

# THE YALE LAW JOURNAL

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## Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony

**ABSTRACT.** The structure and operation of a federation's judicial system are complex, as any student of Federal Courts well knows. But they are also core to a federation's success. It is therefore surprising how little attention scholars have paid to the design and operation of "judicial federalism" from a comparative or theoretical perspective. In our effort to fill this gap, we rest our analysis on two key assumptions about federal judicial design: it should reinforce the continuation of the federation and ensure judicial legitimacy. We then examine how institutional design reflects these goals, focusing on the continuum between a fully integrated judiciary (one set of courts) and separate, dual judiciaries. We argue that the importance of ensuring judicial legitimacy has been overlooked, and we introduce the critical components of *sociological* legitimacy for federal systems: judicial integrity and judicial autochthony. Then, in a series of case studies drawn from the United States, Australia, and Canada, we analyze how these federations have managed the balance of integrity and autochthony over time. We do not seek to identify an optimal balance but intend to highlight the considerations at stake in constructing a federation's judicial architecture – and to demonstrate that judicial federalism deserves deeper and more sustained comparative analysis, more systemic assessment by judicial and political actors, and, ultimately, greater attention from those engaged in constitutional design. In other words, with this Article, we seek to establish the field of comparative federal courts as a site of sustained and serious inquiry.

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## **ARTICLE CONTENTS**

<b>INTRODUCTION</b>	2421
<b>I. CONSTRUCTING A FEDERAL JUDICIAL SYSTEM</b>	2430
A. Federal Success and the Dual-Integrated Continuum	2430
B. Judicial Legitimacy: Integrity and Autochthony as Sociological Inputs	2436
<b>II. MANAGING BY DELEGATION</b>	2443
A. Integrity Through Integration	2445
B. A Dualist Approach	2451
1. Limitations for Integrity	2451
2. Benefits for Autochthony	2455
<b>III. MANAGING BY IMPLICATION</b>	2456
A. Rights Limitations: The United States	2457
B. Structural Limitations: Australia	2466
1. Protecting Autochthony	2467
2. Implying Integrity	2472
<b>IV. MANAGING BY AMENDMENT</b>	2482
A. Canadian Judicial Federalism	2483
B. Renegotiating the Federal Balance: Québec and Judicial Autochthony	2485
<b>CONCLUSION</b>	2493

## INTRODUCTION

To a student newly introduced to Federal Courts, the design of the American judicial system can be in equal parts fascinating and frustrating, as she masters the turns and U-turns in the justifications and mechanisms for managing the complex judicial relationships that our federalism requires. The accretion of doctrine over two hundred years of active management is only part of a story that also includes myriad congressional statutes and state judicial and state legislative action. More than just technically complex, the field highlights some of the nation's most contested and enduring political issues, including the legacy of slavery and the challenges of racial bias. There is little wonder the course is considered one of the most challenging in law school.

Notwithstanding the idiosyncrasies of the U.S. system, it seems likely that other longstanding and democratic federations would have similar complexities in their judicial systems, with similarly important ramifications. A casual observer might expect that there would be robust comparative literature and a clearly articulated set of design principles for structuring judiciaries in federations. But comparativists and constitutional designers have generally ignored the area.<sup>1</sup>

This gap might be explained, at least in part, by the complexities themselves. The technical detail and nuance of the structure and practice of judicial federalism in any individual system are challenging to master and thus the subject of substantial scholarship within each jurisdiction. Assessing judicial federalism comparatively, whether for theory generation or to identify best practices, requires a considerable depth and breadth of knowledge.<sup>2</sup> And federal constitutional design introduces many other critical, and sometimes existential, issues: questions of legislative and executive structure, fiscal responsibility, the division

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1. See, e.g., Sujit Choudhry, *Classical and Post-Conflict Federalism: Implications for Asia*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 163, 171 (Rosalind Dixon & Tom Ginsburg eds., 2014) (noting that “judicial federalism has attracted less comparative attention” than other areas of constitutional design); Peter H. Russell, *Foreword* to *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?*, at vii, vii (Nicholas Aroney & John Kincaid eds., 2017) (“We need more systematic comparative study of federal court systems to gain a better understanding of how the organization of courts in federations affects the federal balance of power and the quality of justice.”).
  2. The future of scholarship in this area will likely arise from academic collaborations, such as the one that produced this Article.

of competences among levels of government, electoral systems, and power-sharing arrangements usually command the most scholarly (and practitioner) attention.<sup>3</sup>

To the extent that the existing literature implicates the judicial structures of federal constitutional systems, the focus remains largely on apex courts,<sup>4</sup> with scant attention paid to the broader federal context in which judicial systems necessarily operate.<sup>5</sup> Scholars of federalism have long been interested in the role of the “supreme judicial arbiter” — an apex court with authority to interpret the constitution and monitor jurisdictional divides — and how it might affect levels of centralization or decentralization in a federal system,<sup>6</sup> as well as the importance of maintaining various safeguards to shore up its institutional independence. But the literature on judicial federalism more broadly has been limited to describing and categorizing federal judicial systems along a continuum between “dual” sys-

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3. For example, in *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, leading authors provide only seven pages on judicial provisions, and their analysis is focused on the role of an apex court in determining rights and federalism questions. They mention nothing about the broader design of the judicial system. MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 151-57 (2004); see also JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 119-25 (2009) (focusing solely on the apex court).
  4. Interest in the apex court is ubiquitous in federalism literature. See, e.g., S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* 122 (1978); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 144 (1959); IVO D. DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* 206-08 (1970); URSULA K. HICKS, *FEDERALISM: FAILURE AND SUCCESS* 7 (1978); K.C. WHEARE, *FEDERAL GOVERNMENT* 58-59 (4th ed. 1963); W.J. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY: A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANIZATION OF COURTS IN FEDERAL STATES* 297-373 (1959); Gabrielle Appleby & Erin F. Delaney, *Judicial Systems in Federal Systems*, in *MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW* (Rainer Grote, Frauke Lachenmann, Rüdiger Wolfrum & Ana Harvey eds., 2016) (discussing the role of the apex court in Section B); *THE FUTURE OF AUSTRALIAN FEDERALISM* (Gabrielle Appleby, Nicholas Aroney & Thomas John eds., 2012).
  5. Leading federal theorists barely mention the subject. See, e.g., WHEARE, *supra* note 4, at 67-69; DUCHACEK, *supra* note 4, at 252-55. *But see* WAGNER, *supra* note 4, at 73-165.
  6. Discussions of federal theory broadly agree on the need for an institution that can monitor and define the jurisdictional boundaries between national and subnational competences set out in the constitutional document. There is general acceptance that such an institution ought to be judicial: a “supreme judicial arbiter.” *But see* WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 10-11 (1956) (arguing that a supreme arbiter need not be judicial). For a comparative analysis of federal centralization and decentralization, see generally *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?*, *supra* note 1.

tems (those with separate, parallel sets of federal and state courts) and “integrated” systems (those with one all-encompassing judicial system).<sup>7</sup> This descriptive-design exercise undersells the importance of judicial federalism to judicial legitimacy at both the national and subnational levels and the fragility of that legitimacy, particularly when courts are engaged in highly contested policy arenas.

This lack of attention to judicial federalism is therefore surprising given the surge in scholarly attention to judicial legitimacy. The academy has long been asking critical normative questions about judicial power: what justifies a court’s decision to strike down an act of a democratically elected legislature? What ensures a court’s authority to push back against an overreaching executive? And in the United States, judicial power is receiving renewed critique, given new appointments to the Supreme Court: recent assessments of the Supreme Court’s legitimacy (or legitimacy crisis) have not only filled the pages of the nation’s top law reviews<sup>8</sup> but have been regularly found in mainstream media.<sup>9</sup>

In attempting to understand the scope and extent of judicial power – and, in some cases, to justify its use – lawyers and political scientists have identified, quantified, and theorized various facets of judicial legitimacy, distinguishing a

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7. See Cheryl Saunders, *Legislative, Executive, and Judicial Institutions: A Synthesis*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 344, 365 (Katy Le Roy, Cheryl Saunders & John Kincaid eds., 2006).
  8. See, e.g., Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609, 2609 (2022); Deepa Das Acevedo, *A Tale of Two Courts*, 105 CORNELL L. REV. ONLINE 67, 67–68 (2020); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 150–53 (2019); Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240–41 (2019) (reviewing RICHARD H. FALLON, JR., *LAW & LEGITIMACY IN THE SUPREME COURT* (2018)).
  9. Peter Coy, Opinion, *The Politicization of the Supreme Court Is Eroding Its Legitimacy*, N.Y. TIMES, June 27, 2022, <https://www.nytimes.com/2022/06/27/opinion/dobbs-supreme-court-legitimacy.html> [<https://perma.cc/ZN9H-NDAJ>]; David B. Rivkin, Jr. & Jennifer L. Mascott, Opinion, *The Supreme Court Reclaims Its Legitimacy*, WALL ST. J., June 24, 2022, 1:54 PM ET, <https://www.wsj.com/articles/supreme-court-reclaims-legitimacy-abortion-roe-v-wade-dobbs-v-jackson-women-health-reproductive-rights-life-originalism-justice-alito-11656084197> [<https://perma.cc/WYQ3-M9T2>]; Molly Coleman & Tristin Brown, *The Supreme Court’s Legitimacy Crisis: From Recusal Issues to Blatant Partisanship*, TEEN VOGUE (June 16, 2022), <https://www.teenvogue.com/story/supreme-court-legitimacy-crisis> [<https://perma.cc/8F2G-BKNK>]. Note also the decision by President Biden to convene a Commission on the Supreme Court of the United States. Exec. Order No. 14023, 86 Fed. Reg. 19569 (2021). The Commission completed its work in December 2021. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES: FINAL REPORT (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/TQY5-JJVU>]. Although beyond the scope of this Article, there are useful comparative lessons for this specific U.S. debate, particularly in light of the ways in which integrity and autochthony interact in Australia and Canada. See *infra* Parts III–IV.

court's legal legitimacy from its sociological legitimacy and institutional legitimacy.<sup>10</sup> And scholars have debated and contextualized the relative importance of these ideas in evaluating, *inter alia*, judicial independence, accountability, appointments, modes of opinion writing, impartiality, theories of interpretation, and “weak form” judicial review.<sup>11</sup>

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10. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789-1801 (2005); see also Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1017-31 (2007) (discussing legal, moral, and sociological legitimacy); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 8-9 & nn.20-27 (2016) (discussing institutional and sociological legitimacy); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL’Y 353, 353-57, 364 (2020) (discussing sociological legitimacy); *infra* text accompanying notes 18-19 (discussing sociological legitimacy).
  11. Scholars have explored the link to judicial legitimacy in these often-overlapping structural and process-based considerations. For example, scholarship around judicial selection and appointments has examined accountability measures countering the delegitimizing effects of a judiciary perceived to be taking on functions traditionally left to democratic processes. Charles G. Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEG. ETHICS 1259, 1259-63 (2008); Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom*, 14 INT’L J. CONST. L. 752, 753 (2016). Scholars have debated how transparent opinion writing can simultaneously foster various forms of legitimacy through independence and accountability, though also imposing residual costs on judicial and social harmony. Mathilde Cohen, *When Judges Have Reasons to Not Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 496-504, 517 (2015) (weighing arguments for and against reason-giving as a legitimizing feature of judicial review); ROSALIND DIXON, *RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE* (2023) (evaluating institutional and individual judicial capacity to engage in responsive review through opinion writing); see Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) (urging “adequately principled opinion[s]”). Still others have pressed depoliticizing and democratizing methods and aims of judicial decision-making as vital to legitimate judicial authority. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595-96 (1995) (advocating for a “metademocratic” statutory interpretive method to prevent impressions of judicial politicization); Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 LAW & SOC. INQUIRY 137, 140 (2010); Corey Barwick & Ryan Dawkins, *Public Perceptions of State Court Impartiality and Court Legitimacy in an Era of Partisan Politics*, 20 ST. POL. & POL’Y Q. 54, 54-57 (2020). Others recognize the use of strategic decision-making in order to preserve institutional legitimacy. Vuk Radmilovic, *Between Activism and Restraint: Institutional Legitimacy, Strategic Decision Making and the Supreme Court of Canada* 42 (2011) (Ph.D. dissertation, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/31908/1/Radmilovic\\_Vuk\\_201111\\_PhD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/31908/1/Radmilovic_Vuk_201111_PhD_thesis.pdf) [<https://perma.cc/54YN-SPNW>] (analyzing the impact of judicial growth on legitimacy). Evaluating judicial review itself, Mark Tushnet has suggested a framework of weak-form judicial review to optimize judicial competence and democratic accountability. See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

Here, too, the tendency has been to focus on the legitimacy of a legal system's apex court,<sup>12</sup> especially if it has authority to conduct constitutional review or articulate rights – an understandable focus given the critical role an apex court plays in a federal system.<sup>13</sup> But scholars have rarely asked how judicial legitimacy might be affected and fragmented by the design and operation of the (often multiple) judicial systems within a federation.<sup>14</sup> And no one has yet explored the ways in which judicial legitimacy might be complicated by federalism more broadly or how it might (or should) be considered in federal judicial design. A federation's set of lower courts, however structured, is key to the operation of the rule of law within the federation,<sup>15</sup> and threats to lower federal or state court legitimacy can undermine the broader federal system.

In short, the institutional design decisions that structure and ensure the legitimacy of federal judicial systems are undertheorized and deserve attention. In this Article, we take a first cut at engaging with the broad questions raised in these federal contexts. How can we understand the legitimacy of a federation's

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12. Divisions of opinion have emerged as to whether such a judicial arbiter should exercise general as well as constitutional jurisdiction, or whether it should be a specialized constitutional body. See Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 817 n.3 (Michel Rosenfeld & András Sajó eds., 2012) (surveying scholarship on the institutional features of constitutional courts). Some federations, in the mold of post-1920 Austria, have apex administrative courts integrated into the federal construct with separate Kelsenian constitutional courts. See Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT'L & COMP. L. 539, 539 (2011) (listing countries across Europe, Asia, and Latin America that adopted versions of the Kelsenian model). This Article's focus on the United States, Australia, and Canada effectively leaves the design of systems with specialized constitutional courts for future scholarship. See *id.* at 541-43 (highlighting the unique dynamics borne out of judicial structures including a specialized constitutional court, coordination and deference norms, intrajudiciary supremacy conflicts, and realpolitik issues).
  13. Cf. Erin F. Delaney, *The Federal Case for Judicial Review*, 42 OXFORD J. LEGAL STUD. 733, 733-38, 751-57 (2022) (contending that, in a federation, the federal apex court is superior to the federal legislature for settling disagreements over rights).
  14. A recent exception is in the work of Tara Leigh Grove, who has addressed legitimacy within the hierarchy of the federal judiciary in the United States. See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1563-66, 1581-1614 (2021). In Australia, scholars have looked across the federation at questions of authority, but, again, not at the impact of judicial federal design. See SHARYN ROACH ANLEU & KATHY MACK, *PERFORMING JUDICIAL AUTHORITY IN THE LOWER COURTS* 1-14 (2017).
  15. Cf. Grove, *supra* note 14 at 1592-1600 (arguing for the importance of considering the legitimacy of lower federal courts in the United States).

system of “judicial federalism,”<sup>16</sup> and what insights might it provide to constitutional design? In doing this, we draw on federal theory and comparative analysis. Our aim is to explore how the legitimacy of judicial hierarchies across a federation might intersect with the value tensions that inhere in federal constitutional design.

We begin with two threshold assumptions about design. First, we assume that, whatever structure of judicial federalism is selected, constitutional designers would seek to ensure that the judiciary will foster the nascent federation – or at least not contribute to the federation’s fracturing.<sup>17</sup> Given this assumption, we would expect that judicial design would, within the constitutional strictures imposed, shift along that dual-integrated continuum mentioned earlier, balancing (or prioritizing) centralizing and decentralizing features depending on the needs and context of the particular constitutional system at any given moment in its history.

Second, we assume that constitutional designers would wish to ensure the legitimacy of the courts at every level of the federation. In this context, our focus is on courts’ *sociological legitimacy*, which is identified in the literature as “a mixture of compliance and enforcement in the face of substantive disagreement.”<sup>18</sup> Although both the need for and the measurement of sociological legitimacy have

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16. We focus here on judicial design and the relationship between state and federal courts, but we note that in other contexts “judicial federalism” has been used to label how an apex court constructs or manages a balance of powers (or of duties) within a given federation, or how state courts in the United States have used state constitutions to vary from the federal baseline of rights protection. In this, there may well be “judicial federalism(s).” See, e.g., Judith Resnik, *Federalism(s)’ Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV* (James E. Fleming & Jacob T. Levy eds., 2014); Heather K. Gerken, *Our Federalism(s)*, 53 *WM. & MARY L. REV.* 1549 (2012).

17. The relevance of this assumption is reinforced by our case studies, which draw from three “coming together” federations – the United States, Australia, and Canada. Coming-together federations result from a bargaining process in which previously independent polities simultaneously pool some sovereignty and retain some identity to achieve increased collective security, economic, or other goals. See Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 *J. DEMOCRACY* 19, 21 (1999); William H. Riker, *Federalism*, in 5 *HANDBOOK OF POLITICAL SCIENCE: GOVERNMENTAL INSTITUTIONS AND PROCESSES* 93, 93-172 (Fred I. Greenstein & Nelson W. Polsby eds., 1975). Given the component states’ mutually reinforcing incentives, we can assume the minimum goal is polity continuance in these contexts. This assumption is further informed by constitutional-design processes, which generally include endurance of the regime itself as a central objective. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 65-92 (2009).

18. Delaney, *supra* note 10, at 8.



been explored,<sup>19</sup> the inputs to sociological legitimacy remain vague. We propose two key values as undergirding sociological judicial legitimacy in the federal context: judicial integrity and judicial autochthony.

By *judicial integrity*, we mean a commitment to fundamental tenets of the rule of law. Among these tenets are protections for judicial independence, predictability and consistency in legal decision-making, requirements of judicial impartiality, fair and consistent judicial processes, and the equal application of the law. Although this commitment will be shared across the federation, we assume ongoing debate as to whether its instantiation must be uniform or whether and to what extent it permits design variation.

*Judicial autochthony*, a term that we introduce, represents the idea that a court system is understood to be of, and in some way accountable to, the society over which it operates. Judicial autochthony thus acknowledges the need for the structural design and jurisdiction of courts to be institutions of local confidence, as well as to be locally responsive and to allow for local experimentation. It is likely to require flexibility and a variety of approaches to judicial design within the individual component states of the federation.

These values resonate with the broader federalism literature, where there is a well-theorized tension between uniformity (often through centralization, promising shared standards, effectiveness, and efficiency) and diversity (through localization, ensuring political ownership, and benefits of subsidiarity). They also dovetail in part with the ideas of independence and accountability developed in literature on judicial efficacy. We explore these areas of overlap in Part I, where we develop this conceptual framework for the federal context.

In Part I, we contextualize the two foundational assumptions above by first reviewing the existing scholarship on federal judicial design. In so doing, we focus on the dual-integrated continuum and how this design choice has been associated with broader questions of federal design and federation success. Second, we turn to judicial legitimacy and explain further the basis for our assertion that integrity and autochthony should be understood to animate sociological legitimacy in federal judicial systems. Finally, we explain how the continuum and legitimacy values interact and argue that this expanded focus on values is vital for design.

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19. See James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 52 J. POL. 1120, 1120-26 (1992) (measuring diffuse support for the Supreme Court among Black Americans); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 197 (2005) (finding little evidence for the proposition that “sharp splits in Court decisions substantially delegitimized those outcomes”); Delaney, *supra* note 10, at 8-9, 67.

In Parts II, III, and IV, we provide examples of how key institutions and constitutional actors have attempted to manage their federation's system of judicial federalism and the implications of these efforts for federal judicial legitimacy. We draw from the experiences of three federations: the United States, Australia, and Canada, all of which share key similarities, including preexisting states or provinces that joined together in federation, with preexisting state or provincial courts, as well as a similar common-law legal background. In each of these jurisdictions, the federal dimension of judicial design received comparatively limited consideration at the federation's founding, with some of the core aspects of judicial federalism, including the sociological legitimacy of the federation's courts, intentionally deferred to post-ratification institutions and actors.

Each federation has also faced challenges in constructing and maintaining judicial legitimacy. And each has drawn on different management approaches with varying success for legitimacy and distinct normative implications for design.<sup>20</sup> We isolate and explore three core mechanisms of judicial legitimacy management: by delegation to the legislature, by implication through judicial interpretation, and by constitutional amendment. Each mechanism is associated with a primary institutional actor (or actors, in the case of amendment) and thus exhibits in practice the features and limitations of that institutional actor. Operating within the system as a whole, the institutional actors (and thus the mechanisms) necessarily interact with one another and therefore can be mutually reinforcing—or undermining. In the Parts that follow, although we have chosen to foreground a singular mechanism, we will note where and how these approaches intersect.

In Part II, we examine management by delegation, specifically, the explicit constitutional delegation in the U.S. Constitution to Congress of both the power to determine the broader structure of the judiciary (whether dual or integrated) and the power to adjust jurisdictional allocations between state and federal courts, depending on developing social, political, and economic exigencies. This U.S. case study demonstrates that power delegation can address some issues for the broader judiciary's sociological legitimacy, whether they be anticipated or latent, in both dimensions of integrity and autochthony. Nevertheless, this approach has distinct limitations depending on the nature of the integrity concerns

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20. All three of these federations have sizeable Indigenous populations for whom the concept of judicial “autochthony” may reflect an ongoing Western imperialism if unconnected to legal pluralism and Indigenous legal culture and traditions. Each federation has a distinct and complicated history and legal framework for engaging with Indigenous populations and each has a different approach to recognizing tribal governance. Although beyond the scope of this Article, the ways in which subnational judicial autochthony interacts with Indigenous autonomy and Indigenous legal-autochthony claims deserve detailed analysis.

that are raised and ultimately proved insufficient for ensuring the legitimacy of state courts in the American context.

