, 1991–2005' in Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds), *Judge Made Federalism?: The Role of Courts in Federal Systems* (Nomos 2009) almost exclusively discuss that court.
189. Kramer (n 41) 218; Tolson (n 61) 902, 908. See also Yoo (n 41) on Wechsler, Choper, et al.

problems nor the historical and textual solutions in these US-specific debates generalize. Kramer accordingly discusses the political safeguards thesis as 'American[-] style' federalism.[190] Still other arguments in the largely American literature rely on particular features of the American political economy. Kramer, for example, also suggests that decentralized American political parties can provide political safeguards but then explicitly contrasts them with the parties of Europe, suggesting his own preferred approach will not generalize to Europe.[191]

More general political safeguards arguments only solve parts of the problems above and leave room for judicial review of state legislation. The strongest version of the political safeguards thesis only seeks to insulate federal legislation from judicial review. As Yoo notes, 'those who support the political safeguards thesis do not challenge generally the legitimacy of judicial review'.[192] Per Yoo, Choper and others sought to reserve the judiciary's political capital for rights cases; if political safeguards could address federalism disputes, courts could instead focus on rights cases. But all parties accept judicial review of state legislation – and implicitly permit courts to draw the lines of federal powers by drawing the lines of state powers. Wechsler, again, arguably leaves open whether Congress better protects 'federalism'.[193] Kramer only opposes 'aggressive' intervention 'to protect the states from Congress'.[194] Clark discusses the scope of judicial review and when courts should interpret the constitution.[195] Each proposal allows judicial review to operate alongside political safeguards that exist.[196] Where political safeguards will only work under certain conditions and come with their own costs and limitations, judicial review presumptively remains necessary.[197]

Finally, other merely theoretically possible review bodies cannot defeat a presumptive case for judicial review today. One can, for instance, imagine an independent commission of experts being created with features likely to maintain stability.[198] Evidence such a commission could play the two necessary roles above may defeat the presumption favoring judicial review. However, the possibility of such a commission playing the roles in the real world cannot be assumed.[199] Relying on 'law commissioners' within other branches of government, as in UK devolution agreements, is likewise unlikely to address the issues above. Law commissioners in the UK historically reached agreements on how to resolve disputes in secret, providing parties with no way of gauging who possesses which powers and whether decisions are consistent with the

190. Kramer (n 41) 278ff.
191. ibid 279. Other political economies can avoid this need but may not persist. To wit, Benz (n 120) 209 highlights that Germany's ability to avoid conflict by avoiding distributional questions ended when its economy stalled.
192. Yoo (n 41) 1371.
193. Wechsler (n 57).
194. Kramer (n 41) 291 even allows some rational basis review.
195. Bradford R Clark, 'Separations of Powers as a Safeguard of Federalism' (2001) 79 Tex LR 1321. Clark further suggests that judicial review of the separation of powers implicates federalism.
196. Kramer (n 41), Bednar (n 17), and others see it as part of a collection of proposals.
197. The political safeguards thesis thus appears consistent with a form of moderate legal constitutionalism in which political and legal processes jointly protect constitutional norms approach. Compare Delaney (n 6) and Bellamy (n 5).
198. I thank an anonymous reviewer for this point.
199. An independent commission capable of securing these values will, I suspect, look like a quasi-judicial body. If it cannot issue binding rulings, it is unlikely that it will be able to provide independent conflict resolution or police borders long-term. A case for 'judicial-esque' review would remain intact. Nothing here turns on that.

constitution.[200] Analysis of decisions that were made public suggested that UK commissioners did not take a principled approach, instead seeking simple compromise.[201]

5.4 Maintaining Margins of Appreciation

The presumption of judicial review is particularly strong where courts can permit some margin of appreciation for different interpretations of powers. Many forms of judicial review maintain options for resolving debates about *who* should set the content of constitutional powers. Goldsworthy rightly suggests a

> constitutional guarantee of the independent exercise of judicial power should be couched in minimal terms, to ensure that the resolution of every legal dispute is ultimately reviewable by an independent court without unduly detracting from the ability of democratically elected legislatures to adopt innovative solutions to public decision making.[202]

Yet the presence of judicial review permits some ongoing contestation about boundaries.[203] It simply limits contestation in the name of necessary conflict resolution and border policing.

The relationship between federalism and democracy is highly contested.[204] But federalism needing to be constrained by democratic concerns need not undermine the present case for judicial review. If one denies that federalism raises questions about *how* to set democratic boundaries across levels of governance,[205] the last section still highlighted that real federal states without judicial review do not justly distribute vote-shares.[206] And democratic contestation remains possible where judicial review is established. Vagueness considerations undergirding Stone's critique of judicial review in division of powers cases cut both ways here.[207] They may highlight judicial opportunities to use moral reasoning. But they clearly highlight legislative opportunities to deviate from constitutional texts and the inevitability of conflicts. The balance of considerations highlights the need for some third-party review. Such review need not undermine participants' access to democratic procedures or legislators' ability to pass

200. Robert Hazell, 'Judges Left Out: The Role of the Judicial Committee of the Privy Council in Resolving Devolution Disputes in the United Kingdom' in Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds), *Judge Made Federalism?: The Role of Courts in Federal Systems* (Nomos 2009) 66–67, 84–87.
201. ibid. Further recall issues with expert commissions in dispute resolution contexts above.
202. Goldsworthy (n 12) 150.
203. Per Robert Schertzer, 'Federal Arbiters as Facilitators: Towards an Integrated Federal and Judicial Theory for Diverse States' (2017) 15 ICON 110, courts could also help facilitate constitutionally sound agreements between other parties.
204. See, e.g., Robert A Dahl, 'Federalism and the Democratic Process' in J Ronald Pennock and John R Chapman (eds), *NOMOS XXV: Liberal Democracy* (NYUP 1983); Goldsworthy (n 12); Delaney (n 6); Da Silva (n 2).
205. Compare Goldsworthy (n 12); Delaney (n 6).
206. Delaney (n 6) proposes a democratic metric balancing group and individual interests. Aroney (n 71) and Goldsworthy (n 12) also point to the importance of group interests. The only third-party 'house' of review in existence, the Ethiopian case, likewise focuses on the needs of 'peoples'. The present argument need not rely on 'group' interests divorced from individual ones or contentious claims about how to measure or fulfill the requisite balance. I thus bracket these concerns while noting that the Ethiopian data below belies 'balancing' claims.
207. Stone, 'Judicial Review' (n 6); Stone, 'Democratic' (n 6).

laws within their domain using democratic processes.[208] Judicial review can even permit some mechanisms challenging judicial determinations, as Stone's eventual acceptance of weak judicial review makes clear. Some dialogue between parties may be healthy in democracies.[209]

Related concerns that judicial review of the division of powers provides courts with 'unilateral nationwide policymaking' cash out in worries about centralization that other forms of federal governance are likely to replicate given the federal incentive structure.[210] Many criticisms of judicial review illicitly equate 'federal' with 'pro-province'.[211] Centralization is not antithetical to judicial review if a federal constitution provides more powers to the center. Yet *good* judicial review could negate concerns about *undue* centralization by forcing federal governments to act within their authority. If only independent courts will serve this function, that highlights a condition for justifiable judicial review, rather than undermining arguments therefor.

5.5 Possible Rights Protections

Finally, judicial review of division of powers cases can safeguard rights. The preceding questioned whether one must argue for review of division of powers cases and rights in parallel. Federal competence and rights questions are analytically distinct. Yet if courts consider rights as a constraint on the exercise of any exercise of powers in a federation, they will have two opportunities to ensure no legislation unduly constrains rights: they will analyze whether legislatures had any constitutional authority to pass the law that would constrain rights and, more specifically, determine whether the law is consistent with the rights. No decision procedure perfectly protects rights, as Waldron himself notes.[212] However, the dual opportunity for review can increase the chances of reaching substantively preferable results. Courts in federations are at least not obviously worse than alternatives at rights protection. If one is concerned about who should set the content of rights, recall that federal governance permits more variation.[213]