In Part III, we consider the management of judicial legitimacy by apex courts through judicial implication. In both the United States and Australia, challenges to judicial integrity within the state courts have come before apex courts, which have used judicial interpretation and doctrinal elaboration to construct implied federal constitutional limitations that protect and promote judicial legitimacy. In the United States, the Supreme Court has developed a robust individual-rights jurisprudence to demand integrity in state judicial processes. And in Australia, the High Court has derived implied structural limitations to ensure minimum integrity standards across state courts. These approaches have had different implications for judicial autochthony, however. Ultimately, it is unclear whether these doctrinal solutions can provide sustained overall legitimacy benefits, as the balance they strike between integrity and autochthony is unstable: the integrity protections are considered too minimal by some, while others may find local expectations of the court system frustrated by these integrity-protecting doctrines.

In Part IV, we look at efforts to amend the constitution as a solution to misalignments and dissatisfaction with a federation's form of judicial federalism. We review the Canadian experience, particularly Québec's claims of insufficiently autochthonous courts. This case reveals a critical challenge for constitutional amendment: frustration with judicial autochthony is likely to be a symptom of larger anxieties about the level of centralization in the federation and the scope of state (or provincial) autonomy. Addressing these concerns through amendment opens the door to a renegotiation of the federal compact itself, a threatening endeavor both to current or ongoing politics and to the stability of the federation.

In conclusion, we distill from these case studies some preliminary lessons both for constitutional designers as well as for those involved in the ongoing management of judicial federalism. Designing any federal judicial system is a deeply contextualized project, and we acknowledge that the examples with which we engage are limited in their breadth. We highlight them not to develop and present a generalized normative theory of how a federal judicial system *should* be structured to maximize judicial legitimacy but rather to shed light on some of the complexities of judicial federalism and federal judicial design. These case studies demonstrate that judicial federalism—just like political federalism—is an inherently dynamic concept with serious repercussions for the wider constitutional system and worthy of continued study.

## I. CONSTRUCTING A FEDERAL JUDICIAL SYSTEM

In this Part, we begin with a review of the literature on federal judicial design and its efforts to describe and categorize federal judicial systems. The choice of constructing a dual versus an integrated system is necessarily rooted in the context of the emerging federation, and we therefore contextualize our understanding of the categorization by reflecting on the instrumental purpose of judicial federalism vis-à-vis the federation. We then argue that judicial legitimacy provides a critical lens through which to enrich this discussion. Finally, we disaggregate the sociological legitimacy of courts, identifying two key components in this context: *judicial integrity* (including judicial independence, fair process, and equality) and *judicial autochthony* (including confidence, diversity, local responsiveness and accountability, flexibility, and experimentation).

### A. Federal Success and the Dual-Integrated Continuum

The literature on federal judicial design is largely descriptive; the dual-integrated continuum has been the central organizing typology. In Cheryl Saunders's words, a dual system is one that "involve[s] largely separate and parallel court hierarchies for each sphere of government, exercising the jurisdiction assigned to the respective spheres."<sup>21</sup> In a strongly dual system, the national and constituent subnational governments would each have a separate set of courts, with distinct jurisdiction only over its own (national or subnational) area of law.<sup>22</sup>

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21. Saunders, *supra* note 7, at 365.

22. In its early and idealized form, the American-style strong dual federalism model defined separate, mutually exclusive spheres for national and state action. See, e.g., *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870) (describing the general government and the states as "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres"). Over time, this model has softened into a one-way check on state action, as the Court has increasingly prioritized protecting national interests. See Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV*, *supra* note 16, at 34, 34-35 [hereinafter Young, *The Puzzling Persistence of Dual Federalism*]; Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 *GEO. WASH. L. REV.* 139, 146-50 (2001) (collecting cases). Edward S. Corwin argued dual federalism had altogether ended in the United States, eclipsed by a centralization model. Edward S. Corwin, *The Passing of Dual Federalism*, 36 *VA. L. REV.* 1, 4 (1950). Yet this observation presumes that dual federalism is the term describing a model for allocating functions between a national government and the states. Some critics of this allocation definition, such as Sotirios Barber, argue dual federalism is "any effort to impose constitutional federalism-based limitations of national authority" through states' rights. See Young, *The Puzzling Persistence of Dual Federalism*, *supra*, at 35; Sotirios A. Barber, *Defending Dual Federalism: A Self-Defeating Act*, in

Each level of government would also enjoy autonomy over judicial appointments. In contrast, an integrated system “involve[s] a single court hierarchy, authority over which is likely to be divided between the national government and the constituent units,” although “[i]t may . . . be assigned to the national government alone.”<sup>23</sup> Given the importance of judicial authority, and the connection between judicial federalism and wider federal design,<sup>24</sup> a country with the most extreme version of an integrated system – only one set of courts run by the national government with comprehensive jurisdiction – might engender questions about its own classification as a federation.<sup>25</sup>

The dual-integrated distinction aids in classifying and analyzing system design, though scholars differ on the nuances of categorization.<sup>26</sup> Of course, as Saunders explains, these categorizations are not meant to be “watertight.”<sup>27</sup> Indeed, the identified need for a supreme judicial arbiter in a federal constitutional system means that even in an otherwise dual judicial system, such an institution would necessarily provide at least one node of integration at the apex of the system. We have previously suggested that it may be most useful to think of the

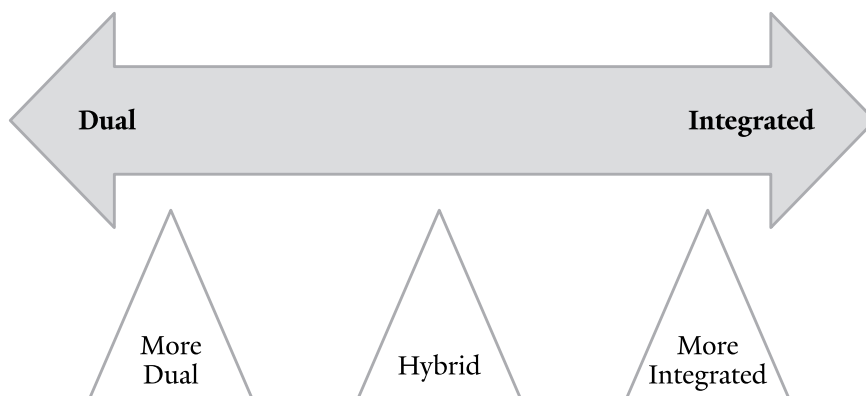
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FEDERALISM & SUBSIDIARITY: NOMOS LV, *supra* note 16, at 3, 3-5. Malcolm M. Feeley and Edward Rubin define the term as standing for “Marshallian federalism” or a managerial “decentralization” model. MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* (2008). The allocation definition is operative for this piece.

23. Saunders, *supra* note 7, at 365.
24. There will necessarily be considerable interaction between a federal system’s substantive division of competences and the ways in which the judicial system operates.
25. See WHEARE, *supra* note 4, at 65 (“If the federal principle were to be strictly applied one would expect a dual system to be established in a federation . . .”); see also WAGNER, *supra* note 4, at 131 (“The co-existence of two legal systems in every federal state necessarily results in a duality of government.”). Ivo D. Duchacek contended that having a dual system of courts was a hallmark of a federation. DUCHACEK, *supra* note 4, at 207-08. *But cf.* Russell, *supra* note 1, at vii (suggesting that “no particular court structure is essential for a country to qualify as a federation”).
26. Compare, e.g., Appleby & Delaney, *supra* note 4 (grouping court systems into “dual” and “integrated” court systems), with Cheryl Saunders, *Courts in Federal Countries*, INT’L IDEA 3 (Mar. 2019), <https://www.idea.int/sites/default/files/publications/courts-in-federal-countries.pdf> [<https://perma.cc/D3G4-W859>] (adding “single court hierarchy” as a third category). Metrics of categorization include how jurisdiction is allocated, the ability to conduct federal constitutional review, the existence of subnational constitutions, various types of appellate review, and oversight and appointment mechanisms. See Erin F. Delaney, *Judicial Federalism in Comparative Perspective*, in *FEDERALISM AND THE COURTS IN AFRICA: DESIGN AND IMPACT IN COMPARATIVE PERSPECTIVE* 15, 22-23 (Yonatan T. Fessha & Karl Kössler eds., 2020).
27. Saunders, *supra* note 7, at 366.

extreme versions as anchoring either end of a continuum (Figure 1).<sup>28</sup> Most systems fall into the “hybrid” middle and vary in their form,<sup>29</sup> which suggests that the typology may be “ripe for reimagining.”<sup>30</sup>

FIGURE 1: FEDERAL JUDICIAL DESIGN DUAL-INTEGRATED CONTINUUM



There are myriad design choices embedded in the dual-integrated distinction. Beyond the foundational questions, including the desirability of multiple court systems and mechanisms of judicial appointments, there are technical legal issues to determine – assigning jurisdiction between or among courts, defining the jurisdictional limits of each system of courts, and creating mechanisms of conflict resolution where jurisdictional disputes arise. There are also more pragmatic challenges, including questions of cost, efficiency, capacity, and staffing.

The major “choice” between an integrated or a dual system, and the necessary selections that flow from that initial decision, all presuppose some set of values that should be maximized or accommodated in some way in design. But the scholarly and practical literature has thus far failed to identify those values. Materials created to assist with the constitutional design of federal systems have

28. For an analysis of different federal systems and where they sit on this continuum, see Appleby & Delaney, *supra* note 4.

29. Though there is not academic consensus on continuum categorization, hybrid systems generally range from Australia (sometimes considered dualist) to the more integrated systems of Germany, India, and Malaysia. See Delaney, *supra* note 26, at 22-23.

30. *Id.* at 23.

tended to focus on jurisdictional and pragmatic decisions that must be addressed.<sup>31</sup> In the International Institute for Democracy and Electoral Assistance's 2011 publication, *A Practical Guide to Constitution Building: Decentralized Forms of Government*, core underlying values are referenced only obliquely and without analysis tailored to the design challenges at hand. For example, in reviewing the advantages of an integrated model, the *Guide* outlines the model's pragmatic attractions, including its ability to alleviate difficult questions of jurisdiction and reduce costs.<sup>32</sup> It gets closer to exposing the value judgments that might inform judicial design choice when it indicates that integration is likely to lead to greater uniformity, thus increasing predictability of decisions.<sup>33</sup> Similarly, in discussing a "separated" (or what Saunders refers to as a "dual") model, the *Guide* explores its possible advantages to the polity in terms of independence, variety, and competition.<sup>34</sup> But these gestures are made only at a general level, referencing diversity and uniformity as typical federalism values without much further analysis, and without consideration to the foundational concern of judicial legitimacy in the federal system.<sup>35</sup>

At some level, the very complexity and mix of political pressures at the moment of federal design provide some answer to this lack of attention to legitimacy when designing federal *judicial* systems. The initial and ongoing viability of a nascent federation will often be a driving—and overwhelming—political concern. The decision whether to adopt a dual or integrated judicial design will be context-specific and often a direct result of expectations and anxieties related to federal success. In this pressurized dynamic, general indications of whether a system will lead to greater uniformity or greater diversity can be simple and useful benchmarks for designers as they contemplate their options. In other words, the legitimacy questions facing the federation writ large are likely to overwhelm any thoughts of the more fine-grained nature of fostering a legitimate judicial system.

History shows that federal designers can be aware of, yet paralyzed by, judicial design. For example, the dual-integrated continuum for structuring federal judicial systems has its roots in the American Founding debates, reflecting the

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31. Markus Böckenförde, *A Practical Guide to Constitution Building: Decentralized Forms of Government*, INT'L IDEA 31-32 (2011), <https://www.corteidh.or.cr/tablas/28321.pdf> [<https://perma.cc/GE9H-G6TX>] (prescribing a more restrictive classification, but adopting similar language of "separated/dual" and "integrated").

32. *Id.* at 33.

33. *Id.*

34. *Id.* at 33-34.

35. *Id.*

worries of designers and legislators regarding the success of the fledging federation.<sup>36</sup> When delegates to the 1787 Constitutional Convention in Philadelphia debated the role and organization of a new federal judicial branch, the dismal failure of the Articles of Confederation provided clarity and impetus to two core needs: an apex federal court and a concomitant robust federal judicial power to protect federal interests.<sup>37</sup> But how would or should the preexisting state courts dovetail with these changes?<sup>38</sup> Which inferior tribunals would support the new Supreme Court in the exercise of the expanded federal judicial power?<sup>39</sup> Finding no resolution, the delegates chose to postpone the debate over whether “inferior tribunals” would be newly created *federal* courts or the preexisting but newly

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36. We accept at face value the contemporaneous arguments and statements that fear of bias animated many of the judicial design decisions, but we recognize that a focus on state court or state judge bias may have been an excuse to hide or obscure other interests and that integrity concerns are only one aspect of what was necessarily a complex political compromise.
37. See THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the “want of a judiciary power” as a crowning defect of the central government created under the Articles). The Articles of Confederation only authorized Congress to establish courts for “the trial of piracies and felonies committed on the high seas” and for “receiving and determining final[] appeals in all cases of captures.” ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1. In response, the Convention drafted Article III of the U.S. Constitution. See generally JAMES E. PFANDER, ONE SUPREME COURT, at ix-xvi (2009) (arguing that the Constitution demands, at a minimum, that all state and federal court decisions over federal matters be reviewable by the Supreme Court).
38. State judicial systems developed slowly but took more robust forms after the Revolution. See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 572 (1989) (“In the early years of the Revolution, the judiciary had almost been forgotten.”); JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS 16–29 (2012); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 452–63 (1969) (explaining developments in the state judiciaries that aimed to temper the excesses of early state legislatures); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1027 (2001) (same). State judicial systems also varied meaningfully between states. See SHUGERMAN, *supra*, at 20, 58–60 (discussing differing features of state courts including life tenure, judicial elections, etc.). But see Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 841–42 (2012) (describing life tenure as an essential shared feature of state and federal judiciaries from the time of the Founding until the mid-nineteenth century).
39. See Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1458.



deputized *state* courts. In phrasing known as the “Madisonian Compromise,” Article III left it to Congress to “from time to time ordain and establish” inferior courts.<sup>40</sup>

In the First Congress, the debate over the designation of inferior tribunals was tightly intertwined with the fears of and hopes for federation itself. Those who feared the centralizing threat of the new federal judicial power advocated using the state courts as inferior tribunals.<sup>41</sup> Having state courts in control of this power would better serve to limit it. In contrast, many of the arguments in favor of creating new federal courts were driven by anxiety about states seeking to undermine the new federal government.<sup>42</sup> As Fisher Ames, who was worried about the propensity of state-court judges to favor state citizens,<sup>43</sup> stated, “[I]t seems little better than madness to my understanding to adopt the state courts. It is delivering the Govt. bound hand and foot to its enemies to be buffeted.”<sup>44</sup>

Ultimately, in the Judiciary Act of 1789, Congress resolved these issues by creating a distinct system of new federal trial and intermediate-appellate courts,

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40. U.S. CONST. art. III, § 1. Historian Julius Goebel suggests that the use of the word “appoint” might have indicated that Congress should choose the pre-existing state courts as the inferior courts, given that Congress had previously used its power to “appoint[] courts” in piracy matters “by designating state judges.” JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 212 (1971). But by choosing the more forceful “ordain and establish,” delegates were attempting “to assure that federal inferior courts *must* be created, and further, that the designation of state tribunals would not do.” *Id.* at 247 (emphasis added). At the same time, the Constitution clearly contemplated a role for state judges in enforcing federal law, as the Supremacy Clause of Article VI bound the judges in every state to the Constitution, federal law, and international treaties, suggesting that federal claims would not necessarily be exclusive to federal courts. See Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 13, 18-19 (Maeva Marcus ed., 1992) [hereinafter *ORIGINS OF THE FEDERAL JUDICIARY*].
41. Centinel I, *Independent Gazetteer*, Philadelphia, Oct. 5, 1787, reprinted in 1 *THE DEBATE ON THE CONSTITUTION* 58 (Bernard Bailyn ed., 1993).
42. Cf. Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 *IND. L.J.* 347, 347 (1976) (“[F]ear of state legislatures . . . significantly influenced the decision to provide for diversity jurisdiction.”). But see JAMES MADISON’S NOTES FROM THE CONSTITUTIONAL CONVENTION OF 1787 (July 18, 1787) [hereinafter *MADISON’S NOTES*], <https://www.nhccs.org/Mnotes.html> [<https://perma.cc/9EKQ-7H35>] (noting that delegates worried that inferior federal courts would threaten the federation, as “[t]hey will create jealousies & oppositions in the State Tribunals, with the jurisdiction of which they will interfere”).
43. These arguments were first offered at the Convention itself. See *MADISON’S NOTES*, *supra* note 42 (June 4, June 5); see also Holt, *supra* note 39, at 1458 (noting that the apparent bias of state courts and the need for the “invention of a federal judiciary” were on the minds of the delegates to the Constitutional Convention in 1787).
44. Marcus & Wexler, *supra* note 40, at 20 (internal quotation marks omitted).

structuring a national judicial framework that “endures essentially to this day.”<sup>45</sup> This parallel system of federal courts complemented, rather than replaced, the state judicial systems; as such, foundations were in place for a dual system. While recognizing the continued vibrancy and authority of the state courts, the Judiciary Act nevertheless attempted to integrate the state courts through appeal to the Supreme Court.<sup>46</sup>

This brief vignette, further explored in Part II, indicates the ways in which design decisions about judicial federalism connect with and reflect the operation of the federation. Acknowledging this relationship enriches our ability to evaluate the dual-integrated choices made by drafters and foreshadows the complications of attempting to “redesign” a federal judiciary through judicial or formal amendment after the federal settlement. We explore this complication in Parts III and IV. But in this Article, we seek to go further in understanding what is at stake in judicial federalism. It is critical to remember that it is a *judiciary* we are discussing and to engage with the requirement of judicial legitimacy. In this next Section, we consider how judicial design might promote, or undermine, judicial legitimacy across the different levels of the federation.

### B. *Judicial Legitimacy: Integrity and Autochthony as Sociological Inputs*

In addition to the continued existence of the federation itself, we assume a commitment to the legitimacy of its judicial system.<sup>47</sup> Taking this assumption seriously requires attention to the various inputs to judicial legitimacy and the elements of that legitimacy over which designers and later constitutional actors

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45. Holt, *supra* note 39, at 1478.

46. In the Convention, “delegates gingerly tiptoed around the explosive question of whether any sort of appeal would lie from state courts to federal.” William M. Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in *ORIGINS OF THE FEDERAL JUDICIARY*, *supra* note 40, at 224. *But see* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1618 (1990) (“[A]t the Convention, in the ratification debates, and in the first Congress, there surely was a widespread expectation that the Supreme Court would exercise appellate jurisdiction, often coupled with the observation that only such review could ensure uniformity.”).

47. Of course, there is not a strict demarcation between these goals. The elements of sociological legitimacy of the judicial systems that we discuss below may themselves be closely connected to the success of the federation—particularly the expectations of judicial autochthony. For instance, in Australia, peculiarly designed colonial judiciaries that manifestly lacked judicial independence were nonetheless incorporated into the new federal judicial system to facilitate the union. *See* Stephen McDonald, ‘*Defining Characteristics and the ‘Forgotten Court,’* 38 SYDNEY L. REV. 207, 221–23 (2016) (describing the South Australian Court of Appeal, which was thought to violate separation-of-powers principles by including members of the Executive Council).

may have some control. In general terms, judicial legitimacy is often disaggregated into component constructs; one influential article describes judicial legitimacy as having legal, moral, and sociological components.<sup>48</sup> Legal legitimacy can be understood as a fidelity to the legal method—the application of “rigorous standards of principled adjudication”<sup>49</sup>—and, by definition, is primarily within the control of judges making legal determinations through the development of case law. Moral legitimacy, or the normative legitimacy of the law itself,<sup>50</sup> is a substantive criterion that is an ongoing project of the entire society. Finally, sociological legitimacy is that which ensures societal “compliance and enforcement in the face of substantive disagreement.”<sup>51</sup> We argue here that there are important design implications for sociological legitimacy in a federal system.

In the federal context, the literature addressing sociological legitimacy is focused on the supreme judicial arbiter, or apex court, of the federation and its role in supporting the emerging federation. Conflicting concerns include the court’s ability to support a fledgling central government while still being sufficiently independent from that government, and the court’s responsiveness to the subnational governments. Because of the need for federal stability,<sup>52</sup> constitutional designers are likely to be attuned to the chance of actual or perceived bias in the makeup of the apex court, and they may seek to mitigate it.<sup>53</sup> But far less attention is given to legitimacy challenges rooted in the underlying judicial system or systems.

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48. Fallon, *supra* note 10, at 1802-03.

49. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 22 (1964).

50. Fallon, *supra* note 10, at 1803-13; Andreas Føllesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 THEORETICAL INQUIRES L. 339, 345 (2013).

51. Delaney, *supra* note 10, at 8.

52. Martin Shapiro describes an inherent instability of courts as the threat of the independent court structure breaking down into two-against-one. Martin Shapiro, *Courts*, in 5 HANDBOOK OF POLITICAL SCIENCE: GOVERNMENTAL INSTITUTIONS AND PROCESSES 322 (Fred I. Greenstein & Nelson W. Polsby eds., 1975). This concern would presumably be heightened in a federal system, where the breakdown could threaten the stability of the federal compact itself.

53. Of course, even here, not many federal systems have *constitutionalized* territorial representation on the apex court. See Delaney, *supra* note 13, at 751 n.139. Some engage the states—often through a role for the “States’ house” in the central legislature—in appointments. See, e.g., U.S. CONST. art. I, § 3; *id.* art. II, § 2; Grundgesetz [GG] [Basic Law], translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html) [<https://perma.cc/VK88-J9SY>]. There are myriad design questions dealing with this concern that could be addressed in any individual system. For example, is formal representation by territorial allocation appropriate? How are appointments and removal constructed?