Courts ensuring that all variation meets basic constitutional standards should be considered less problematic if other third parties lack competence to address relevant concerns. The Ethiopian case highlights how a lack of authority and incentives to conduct any form of judicial review can easily undermine the protection of rights by leaving all constitutional constraints unenforced. While one cannot, again, draw strong conclusions from one case, it is notable that the major alternative structure on offer produced this problematic outcome. Data on the political safeguards thesis is likewise

208. Compare Goldsworthy (n 12) and Stone, 'Democratic' (n 6) (including their approaches to John Hart Ely-style reasoning).
209. Sigalet, Webber and Dixon (n 5) are excellent on dialogue theories. I suspect constitutional supremacy supports me in further debates about whether exercise of overrides, etc. must be subject to constraints or judicial review. If an outcome requiring judicial review here remains problematic, Dicey's (n 16) conclusion appears apt: that worry augurs against having a federal constitution, rather than directly opposing judicial review. Legal considerations should also bind unitary states. See Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty' (2008) 28 Oxford J Leg Stud 709.
210. The quote here is in Jonathan F Mitchell, 'Judicial Review and the Future of Federalism' (2017) 49 Ariz St LJ 1091.
211. Recall n 189, surrounding, and (other) sources on the political safeguards.
212. Waldron, 'The Core' (n 6) 1372.
213. Delaney (n 6).

mixed at best and those safeguards are, again, only likely to fulfill their intended functions under limited conditions and alongside judicial review.[214]

6 ADDRESSING EMPIRICAL CONCERNS

Empirical considerations do not defeat my proposal. One's view on courts' performance on review will be a function of one's evaluative criteria. Concerns about judicial ability to support substantively 'correct' views from any political perspective are moot in a wider context where judicial review across time and spaces supports most positions at some point. Concerns that courts do not use one's preferred method of constitutional interpretation likewise seem beside the present point: judicial review using 'better' interpretive methods remains possible. Still further concerns that courts fare poorly because they will 'make' new laws or be necessary partisan are at best contingently true. The law of precedent provides some institutional safeguards on courts making laws and partisanship worries stem from issues of constitutional drafting, not review as such. The present argument conditioned on independent review stands.

Evidence that courts consistently exhibit undue tendencies toward centralized power could directly undermine judicial competence claims purporting to justify judicial review. Concerns about centralization appear throughout the history of these debates, featuring in Dicey, Wheare, and Duchacek.[215] Recent practices highlight their continued import and query whether courts generally police boundaries. For instance, early twenty-first-century case law saw the aforementioned SCC largely defer to the federal government in its use of immunity powers; only 'interfere' to resolve conflicts between federal and provincial bodies; and presume that intergovernmental agreements were constitutional absent strong evidence to the contrary.[216] While more recent cases saw that Court strike down parts of intergovernmental agreements premised on questionable understandings of the division of powers, it still defers to the federal government in ways that expand the federal role.[217] The SCC may not play either intended role above well. Comparative scholarship then highlights other courts' centralizing tendencies.[218]

Courts do not, however, consistently centralize authority, and some centralization merely results from courts appropriately staying within the confines of constitutional texts. Aroney and Kincaid's comparative study suggests that judicial review leads to greater centralization overall but also identifies trends pointing in multiple directions.[219] While Aroney and Kincaid suggest that centralization is more frequent in common law states, they further note variations within common law systems like Canada and India.[220]

214. Recall safeguard-related sources above.
215. Dicey (n 16) 139, 178–79; Wheare (n 17) 62; Duchacek (n 46) 257.
216. Wright (n 132).
217. While Reference re *Assisted Human Reproduction Act*, [2010] 3 SCR 457 and *Quebec (Attorney General) v Canada (Attorney General)*, [2015] 1 SCR 693 later demonstrated judicial desires to protect the division of powers, the aforementioned References re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 centralizes authority greatly. Even then, the recent Reference re *Impact Assessment Act*, 2023 SCC 23 decentralizes power in the same sphere.
218. See e.g. Patricia Popelier, 'Federalism Disputes and the Behavior of Courts: Explaining Variation in Federal Courts' Support for Centralization' (2017) 47 Publius 27 and Tierney (n 81) 194–96, 234–37, 271–82.
219. Aroney and Kincaid, 'Comparative Observations' (n 114).
220. ibid.