We propose two key inputs to sociological legitimacy that should be examined within a broader federal judicial system: *judicial integrity* and *judicial autochthony*.<sup>54</sup> Judicial integrity is a familiar concept in constitutional jurisprudence and scholarship and is closely associated with public confidence in the judiciary as a legal institution. While it does not have a universal definition, the concept incorporates commitments to fundamental tenets of the rule of law and the operation of independent courts. It requires minimum protections for judicial independence; predictability and consistency in legal decision-making; standards of judicial impartiality; and fair and consistent judicial processes. The input of integrity will often serve a unifying function in judicial federalism, setting expectations for equal treatment (like cases being treated alike) irrespective of court or location and instantiating shared citizenship in the federal polity.<sup>55</sup> However, judicial integrity is not universally associated with centralization, and integrity in a federal judicial system might be best protected through autochthony and design choices at the subnational level.<sup>56</sup>

Judicial autochthony, in turn, represents the need for a court to be accepted by the society it serves.<sup>57</sup> We adopt the new term judicial autochthony to give meaning to the sense that, in a democratic society, a court should be rooted in some way in the people—imparting public confidence in the judiciary as a democratic institution. In this, judicial autochthony overlaps with judicial accountability—the idea that either through *ex ante* appointments or *ex post* review

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54. In focusing on sociological legitimacy, we are attempting to isolate the element of judicial legitimacy on which constitutional design can have a more obvious impact. We recognize, however, that Fallon's disaggregation does not result in water-tight compartments. Indeed, *legal* legitimacy will clearly affect understandings of *judicial integrity*, and the norms of judging are likely to change over time. See, e.g., JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011). Vicki C. Jackson has put forward the idea that judicial independence should be understood as a "package," including "legal, institutional, political, psychological, sociological, and culture elements." Vicki C. Jackson, *Packages of Judicial Independence: Implications for Reform Proposals on the Selection & Tenure of Article III Judges*, DAEDALUS 48, 48 (2008). Our stylized approach in this project necessarily flattens—but is not intended to disavow—the complexities of judicial legitimacy.

55. On the importance of shared citizenship to federation, see Erin F. Delaney & Ruth Mason, *Solidarity Federalism*, 98 NOTRE DAME L. REV. 617 (2022).

56. See discussion *infra* Sections II.B.2, III.B.2.

57. The challenge of identifying and defining the "public sphere" or "society" is a long-standing one. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 56-63 (1990). We sidestep some of these debates by defining the relevant "society" as those over whom the court can exercise its jurisdiction (i.e., "society it serves").

mechanisms, the people should have some role in authorizing or affirming judicial action.<sup>58</sup> But it goes beyond accountability and can be understood to encompass broader ideas of legitimacy.<sup>59</sup> For example, in a number of countries, those justifying efforts to diversify the bench have drawn upon the idea of reflective representation as a mechanism of legitimacy—that courts will inspire collective confidence if the bench is reflective of the people over whom it has jurisdiction.<sup>60</sup> Of course, actual representation would be in tension with principles of judicial impartiality: an individual judge cannot be understood to represent—or to ensure—preexisting substantive positions that would prevent him from even-handed adjudication.<sup>61</sup> And thus the language of representation (and, by implication, accountability) can function to encourage backlash to diversity efforts,<sup>62</sup>

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58. Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 399, 401 (2008) (examining the merits and challenges of judicial accountability mechanisms, including electoral options); K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ALTA. L. REV. 708, 721-22 (2000) (advocating for increased judicial accountability in the United Kingdom); see also Delaney, *supra* note 11, at 761-68 (discussing accountability in the sense that a lack of diversity in the judiciary of the United Kingdom threatened public perception of its legitimacy).
59. See DAVID K. RYDEN, REPRESENTATION IN CRISIS: THE CONSTITUTION, INTEREST GROUPS, AND POLITICAL PARTIES 15-19 (1996); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 11, 87-89 (1967).
60. Urbinati & Warren, *supra* note 58, at 401; Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 247 (2006) (“Descriptive representation increases perceptions of fairness and access to our judicial institutions because judges as officials mirror the characteristics of group identification.”); Richard Devlin & Adam Dodek, *Introduction: The Challenge of Empowered Judiciaries*, in REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY 1, 9 (Richard Devlin & Adam Dodek eds., 2016); see also Delaney, *supra* note 11, at 764-68 (discussing the link between representation and judicial legitimacy).
61. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 589 (2005). The efforts to reject “representation” in favor of “perspective-based” justifications, see, e.g., Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002), do not necessarily resolve this tension as “perspective-based” justifications can also be substantive in nature.
62. See Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 98-100 (2010); cf. Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 LAW & ETHICS HUM. RTS. 1, 61-84 (2021) (discussing several studies, including one on the impact of a judge’s gender on her decision-making).

for example, by inspiring demands for recusals.<sup>63</sup> Autochthony better frames the many intangibles of public confidence.<sup>64</sup>

Both judicial integrity and judicial autochthony would seem to contribute to the sociological legitimacy of any court in any judicial system, whether federal or unitary. But we consider judicial autochthony to have a special and additional relevance in federations. Unlike judicial accountability, which focuses on the *judiciary*—its actors or its outputs—judicial autochthony taps into the federal focus on subnational *communities*. In a federation, these subnational communities are organized territorially as jurisdictional constructs,<sup>65</sup> with some amount of stand-alone governing authority.<sup>66</sup> By using the term autochthony, therefore, we explicitly acknowledge the existence of these subnational communities, with their interests in reflecting the unique historical experiences, preexisting legal differences, or political preferences of their populations.<sup>67</sup> A full analysis of judicial autochthony thus requires an assessment of the role of subnational legislatures and their efforts to design, fund, and determine the jurisdiction and operation of “their” courts, as well as attention to and engagement with subnational constitutionalism and constitutional amendment.<sup>68</sup>

In a federation, judicial integrity and judicial autochthony may come into conflict. System-wide demands of judicial legitimacy might reinforce core rule-of-law and equality-of-justice principles. But uniformity imposed by the center could undermine confidence in local courts, which might then fail to appear responsive to local conditions or local needs. In turn, judicial autochthony allows for broad diversity in judicial design. While autochthony can therefore contribute to judicial legitimacy, it may also cause, or aggravate, tensions that threaten

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63. Litigants in the United States have used a judge’s racial background to impugn his or her impartiality. Federal courts have consistently rejected these efforts. *See, e.g., MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998) (“Courts have repeatedly held that matters such as race or ethnicity are improper bases for challenging a judge’s impartiality.” (citation omitted)).

64. Autochthony can also reflect substantive outcomes: such as the benefit to judicial decision-making of diverse groups, quite apart from any particular “representative” outcome that may result. *See Sherrilyn A. Ifill, Judicial Diversity*, 13 GREEN BAG 2D, at 45, 52 (2010).

65. *See* STEPHEN TIERNEY, *THE FEDERAL CONTRACT: A CONSTITUTIONAL THEORY OF FEDERALISM* 21 (2022) (describing the “centrality of constituent territories to the formation of the federal constitutional contract”).

66. The idea of an irreducible core of governing authority is one way in which theorists distinguish federations from systems of decentralization.

67. Only the Supreme Court of Canada has explicit subnational representation mandated by federal constitutional law. *See Delaney, supra* note 13, at 751 n.139.

68. *Cf. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 66 (2013) (discussing the role of state constitutional amendments in curbing state judicial power).

the endurance of the wider federative project.<sup>69</sup> Dramatic variation could foster intrafederation bias undermining the political union and could threaten rule-of-law values of predictability and consistency that uniformity promotes, as well as raise concerns about whether local variations are meeting rule-of-law thresholds.

Notwithstanding the potential for conflict, the two inputs can (and, we would argue, should) operate to reinforce one another. In this regard, these terms allow us to transcend claims of an inherent dialectical tension that some scholars have identified in the narrower independence-accountability framework.<sup>70</sup> The more capacious and overlapping nature of integrity and autochthony clearly reinforces their overarching and synthesized frame: public confidence in a federation's courts requires elements of integrity *and* autochthony, the balance of which will depend on the constitutional, political, and social context in which they are operating.

These inputs to sociological legitimacy do not neatly map onto the dual-integrated distinction, though there are obvious connections. For example, a fully integrated system in which the central government is singularly responsible for that system, and therefore which necessarily permits no localized variation, unifies integrity issues—biases and solutions receive a one-size-fits-all treatment. But this choice does not necessarily mean the system has prioritized judicial integrity. Indeed, the integrity protections in such a system may fall below the standards that might have been adopted across a dualist judicial system.<sup>71</sup> In many areas of judicial regulation and structure, there is no agreed 'best model' to achieve the various tenets of judicial integrity.<sup>72</sup>

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69. Cf. Erin F. Delaney, *Managing in a Federal System Without an 'Ultimate Arbiter': Kompetenz-Kompetenz in the EU and the Ante-Bellum United States*, 15 REG'L & FED. STUD. 225, 227-30 (2005) (explaining how judicial structure created conflicts between the U.S. Supreme Court and state courts as well as between the federal government and the states).

70. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMPAR. L. 103, 103, 105 (2009) (describing a dialectical tension between judicial independence and judicial accountability). *But see* Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System that Enhances Institutional Integrity*, 38 MELB. U. L. REV. 1, 37-38, 67 (2014) (arguing that the two concepts are reinforcing).

71. Weak national-integrity norms could in turn result in a push for a more dualist system, in which the subnational courts have sufficient autonomy to allow for greater integrity and legitimacy at the subnational level. In Australia, the federal government has proven resistant to calls for reforms that would enhance the integrity of the judiciary, while a number of Australian states have made significant inroads in designing new processes and structures relating to judicial appointments and judicial discipline.

72. *See, e.g., N Austl Aboriginal Legal Aid Serv v Bradley* (2004) 218 CLR 146, 152 (Austl.) (opinion of Gleeson, CJ) (discussing variances in independence inputs such as appointment, tenure, and court administration); *id.* ("The differences exist because there is no single ideal model

In some respects, judicial federalism reflects the values inherent in federation and the core design challenge: optimizing both shared commitments and common values alongside the benefits of variation and diversity. And the first of our threshold assumptions, that the federation is intended to endure, will make the balance and realization of these values an ongoing project. As we noted at the beginning of this Part, constitutional drafters may take some of these concerns into account in creating a federal judicial system. Explicit constitutional decisions could include positioning the judiciary along the dual-integrated continuum, identifying judicial appointments or removal mechanisms, allocating competences and identifying areas of uniform law, and enshrining system-wide constitutional rights such as fair process. At the initial drafting stage, constitutional framers may make proposals based on their contemporaneous assessments of preexisting courts in local hierarchies and relevant political demands.

But solving for inchoate and evolving threats to a judicial system's sociological legitimacy is challenging, especially when integrity and autochthony collide. For instance, designers may prioritize certain integrity concerns that support an initial decision for a fully integrated judicial system, leaving dissatisfied local communities with limited recourse when accountability or trust issues later threaten legitimacy. Or concessions to subnational control over local courts may later give rise to serious integrity concerns when judicial design, powers, and processes are driven by partisan or protectionist local politics, introducing bias. The likelihood of unanticipated events makes future interventions into judicial federalism probable.

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In the remainder of this Article, we explore a number of ways in which these dynamics between judicial integrity and judicial autochthony have been managed in contextualized examples. We draw on experiences across three aggregative federations: the United States, Australia, and Canada. In federations that combine subnational units with historically and culturally divergent legal traditions, subnational judicial variation may have been a necessary requirement for federation itself, leading inevitably to a form of dualist or at least dual-leaning hybrid systems. The potential arises for more robust diversity in institutional design and for differential—national versus subnational—integrity concerns. We demonstrate how legislatures, courts, and subnational units themselves

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of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.”).



(through proposed constitutional amendment) have navigated the shifting dynamics of judicial legitimacy embedded in a federal judicial system, and we highlight some potential lessons these experiences provide for institutional design.

## II. MANAGING BY DELEGATION

In this Part, we assess how shifts along the dual-integrated continuum may be used to manage judicial integrity and judicial autochthony, using the example of the United States. As mentioned above, the Framers of the U.S. Constitution intentionally deferred some of the more complex decisions relating to the new federation's judicial system, as the various design choices were closely tied to deeply politicized views about the fledgling federation. The authority was thus delegated to Congress to construct, monitor, and maintain the federal judiciary.<sup>73</sup> The tensions, already apparent in the Convention, were between the value of autochthony—and the concomitant interest of states in controlling their courts (and the federal judiciary)—and the threat of local bias undermining the integrity of the whole.<sup>74</sup>

In the Judiciary Act of 1789, Congress charted a course through these shoals, drawing on both dualist and integrated approaches.<sup>75</sup> Rather than address po-

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73. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation . . .”).
74. Madison warned of the possibility that “a strong prejudice may arise in some States, against the citizens of others, who may have claims against them.” 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1413 (John P. Kaminski & Gaspare J. Saladino eds., 1993); see also MADISON’S NOTES (June 5, 1787), *supra* note 42 (discussing the structure of the judiciary in light of a concern about “the local prejudices of an undirected jury”).
75. The Act’s approach to admiralty courts is instructive. Of critical importance at the time (but with waning relevance over the history of state-federal relations), prize cases were a major area of contention. State admiralty courts had original jurisdiction over prize cases, but the Articles of Confederation authorized Congress to create an appellate tribunal to review these state-court decisions. Thomas H. Lee, *Article IX, Article II and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787-1792*, 89 FORDHAM L. REV. 1895, 1902-03 (2021); ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1. This “Court of Appeals in Cases of Capture is widely recognized by scholars as the first ‘federal court.’” Lee, *supra*, at 1904. Appeals entailed complete relitigation, with no deference to state courts’ findings of facts or law. *Id.* at 1905. The system, however, failed to resolve conflicts among state admiralty court decisions. Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 461-63 (1925). The 1789 Act replaced the state admiralty courts with federal admiralty courts.

tential bias by controlling or standardizing state judiciaries (a political and constitutional impossibility),<sup>76</sup> Congress created a separate system of lower federal courts<sup>77</sup> with original jurisdiction over “controversies between citizens of different states”<sup>78</sup> – or “diversity” actions.<sup>79</sup> At the same time, Section 25 of the Act provided an integrative mechanism by authorizing appeals to the Supreme Court from state-supreme-court decisions that found against federal interests.<sup>80</sup> Against a backdrop of strong judicial autochthony, Congress addressed judicial-integrity concerns through an imperfect mixture of diversity jurisdiction in separate federal courts and appellate review of state courts by the Supreme Court.

But delegating this authority to the national legislature can only go so far, as courts themselves are able to interpret and structure statutory law. In the face of a Supreme Court committed to protecting state autonomy, Congress was limited in its options to counteract local bias. It therefore empowered litigants themselves to vote with their briefs to find the more neutral forum for their claims.<sup>81</sup>

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76. Cf. GOEBEL, *supra* note 40, at 211 (discussing Sherman and Rutledge’s pragmatic reasons for pushing back against certain proposals about the judiciary).
77. See Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 616-20 (2004) (arguing that concern for out-of-state creditors animated the decision to create lower federal courts); see also Holt, *supra* note 39, at 1478-1517 (same).
78. U.S. CONST. art. III, § 2 (identifying this part of the *federal* judicial power).
79. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 78-79. In addition, the Judiciary Act designated some areas of original jurisdiction to the federal circuit and district courts concurrent with the courts of the several states and some areas of exclusive jurisdiction, clarifying (though not exhausting) the extent of the constitutional jurisdictional grants. *Id.* § 9; see also Marcus & Wexler, *supra* note 40, at 16-17 (discussing congressional debate over concurrent and exclusive federal jurisdiction under the Act). Note that Article III itself granted the Supreme Court original jurisdiction “in cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party.” U.S. CONST. art. III, § 2.
80. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (allowing for Supreme Court review of decisions questioning the validity of treaties or federal statutes in which the highest state court decides *against* that validity; questioning the validity of a state law or state action as repugnant to the Federal Constitution in which the highest state court *upholds* the state law or action; and decisions of the highest state court *denying* a right claimed under the Federal Constitution, statutes or treaties). There is some question about the effectiveness of this “control” in the antebellum years. See Wiecek, *supra* note 46, at 224-29; Delaney, *supra* note 69, at 227-30.
81. Note that initially even federal district judges themselves were seen as closely connected to the state: “[T]he district judge will be elected from among the citizens of the State where he is to exercise his function, and will feel every inducement to promote the happiness and protect the liberties of his fellow-citizens.” Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 40, at 287 (quoting William Loughton Smith of South Carolina).

By pitting lower federal courts against state courts, Congress enhanced the dualist nature of U.S. judicial federalism.<sup>82</sup> Autochthony was maintained, and one threat to judicial integrity—local bias against out-of-state litigants—was neutralized.

### A. *Integrity Through Integration*

As an initial matter, the lion's share of litigation was left to the state courts, leaving the nascent federal courts in a subsidiary position to the robust, preexisting state judiciaries.<sup>83</sup> Integration, through Section 25 of the Judiciary Act of

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82. This more robust duality eventually led to twentieth-century claims of “parity” between state and federal courts, which were used both to suggest commensurability in quality and independence (regardless of differing safeguards) and to limit federal involvement with monitoring state judicial structure. Whether state courts are actually commensurate to federal courts in the enforcement of federal law is a well-explored topic in the literature on federal jurisdiction. Indeed, the empirical debate has generally been deemed unresolvable. See, e.g., Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1469 (2005) (“[N]one of the empirical literature on parity is, or purports to be, even remotely definitive . . .”); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1279 (2004) (similar); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 338 (1988) (similar). Nevertheless, lawyers continue to display a preference for federal court, Solimine, *supra*, at 1468, and scholars continue to present and develop principled arguments for doubting the propriety of parity-based assumptions in light of marked differences in judicial structure, see Redish, *supra*, at 338; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977).

83. One major issue that could have altered this story was the role of the common law. If Article III had been interpreted to incorporate at the federal level the common law—the main engine of business of state courts—federal courts would have had jurisdiction over large substantive areas of civil and criminal law. Charles Haines describes the efforts to argue for federal common law as indicative of “extreme centralizing tendencies.” CHARLES GROVE HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835*, at 160 (1944). A series of cases in the 1790s raised the issue in the context of the common law of crimes. See *Henfield’s Case*, 11 F. Cas. 1099, 1102-03 (C.C.D. Pa. 1793) (No. 6360); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99 (1793); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 391-92 (1798); STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 29-31 (1991); Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 272-73 (1986); Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 LAW & HIST. REV. 325, 327 (1986); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 235 (1986). Republicans “accused Federalists of scheming to dissolve any limitations on federal authority through the wholesale incorporation of British common law, which would have rendered legislative authority boundless.” Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1252 (1985). In *United States v. Hudson*, 11

1789, allowed for Supreme Court review of state decisions, a means of oversight for error correction. However, the scope of Section 25 was limited. If a state court chose to *uphold* a federal law or a federal right, for example, the Supreme Court had no way to review the reasoning or reconcile conflicts between state courts. Furthermore, appellate review was strictly confined to the substance of the case below, and any “collateral” claims—such as a challenge to the integrity of the state judge making the decision—would have been considered outside the scope of this jurisdiction.<sup>84</sup>

Prior to the Civil War, Congress made no attempt to strengthen this weakly integrated approach, but in the wake of the War, there were attempts to increase the scope of the Supreme Court’s jurisdiction over state courts. Three main developments are of particular note: an attempt to increase the scope of the Supreme Court’s appellate jurisdiction over state courts in the 1867 Habeas Corpus Act;<sup>85</sup> a new mechanism by which litigants could seek habeas relief in federal court for state imprisonment, also in that Act;<sup>86</sup> and causes of action that made state officials subject to claims in federal court, developed in 1871 and 1908.<sup>87</sup> As we discuss below, the ineffectiveness of these mechanisms set the stage for an alternative approach to integrity issues: the strengthening of the *dualist* nature of the judicial system.

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U.S. (7 Cranch) 32 (1812), Justice Johnson, writing for the majority, concluded that the question of whether the “courts of the United States can exercise a common law jurisdiction in criminal cases . . . [has] been long since settled in public opinion” in the negative. *Id.* at 32; *see also* *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 415-16 (1816) (declining to recognize federal common-law crimes).

84. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 86-87 (“[N]o other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute . . .”); *see* Wiecek, *supra* note 46, at 225 (“Without this proviso, Section 25 would have permitted a much broader review of state court decisions. Because of it, the Supreme Court developed a highly constrictive policy of review, confining itself exclusively to errors of law that appeared somewhere on the face of the record and, of course, to questions of federal law.”).
85. Habeas Corpus Act of 1867, ch. 28, § 2, 14 Stat. 385, 386.
86. *Id.* We are self-consciously adopting the “federal forum” theory of habeas, which argues that there is “a clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants.” *Fay v. Noia*, 372 U.S. 391, 418 (1963); *see generally* Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151 (1994) (discussing various strands of “federal forum” theory).
87. *See* Civil Rights Act of 1871, ch. 22, § 1, Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983); *Ex parte Young*, 209 U.S. 123, 159-60 (1908). The effectiveness of these mechanisms was limited until the substantive federal law applicable to the states expanded to include a wider array of individual rights.

During its efforts to shore up federal (Northern) power after the Civil War, the Reconstruction Congress reenacted Section 25 of the Judiciary Act of 1789 in Section 2 of the 1867 Habeas Corpus Act.<sup>88</sup> This enactment appeared to expand the Supreme Court's supervisory powers,<sup>89</sup> by omitting a critical limiting phrase and thus "allowing" it to wade into the waters of state law.<sup>90</sup> But the Supreme Court itself was unwilling to read such intent into the statute so as to permit it to redetermine the state-law aspects of a state-law case. And in 1874, in *Murdock v. City of Memphis*,<sup>91</sup> the Court concluded that Congress could not have meant to effect so dramatic a change on the federal system.<sup>92</sup> Writing for the majority, Justice Miller concluded that "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of [state courts'] integrity or of their ability to construe [their local laws] correctly."<sup>93</sup> Beyond reinforcing the importance and role of state courts, the Supreme Court further limited its own role. It concluded that even should it find the state court in error on an issue of federal law, it would not effect a "useless and profitless reversal" on a record in which state grounds were "sufficient to maintain the judgment of the court."<sup>94</sup> Ultimately, the Supreme Court determined that it would not assert its jurisdiction to review a federal issue in the face of adequate and independent state grounds.<sup>95</sup>

This decision highlighted two critical positions that would become hallmarks of the federal-state judicial relationship for the next one hundred years. First, in concluding that Congress could not have meant to impugn the integrity of the state courts, the Supreme Court set the stage for the twentieth-century principle of "parity" — the assumption that "state and federal courts are functionally interchangeable forums likely to provide equivalent protection for federal

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88. Habeas Corpus Act of 1867, ch. 28, § 2, 14 Stat. 385, 386-87.

89. *Id.*; see also sources cited *supra* note 80.

90. See Wiecek, *supra* note 46, at 232-33 (citing FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927)); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 104-05 (1923); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 924 (1986).

91. 87 U.S. (20 Wall.) 590 (1874).

92. This theme — the unchanging nature of the federal system, notwithstanding the passage of the Reconstruction Amendments — was raised two years earlier in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and would be further developed in the *Civil Rights Cases*, 109 U.S. 3 (1883).

93. *Murdock*, 87 U.S. at 626.

94. *Id.* at 635-36.

95. *Id.* The first use of this as a jurisdictional rule was in *Eustis v. Bolles*, 150 U.S. 361, 366 (1893). See Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1949-51 (2003).

constitutional rights.”<sup>96</sup> Second, the Supreme Court reinforced the division in allocation of authority—that state courts are to interpret state law,<sup>97</sup> and that an independent and adequate *state* ground for a holding was sufficient to insulate a state court decision from federal review. Therefore, although the principle of an integrated judiciary was reinforced by Congress, the Court limited this 1867 opportunity for more robust integration through appellate review.

The Habeas Corpus Act of 1867 took a second approach to integration by authorizing collateral attacks on state judicial proceedings. It gave federal courts the power “to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”<sup>98</sup> The original statutory grounding for the issuance of writs of habeas corpus by federal courts and the Supreme Court was in the Judiciary Act of 1789, which allowed for such writs where prisoners were “in custody, under or by colour of the authority of the United States.”<sup>99</sup> As one commentator

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96. Neuborne, *supra* note 82, at 1105; *see* discussion and sources cited *supra* note 82. Recent scholarship argues that the Supreme Court built this fiction of state judicial fairness as part of an effort to undermine the Reconstruction agenda, with normatively problematic results that are “partisan, racialized, and substantive.” Helen Hershkoff & Fred O. Smith, Jr., *Reconstructing Klein*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 61, 64), <https://ssrn.com/abstract=4180792> [<https://perma.cc/7A9N-7N7R>] (encouraging “jurisdictional values be interrogated to surface their anti-egalitarian and racial aspects”); *see also* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 18-19 (2019) (“[T]here is the troublesome question of how much weight should be given to the various opinions written during the turbulence of the Civil War era.”).
97. Historically, federal courts did contribute to the evolution of state law in cases of diversity jurisdiction—either by creating federal general law through an analysis of the various state common-law doctrines at issue in the case or by interpreting state statutes or state constitutions without deference to state courts. But that authority was largely extinguished by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). In today’s courts, the “state law in state courts” position is moderated by the existence of pendent and supplemental jurisdiction, allowing federal courts to make determinations of state law. 28 U.S.C. § 1367 (2018). Yet it is also reinforced by the development of certification, which in those states that have passed enabling statutes allows the state supreme court to accept and answer questions on matters of state law submitted to it by federal courts. *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1545-49 (1997); *see generally* RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. METZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 461-558 (7th ed. 2015) [hereinafter *HART & WECHSLER*] (discussing the relationship between state and federal courts).
98. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385.
99. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. Whether

has written, “Clearly, Congress did not intend for the federal courts at this juncture to be able to issue the writ in the case of state prisoners.”<sup>100</sup> Extensions to the federal courts’ habeas authority in 1833 and 1842 “empower[ed] the federal courts to intervene in the state criminal process,”<sup>101</sup> but this intervention was limited to federal officers or citizens of foreign states.<sup>102</sup> The 1867 grant, however, was interpreted as bringing “within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws.”<sup>103</sup> But, although the federal habeas powers “vastly increased the supervisory capacity of the federal courts,”<sup>104</sup> little changed in practice.<sup>105</sup> In a habeas challenge, the question presented was whether a state prisoner had been deprived of liberty without due process of law, but, at this time, these guarantees presented only a thin conception of procedural due process.<sup>106</sup>

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the Suspension Clause implies (or requires) the existence of a federal forum to pursue a habeas claim is subject to debate. See, e.g., Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 888-89 (1994); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 72-77 & n.65 (2006); HART & WECHSLER, *supra* note 97, at 1200-03.

100. Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 394 (1998).
101. *Id.* at 400-01.
102. Act of August 29, 1842, ch. 257, 5 Stat. 539, 539-40; Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35.
103. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1869). Congress curtailed this expanded jurisdictional grant to the lower federal courts by limiting Supreme Court review, Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, ultimately reestablishing broad appellate jurisdiction in 1885, Act of March 3, 1885, ch. 353, 23 Stat. 437. In the interim, the Court held that its review of state confinement would remain available via direct petition. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103-06 (1868).
104. Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1178 (2011).
105. Cf. Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1253 (2006) (describing incorporation as “transform[ing] habeas doctrine from a limited remedy for cases in which courts lacked authority to punish . . . to a broader remedy for ad hoc injustices in otherwise lawful proceedings”).
106. See Clarke, *supra* note 100, at 421-22 (collecting the few cases that provide “a remedy for the small number of truly fundamental claims that met that era’s constitutional conceptions” at the federal level and listing few successful challenges to state convictions). For a brief while in the 1870s, Chinese litigants succeeded on habeas corpus claims against the State of California, drawing on the process provided under the Burlingham Treaty. See, e.g., *In re Ah Fong*, 1 F. Cas. 213, 218 (C.C.D. Cal. 1874) (No. 102); see also CHRISTIAN G. FRITZ, *FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1891*, at 210-49 (1991) (explaining how thousands of Chinese litigants used habeas to enter the United States). *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was the first time an imprisonment from a state conviction was reversed

Finally, in the Civil Rights Act of 1871, Congress created yet another mechanism to rein in bad behavior by state actors.<sup>107</sup> Passed in the waning days of Reconstruction, the Act recognized that the states might fail to acknowledge and accommodate federal rights. Section 1 of the Act, codified at 42 U.S.C. § 1983, allowed individuals to bring suits in federal court for violations of federal rights by persons acting under color of state law.<sup>108</sup> And in 1908, in *Ex parte Young*, the Supreme Court itself allowed suit in federal court against state officials to enjoin unconstitutional state laws.<sup>109</sup> However, these mechanisms for attacking problematic state behavior proved to be of only limited efficacy: a mere twenty-one suits were brought under § 1983 between 1871 and 1920.<sup>110</sup> And, regarding state judiciaries or state judicial actors, in *Ex parte Young* itself, the Court described an injunction against a state court as “a violation of the whole scheme of our government.”<sup>111</sup>

These congressional efforts to redefine the relationship between the state and federal judiciaries demonstrate a weakness of a delegated management system for maintaining judicial legitimacy: in a system with federal judicial power to interpret federal statutes, management by delegation cannot be self-executing. It will require courts to read implications into broad enactments. And where the judiciary is not aligned with the legislature, efforts at change may be stymied.<sup>112</sup>

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by the Court on a writ of habeas, broadening the Court’s conception of fundamental injustices. See Clarke, *supra* note 100, at 413. In general, however, the Court used jurisdictional issues and an early version of procedural default to preclude review over most such violations. See Clarke, *supra* note 100, at 414-17; *In re Wood*, 140 U.S. 278, 288-89 (1891) (raising procedural default to deny habeas relief from a death sentence imposed without assistance of counsel and from a trial in which Wood, a Black defendant, alleged that Black people were excluded from the venire).

107. Civil Rights Act of 1871, ch. 22, § 1, Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983); see also *Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972) (noting that the legislative history of the 1871 Act indicates that members of Congress were wary of state courts).
108. For an overview of the interaction of § 1983, the *Ex parte Young* doctrine, and the Eleventh Amendment, see generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).
109. 209 U.S. 123, 159-60 (1908).
110. See Comment, *Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). For the argument that this lack of litigation is best understood against a backdrop of a narrow set of federal rights upon which a § 1983 claim could be based, see Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 187-88 (2012).
111. *Ex parte Young*, 209 U.S. at 163. For a modern example, see *Whole Women’s Health v. Jackson*, 142 S. Ct. 522 (2021) (denying a proposed injunction to block state judges from enforcing Texas law S.B. 8).
112. Cf. Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 599-603 (2012) (depicting the Reconstruction as sowing early roots of judicial activism).



## B. *A Dualist Approach*

The limited scope of integrationist methods to protect against bias within state judiciaries encouraged a more dualist solution to the integrity challenges that had now squarely emerged in state courts. And thus Congress's use of jurisdictional allocation—providing a federal forum for federal issues and leaving state issues to the states—took hold, although with possibly unanticipated consequences for both integrity and autochthony.

### 1. *Limitations for Integrity*

The integrity-enforcing measures of diversity jurisdiction and removal had provided protections to some litigants from self-interested state courts and had been expanded in the antebellum years.<sup>113</sup> But these were small measures compared to the aggressive moves in the late-nineteenth and twentieth centuries to ensure that federal claims would be heard in federal courts, without state-court off-ramps. State judges would not be able to favor state over federal interests if cases with federal claims were not filed in state court.<sup>114</sup> The two critical actions energizing this shift were the introduction of federal-question jurisdiction (and the concomitant growth of the federal government) and the increasing number of federal courts themselves.

The Founding Congress created federal courts, and alongside those courts, it incorporated two key aspects for ensuring federal fora for certain claims: diversity and removal. Section 11 of the Judiciary Act authorizes federal courts to hear suits “between a citizen of the State where the suit is brought, and a citizen of another State,” “where the matter in dispute exceeds, exclusive of costs, the

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113. As early as 1815, Congress expanded removal jurisdiction to protect federal interests and renewed the tactic as tensions increased in the antebellum United States. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231 (expired April 1816). In 1833, Congress allowed for the removal of cases against customs officers, revenue officers, and military personnel. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633–34. And during the Civil War, a flurry of legislation sought to provide a federal forum for various claims. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756; Separable Controversy Act of 1866, ch. 288, 14 Stat. 306. The aptly named Prejudice of Local Influence Act of 1867, ch. 288, 14 Stat. 558, 559, allowed removal to federal court by a diverse defendant in state court upon the filing of an affidavit that “he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.” See also Haiber, *supra* note 77, at 620–21 (discussing the experiment with expanded removal during Reconstruction).

114. The strongest driver of this expansion was likely the desire of the business community for national uniformity in light of the pressures of the expanding economy. See FRANKFURTER & LANDIS, *supra* note 90, at 60 (noting that the shift from state to federal court was a result of “the growth of the country’s business”); cf. Haiber, *supra* note 77, at 622 (“[C]ommercial development following the Civil War increased the volume of litigation.”).

sum or value of five hundred dollars.”<sup>115</sup> This “diversity” jurisdiction does not remove the authority of state courts to hear claims brought by their citizens. Rather, it privileges the plaintiff in a case: the plaintiff may choose the forum, whether state or federal, when filing. The second element addressed the plight of out-of-state defendants haled into an unfriendly state court: Section 12 allowed for the removal of a suit “commenced in any state court . . . by a citizen of the state in which suit is brought against a citizen of another state” to federal court.<sup>116</sup>

During the antebellum years, these mechanisms were of limited effect in creating a robust parallel court system. Diversity jurisdiction was constrained by both Congress’s amount-in-controversy requirement and by the Supreme Court’s narrowing interpretation of the Judiciary Act itself.<sup>117</sup> Congress’s decision to set five-hundred dollars as the jurisdictional minimum served to “restrict[] the federal courts to hearing only the most momentous cases within the universe defined by Article III.”<sup>118</sup> And soon after, the Supreme Court created the “complete diversity” doctrine, interpreting Section 11 to require that none of the plaintiffs in a case be from the same state as any of the defendants.<sup>119</sup> Joinder

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115. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

116. *Id.* § 12; see also Haiber, *supra* note 77, at 618 (“[M]ost federal courts treated removal as a necessary procedural mechanism affording defendants an equal opportunity with plaintiffs to select a federal forum.”).

117. The amount-in-controversy limitation for *removal* proceedings mirrors that in the positive grant of original diversity jurisdiction, “consistent with the notion that the original intent of removal was to address cases in which a defendant might face local prejudice.” Haiber, *supra* note 77, at 618; see Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79.

118. Marcus & Wexler, *supra* note 40, at 16.

119. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). This paradigm persists through 28 U.S.C. §§ 1332, 1367 (2018), which respectively confer diversity and supplemental jurisdiction upon district courts and have been interpreted to require complete diversity in most instances, although there is general consensus that complete diversity is not a constitutional requirement. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-54 (2005) (observing that “[t]he complete diversity requirement is not mandated by the Constitution, or by the plain text of § 1332(a)” but that “[t]he Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants” (citation omitted)); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 130 (1999) (arguing that a complete diversity rule “does not control the scope of Congress’s power under the diversity grant in Article III”); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1803 (1992) (noting that “the Supreme Court conclusively decided that the complete diversity requirement was statutorily, rather than constitutionally based” in 1967); see also Meltzer, *supra* note 46, at 1571 n.6 (“[W]hether or not ‘the framers’ gave any thought to

motions for defeating complete diversity would thereby defeat federal jurisdiction, leaving a case in state court. And, whether the case was filed in or removed to federal court, there was no clear answer provided by the Act as to what *law* the judge was to apply.<sup>120</sup> The complete “absence of any clear statement regarding the basic law that was to govern the new judicial system” created complications that festered for over a century.<sup>121</sup>

A major transition occurred in 1875, when Congress created “federal question jurisdiction,”<sup>122</sup> a first step in a dramatic shift in the locus of litigation: the floodgates were opened to the federal courts. Scholars have suggested that this expansion was driven by “fear of state court bias against federal law.”<sup>123</sup> The 1875 Act granted plaintiffs the right to file in federal court as an original matter for all civil claims “arising under” the U.S. Constitution, laws, or treaties of the United States.<sup>124</sup> A concomitant removal provision allowed both plaintiffs and defendants to remove a case to federal court whenever a matter of federal law was at

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the complete diversity rule of *Strawbridge v. Curtis*, it is clear today that the statutory scope of diversity jurisdiction falls far short of its constitutional scope.” (citation omitted)).

120. Section 34 of the Judiciary Act of 1789 provided that, with some exceptions, “the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply,” but it was not clear as to the status of state common law. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 92. In 1842, Justice Story proclaimed that “decisions of the local tribunals . . . cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.” *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842). This decision allowed for federal general law to develop through diversity cases and increased the federal courts’ role in reviewing state law. See, e.g., *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 205-07 (1863) (refusing to defer to the Iowa Supreme Court’s interpretation of the Iowa state constitution).
121. Marcus & Wexler, *supra* note 40, at 27. The development of a federal general law in the *Swift* era was difficult to square with the Founding Era discussions about federal common law. See discussion *supra* note 83. In the first part of the twentieth century, the Supreme Court reversed *Swift* in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), agreeing with historian Charles Warren that *Swift* “has resulted in the total reversal of the purposes for which Sections 11 and 34 [of the Judiciary Act] were originally enacted.” Warren, *supra* note 90, at 85.
122. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (conferring jurisdiction in all cases “arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority”); see also Haiber, *supra* note 77, at 622 (“Expanded removal opportunities and the creation of federal question jurisdiction greatly increased the reach of the federal courts.”).
123. Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1331-32 & n.57; see G. Merle Bergman, *Re-appraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 28-31 (1947).
124. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

issue in the case.<sup>125</sup> And in the wake of these changes, the Supreme Court became a more reliable partner to Congress in bolstering federal jurisdiction.<sup>126</sup>

The resulting explosion in the federal docket then required the expansion of the federal courts: the Circuit Court of Appeals Act of 1891 (known as the Evarts Act) created sitting federal Courts of Appeals, increasing the number of federal judges along with the capacity of the courts to hear more claims.<sup>127</sup> Over the course of the twentieth century, the Courts of Appeals have expanded in number, and Congress has also constituted subject-matter-specific courts.<sup>128</sup>

The increasingly dualist nature of the American judicial system was far from a complete solution to the problem of state-court bias. First, state courts still heard federal claims,<sup>129</sup> and there remained many situations in which a state-

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125. 28 U.S.C. § 1441 (2018).

126. Regarding “arising under” jurisdiction, the Court was willing to extend it to federal charters, see *Pac. R.R. Removal Cases*, 115 U.S. 1, 11-14 (1885), and to define corporations as “persons” under the Fourteenth Amendment, see *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886), allowing corporate litigants to remove constitutional claims to federal court. But it also expanded both diversity and removal. For example, it protected nonresidents from state courts by requiring service/attachment within the state. *Pennoyer v. Neff*, 95 U.S. 714, 723-24 (1878); see also Kyle Voils, Note, *Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction from Pennoyer to Nicaastro*, 110 Nw. U. L. REV. 679, 684 (2016) (“*Pennoyer* represents the Supreme Court’s first assertion that due process plays a meaningful limiting role in personal jurisdiction.”). Of course, this development may not have been motivated by distrust of state courts but by the need for a workable system to determine the validity of judgments issued by state courts (in other words, to make the Full Faith and Credit Clause workable). See James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 3 (1992). The Court also eased the diversity requirements for corporations. See Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 873-77, 885-89 (1943).

127. Circuit Courts of Appeals Act, ch. 517, 26 Stat. 826 (1891) (codified as amended in scattered sections of 28 U.S.C.). For one explanation of the development of the lower federal court system, see generally Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judiciary*, FED. JUD. CTR. (1989), <https://www.ncjrs.gov/pdffiles1/Digitization/120728NCJRS.pdf> [<https://perma.cc/QG3A-WNHT>].

128. See Wheeler & Harrison, *supra* note 127, at 24-27.

129. Notwithstanding the increasingly dualist nature of American judicial federalism, state courts were still deemed essential to the successful operation of the federal system. Federal courts may have increased in number and in their scope of jurisdiction, but the number of federal statutes and federal causes of action was also expanding. In 1876, the Supreme Court explicitly confirmed the assumption built into the Constitution that state courts could hear federal claims, see *Clafin v. Houseman*, 93 U.S. 130, 136 (1876), and in 1912, it noted that where the state courts had concurrent jurisdiction, they were obligated to hear federal claims, see *Second Employers’ Liability Cases*, 223 U.S. 1, 56-59 (1912). In the face of expanded federal regulatory action, by 1947 the Court was forced to remind the state courts that they were obligated to enforce federal law and could not discriminate against federal claims: if a state court heard a

skeptical litigant could not ensure a hearing in federal court.<sup>130</sup> In addition, the Supreme Court’s regard for the “rightful independence of the state governments”<sup>131</sup> was used to develop federalism doctrines that served to support state jurisdiction.<sup>132</sup> But some integrationist measures remained in force.<sup>133</sup> And, ultimately, the threat of bias against out-of-state actors was dramatically mitigated through these expansions to the federal judiciary and its jurisdiction. Other biases – most critically, the courts’ racial discrimination – remained untouched.

## 2. *Benefits for Autochthony*

In parallel to this history at the federal level is a robust story of judicial autochthony within states. Left largely to their own devices, states were free to develop their judiciaries as they saw fit. A “wave of judicial democracy in the 1840s and 1850s”<sup>134</sup> was inspired by legislative corruption and the hope that strengthening judges would counteract abuses of power. Judicial accountability and enhanced legitimacy was the goal,<sup>135</sup> and states experimented with reducing term lengths and, eventually, with judicial elections. In fact, “[b]y 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges.”<sup>136</sup> Jed Shugerman, a historian of the phenomenon, argues that “[j]udicial independence has long been the rallying cry *in favor of*

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state claim, it was so obligated to hear analogous federal claims. *Testa v. Katt*, 330 U.S. 386, 394 (1947); see also PFANDER, *supra* note 37, at 84 (“*Testa v. Katt* holds that the state courts must entertain federal claims, at least in the absence of an appropriate nondiscriminatory excuse.”).

130. Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 10–11 (2014) (describing how the over 10,000 state court judges “are likely the only adjudicator to whom a litigant will ever have access, given the limited availability of federal review, either in the form of habeas, removal jurisdiction, or Supreme Court certiorari”).
131. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).
132. See, e.g., *id.* (abstention doctrine); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (abstention doctrine). Later cases developing these themes include *Younger v. Harris*, 401 U.S. 37, 43–45 (1971), on abstention doctrine; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983), on standing doctrine; and *Rizzo v. Goode*, 423 U.S. 362, 379 (1976), on limits on federal equity power.
133. Throughout much of this period appellate review – as of right – persisted under Section 25, only giving way with the Judiciary Act of 1925, which dramatically increased the Court’s discretionary power over its docket.
134. SHUGERMAN, *supra* note 38, at 65.
135. See Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. BAR FOUND. RSCH. J. 345, 347–48.
136. SHUGERMAN, *supra* note 38, at 105.

judicial elections in their various forms.”<sup>137</sup> The understanding was that “judicial elections would lead to general independence by giving judges more confidence and a stronger sense of democratic legitimacy.”<sup>138</sup> This connection between democratic accountability and sociological legitimacy resonates with the benefits of judicial autochthony. And as new challenges arose in the late nineteenth and early twentieth centuries, such as threats from political patronage and machine politics, states had the flexibility to respond. Some shifted to nonpartisan judicial elections or introduced merit-based selection processes and nominating commissions.<sup>139</sup>

In short, state judiciaries were able to develop in varied ways that responded to internal state political pressures, instantiating values of judicial autochthony. Of course, state courts might still exhibit bias toward subsets of their own state citizens when litigating issues of state law. But this understanding of bias would not be recognized until the mid-twentieth century—at which point it was clear that by insulating state courts, the focus on dualism ultimately exacerbated integrity problems by allowing racial bias in those courts to flourish.