Specific case studies then highlight that courts can protect constitutionally entrenched jurisdictions. Austrian jurisprudence contains centralizing and decentralizing decisions, but courts in Austria have clearly protected sub-state entities' ability to create distinct policy regimes.[221] Judicial review in Belgium has, in turn, developed alongside Belgium's movement from a unitary to a federal state.[222] Division of powers jurisprudence there has been 'mostly decentralizing', leading to protections in sub-state authority that state representation in the Senate was unable to secure.[223] Centralization in other states, like Brazil,[224] is largely (if not exclusively) attributable to a centralized constitutional text. Even courts with such texts have important roles to play. For instance, German courts need to enforce constitutional provisions requiring cooperation.[225] Any consequent centralization of legislative power there is apt where it follows directly from the constitutional text; courts there are policing borders.[226] Simple evidence of centralization is, in short, not evidence of *undue* centralization or that courts generally deviate from plausible understandings of a country's specific constitution.

Lingering concerns merely highlight the importance of an independent judiciary and how far existing legal practices deviate from the ideal case. Undue centralization is less likely where courts are fully independent and do not defer to other bodies with incentives to deviate from constitutional texts. This too highlights the need for judicial independence. Longstanding concerns about judicial appointments and dismissals subject to legislative or executive action should be resolved.[227] Some courts should defer less to other parties and focus on enforcing the terms of the constitution itself. But these concerns also speak to institutional design and use of review powers, not judicial review itself. Institutional design aimed at limiting circumstances minimizing centralizing tendencies and limited use of centralizing principles, like a paramountcy rule favoring federal governments in conflicts, can further minimize such worries.[228] Where other bodies also raise these concerns, the presumption favoring judicial review remains.

Concerns that judicial review alone cannot ensure proper conflict resolution or border policing are also non-fatal to the present arguments. Bednar and her collaborators suggest that judicial review alone cannot negate incentives to deviate from the constitution or opportunities to do so.[229] Absent other structural guarantees of constitutional loyalty, parties can and will deviate. This too largely speaks to design considerations. It could admittedly imply that judicial review requires additional institutional

221. Anna Gamper, 'Judge Made Federalism?: The Role of Constitutional Courts in Austria' in Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds), *Judge Made Federalism?: The Role of Courts in Federal Systems* (Nomos 2009) 213–14, 219.
222. Peeters and Mosselmans (n 107) 89–91.
223. ibid 76.
224. Gilberto Marcos Antonio Rodrigues, Marco Antonio Garcia Lopes Lorencini and Augusto Zimmermann, 'The Supreme Federal Court of Brazil: Protecting Democracy and Centralized Power' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017).
225. Benz (n 120) 198, 211.
226. Provincial advocates may also overstate the problem here: even where judicial review leads to centralization within a country, most federal states remain the most decentralized overall. See Aroney and Kincaid, 'Comparative Observations' (n 114) 487.
227. See Wheare (n 17) 62.
228. On institutional design, see e.g. Popelier (n 218) and Tierney (n 81).
229. See Bednar, Eskridge Jr. and Ferejohn (n 17) and Bednar (n 23).

commitments. For instance, Bednar, Eskridge Jr., and Ferejohn suggest that adequate judicial review in division of powers cases depends on a separation of powers that insulates courts from executive or legislative pressures.[230] If so, the federal form will have further institutional commitments than one might otherwise assume. However, this is non-obvious. And if the preceding entails that federalism requires both judicial review and a separation of powers, that hardly makes the case less interesting. Other accounts of federalism also come with conceptual or institutional baggage. Recall debates about whether federalism entails commitments to loyalty or cooperation noted in the Introduction. The preceding is thus at worst on par with alternatives. Requiring a commitment to the separation of powers would, moreover, fit with findings in other fields.[231] If nothing else, an account entailing strong commitments from some minimalist formal considerations is highly generative and, accordingly, better in at least one respect. This 'objection' could accordingly highlight the federal form's normative status. I now conclude by demonstrating further real-world legal implications.