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This brief discussion of the American experience suggests that, if delegated constitutional authority, a federal legislature may be well placed to exercise its capacity to alter or manage a federation’s judicial federalism. But initial flexibility to shift jurisdiction and create new structures can end up in path dependence: institutional development may limit a legislature’s choices in the future. And legislative delegation does not remove some necessary interplay with a federal apex court. Responsive to both state and federal interests, with an assumed dedication to federal continuity, a federal legislature nevertheless benefits from its democratic underpinnings. It is a different and normatively more complicated option when ongoing management is left to (or claimed by) the federation’s apex court alone.

### III. MANAGING BY IMPLICATION

In most federations, the ultimate judicial arbiter has authority to interpret the federal constitution. Through that interpretive process, it can alter the federation’s judicial federalism. By its nature, judicial constitutional interpretation is stickier than legislative action and thus may operate as a one-way ratchet. Apex

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137. *Id.* at 5.

138. *Id.* at 84.

139. *See id.* at 197-207.

courts are also more likely to focus on rule-of-law issues relating to judicial integrity than on the elements of democratic accountability or trust and confidence that drive judicial autochthony interests. The combination of these factors means that apex courts are likely to constitutionalize integrity standards through integrative mechanisms, with little recourse for unwinding those decisions later, leaving the federation's component states with fewer options to reflect divergent or unique state interests.

In this Part, we explore the efforts made by the U.S. Supreme Court and the High Court of Australia to confront integrity issues in state judiciaries. In the first example, we return to the United States, where, given that congressional tweaking of jurisdictional allocations failed to mitigate racial bias, the Supreme Court addressed state-based integrity concerns through rights claims. In our second example, we show how the High Court of Australia has used structural implications to apply the constitutional integrity guarantees to state courts across the wider federal judicial system. In both cases, the judicial responses have proven capable of addressing at least some of the integrity issues, with different consequences for judicial autochthony and judicial legitimacy more broadly.

#### *A. Rights Limitations: The United States*

The decision by the Framers to defer the difficult decision of how exactly to structure the broader judicial system allowed the U.S. Congress considerable flexibility in adapting to changing conditions during the nineteenth century. By creating new courts and shifting jurisdictional allocations along the dual-integrated continuum, Congress was able to respond to concerns of state bias in state courts. And in so doing, states were left with tremendous flexibility to structure their courts in ways that reflected state concerns about judicial legitimacy. This effort to use the dual-integrated continuum, however, provided no solution to challenges to the internal integrity of state courts adjudicating state claims. And yet, the nature of those integrity failures – race-based discrimination – threatened the cohesion of the federation.

As the U.S. federation entered the middle of the twentieth century, the fear of bias in favor of state interests or state litigants was receding in the face of the reality of bias against certain subsets of state citizens – particularly discrimination against Black Americans. The dualist system allowed deeply flawed state processes to be insulated from federal review. And the few mechanisms of integration that existed to check state courts – primarily Supreme Court review of

state-court decisions—were limited by the paucity of federal constitutional rights applicable to state actors and statutory rights narrowly construed.<sup>140</sup>

Resolving these integrity issues in the state courts was not accomplished through structural design—neither tighter judicial integration nor increased judicial dualism provided the solution. Instead, the Supreme Court ushered in an unprecedented expansion of substantive law through the delineation of individual rights. By incorporating the Bill of Rights against the states, the Supreme Court empowered litigants to enforce minimum standards of integrity themselves, beginning with fair and consistent judicial processes in the state courts.

As initially conceived and as applied well into the twentieth century, the Bill of Rights had largely served to constrain only the federal government.<sup>141</sup> The Supreme Court identified the exclusively federal nature of the Bill of Rights in an 1833 case, *Barron v. Baltimore*.<sup>142</sup> In its exhortation that no state shall abridge the “privileges or immunities of citizens of the United States,” the Fourteenth Amendment created the possibility for a more robust set of individual rights that would apply against the states and be protected by the federal government.<sup>143</sup> But the Supreme Court concluded otherwise in the 1873 *Slaughter-House*

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140. Note that the Supreme Court’s appellate review was expanded in 1914, when Congress authorized the Court to review state-court decisions *upholding* federal claims, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (current version codified at 28 U.S.C. § 1257), with a stated purpose of promoting uniformity. 63 CONG. REC. 276 (daily ed. Dec. 16, 1914) (statement of Rep. Webb) (“This would make for the uniformity of the Federal Laws in their practical application to the numerous questions that would arise in the several States.”).

141. See WOOD, *supra* note 38, at 536–43; see also JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788, at 158–61 (1961) (describing the Anti-Federalists’ alarm at “the concentration of power in the federal government” and their desire that “the liberties of citizens [be] preserved by a bill of rights”). Note that during the antebellum years, however, some “state courts understood the [federal] Bill [of Rights] to set out general constitutional principles applicable to state legislatures and executives alike.” Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 3 (2007). It was not until 1937, in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937), that the Court formally recognized a framework for applying the Bill of Rights against the States. A few pre-*Palko* cases expanded the set of federal rights applicable against the states, including *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), which incorporated the requirements of the Just Compensation Clause; *Gitlow v. New York*, 268 U.S. 652 (1925), which incorporated the First Amendment’s speech protections; and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), which held that a prior restraint censoring newspapers is unconstitutional. See early criminal-procedure cases cited *infra* note 146.

142. 32 U.S. (7 Pet.) 243, 250–51 (1833); see also *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551–52 (1833) (“As to the amendments of the constitution of the United States, they must be put out of the case; since it is now settled that those amendments do not extend to the states . . .”). But see generally Mazzone, *supra* note 141 (arguing that this reading of *Barron* is wrong).

143. U.S. CONST. amend. XIV, § 1.



Cases.<sup>144</sup> Indeed, the Court maintained that the Amendment provided only a limited set of uniform rights available to all national citizens.<sup>145</sup>

Notwithstanding the Supreme Court's approach to the Privileges or Immunities Clause, the Fourteenth Amendment's guarantee of due process remained an available avenue for reining in state actors. For example, a series of cases beginning in 1880 made some efforts to remedy the paucity of procedural protections for Black litigants in state courts.<sup>146</sup> The Supreme Court's doctrinal approach consisted of case-by-case determinations allowing for variation at the state level, with some deference to state practice.<sup>147</sup> Protecting only those substantive rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"<sup>148</sup> the Court's touchstone of "fundamental fairness" was lauded for its flexibility. But in a broader context of ingrained and state-sponsored racism, this flexibility looked to some like the Supreme Court was allowing the states to enforce "watered-down" versions of the Bill of Rights,<sup>149</sup> ultimately harming

144. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) (concluding that the Fourteenth Amendment did not "transfer the security and protection of all the civil rights . . . from the States to the Federal government").

145. *Id.* at 78-80. The Fourteenth Amendment can be understood as an effort to recast American federalism – including judicial federalism – through constitutional amendment, a mechanism we take up in Part IV. Once again, the Supreme Court's interpretive decisions complicated the efficacy of these alternative management techniques. Even a textual commitment to delegate new authority to Congress in Section 5 of the Fourteenth Amendment has been read narrowly by the Supreme Court. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

146. *See Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (recognizing a right to equal protection in jury participation for Black Americans); *Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923) (reversing the denial of defendants' habeas corpus petition after conviction by a mob-dominated trial); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (invalidating convictions based on forced confessions); *Norris v. Alabama*, 294 U.S. 587, 597-99 (1935) (guaranteeing defendants' access to a jury of peers); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (recognizing an obligation to provide counsel in capital cases); *see also* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 117-35 (2004) (providing detailed account of early twentieth-century criminal-procedure cases).

147. *See, e.g., Wolf v. Colorado*, 338 U.S. 25, 29 (1949) (surveying state practice for evidence that the exclusionary rule was not compelled by due process); *Ownbey v. Morgan*, 256 U.S. 94, 110-11 (1921) (emphasizing the historical pedigree of state practice as evidence of propriety under due process challenge).

148. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (internal quotation marks omitted); *see also Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) ("A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.").

149. *See Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (opinion of Brennan, J.) (dissenting from the per curiam opinion and criticizing fundamental fairness approach as giving "license

Black Americans. These concerns were accompanied by a deep suspicion of state courts and legislatures (belying previous sops to parity),<sup>150</sup> as evidence grew of states failing to enforce their own rights guarantees equally among state citizens.<sup>151</sup>

In the 1960s, the doctrine of selective incorporation, an approach driven in large part by the deep racial injustice confronting the nation,<sup>152</sup> superseded fundamental fairness as the process for identifying individual rights under the Due Process Clause. This doctrine accepted the “very presence of a right within the Bill of Rights” as largely indicative of that right’s essential nature,<sup>153</sup> “layer[ing] federal constitutional law onto state criminal law, opening up a vast body of state cases to the possibility of Supreme Court review.”<sup>154</sup> In addition, once a given right had been incorporated, it was to apply in the same manner among states and between the states and the federal government by importing the “full federal regalia intact.”<sup>155</sup>

Incorporation thus moved the Court away from the contextualized, often fact-specific, understanding of due process’s requirements toward uniform rules and, at this time, heightened protection applicable to all levels. The Supreme Court was finally able to regulate state judicial processes on appeal by reviewing

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to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us”); see also *Cohen v. Hurley*, 366 U.S. 117, 158–59 (1961) (Brennan, J., dissenting) (similar). As one academic has explained, “Without application of free speech, press, petition, and assembly guarantees to the states, the Southern states [in the 1960s and 1970s] could have done more to suppress the Civil Rights Movement’s dissent against their racial caste system.” Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause,”* 36 AKRON L. REV. 617, 623 (2003); see also SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 211 (2010) (“[T]aken together, Brennan’s opinions sent a clear signal to lower courts that the law could no longer be employed as a bludgeon against the civil rights movement.”).

150. See Neuborne, *supra* note 82, at 1110 (identifying “thinly disguised assumptions of nonparity between state and federal courts”); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1162 (1988) (noting “suspicion of state courts as inadequate guardians of constitutional norms and a preference for federal courts as the guarantors of federal rights against the states”).
151. See Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984) (“[M]ost state courts had a poor record of taking seriously the individual rights and fair procedures promised in their states’ bills of rights.”).
152. See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60.
153. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 292 (1982).
154. Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1490 (1987).
155. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 544 (1986).

individuals' new rights-based challenges to various state actions.<sup>156</sup> Although the Supreme Court decisions were often mute on the issue,<sup>157</sup> many of these cases dealt with Black litigants confronting institutionalized and pervasive racism, or with racist policies applied against others.<sup>158</sup>

As the Supreme Court expanded the world of substantive rights that litigants could claim against state actors, including many that affected state judicial processes, some of the integrationist mechanisms designed in the wake of the Civil War were given new life. The incorporated criminal-procedure rights reinvigorated the system of habeas review,<sup>159</sup> as claims under newly relevant constitutional provisions "could be brought in virtually every criminal case, increasing exponentially the percentage of state criminal cases in which the defendant could seek federal habeas review."<sup>160</sup> And § 1983 was revitalized in *Monroe v. Pape* and

156. During Warren's tenure as Chief Justice, the Court embraced selective incorporation to prohibit the admission of evidence seized in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), and confessions compelled in violation of the Fifth Amendment, *Miranda v. Arizona*, 384 U.S. 436 (1966), and to guarantee defendants in state courts the right to counsel in noncapital cases, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to a public and speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1967), and the right to trial by jury, *Duncan v. Louisiana*, 391 U.S. 145 (1968). Further, the Court found that such trial would involve opportunity to confront witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965), and to have compulsory process, *Washington v. Texas*, 388 U.S. 14 (1967), and applied the Eighth Amendment to prohibit state courts from ordering cruel and unusual punishment, *Robinson v. California*, 370 U.S. 660 (1962). For an examination of the state of selective incorporation at the end of the Warren Court, see generally Israel, *supra* note 153. For an overview of the current state of selective incorporation, see, for example, *McDonald v. City of Chicago*, 561 U.S. 742, 764-66 & nn.12-14 (2010).
157. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63 (1996) ("Even by the 1960s, when many of the Court's principal criminal procedure cases seem facially unconnected with race, the statistical correlation between race and poverty, and between poverty and crime, ensured that for the justices of the Warren Court, criminal procedure questions were never entirely divorced from racial concerns.").
158. Many of the critical incorporation cases involved Black defendants. See, e.g., *Duncan*, 391 U.S. 145; *Washington*, 388 U.S. 14; *Klopfer*, 386 U.S. 213; *Pointer*, 380 U.S. 400; *Mapp*, 367 U.S. 643; cf. *Miranda*, 384 U.S. 436; *Aguilar v. Texas*, 378 U.S. 108 (1964); BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 591 (1983) (referring to racial overlay by quoting a draft opinion of *Miranda* as opening: "In a series of cases decided by this Court long after [studies of custodial interrogation abuses], Negro defendants were subjected to physical brutality—beatings, hanging, whipping—employed to extort confessions"); Klarman, *supra* note 157, at 63.
159. See David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 321 (1973) (outlining the vast increase in federal habeas corpus petitions over the twenty-year period covering incorporation, from 560 petitions in 1950 to 9,063 in 1970).
160. Semeraro, *supra* note 105, at 1258-59. The potential to upset large numbers of state convictions through retroactive application of new constitutional principles did create controversy and

its sequellae,<sup>161</sup> in which the Supreme Court recognized the statute's purpose to provide federal remedies where state law was "not available in practice."<sup>162</sup> Earlier views of § 1983 predicated federal jurisdiction on showing state courts inadequate. But critically, the Supreme Court concluded that a plaintiff did not need to exhaust state remedies but could go immediately to federal court.<sup>163</sup> In other words, the question of adequacy was resolved through concurrent jurisdiction: the plaintiff was allowed to choose whether to proceed in state or federal court.

Thus, through doctrinal elaboration and revitalized causes of action, the Supreme Court addressed integrity claims against state courts and, in many cases, has been able to articulate clear rules that have had direct impact on how state judicial processes unfold.<sup>164</sup> But using individual rights as the mechanism of ensuring integrity places the onus on individual litigants to raise claims and seek redress, and the fact-bound nature of some issues means that broad reform is not always possible.<sup>165</sup> Notwithstanding these weaknesses, and to the extent any

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eventually gave rise to the *Teague* doctrine, which protects the finality of state convictions in the face of changing constitutional interpretations. *Id.* at 1270-74; *see also* *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless [state convictions] fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

161. 365 U.S. 167 (1961); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (approving imposition of municipal liability under § 1983); *see also* *Friedman & Delaney*, *supra* note 104, at 1178 (describing *Monroe* as revitalizing a "ninety-year-old congressional statute that had lain largely dormant and turn[ing] it into a powerful weapon allowing individuals to enforce constitutional guarantees against state actors").
162. *Monroe*, 365 U.S. at 174.
163. *Id.* at 174-75; *see* *Kian*, *supra* note 110, at 185; *Neuborne*, *supra* note 82, at 1109-10.
164. *See* cases cited *supra* note 156.
165. Fact-specific cases allow for the proliferation of exceptions. *Cf.* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 939 (2010) (noting that the Court has "stopped short of explicitly overruling earlier Fourth Amendment landmarks," instead "announcing a multitude of doctrinal limitations and exceptions that make the earlier protections largely meaningless in practice"). In addition, with the notable exception of its ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court has been wary of prophylactic rules. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) ("Broad prophylactic rules in the area of free expression are suspect." (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))); *Ohio v. Robinette*, 519 U.S. 33, 39 (1997) (arguing the Court has "consistently eschewed bright-line rules" in Fourth Amendment jurisprudence). *But see* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (identifying prophylactic rules insulating the First Amendment and arguing that "'prophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law").

particular Court has integrity concerns,<sup>166</sup> the rights-based approach is clearly the Court's preferred mechanism of reform.

By focusing on rights, the Supreme Court has demonstrated its distaste for any type of more sweeping mode of structural reorganization. For example, the structural injunction, used “to effectuate the reorganization of an ongoing social institution,”<sup>167</sup> is not thought to apply to state judicial systems. As a starting point, the Anti-Injunction Act, enacted in 1793 as a way of placating those anxious about federal power,<sup>168</sup> limits the abilities of federal courts to enjoin state proceedings.<sup>169</sup> And, using the rhetoric of parity, the Supreme Court added additional restrictions in *Younger v. Harris*,<sup>170</sup> by concluding that federal courts may not enjoin ongoing state proceedings absent a (rare) showing of irreparable harm or of bad faith by state actors.<sup>171</sup> A set of narrow circumstances remains in which an injunction might lie, but the Supreme Court has never reached the merits in a case presenting that rare occasion.<sup>172</sup> And the Justices are clearly skeptical: in dicta in *O’Shea v. Littleton*, the Court was dismissive of what would amount to “an ongoing federal audit of state criminal proceedings.”<sup>173</sup> Thus, without the broader interventionist possibilities inherent in structural institutional reform, the Supreme Court addresses integrity issues on the retail level through rights claims.

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166. Commentators have noted that the Burger Court did not share the Warren Court's interest in ensuring state judicial integrity. See, e.g., Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 237-39 (1983); Davies, *supra* note 165, at 938-39. And the federalism revolution ushered in by the Reagan Administration resulted in a narrowed scope of federal habeas review of state-court actions. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, 110 Stat. 1214, 1217-26 (codified as amended at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266).
167. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978); see also Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1153 (1977) (characterizing the plaintiffs in *O’Shea v. Littleton*, 414 U.S. 488 (1974), as seeking “an intrusion into the state judicial sphere so massive as to dwarf the mere enjoining of a prosecution proscribed by *Younger*”).
168. Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334-35. For a revised historical assessment of the Anti-Injunction Act, see James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187 (2014).
169. For a broad overview of the Act's applicability, see generally Fiss, *supra* note 167.
170. 401 U.S. 37, 43-44 (1971) (relying on principles of “equity,” “comity,” and “[f]ederalism”).
171. *Id.* at 46, 52-53; see also Steffel v. Thompson, 415 U.S. 452, 460-62 (1974). On exceptions to *Younger*, see *Younger*, 401 U.S. at 53-54; and Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2284, 2296-2303 (2018).
172. See, e.g., *O’Shea*, 414 U.S. at 500, 502-04 (finding that plaintiffs lacked standing to raise a claim for injunctive relief against two state judges for discriminatory bond-setting sentencing practices).
173. *Id.* at 500.

In part because of this fine-grained, rights-based approach, which has not focused on wholesale structural reforms but on individual incidents of bias, state judicial systems have been able to maintain their autochthony in the area of judicial design.<sup>174</sup> There is dramatic variation in the ways in which individual states structure their judiciaries, particularly in relation to judicial selection—it has been said that there are “nearly as many different schemes for selecting judges as there are states.”<sup>175</sup> In the twenty-first century United States, mechanisms of judicial selection can be broadly grouped into five categories: executive appointment with legislative confirmation, legislative appointment, partisan judicial elections, nonpartisan judicial elections, and appointment by independent commission, followed, in some cases, with retention elections.<sup>176</sup> These approaches to judicial selection developed over many decades in response to specific sets of issues and controversies in individual states and their quests to achieve judicial independence,<sup>177</sup> as the understanding of that phrase changed over time.<sup>178</sup> In addition, *ex post* regulation through removal and disciplinary procedures can also vary, as, notwithstanding the American Bar Association’s Model Code of Judicial Conduct, regulating judicial conduct takes place on a state-by-state basis by state bar associations.<sup>179</sup>

What began in the nineteenth century as autochthonous efforts to improve judicial integrity has morphed into a new type of bias in the late twentieth and

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174. The independence of the federal judiciary may also provide a critical backstop that allows for state-level institutional diversity. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007 (2007) (“The strong institutional independence of Article III judges anchors the legal infrastructure that accommodates elected judges . . .”).

175. Polly J. Price, *Selection of State Court Judges*, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 10 (Roger Clegg & James D. Miller eds., 1996). For a map detailing how each state selects its high court judges, see *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), <https://www.brennancenter.org/judicial-selection-map> [<https://perma.cc/578L-8LLB>].

176. See generally Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259 (2008) (describing the five general categories of judicial selection processes); Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829 (2016) (providing an in-depth examination of state judicial selection methods, including popular partisan and nonpartisan elections).

177. See Price, *supra* note 175, at 9 (“Each state’s selection system reflects conflicting expectations about a judge’s role, and each system accommodates in some way the tension between competing ideas of judicial independence and accountability.”).

178. See SHUGERMAN, *supra* note 38, at 5.

179. See generally Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL’Y REV. 123 (2011) (describing the current state of relationships between judges and lawyers, including judicial conduct regulation and potential reforms).

early twenty-first centuries. State-level judicial elections increase the potential for perceptions of judicial bias,<sup>180</sup> a threat made more salient by the Supreme Court's decision in 1976 to limit the regulation of money in elections.<sup>181</sup> The most recent judicial election cycles have raised more attention and more money than ever before.<sup>182</sup> Cases alleging individual-rights claims are highlighting serious concerns about the composition and structure of the state judiciaries themselves.<sup>183</sup> But the Supreme Court has been reluctant to find even the appearance of bias except in the most egregious circumstances,<sup>184</sup> and the doctrine of absolute judicial immunity further limits the scope of federal-court enforcement of suits brought against state-court judges.<sup>185</sup> Far more typical is a concern from the Court about infringing on a state's autonomy to structure its judicial system.<sup>186</sup> And even though scholars suggest the Due Process Clause could be read

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180. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 789-90 (2002) (O'Connor, J., concurring) (outlining the potential problems of bias created by judicial elections).
181. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (holding that "limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from [their] personal funds" are inconsistent with First Amendment free speech); see also *Randall v. Sorrell*, 548 U.S. 230, 248-53 (2006) (holding that a Vermont statute's contribution limits on amounts that individuals, organizations, and political parties could contribute to campaigns of candidates for state office violated First Amendment free speech protections).
182. See Douglas Keith & Eric Velasco, *The Politics of Judicial Elections, 2019-20*, BRENNAN CTR. FOR JUST. 1 (Jan. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2019-20> [<https://perma.cc/JN4P-GB37>] ("In 2019-20, state supreme court elections attracted more money—including more spending by special interests—than any judicial election cycle in history, posing a serious threat to the appearance and reality of justice across the country.").
183. These cases often claim that a state judge's failure to recuse himself violated the due process rights of a party before the court. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889-90 (2009). Other claims focus on the manner in which the state election is regulated, raising First Amendment claims against state efforts to limit electioneering. See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015); *Republican Party of Minn.*, 536 U.S. at 788; *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (holding, upon granting certiorari, that the standard for recusal was whether risk of bias was too high to be constitutionally tolerable); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (holding that the remedy of recusal was based on a litigant's due-process right to a fair trial before an unbiased judge).
184. See *Caperton*, 556 U.S. at 887 (emphasizing the narrowness of the holding as applicable to the "extraordinary situation" presented by disproportionately large donations).
185. See *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978). But see *Forrester v. White*, 484 U.S. 219, 229-30 (1988) (limiting absolute judicial immunity in the context of employee management); *Pulliam v. Allen*, 466 U.S. 522, 543-44 (1984) (limiting absolute judicial immunity to allow for liability for attorney's fees).
186. See *Caperton*, 556 U.S. at 888-90 (assuming propriety of state judicial elections without explanation and praising states for adopting rules that are often more stringent than due-process requirements within election-based systems).

to prevent partisan judicial elections,<sup>187</sup> the Supreme Court has not yet “seriously considered the possibility that popularly based methods for determining state judicial retention are constitutionally suspect.”<sup>188</sup>

In short, during the late twentieth century, the Supreme Court extended a wide variety of federal rights to state citizens, allowing them to challenge state actors, including state courts, for violations of those rights. These inroads into mitigating judicial bias improved the integrity of the state courts along some dimensions. But the longstanding appreciation for state autonomy and state judicial autochthony, born out of the dualist approach to judicial federalism, has also served to limit the reach of these rights. The Supreme Court has not found state judicial elections themselves to violate due process and appears unlikely to do so in the near future.<sup>189</sup>

### B. *Structural Limitations: Australia*

As in the United States, the Australian experience with judicially implied institutional-integrity requirements recalibrated the integrity-autochthony relationship that informs judicial legitimacy. In a constitutional system that was primarily concerned with autochthony, the hybrid Australian judiciary suffered from legitimacy concerns in the face of jurisdictional and institutional developments within states implementing tough-on-crime law-and-order regimes. Given that few rights are entrenched in the Australian constitution, it has been through implied structural limitations that the High Court of Australia has been able to address systemic legitimacy concerns. But this institutional-based approach has limits: nonsystemic behavior by bad state actors – including individual rights violations in individual cases – is not reachable. And the implications

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187. See generally Redish & Aronoff, *supra* note 130 (discussing the ways in which judicial retention elections threaten the appearance of judicial fairness and undermine public confidence in the judiciary).

188. *Id.* at 6.

189. See *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010) (distinguishing *Caperton* and remarking that the appearance of influence or access will not cause the electorate to lose faith in this democracy, largely because the “fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt”). It should be noted, however, that the dualist nature of the judicial system may work to safeguard integrity gains. Certain state courts might expand rights-based integrity gains and/or serve to pressure federal judges to preserve commitments made under previous regimes. Cf. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1093, 1097–99 (1996) (discussing the new judicial federalism, by which state judges increasingly rely on state declarations of rights as an avenue to secure rights that may be more difficult to secure or unavailable under the Constitution); Brennan, *supra* note 155 (describing the trend of state courts interpreting provisions in their constitutions to be more protective of rights than federal courts).



for continued autochthony are complex: to some, the High Court's actions have unnecessarily sacrificed local responsiveness, and to others, the High Court's warnings function merely as a challenge around which to legislate.

1. *Protecting Autochthony*

The Australian Constitution sets out its judicial system in Chapter III, which borrows heavily from Article III of the U.S. Constitution. As with the U.S. Constitution, the Australian Constitution decrees the creation of a supreme judicial arbiter with original and appellate jurisdiction; this arbiter is the High Court of Australia.<sup>190</sup> It leaves the contours of the broader federal judicial system to the Federal Parliament. The Federal Parliament may vest federal judicial power either in other federal courts that it creates or in the preexisting state courts. The anticipated use of preexisting state courts—famously referred to later by the High Court as the “autochthonous expedient”—was inspired by a desire to save money in the new federation by avoiding the creation of a new system of federal courts, demonstrating both the inertia of path dependency and the realpolitik of founding constitutional moments.<sup>191</sup> The Constitution guarantees core areas of original jurisdiction federal judicial power for the High Court in Section 75 and allows Parliament to confer further jurisdiction on the High Court in Section 76.<sup>192</sup> At Federation, the Privy Council of the United Kingdom remained the final court of appeal, but its jurisdiction was gradually reduced until it was finally removed entirely in 1986.<sup>193</sup>

Questions of state autochthony and input into the federal judicial design pulled against concerns over integrity from the very beginning. The suggestion that the High Court might be constituted from time to time by the Chief Justices of the states was rejected at the convention, but it arose again in 1902, when, following Federation, the Australian Federal Parliament created the High Court of Australia in the *Judiciary Act 1903*.<sup>194</sup> When the Judiciary Bill was introduced, Attorney-General Alfred Deakin, himself a key framer, objected to the idea for a

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190. *Australian Constitution* s 73.

191. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Austl.) (opinion of Dixon, CJ, McTiernan, Fullagar & Kitto, JJ). See further discussion of the political negotiation of this clause in GABRIELLE APPLEBY, ANNA OLIJNYK, JAMES STELLIOS & JOHN M. WILLIAMS, *JUDICIAL FEDERALISM IN AUSTRALIA: HISTORY, THEORY, DOCTRINE AND PRACTICE* 32-52 (2021).

192. Section 75 of the Constitution guarantees the High Court's original jurisdiction over five types of matter, whereas Section 76 gives the Parliament the power to vest the High Court with jurisdiction over four types of matters. *Australian Constitution* ss 75-76.

193. *Australia Act 1986* (Cth) s 11 (Austl.); *Australia Act 1986*, c. 2, § 11 (U.K.).

194. *Judiciary Act 1903* (Cth) s 39A (Austl.).

number of reasons,<sup>195</sup> including that it ran the risk of undermining the Court's authority because of allegations of provincial favoritism and bias. (Fueling this concern was the practice where many state Chief Justices also sat as the Lieutenant Governors of their state, stepping into the Governor's role when that officer was absent.<sup>196</sup>) Deakin also noted that "very able State benches" had dealt with constitutional questions "in an extremely unsatisfactory manner to a great number of the profession, and of the people of their States," thus justifying the federal government's choosing and appointing their own judges, rather than adopting those of the states.<sup>197</sup>

Despite these concerns as to the quality and neutrality of state courts, the *Judiciary Act 1903* also vested state courts with significant federal jurisdiction.<sup>198</sup> Indeed, state courts would exercise almost all federal jurisdiction until a more expansive system of federal courts was established in the 1970s.<sup>199</sup> In Saunders's terms, until this time, Australia was a highly integrated system.<sup>200</sup> Its form of integration was not as a single, national system but an autochthonous one: below its apex court, its system of courts was state-established and state-controlled without robust national standards for or oversight of integrity features. The conferral of federal jurisdiction in state courts in the *Judiciary Act 1903* was made subject to only one limited, but telling, integrity condition: an expectation that

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195. Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10962 (Alfred Deakin, Attorney-General) (Austl.).
196. Governors in the Australian states fill largely ceremonial roles as formal heads of state, representing the King and acting on instruction from the Premier and Cabinet. The dual role of Chief Justice and Lieutenant Governor has come under criticism in recent times for undermining the integrity of state courts. Matthew Stubbs, *The Constitutional Validity of State Chief Justices Acting as Governor*, 25 PUB. L. REV. 197, 199-200, 209 (2014); Rebecca Ananian-Welsh & George Williams, *State Judges as Lieutenant-Governors*, in JUDICIAL INDEPENDENCE IN AUSTRALIA: CONTEMPORARY CHALLENGES, FUTURE DIRECTIONS 194 (Rebecca Ananian-Welsh & Jonathan Crowe eds., 2016).
197. Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10973 (Alfred Deakin, Attorney-General) (Austl.).
198. *Judiciary Act 1903* (Cth) s 39A (Austl.). Today, federal jurisdiction is also conferred on state courts by other federal provisions, subject to the regulations and exceptions in Section 39A.
199. JOHN QUICK & ROBERT RANDOLPH GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 726 (1901) ("[I]t is probable that for some time there will be no necessity for the creation of any inferior federal courts, but that all the cases in which the original jurisdiction of the Commonwealth is invoked can be dealt with either by the High Court itself or by the Courts of the States."); see also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 605 (Austl.) (Kirby, J) (holding that federal courts' jurisdiction is limited to federal matters and that, under cross-vesting, state jurisdiction could not be conferred on federal courts).
200. For this period, Sir Owen Dixon described Australia as having, essentially, one system of courts. OWEN DIXON, *The Law and the Constitution*, in JESTING PILATE: AND OTHER PAPERS AND ADDRESSES 38, 53-54 (Severin Howard Zichy Woinarski ed., 1965).

federal jurisdiction be exercised only by certain persons with some guarantee of judicial training and professional independence.<sup>201</sup>

Early in the Australian Federation, the High Court held that, when the federal Parliament confers federal judicial power on state courts, it has no power to alter the constitution of those courts or their organization.<sup>202</sup> Thus, it is commonly said that the Federal Parliament, in choosing to confer federal judicial power on state courts, must “take them as it finds them.” In *Le Mesurier v Connor*, the High Court explained:

The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a state are the judicial organs of another Government. They are created by State law; their existence depends upon State law; that law, primarily at least, determines the constitution of the Court itself, and the organization through which its powers and jurisdictions are exercised.<sup>203</sup>

According to this maxim, the Federal Parliament possesses the necessary power to regulate the *procedure* of state courts when they are exercising federal jurisdiction—but not their *structure and organization*.<sup>204</sup> Justice Mason explained in a later decision that this doctrine meant that the Federal Parliament could choose either to vest federal judicial power in selected state courts or, if it did not approve of the structure or organization of the state court, it may choose to establish and confer jurisdiction on federal courts.<sup>205</sup> The Federal Parliament thus had the capacity to create a dualist system of courts—with a separate hierarchy of

201. *Judiciary Act 1903* (Cth) s 39A (Austl.) (providing that federal jurisdiction in state courts of summary jurisdiction must be exercised only by a Stipendiary or Police or Special Magistrate, or some Magistrate of the state specially authorized by the Governor-General to exercise such jurisdiction). The stipulation in this provision was repealed in 2006. See *Judiciary Legislation Amendment Act 2006* (Cth) sch 1 (Austl.). The conferral of federal jurisdiction on state courts is also subject to exceptions insofar as matters in the original jurisdiction of the High Court are made exclusive of the jurisdiction of the courts of the states by Section 38. These exceptions include: suits between states, or between persons suing or being sued on behalf of different states, or between a state and person suing or being sued on behalf of another state; suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a state, or any person being sued on behalf of a state; suits by a state, or any person suing on behalf of a state, against the Commonwealth, or any person being sued on behalf of the Commonwealth; and matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth.

202. *Le Mesurier v Connor* (1929) 42 CLR 481 (Austl.).

203. *Id.* at 495-96.

204. *Kable v DPP (NSW)* (1996) 189 CLR 51, 82 (Austl.).

205. *Commonwealth v Hosp Contribution Fund* (1982) 150 CLR 49, 61 (Austl.).

federal courts over which it exercised complete control—in the event that serious, and federally unacceptable, integrity issues arose in the state courts.

The development of federal courts, however, began slowly after Federation. In the decades following, Parliament created only two courts with limited, specialized jurisdiction: the Federal Court of Bankruptcy was established in 1930 and in 1956 was joined by the Commonwealth Industrial Court (later renamed the Australian Industrial Court).<sup>206</sup> It was not until 1976, with the introduction of the Federal Court of Australia, that the size and jurisdiction of Federal Chapter III courts would expand to form a meaningful parallel hierarchy to the still dominant state courts. Today, subsuming the jurisdiction of earlier courts, the Federal Court, sitting atop the Federal Circuit and Family Court, has become “very nearly a general federal court possessed of a substantial part of federal jurisdiction.”<sup>207</sup>

Acute integrity concerns did not motivate the introduction of the federal tier of courts in Australia. Rather, the Federal Court was introduced in the mid-1970s in response to complaints about delay in the state system, divergences of doctrine and interpretation,<sup>208</sup> concerns about differences in federal philosophy and procedure, and lack of federal control over and accountability for federal matters.<sup>209</sup>

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206. The Federal Court of Bankruptcy was created under the *Bankruptcy Act 1924* (Cth), established 1930. The Commonwealth Industrial Court was established under the *Conciliation and Arbitration Act 1904-1956* (Cth), following the High Court’s decision in *R v Kirby* (1956) 94 CLR 254 (Austl.), requiring federal judicial power to be exercised exclusively by bodies constituted in accordance with Chapter III of the Constitution.

207. LESLIE ZINES, COWEN AND ZINES’S FEDERAL JURISDICTION IN AUSTRALIA 150 (3d ed. 2002). The Federal Court was established in 1976 under the *Federal Court of Australia Act 1976* (Cth). The Federal Circuit and Family Court was established in 2021. *Federal Circuit and Family Court of Australia Act 2021* (Cth). This act amalgamated the Family Court (established in 1976 (*Family Law Act 1975* (Cth))) and the Federal Circuit Court (established as the Federal Magistrates Court of Australia in 1999, *Federal Magistrates Act 1999* (Cth)), and renamed in 2013, *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth)).

208. But note that *R v Parsons* served as a standardizing mechanism among and between state courts exercising federal jurisdiction, holding that “[s]tate courts should give a consistent meaning to a Commonwealth statute” and treat decisions of a Full Court of another state as equally persuasive as that of the state’s own Full Court. *R. v Parsons* [1983] 2 VR 499, 499 (Austl.). This position was reiterated by the High Court in *Austl Sec Comm’n v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492, which extended the proposition from Commonwealth statutes to uniform legislative schemes. It was confirmed again in *Farah Constructions. Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-52, which also extended the proposition to the general common law, which is now accepted as being a “single” common law across the federation. See, e.g., *Lange v Austl Broad Corp* (1997) 189 CLR 520, 563; *Lipohar v The Queen* (1999) 200 CLR 485, 492, 506.

209. JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW 135 (1993); Brian R. Opeskin, *Federal Jurisdiction in Australian Courts: Policies and Prospects*, 46 S.C. L. REV. 765, 770-86 (1995).

There was also a desire to relieve the High Court of some of its original jurisdiction and its appellate jurisdiction from the Territory Courts.<sup>210</sup>

In introducing the legislation to establish the federal courts, the Attorney-General gestured at maintaining the dominance of state courts despite the creation of the new parallel federal system,<sup>211</sup> but subsequent years saw a mounting “perception that the prestige and status of the state Supreme Courts was deteriorating.”<sup>212</sup> A set of design solutions was contemplated,<sup>213</sup> ranging from the creation of a wholly integrated system of courts,<sup>214</sup> to a return to a more strongly dual system.<sup>215</sup> The *Final Report of the Constitutional Commission*, handed down in 1988, rejected the full integration of Australia’s judicial system for reasons including that a single system in which all governments must participate but for which none would be “directly and fully responsible” “would inevitably fetter boldness and innovation and foster conservatism and inertia.”<sup>216</sup> Ultimately, in 1988, a cooperative cross-vesting scheme was implemented between the state and federal court systems that, in effect, allowed a litigant to bring a state or federal matter in either court system. The cross-vesting scheme was a compromise that maintained state control and autonomy over its judiciary while achieving greater integration between the two systems. To the extent that state matters were vested in federal courts, however, the scheme was struck down as unconstitutional.<sup>217</sup> In contrast to the fate of state jurisdiction in federal courts, the vesting of expanded federal jurisdiction in state courts remains in place today.

210. Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2111 (Robert Ellicott, Attorney-General) (Austl.).

211. When the Bill creating the Court was introduced in 1976, Attorney-General Robert Ellicott QC explained that “[t]he Government believes that only where there are special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court.” *Id.*

212. Brian Opeskin, *Cross-Vesting of Jurisdiction and the Federal Judicial System*, in *THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM* 299, 305 (Brian Opeskin & Fiona Wheeler eds., 2000); see also ZINES, *supra* note 207, at 151.

213. A number of solutions to these concerns were proposed, including at a constitutional convention held in 1983, and in the subsequent report of the Constitutional Commission. 1 *FINAL REPORT OF THE CONSTITUTIONAL COMMISSION* 369-71 (1988) [hereinafter *FINAL REPORT*].

214. This was proposed by the Constitutional Convention. See *id.* at 367.

215. For instance, Sir Francis Burt proposed that the Supreme Courts be given unlimited original jurisdiction over federal matters, with the creation of a single Court of Appeal below the High Court. Sir Francis Burt, *An Australian Judicature*, 56 *AUSTL. L.J.* 509, 511-14 (1982).

216. 1 *FINAL REPORT*, *supra* note 213, at 369.

217. *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 (Austl.). The scheme unlawfully vested non-federal judicial power (i.e., state judicial power) in federal Chapter III courts. Nonetheless, following this decision, a broad reading of federal courts’ “accrued jurisdiction” has allowed many state matters to be decided within federal jurisdiction. See JAMES STELLIOS, *THE FEDERAL JUDICATURE: CHAPTER III OF THE CONSTITUTION, COMMENTARY AND CASES* 366 (2010).

## 2. *Implying Integrity*

As we explained above, when choosing to vest federal judicial power in state courts, it is said that the federal Parliament must take those courts “as it finds them.” Although state statutes have always provided a number of safeguards in relation to judicial tenure and compensation, these did not have the entrenched status of the Federal Constitution, leaving open the possibility that a state could abolish its courts, take away judicial tenure, or reduce judicial remuneration through the mere passage of ordinary legislation.<sup>218</sup> However, following litigation over serious integrity concerns arising in the mid-1990s regarding major incursions into judicial process in targeted criminal regimes, the High Court has drawn on constitutional principles relating to the integrity of *federal courts* to imply structural guarantees of integrity to state courts.

To understand this development, it is first necessary to understand the full extent of integrity protections at the federal level. The Constitution makes provision for minimum independence guarantees for the High Court and other created federal courts, including in relation to tenure and salary in section 72. Chapter III forms the basis of the High Court’s critical decision in relation to the integrity of federal courts in the *Boilermakers’ Case*.<sup>219</sup> Decided at the time by a narrow 4-3 majority, the *Boilermakers’ Case* has become a landmark Australian decision setting out the High Court’s interpretation of the implied structural guarantees for the exercise of federal judicial power, the judicial independence of federal courts, and the fairness of judicial process in those courts. It said nothing about the minimum integrity standards of state courts. The decision was premised on two strands of reasoning: one that emphasized the need for an impartial central judiciary in a federal system and one that drew from the structural design of the Constitution and Chapter III of the Constitution.

Developing principles first established in earlier cases,<sup>220</sup> the implied guarantees are known as the “two limbs” of the *Boilermakers’ Case*.<sup>221</sup> The first limb concludes that only those courts or bodies contemplated by section 71 of the

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218. Even the provisions of the *Constitution Act 1975* (Vic) that purport to entrench its safeguards of judicial independence (s 18 and pt IIIA) may not be effective on the basis that, under *Australia Act 1986* (Cth) s 6, state parliaments have only the power to entrench statutory provisions that relate to the constitution, powers, or procedures of the parliament of the state.

219. (1956) 94 CLR 254 (Austl.).

220. *Id.* at 270 (opinion of Dixon, CJ, McTiernan, Fullagar & Kitto, JJ) (citing *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54 (Austl.)).

221. (1956) 94 CLR 254 (Austl.).

Constitution and constituted according to Chapter III can exercise federal jurisdiction.<sup>222</sup> And the second limb recognizes that the federal judiciary must exercise only federal judicial power.<sup>223</sup>

The impact of *Boilermakers'* has been dramatic, initially in relation to integrity questions within federal courts. The High Court has extended protections to the integrity and fairness of the *process* by which courts quell controversies.<sup>224</sup> For example, in 1998, Justice Gaudron explained that judicial power must be defined by reference to its exercise “in accordance with the judicial process.”<sup>225</sup> This principle, she elaborated, requires courts to exercise judicial power that ensures

equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.<sup>226</sup>

She went on to explain that a court cannot be required to act in a way “which involves an abuse of process,” or “would render its proceedings inefficacious,” or

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222. *Id.* at 270 (opinion of Dixon, CJ, McTiernan, Fullagar & Kitto, JJ).

223. *Id.* at 271-272 (opinion of Dixon, CJ, McTiernan, Fullagar & Kitto, JJ).