7 CONCLUSION: IMPLICATIONS FOR CONSTITUTIONAL DESIGN AND INTERPRETATION

There should, then, be a (defeasible) presumption of judicial review of division of powers cases in federal states due to the need for a third-party entity capable of resolving conflicts and policing borders, other bodies' inability to play these roles; and several independent factors factoring the judiciary as the necessary third party, including the nature of their role, their expertise, and their ability to contribute to stability while safeguarding opportunities to contest constitutional understandings of non-core issues and to potentially even protect (human) rights.

This presumption should stand absent new evidence that another party can play the necessary roles.

Factors establishing the presumption should also lead to new federal constitutions with particular factors not seen in all states and different approaches to constitutional interpretation than are seen in extant states. Fully establishing these points requires another article, but concerns above already highlight some basic, but substantive, constitutional implications. Those who find judicial review problematic could read the foregoing as providing reasons not to adopt the federal form. I doubt worries about judicial review should be dispositive of the pertinent questions, but a strong presumption federal countries will adopt judicial review in division of powers cases could produce Dicey-like skepticism about federalism. I am more interested in the above implications for federal design. Waldron and Delaney take the possibility of a written federal constitution of the UK as an impetus for their work.[232] Such constitutions may appear in many places and for many reasons. Considerations above suggest that any such constitution should have clear and detailed lists of federal and provincial areas of jurisdiction to limit entities' ability to adopt interpretations outside their intended

230. Bednar, Eskridge Jr. and Ferejohn (n 17) 232.
231. See Watts (n 17). See also Jessica Bulman-Pozen, 'Federalism as a Safeguard of the Separation of Powers' (2012) 112 Colum LR 459 on how federalism can support a separation of powers.
232. See Waldron, 'Right-Based' (n 66); Delaney (n 6).

competence. This should further minimize the requirements for judicial review, as the above-mentioned 'democratic' theorists' desire.

The preceding nonetheless also suggests some disputes will take place and that parties will inevitably attempt to act outside their competence. Explicitly providing for judicial review in a federal constitution is then desirable. Details on how they will conduct the review may also be desirable to minimize concerns. This should add to the legitimacy of judicial review – even Dicey grants that the US Supreme Court and President are equally legitimate where both have formal powers in that country's constitution[233] – and perceptions thereof.[234] It would not, of course, fully resolve debates about such legitimacy – the constitution itself can always be critiqued as illegitimate[235] – but would contribute to legitimacy, helping ensure courts can play their necessary roles.[236]

Fully determining which courts can best fulfill the roles and how courts can best do so also clearly requires further analysis. Comparative analysis of judicial review in federations remains nascent despite excellent recent contributions cited above. The preceding suggests that scholars should focus on questions concerning what kinds of courts can play the necessary roles, rather than whether judicial review is advisable at all. It thereby supports others who call for analytical reorientation in the study of judicial review and federalism.[237] But neither the foregoing nor the broader literature to which it seeks to contribute is silent on the further questions raised here. For instance, Appleby and Delaney provide evidence that having judicial review available in both federal and provincial courts is more likely to resolve conflicts in ways that will safeguard rights within states.[238] And the foregoing suggests that courts must be suitably independent of other levels of government to serve their intended functions. The need for more research in no way undermines the contributions above.[239]

Regarding constitutional interpretation, the preceding should lead to different approaches and outcomes than those in major existing cases. The preceding permits some overlap between powers, remaining consistent with increasing moves toward cooperative federalism. However, it grounds judicial review in the importance of the initial division of powers. Courts should thus have clear, consistent rulings on the scope of federal and provincial powers and avoid invoking any principles that blur jurisdictional boundaries. For instance, stronger interpretations of cooperative federalism committed to a loyalty principle under which parties can be compelled to work together and seek to resolve all conflicts through negotiation prior to judicial review are questionable absent an explicit constitutional mandate.[240] Such cooperation is