224. See *Roberts v Bass* (2002) 212 CLR 1, 55 (Austl.) (opinion of Kirby, J); Michael McHugh, *Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?*, 21 AUSTL. BAR REV. 235, 238 (2001); Fiona Wheeler, *Due Process, Judicial Power and Chapter III in the New High Court*, 32 FED. L. REV. 205, 224 (2005) (describing this as a “recent development”); Rebecca Welsh, *A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality*, 39 MONASH U. L. REV. 66, 101 (2013). Note, however, that these implied guarantees of process are not absolute. See, e.g., *Thomas v Mowbray* (2007) 233 CLR 307, 322-335 (Austl.) (opinion of Gleeson CJ) (accepting that an *ex parte* hearing decided on the balance of probabilities resulting in the issue of an interim control order that restricted the subject’s liberty of movement and freedom of association was nonetheless consistent with Chapter III of the Constitution and the *Boilermakers'* limbs).

225. *Nicholas v The Queen* (1998) 193 CLR 173, 207-08 (Austl.) (opinion of Gaudron, J); see also *Int’l Fin Tr Co v Crime Commission (NSW)* (2009) 240 CLR 319, 354 (Austl.) (opinion of French, CJ) (stating that procedural fairness in the federal constitutional context “is an incident of the judicial power exercised pursuant to Ch III of the *Constitution*”).

226. *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Austl.) (opinion of Gaudron, J).

would “bring[] or tend[] to bring the administration of justice into disrepute.”<sup>227</sup> And beyond process,<sup>228</sup> other implied limitations drawn from the structural limbs of the *Boilermakers’ Case* include safeguards against federal bills of attainder,<sup>229</sup> and arbitrary detention by the federal executive.<sup>230</sup>

In contrast to its explicit provisions relating to independence of the federal judiciary, the Constitution leaves the integrity of state courts unaddressed. The first limb of the *Boilermakers’* doctrine contemplates state courts exercising federal jurisdiction. The second limb is limited to protecting the jurisdictional purity of Federal Chapter III courts, however, and does not extend its protections to state courts.<sup>231</sup> There was no state counterpart, let alone equivalent, to the increasingly developed and stringent integrity guarantees of the *Boilermakers* doctrine until the 1990s.

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227. *Id.* at 208-09.

228. The *Boilermakers’* limbs are accepted as important safeguards for procedural rights in the federal courts. See *Street v Queensland Bar Ass’n* (1989) 168 CLR 461, 521 (Austl.) (opinion of Deane, J) (stating that the separation of powers “is the most important of” the guarantees of rights and immunities, express or implied, under the Australian Constitution); see also *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Austl.) (opinion of Brennan, CJ, Dawson, Toohey, McHugh & Gummow, JJ) (“The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.”). But they have not been able to operate as a complete substitute for rights protections. For instance, the High Court has rejected arguments that these protections extend to a prohibition on retroactive laws, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Austl.), or a substantive equality guarantee, *Leeth v Commonwealth* (1992) 174 CLR 455 (Austl.) (opinion of Deane, Toohey & Gaudron, JJ); *Queensland Elec. Comm’n v Commonwealth* (1985) 159 CLR 192 (Austl.) (opinion of Deane, J); *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.) (opinion of Toohey, J).

229. *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Austl.).

230. See *Chu Kheng Lim v Minister for Immigr., Loc. Gov’t & Ethnic Affs.* (1992) 176 CLR 1, 27 (Austl.) (“[T]he involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.”). But note that the Court has allowed for robust exceptions, including permitting the executive to detain aliens where that detention is “reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered,” in ways that have been of little comfort to those languishing in executive immigration detention. See *Al-Kateb v Godwin* (2004) 219 CLR 562, 586 (Austl.) (opinion of McHugh, J) (citing *Chu Kheng Lim* (1992) 176 CLR 1, 33 (Austl.)); *Behrooz v Sec’y of the Dep’t of Immigr & Multicultural & Indigenous Affs* (2004) 219 CLR 486, 538 (Austl.) (opinion of Hayne, J); *Re Woolley; Ex Parte Applicants M276/2003* (2004) 225 CLR 1, 3 (Austl.).

231. The High Court has extended the protections of the second limb in limited cases to individual federal judges exercising nonjudicial power. *Grollo v Palmer* (1995) 184 CLR 348, 364-65 (Austl.) (opinion of Brennan, CJ, joined by Deane, Dawson & Toohey, JJ).



The early 1990s ushered in a trend in the states toward severe and unprecedented preventive criminal-justice policies that continue to the present day.<sup>232</sup> These state policies took the criminal law away from its traditional focus on the deterrence against and punishment of criminal acts and toward the “prevention” of such acts.<sup>233</sup> The state parliaments co-opted state judiciaries into preventive schemes and made incursions into normal judicial processes, including increased reliance on *ex parte* hearings, closing of judicial hearings, and reliance on “secret” evidence by the government, not released to the other parties.<sup>234</sup> The initial targets of such policies were serious and sexual offenders, expanding to serious and organized criminals (predominantly outlaw motorcycle gangs), and, more recently, to generally high-risk convicted criminals.<sup>235</sup>

A majority of the High Court viewed these local policy trends as direct and unprecedented threats to judicial legitimacy by undermining minimum levels of integrity, and thus developed a countervailing doctrine of minimum integrity standards to shore it up. In 1996, the High Court extended fundamental integrity protections to state courts in *Kable v DPP (NSW)*.<sup>236</sup> *Kable* confronted the High Court with a constitutional challenge to the Community Protection Act 1994 (NSW), a piece of state legislation enacted as a reaction to the violent threats made by a particular prisoner, Gregory Wayne Kable, convicted of the manslaughter of his wife, pending his release. The Community Protection Act applied *ad hominem* to Kable.<sup>237</sup> It authorized the New South Wales Supreme Court to issue a detention order against Kable if it was satisfied “on reasonable grounds” that he “is more likely than not to commit a serious act of violence,

232. See the most recent High Court case concerning such a regime in *Garlett v Western Australia* [2022] HCA 30 (Austl.), involving a challenge to the constitutionality of the *High Risk Serious Offenders Act 2020* (WA).

233. See, e.g., Andrew Lynch, Nicola McGarrity & George Williams, *The Emergence of a ‘Culture of Control,’* in COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11, at 3, 5 (Nicola McGarrity, Andrew Lynch & George Williams eds., 2010).

234. Gabrielle Appleby & John Williams, *The Anti-Terror Creep: Law and Order, the States and the High Court of Australia*, in COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11, *supra* note 233, at 150, 152-54.

235. See the discussion of this progression in Gabrielle J. Appleby & John M. Williams, *A New Coat of Paint: Law and Order and the Refurbishment of Kable*, 40 FED. L. REV. 1, 2-5 (2012), and the most recent expansion to general high-risk offenders in Tamara Tulich & Sarah Murray, *Confronting Race, Chapter III and Preventive (In)justice: Garlett v Western Australia*, AUSPU-BLAW (Nov. 4, 2022), <https://auspublaw.org/blog/2022/11/confronting-race-chapter-iii-and-preventive-injustice-garlett-v-western-australia> [<https://perma.cc/S26Y-3LF4>].

236. (1996) 189 CLR 51 (Austl.).

237. *Community Protection Act 1994* (NSW) s 3(3) provides: “This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.”

and . . . that it is appropriate, for the protection of a particular person or persons or the community generally, that [he] be held in custody.”<sup>238</sup> The High Court upheld the challenge on the basis that the Community Protection Act 1994 was in breach of Chapter III of the Constitution.

Key to the reasoning in the judgments was the Constitution’s creation of an integrated judicial system,<sup>239</sup> in which both state and federal courts exercise federal power and appeal is available to the High Court. This raised two implications: first, the state legislatures cannot abolish their courts so as to frustrate the integrated judicial design;<sup>240</sup> and second, state legislatures could not confer powers on state courts that would be repugnant to or incompatible with their exercise of federal judicial power.<sup>241</sup> In Justice Gaudron’s words, the Constitution did not permit “different grades or qualities of justice, depending on whether judicial power is exercised by state courts or federal courts created by the Parliament.”<sup>242</sup> In the language of the American debate, the High Court was unwilling to assume “parity” between the two levels of courts and, rather, sought to enforce minimum equal standards of integrity.

The judgments were concerned with maintaining the integrity of state judicial process; as Justice Gaudron explained, it is necessary “to ensure the integrity

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238. *Id.* at s 5(1). The proceedings were deemed to be civil, *id.* at s 14, and thus decided on the balance of probabilities. *Id.* at s 15.

239. *Kable v DPP (NSW)* (1996) 189 CLR 51, 102 (Austl.) (opinion of Gaudron, J) (finding that the overall scheme created by Chapter III is “one of the clearest features of our Constitution,” and adding that “it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth”); *id.* at 114 (opinion of McHugh, J) (noting that state courts, supervised by the High Court, perform “a role that extends beyond their status and role as part of the State judicial systems”).

240. *Id.* at 103 (opinion of Gaudron, J) (holding that Chapter III forbade state parliaments from abolishing their courts, so as to prevent states from frustrating the integrated judicial system); *id.* at 110 (opinion of McHugh, J) (finding that “the Constitution requires and implies the continued existence of a system of State courts, with a Supreme Court at the head”); *id.* at 139 (opinion of Gummow, J) (stating that the integrated court system implied that each state must maintain a body answering the constitutional description of a Supreme Court).

241. *Id.* at 103 (opinion of Gaudron, J) (using propositions to draw a limitation on state legislative power, preventing state parliaments from conferring powers on state courts that would be “repugnant to or incompatible with their exercise of the judicial power of the Commonwealth”); *id.* at 118 (opinion of McHugh, J) (finding that that no government can act in a way toward state courts that would “undermine public confidence in the impartial administration of the judicial functions of State courts,” because this would “inevitably result in a lack of public confidence in the administration of invested federal jurisdiction in those courts”); *id.* at 96-97 (opinion of Toohey, J) (stating that a state supreme court that exercised federal judicial power must not be the recipient of powers and functions incompatible with that power).

242. *Id.* at 103 (opinion of Gaudron, J); *see also id.* at 115 (opinion of McHugh, J) (“There are not two grades of federal judicial power.”); *id.* at 116 (“State courts are an integral and equal part of the judicial system set up by Ch III.”).

of the judicial process and the integrity of the courts specified in s[ection] 71 of the Constitution.<sup>243</sup> Further, “[t]he integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process,” particularly in criminal proceedings.<sup>244</sup> Justice McHugh said that legislation that required a state court “to disregard the rules of natural justice or to exercise legislative or executive power” while exercising federal judicial power would be unconstitutional.<sup>245</sup> The *Kable* principle thus emerged as one directed to ensuring the integrity of state courts so that they would be suitable receptacles of federal judicial power.

Since its establishment in 1996, the *Kable* principle has evolved: today it is most often evoked through an implication in the constitutional terms “state courts” and “state supreme courts,” as referred to in Chapter III. The High Court has held that these must possess minimum defining, or essential, characteristics. Generally speaking, these characteristics reinforce or protect what the High Court refers to as “institutional integrity,”<sup>246</sup> often encapsulated in the notion of maintaining the “independence and integrity” of state courts.<sup>247</sup> The formulation of the *Kable* principle as a structural protection has allowed litigants to bring challenges to higher-order issues, such as the remuneration or appointment of judicial officers – provided that threshold principles such as standing are satisfied. Indeed, writing in the decade following *Kable*, Justice McHugh said that *Kable* was a decision of limited application, and that if it were to be applied in the future, it “is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions.”<sup>248</sup> A number of (ultimately unsuccessful) challenges to the terms and conditions of appointment of state judges have followed.<sup>249</sup> In a case challenging the process for appointing and determining the tenure of the Chief Magistrate of the Northern Territory, Chief Justice Gleeson noted that variation in appointments and tenure is likely across a federation, with different constitutional contexts influencing that choice. The choice

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243. *Id.* at 104 (opinion of Gaudron, J).

244. *Id.* at 107.

245. *Id.* at 116 (opinion of McHugh, J).

246. *Forge v Austl Sec & Inv Comm'n* (2006) 228 CLR 45, 76 (Austl.) (opinion of Gummow, Hayne & Crennan, JJ).

247. *Id.*; see, e.g., *N Austl Aboriginal Legal Aid Serv Inc v Bradley* (2004) 218 CLR 146, 163 (Austl.) (opinion of McHugh, Gummow, Kirby, Hayne, Callinan & Heydon, JJ).

248. *Fardon v A-G (Qld)* (2004) 223 CLR 575, 601-02 (Austl.).

249. See, e.g., *Forge v Austl Sec & Inv Comm'n* (2006) 228 CLR 45 (Austl.) (denying a *Kable* challenge to the appointment of acting judges in New South Wales); *N Austl Aboriginal Legal Aid Serv v Bradley* (2004) 218 CLR 146 (Austl.) (denying a challenge to the tenure and remuneration of the Chief Magistrate in the Northern Territory).

exists because there is, he explained, “no single ideal model of judicial independence, personal or institutional.”<sup>250</sup> Indeed, in more recent times in Australia, the state-level processes for judicial appointments, introducing greater transparency, merit- and diversity-based selection criteria and a role for an independent body, have been seen as being far more responsive to integrity concerns than the traditional process in federal courts that relies on executive appointment.<sup>251</sup>

There is one important caveat—a lacuna left by the *Kable* principle. There is no equivalent to the first limb of the *Boilermakers’ Case*, limiting the extent to which non-judicial state bodies can exercise state judicial power. This means, for instance, that if a state legislature wished to circumvent the application of the *Kable* limitation and subvert its protection, it could do so by vesting the particular function or power in a nonjudicial body.<sup>252</sup> This possibility has featured as a significant concern in some High Court judgments, which have been reluctant to enforce the *Kable* principle too strongly against the states for fear they will turn to this mechanism.<sup>253</sup> However, thus far, state legislatures have generally refrained from doing so.<sup>254</sup>

The focus of the *Kable* principle on protecting the structure and processes of state courts has necessarily limited, to some extent, the autonomy of state legislatures to shape the design and functions of those courts. That is, its promotion

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250. *N Austl Aboriginal Legal Aid Serv Inc v Bradley* (2004) 218 CLR 146, 152 (Austl.) (opinion of Gleeson, CJ).

251. *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, AUSTRALIAN L. REFORM COMM’N 436 (Dec. 2021), <https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf> [<https://perma.cc/XXS8-D2CX>] (“In maintaining the traditional approach to appointments to the federal judiciary, the Australian Government is an outlier both domestically and among other Commonwealth countries. All Australian states and territories have adopted criteria for judicial appointment and/or seek expressions of interest for judicial vacancies for some or all of their courts.”).

252. The High Court has placed limits on the extent to which nonjudicial state bodies can exercise judicial power in matters of the kinds identified as federal judicial matters in sections 75 and 76 of the Constitution. See, e.g., *Burns v Corbett* (2018) 265 CLR 304, 340-41 (Austl.).

253. See, for example, *Fardon v A-G (Qld)* (2004) 223 CLR 575, 646 (Austl.) (opinion of Gleeson, CJ), in which Chief Justice Gleeson states that “the confinement of the application of the [*Kable*] principle . . . has been done virtually to the point where the principle itself has disappeared.”

254. There has been one unsuccessful attempt in Queensland to confer power on an executive officer to issue an ongoing preventive detention order against an individual who was subject to a court-issued supervision or a continuing-detention order. The statute, *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) (amending the *Criminal Law Amendment Act 1945* (Qld)), interfered with the judicial function conferred in another piece of state legislation, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The relevant provisions were struck down in *A-G (Qld) v Lawrence* (2014) 2 Qd R 504 (Austl.), on the basis of this interference. However, if a future version of such a law did not so directly intersect and interfere with the judicial process, it is likely that it would be held valid.

of integrity has necessarily come at some expense of judicial autochthony. As William G. Buss has explained, the implication denies state parliaments discretion in creating and abolishing their courts “in order to enhance the Commonwealth’s choices” under sections 71 and 77.<sup>255</sup> It elevates the value of minimum-integrity guarantees across the entire federal judicial systems over the autonomy of state legislatures.<sup>256</sup> The current formulation of the doctrine, by reference to a set of essential characteristics, inherently reduces the states’ choice in judicial institutional design.<sup>257</sup>

Brendan Lim has argued that permissible diversity under the *Kable* doctrine will depend (and indeed has depended) upon the nature of its enforcement by the High Court.<sup>258</sup> Under the doctrine, the judges might—and at least did initially—emphasize the attribution of state courts as courts *of a state* and, in turn, accept the diversity of different design choices across the federation. More recently, however, the High Court has become more concerned with the attributes of state courts as *courts* of a state, thus emphasizing the attributes that must be shared across the federation.<sup>259</sup> The doctrine has thus had flexibility to emphasize integrity or local federal values, and the High Court’s emphasis has shifted over time.

One view in the Australian constitutional system is that the restrictive effects of the *Kable* principle on regional judicial experimentation should be welcomed and the independence and integrity of courts should be paramount. Indeed, positive developments born out of the *Kable* approach include rules preventing state legislatures from directing state courts to detain an individual without the protections of the normal rules of evidence or to conduct substantive hearings that would lead to the confiscation of property in the absence of the respondent.<sup>260</sup> As Chief Justice French remarked:

For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of

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255. William G. Buss, *Andrew Inglis Clark’s Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States*, 33 MELB. U. L. REV. 718, 743 (2009).

256. *Id.*

257. *Id.*

258. Brendan Lim, *Attributes and Attribution of State Courts—Federalism and the Kable Principle*, 40 FED. L. REV. 31, 51 (2012).

259. *Id.* at 44-46.

260. *Kable v DPP (NSW)* (1996) 189 CLR 51 (Austl.) (codifying rules of evidence protections in detention proceedings); *Int’l Fin Tr Co v Crime Comm’n (NSW)* (2009) 240 CLR 319 (Austl.) (preventing confiscation of property in absentia).

procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.<sup>261</sup>

But there are other areas in which state legislatures may also be restricted from experimenting in ways that many would agree are beneficial. One such area, for instance, is the design of civil and administrative tribunal systems in the Australian states that are intended to create a more efficient form of justice for smaller disputes.<sup>262</sup> And another area is the development of less adversarial court practices, which incorporate the concepts of therapeutic jurisprudence, restorative justice, preventive law, creative problem-solving, holistic approaches to law, and appropriate dispute resolution.<sup>263</sup> A number of Australian scholars have considered whether, in conferring nonadversarial practices on state courts, states run the risk of stripping them of their defining characteristics as courts.<sup>264</sup>

A recent study published by Appleby, Olijnyk, Stellios, and Williams provides empirically informed insight into the “costs” to judicial autochthony of the *Kable* doctrine.<sup>265</sup> Through interviews with state and territory policy and law-makers and their advisers, they describe a complex relationship between the integrity standards of *Kable* and local judicial experimentation and variation.<sup>266</sup> In some jurisdictions, there was evidence that state politicians had abandoned local responsiveness and innovations in attempts to ensure their regimes met institutional integrity requirements.<sup>267</sup> But there was also significant evidence of governments’ undertaking careful, informed cost-benefit analyses of particular policies that include, but are not dictated by, constitutional requirements of judicial

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261. *SA v Totani* (2010) 242 CLR 1, 47-48 (Austl.) (footnote omitted).

262. There is some evidence that some states are adopting less efficient measures, particularly around the availability of review and appeal from the tribunals to state courts, because of an uncertainty, and therefore degree of risk, that this might be in breach of the *Kable* principle. See generally Anna Olijnyk & Gabrielle Appleby, *Constitutional Influences on State and Territory Lawmaking: An Empirical Analysis*, 26 FED. L. REV. 231 (2018) (providing examples).

263. See generally MICHAEL KING, ARIE FREIBERG, BECKY BATAGOL & ROSS HYAMS, *NON-ADVERSARIAL JUSTICE* (2d ed. 2014) (examining theoretical underpinnings and practices of a nonadversarial approach in the Australian justice system).

264. See, e.g., SARAH MURRAY, *THE REMAKING OF THE COURTS: LESS-ADVERSARIAL PRACTICE AND THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN AUSTRALIA* (2014); James Duffy, *Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?*, 35 MELB. U. L. REV. 394, 406-19 (2011).

265. APPLEBY ET AL., *supra* note 191.

266. *Id.* at 128-88.

267. *Id.* at 134.

integrity.<sup>268</sup> That is to say, there was careful, deliberate consideration of the autochthony values of responsiveness and innovation, against informed analysis of the constitutional risks to institutional integrity of state courts. Judicial legitimacy in such a situation is informed by the intermixing of its constituent values.<sup>269</sup>

However, there was also evidence that state politicians intentionally flouted constitutional integrity requirements to pass locally popular legislation.<sup>270</sup> This occurred in relation to locally populist “tough-on-crime” regimes targeting organized criminal gangs and other serious offenders, where integrity failures pose troubling judicial-legitimacy concerns such as those that gave rise to the *Kable* decision in the first place.<sup>271</sup> But there was also evidence that it was occurring in states’ experimentation with more therapeutic jurisprudential approaches in lower-level courts, including in relation to specialist-designed courts such as those for sentencing Indigenous offenders or those affected by drug dependences.<sup>272</sup> In these areas, integrity concerns appeared less likely to affect judicial-legitimacy perceptions, and thus autochthony concerns were at the fore of policy and legal developments.

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In both Parts II and III, we have focused on the development of threats to judicial integrity within the federal judicial system—from the threats of out-of-state bias and racial bias in the United States to threats to the judicial process driven by subnational law-and-order politics in Australia. In both contexts we have discussed, there seems to be a trend toward centralization—in part, of course, because responsibility for addressing the integrity issues has rested with federal (or central) institutions. The apex courts, in particular, work through the imposition of uniform rules—hardly a surprising result from courts eager to provide predictability and clarity but one which may well reinforce assumptions or anxiety regarding centralizing tendencies.<sup>273</sup> What happens when the threat to

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<sup>268</sup> *Id.* at 133.

<sup>269</sup> This was particularly evident in relation to the design of state-based superadministrative tribunals where constitutional concerns animated but did not dictate design choices. *Id.* at 186–87.

<sup>270</sup> *Id.* at 135.

<sup>271</sup> *Id.* at 137–40.

<sup>272</sup> *Id.* at 140–42.