233. Dicey (n 16) 161.
234. See e.g. Fiseha's (n 143) discussion of views on judicial review in Germany and the USA.
235. Stone, 'Democratic' (n 6).
236. Delaney (n 6) 736 suggests 'pressures demanding federation may also push constitutional designers to include a court ab initio, perhaps with rights review authority'. The above does not establish determinative reasons favoring or disfavoring rights review. It instead offers reasons to question the parallel and suggests operating outside that paradigm. If one still thinks the cases stand or fall together, the preceding offers some evidence for rights review.
237. Indeed, Aroney and Kincaid, 'Comparative Observations' (n 114) 538 and Appleby and Delaney (n 46) likewise champion further research.
238. Appleby and Delaney (n 46).
239. Recall n 236.
240. For competing views on federal loyalty as an interpretative principle, compare Gamper (n 84) and Da Silva (n 85). For an explicit constitutional mandate, see Peeters and Mosselmans's (n 107) discussion of the Belgian case.

unnecessary for conflict resolution or border policing. And if a federal constitution lacks a loyalty principle, invoking loyalty may undermine the basic division of powers that is explicitly in that constitution. If parties must understand their powers in light of their impact on others and consistently seek to work with others, their use of the powers that they explicitly possess will be constrained and they will be institutionally incentivized to understand them in ways that blur boundaries, making nearly all areas potentially overlapping spheres. If judicial review cannot maintain federalism's constitutive jurisdictional divisions, courts' ability to police borders providing major motivation for judicial review in federal countries will be severely undermined.

This result admittedly offers some reason not to adopt fully cooperative understandings of federalism. However, it does not rely on the general plausibility of dualist federalism or autonomy-based definitions of federalism. The foregoing instead suggests that if a state does not explicitly adopt a loyalty principle, courts need not recognize one. One may, of course, then worry that this permits forms of 'federalism' without explicit commitments to cooperation. Yet dualist states clearly already exist. And the preceding did not beg the question of whether federalism is cooperative by definition. It instead provided principled reasons to question whether courts should or must interpret constitutions as necessarily cooperative. The constitutional interpretation recommendation offered here does not stem from a particular definition of federalism. Rather, the considerations justifying judicial review presented a recommendation about how to interpret dualist constitutions that may favor one definition.

The final point concerning constitutional interpretation following from the preceding is that many courts should be less deferential to other actors. Less deference to federal and provincial governments is necessary to fulfill the roles above. With respect to federal governments, judicial review here is also partially justified by concerns about undue centralization. Centralizing interpretive doctrines are thus questionable. At the very least, paradigmatically dualist states like the US should be less deferential. For example, the US preemption power permitting federal law to displace state law should be sparingly invoked to maintain state powers enumerated in the constitutional text.[241] Yet courts in states that recognize principles of cooperative federalism should likely be less deferential too. Canada is again interesting here. Canada has a clear constitutional division of powers but recognizes broad areas of overlapping or concurrent jurisdiction and a principle of cooperative federalism. It also recognizes a 'paramountcy' principle permitting federal laws to trump provincial ones.[242] This equivalent to the preemption principle should also be sparingly invoked. Courts may still use a preemption power wherever required by the constitutional text, like Germany.[243] But they should be reluctant to accept federal interpretations of federal powers that would limit provincial powers in ways that threaten jurisdictional boundaries. If, moreover, courts are primarily reviewing division of powers cases to resolve conflicts *and* police borders, we should also expect less deference to federal and provincial governments on the constitutionality of their actions, either independently or in intergovernmental agreements. The Canadian principle of interjurisdictional immunity protecting core areas of federal and provincial competence should thus be invoked more often, and there should be less

241. On the US law, see e.g. *Wyeth v Levine*, 555 US 555 (2009) and commentary thereon.
242. On the Canadian law, see e.g. *Rothmans, Benson, & Hedges Inc v Saskatchewan*, 2005 SCC 13 and commentary thereon. American and Canadian doctrines are also covered in any introductory constitutional law textbook.
243. On German law, see e.g. art 31 of the German Basic Law and commentary thereon.

deference on the constitutionality of cooperative schemes than Canadian courts have shown to date.[244] If the preceding is correct, legitimate judicial review in two of the world's largest and most influential federations, the US and Canada, requires more line-drawing regarding federal and provincial powers and less deference than seen to date. Other federal countries should likewise adopt principles maintaining clear areas of federal and provincial jurisdictions and be skeptical of schemes that could unduly alter the scope thereof.

244. See e.g. Kerry Wilkins, 'Exclusively Yours: Reconsidering Interjurisdictional Immunity' (2019) 52 UBCLR 697.