<sup>273</sup> Whether apex courts do act as centralizing forces within federations is a hotly contested topic. The most recent work on the subject is unable to provide conclusive determination, but suggests they lean in a centralizing direction. See Russell, *supra* note 1, at vii–x; see also Delaney, *supra* note 13, at 752–53.

legitimacy comes from anxiety about homogenization? When the point of tension is a need for greater autochthony? We do not have ready examples of the centralizing ratchet loosening through federal-level institutional action. Rather, it appears that increasing autochthony requires popular engagement.

#### IV. MANAGING BY AMENDMENT

In this Part, we explore the example of Canada, which over the past fifty years has grappled with Québec's attempts to increase the autochthony of its provincial courts and amend the constitution to address its concerns about the representative nature of the Supreme Court of Canada. Québec failed in its efforts to gain constitutional amendment, though it succeeded in part in achieving judicial recognition of its concerns through a recently negotiated political settlement on certain issues with the Trudeau government.

The Canadian story of failed constitutional amendment is, in part, a function of the rigidity of the constitutional system and unique aspects of Canadian federalism that reinforce asymmetries among provinces, leading to the outsized influence of Québec.<sup>274</sup> Nevertheless, it may well be that in any federation, demands for greater judicial autochthony are driven by a larger centrifugal dynamism. In such a circumstance, the range of topics to be renegotiated will rarely be limited to the judiciary, and the frustration that is demonstrated by insufficiently autochthonous courts may reflect a broader frustration with the federative project. Attempted constitutional amendment in this context might bring with it threats to the federation.<sup>275</sup>

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274. Cf. Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 469-70 (2007) (noting that Québec's demands for autonomy can occasionally embolden other provinces to demand similar concessions).

275. This intuition borne from the Canadian experience is reinforced by a brief review of other comparative examples. In those few federations in which constitutional amendment has been used to accomplish judicial restructuring, the driving concern was improving the *integrity* of the judicial system, not increasing *autochthony*. In Mexico, for example, a 1995 constitutional amendment fundamentally changed the Mexican Supreme Court. See Héctor Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1, 1-2 (1998); Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. INT'L L. REV. 295, 295-97 (1996). The amendment, brought forward by President Zedillo as part of an ambitious package of reform, reduced the number of sitting Supreme Court Justices from twenty-six to eleven, Constitución Política de los Estados Unidos Mexicanos, CP, art. 94, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2022; introduced restrictions on who could be appointed a justice, highlighting that preference was to be given to persons "who have served in an efficient, talented and honest" way as judges or who had been distinguished by their "honorability, competence and background" as practitioners, *id.* at art. 95(vi); and restricted the



A. *Canadian Judicial Federalism*

The Canadian judiciary is an example of the amorphous and large “hybrid” category of federal judiciaries, referenced in Part I. It was intended to be a largely integrated regime, as structured by the British North America Act of 1867 and the Supreme and Exchequer Courts Act of 1875. The British North America Act created the Canadian federation (at the time New Brunswick, Nova Scotia, Ontario, and Québec) and recognized the preexisting colonial courts. The provincial-court hierarchies are given statutory recognition under Section 96 of the Act—Superior, District, and County Courts, with judges appointed by the federal government.<sup>276</sup> The Supreme Court of Canada, created in 1875, began as an intermediate appellate court,<sup>277</sup> as the Judicial Committee of the Privy Council served as the final court of appeal until 1949.<sup>278</sup> Provincial courts of appeal sit below the Supreme Court, and provincial superior courts serve as courts of first instance. In the early days of the federation, until 1949, the provinces could appeal directly from provincial courts to the Judicial Committee of the Privy Council for advisory rulings,<sup>279</sup> avoiding the Supreme Court altogether. Furthermore, the Judicial Committee of the Privy Council “generally favoured the provinces”

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justices to a term of fifteen years, *id.* at art. 94. In Brazil, an amendment in 2004 was designed to improve the administration of justice. Principal among the changes, a new mechanism of introducing binding precedent was instituted for use by the Supreme Federal Court in cases where disagreements as to constitutional interpretation threatened “serious juridical insecurity and the filing of multiple lawsuits,” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45, art. 2 (Braz.), conditions which had spurred doubts as to the court’s effectiveness. See Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOB. STUD. L. REV. 99, 149-150 (2006).

276. Constitution Act, 1867, 30 & 31 Vict., c 3, § 96 (U.K.).

277. See Benoît Pelletier, *The Abolition of Appeals to the Judicial Committee of the Privy Council in Canada and the Evolution of the Role of The Supreme Court of Canada*, 4 CARIBBEAN J. INT’L RELS. & DIPL. 41, 53-56 (2016) (explaining that criminal appeals ended in 1933 and civil appeals ended in 1949).

278. See, e.g., *Reference re Supreme Court Act*, ss. 5 and 6, [2014] S.C.R. 433, 467 (Can.) (noting that early lawmakers assumed the judicial authority for Canada would continue to be the Judicial Committee of the Privy Council (JCPC)); see also Jason Herbert, *The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defense of Tolofson v. Jensen*, 56 U. TORONTO FAC. L. REV. 3, 8 (1998) (“[T]he development of uniquely Canadian notions of judicial federalism may have been suppressed by a dominant political culture that viewed the Canadian judicial structure as a mere component of a grander, Imperial judicial order.”); H. Patrick Glenn, *Foreign Judgments, the Common Law and the Constitution: De Savoye v. Morguard Investments Ltd.*, 37 MCGILL L.J. 537, 538-39 (1992).

279. Glenn, *supra* note 278, at 538-39.

in its interpretation of the Constitution Act 1867.<sup>280</sup> The integrated nature of the system was therefore tempered by the substantive results favoring provincial autonomy.

The modern structure has the Supreme Court sitting atop the largely integrated apex with federally appointed judges in all federal courts, as well as in Section 96 provincial courts. In addition to its authority to review all questions of federal law, the Supreme Court has the authority to review questions of provincial law, both statutory and common-law based. The Supreme Court's broad appellate jurisdiction allows the Court to "eliminat[e] divergences in the common law and in the interpretation of similar statutes among the various provincial courts of appeal," and it has been described as serving a unifying, perhaps even "homogeniz[ing]," aim.<sup>281</sup> The main substantive areas of law are thus adjudicated in an integrated judiciary, appointed by the federal government, with appeal to the Supreme Court.

The duality of the Canadian judicial system lies only along the jurisdictional edges—specialized federal courts and specialized provincial courts. Under the British North America Act, both the Federal Parliament and the provincial legislatures have authority to create courts.<sup>282</sup> The federal hierarchy now includes the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada;<sup>283</sup> in these courts, federally appointed judges hear matters falling exclusively within federal jurisdiction.<sup>284</sup> Provinces are able, under Section 92(14), to establish specialized courts of limited jurisdiction.<sup>285</sup> The specialized provincial courts and

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280. GERALD BAIER, COURTS AND FEDERALISM: JUDICIAL DOCTRINE IN THE UNITED STATES, AUSTRALIA, AND CANADA 123 (2006); see Gerald Baier, *The Courts, the Constitution, and Dispute Resolution*, in CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY 79, 80–81 (Herman Bakvis & Grace Skogstad eds., 3d ed. 2012) (discussing the JCPC's interpretation of the "peace, order, and good government" clause of the 1867 Constitution Act); Frédéric Bérard, *Le Fédéralisme Canadien et la Court Suprême*, 17 FÉDÉRALISME 2034–6298 (2017). But see Alan C. Cairns, *The Judicial Committee and Its Critics*, 4 CAN. J. POL. SCI. 301, 301 (1971).

281. Herbert, *supra* note 278, at 29; see also Peter W. Hogg, *Jurisdiction of the Court: The Supreme Court of Canada*, 3 CAN.-U.S. L.J. 39, 42 (1980) ("When the Supreme Court has to determine a question of provincial law it might perhaps be expected that it would defer to the decisions of the courts of that province (or at least decide the question as a court of that province would have done), and that it would tolerate divergent doctrine which had been developed in different provinces. This is not what has happened at all.")

282. Constitution Act, 1867, 30 & 31 Vict., c 3, § 96(4) & 101 (U.K.).

283. Federal Courts Act, R.S.C. 1985, c F-7, s 3-4.

284. There are also military courts and a Court Martial Appeal Court with appeal to the Supreme Court of Canada (SCC). National Defence Act, R.S.C. 1985, c N-5, s 245(1).

285. See Att'y Gen. for Ont. v. Pembina Expl. Can. Ltd., [1989] 1 S.C.R. 206, para. 17 (Can.). Note that this jurisdictional authority over the administration of justice and procedure covers both Section 96 and Section 92 courts. See British North America Act 1867, 30 & 31 Vict. c. 3, § 92(14) (U.K.).

administrative tribunals, with judges appointed by provincial governments, are “the most diverse structurally in the Canadian judicial system, organized on the basis of varying regions, circuits or functions (family, juvenile, mental health).”<sup>286</sup>

The integrated nature of the system, particularly the federal appointments of provincial judges, limits the influence of provincial governments.<sup>287</sup> And these appointments are controversial in the contemporary practice of federalism in Canada: as one commentator argued, appointment of provincial judges by the federal government is an “outdated relic[] of nineteenth century British imperial rule that [has] no place in [a] modern democratic federation[.]”<sup>288</sup> Committees exist in each province to assess the qualifications of judicial candidates,<sup>289</sup> but the Federal Minister of Justice selects the committee members from nominations by a variety of constituencies, including the provincial law society, law enforcement, branch of the Canadian Bar Association, as well as the provincial government itself.<sup>290</sup> Ultimately, “[provincial] political influence in the final selection by the government is most likely to arise in choosing among those who have been recommended,”<sup>291</sup> relegating provincial governments to an intermediate position – something akin to a constituency group – in their own institutional design.

### B. *Renegotiating the Federal Balance: Québec and Judicial Autochthony*

Canadian judicial federalism is tightly interwoven with broader questions of Canadian federalism, demonstrating both the path dependency of institutional structures and the challenges of federal constitutional change. Constitutional and federal tensions in Canada are longstanding, difficulties heightened by the cultural and linguistic separation between Québec and English Canada and by

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286. Gerald Baier, *Judicial Federalism in Canada: Quasi-Federalism Realised?* (conference paper presented at ICON-S 2017 Copenhagen, July 6, 2017) (on file with author).

287. *See Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3, 13-14 (Can.) (embracing the view that all members of the judiciary are protected by the Constitution to such a degree that provinces may not themselves modify salaries of provincial judges but must first create independent commissions).

288. F.L. Morton, *Provincial Constitutions in Canada 2* (conference paper prepared for Conference on “Federalism and Sub-national Constitutions: Design and Reform,” Apr. 4, 2004), <http://statecon.camden.rutgers.edu/sites/statecon/files/subpapers/morton.pdf> [<https://perma.cc/R6MM-97RV>].

289. INT’L COMM’N OF JURISTS CAN., *INTERIM REPORT: THE CANADIAN FEDERAL JUDICIAL APPOINTMENTS PROCESS AND OPPORTUNITIES FOR REFORM 6* (2016).

290. *Id.* at 7.

291. *Id.* at 9.

“an overlap—real and perceived—between English Canada and federal Canada.”<sup>292</sup>

Québec’s frustrations manifested in electoral, judicial, and constitutional actions. The 1960s and 1970s ushered in an era of robust Québécois nationalism, alongside economic pressures and other cultural changes within Canada.<sup>293</sup> In 1976, Québec separatists, the Parti Québécois, won the Québec general election, setting the stage for the first referendum on secession in 1980. Clearly, there was widespread and generalized dissatisfaction with Québec’s role and place within the Canadian federation; this included frustration with the judiciary.

Some of this dissatisfaction was linked to the role of the Supreme Court, reflecting the importance of judicial federalism to broader federalism design and practice. The Privy Council had been considered solicitous of the provinces, and its abolition in 1949 was met with some concern.<sup>294</sup> The 1975 grant of docket control allowed the Supreme Court to become more clearly “a public law court resolving issues of broad Canadian import.”<sup>295</sup> In the face of these changes, a robust Québécois discourse has long suggested that the Supreme Court is biased against Québec—like the tower of Pisa, it always leans one way.<sup>296</sup> Scholars have

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292. Erin F. Delaney, *Constitutionalization à l'Écosse: Subnational Constitutionalism as Constitutional Reconciliation*, in *A WRITTEN CONSTITUTION FOR QUEBEC?* 283, 285 (Richard Albert & Léonid Sirota eds., 2023).

293. Roy J. Romanow, *Nation Building and the Canadian Constitution: The Impact of Ken Lysyk as an Advocate on the Patriation Reference and Other Important Cases*, 38 *U.B.C. L. REV.* 493, 493-95 (2005) (discussing the rise of oil prices and the increased value of natural resources in Western Canada, in addition to Quebec nationalism).

294. A. Wayne MacKay, *Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the Charter of Rights*, 21 *OSGOODE HALL L.J.* 55, 56 (1983) (noting that some Members of Parliament only abandoned resistance when assured that the SCC would adhere to Privy Council decisions).

295. *Id.* at 60 n.32. This grant, coupled with the federal government’s use of reference procedure to circumvent provincial courts in such issues of broad import, weakened the Court’s reputation as independent and respectful of provincial authority. See JAMES G. SNELL & FREDERICK VAUGHAN, *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION* 247-48 (1985).

296. In politics, see discussion in FLORIAN SAUVAGEAU, DAVID SCHNEIDERMAN & DAVID TARAS, *THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA* 105-06 (2005).

challenged this argument,<sup>297</sup> but a sense of bias (accurate or not) is hard to dislodge.<sup>298</sup> Since 1875, statutory provisions required appointment of justices from the Québec Bar to the Supreme Court.<sup>299</sup> In this, autochthony claims dovetail with integrity goals, as these appointments are meant to ensure against bias. Nevertheless, the federal government's authority to select these justices has limited the possible benefits. Contemporary reform proposals to address the bias concerns suggested shifting to a constitutional court with members "selected proportionately by both the federal and provincial governments."<sup>300</sup> However, they have gained little traction.

Constitutional amendment in Canada is notoriously difficult,<sup>301</sup> particularly in relation to federal design. "[T]here were only three formal amendments to the distribution of powers between 1867 and 1982,"<sup>302</sup> indicating the rigidity of the constitutional framework compounded by the convention "requiring, if not unanimity, a substantial degree of provincial consent to make any alterations."<sup>303</sup>

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297. See FREDERIC BERARD, *CHARTE CANADIENNE ET DROITS LINGUISTIQUES* (2017). Research on the SCC indicates that the regional affiliations of justices are *not* predictive of their decision-making. Robert Schertzer, *Quebec Justices as Quebec Representatives: National Minority Representation and the Supreme Court of Canada's Federalism Jurisprudence*, 46 *PUBLIUS* 539, 540 (2016) (citing DONALD R. SONGER, SUSAN W. JOHNSON, C.L. OSTBERG & MATTHEW E. WETSTEIN, *LAW, IDEOLOGY, AND COLLEGIALITY: JUDICIAL BEHAVIOUR IN THE SUPREME COURT OF CANADA* (2012)). But given the federal government's role in appointments, this fact may not say anything about the results under a different system of appointments.

298. Perceived bias in a single case may not threaten a court's legitimacy, but persistent losses for a particular group can undermine that group's support for the institution. Cf. Gibson & Caldeira, *supra* note 19 (studying diffuse support of the U.S. Supreme Court among Black Americans and its impact on the institutional stability of the Court).

299. This assurance of Québec representation has remained across versions of the Supreme Court Act, dating back to 1875, which required two of the six seats to be appointed from members of the Québec Bar. Supreme and Exchequer Courts Act, S.C. 1875, c 11, § 4 (Can.). A seventh seat was added in 1927, Supreme Court Act, S.C. 1927, c 35, § 4 (Can.), and in 1949, the Supreme Court Act was amended to increase the bench to its modern-day nine seats and restore the one-third balance with three seats to be filled by individuals from the Québec Bar. Act to Amend the Supreme Court Act, S.C. 1949 (2d Sess.), c 37, §§ 1, 3 (Can.); see also SNELL & VAUGHN, *supra* note 295, at 194-95 (detailing the changes made to the SCC in 1949). This ratio was reaffirmed in the 1985 Supreme Court Act, R.S.C. 1985, c S-26, § 6 (Can.).

300. Paul C. Weiler, *The Supreme Court of Canada and Canadian Federalism*, 11 *OSGOODE HALL L.J.* 225, 240 (1973).

301. See generally Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 *ALTA. L. REV.* 85 (2015) (suggesting that the Constitution of Canada is harder to amend than the United States Constitution).

302. Katherine Swinton, *Federalism Under Fire: The Role of the Supreme Court of Canada*, 55 *LAW & CONTEMP. PROBS.* 121, 125, n.15 (1992) (citing unemployment insurance (§ 91), pensions (§ 94A), and benefits (§ 94A)); see also K. M. Lysyk, *Reshaping Canadian Federalism*, 13 *U.B.C. L. REV.* 1, 4 n.3 (1979).

303. Swinton, *supra* note 302, at 125.

Another element of complexity was the remaining legal tie to the United Kingdom, which required the Westminster Parliament to approve (by legislative enactment) constitutional amendments.<sup>304</sup> Efforts to “repatriate” the Canadian Constitution occurred a number of times over the course of the twentieth century,<sup>305</sup> but it was not until the early 1980s that the final break with the United Kingdom was made.

Under Prime Minister Pierre Trudeau, the federal government not only moved to sever the formal link with the Westminster Parliament but also proposed a new amending formula and a charter of fundamental rights and freedoms, a “People’s Package” of reforms.<sup>306</sup> The idea that these reforms would give “expression to the aspirations of people and not necessarily of their governments,” alongside the detailed rights provisions, highlighted the integrative features of national citizenship rather than the territorially bounded interests of provincial governments.<sup>307</sup>

Unsurprisingly, before the submission of the proposal to the United Kingdom, Québec challenged the proposed amendments. The Québec Court of Appeals unanimously held that the proposed amendments would impact provincial legislative competence and diminish the status and role of provincial governments but further held that the constitution gave the federal government authority to make unilateral changes to the constitution. The Supreme Court consolidated the Québec case with cases from Manitoba and Newfoundland. In its decision, known as the *Patriation Reference*, the Supreme Court concluded that a “substantial degree” of provincial consent was necessary for the federal government to amend the constitution.<sup>308</sup>

With a newly minted “substantial degree” of provincial consent, the amendments, in the form of the Constitution Act 1982, were passed as Schedule B to

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304. The Statute of Westminster in 1931 provided that British laws would not apply to Canada unless by the request and consent of the Canadian legislature, and conflicts between enacted Canadian law and British law would no longer be invalidated under the Colonial Laws Validity Act. The British North America Act was exempt, however, meaning that alterations could still be made by Westminster. P. MACKLEM, K.E. SWINTON, R.C.B. RISK, C.J. ROGERSON, L.E. WEINRIB & J.D. WHYTE, *CANADIAN CONSTITUTIONAL LAW* 6 (2d ed. 1997).

305. Barry L. Strayer, *Ken Lysyk and the Patriation Reference*, 38 U.B.C. L. REV. 423, 427 (2005) (noting multiple initiatives to repatriate by adopting a domestic amending formula).

306. *Id.* at 438.

307. *Id.*

308. *Reference Re Resolution to Amend the Constitution (Patriation Reference)* [1981] 1 S.C.R. 753, 904-05 (Can.). “In effect, this decision invented a new constitutional convention to regulate the amendment of the constitution in order to give a role to the provinces that [had been] denied them by law.” Peter W. Hogg & Wade K. Wright, *Canadian Federalism, The Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism*, 38 U.B.C. L. REV. 329, 350 (2005).

the Canada Act 1982 (U.K.), ending Westminster's relationship with Canada.<sup>309</sup> The Constitution Act 1982 included the Canadian Charter of Rights and Freedoms, guaranteeing baseline rights across Canada,<sup>310</sup> as well as a formal supremacy clause,<sup>311</sup> and a new amending formula with tiered rules for different subject matters.<sup>312</sup>

Substantial degree is not, however, unanimity. Québec did not agree to the constitutional changes of 1982. The changes heightened anxiety about the Supreme Court, as the new Charter of Rights and Freedoms proposed a dramatic expansion of the Court's jurisdiction.<sup>313</sup> In addition, although there was a preexisting statutory commitment requiring one-third of the Supreme Court's judges to represent Québec,<sup>314</sup> that commitment was not considered *constitutional*. The Constitution Act 1982 listed the statutes understood to have constitutional status, and the 1875 Act outlining the structure of the Supreme Court was not among them.<sup>315</sup> Québec was the only province not to sign the repatriated constitution, and "that day, it flew its flags at half-mast."<sup>316</sup>

Following Québec's refusal to sign onto the repatriated constitution, constitutional negotiations on the matter began in 1984 between Prime Minister Brian

309. The Constitution Act, 1982, was passed as Schedule B to the Canada Act, 1982 (U.K.), which stated that "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." Canada Act, 1982, c 11, § 2 (U.K.).

310. The Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, §§ 1-34 (U.K.).

311. *Id.* § 52 ("The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.").

312. The general formula requires "resolutions of the Senate and House of Commons; and resolutions of the legislative assemblies of at least two-thirds of the provinces that have . . . at least fifty per cent of the population of all the provinces." *Id.* § 38(1). Unanimous consent of all provincial legislatures, in conjunction with resolutions of the Senate and House of Commons, is required for certain subject-matter categories, including "the use of the English or the French language," *id.* § 41(c) and "the composition of the Supreme Court of Canada," *id.* § 41(d). In addition, a change regarding the use of English or French *within a province* also requires "resolution[s] of the Senate and the House of Commons and of the legislative assembly of each province to which the amendment applies." *Id.* § 43.

313. Cf. Richard Devlin, A. Wayne MacKay & Natasha Kim, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary*, 38 ALTA. L. REV. 734, 752-55, 814 (2000). We should note the existence of a robust debate in Canada over judicial appointments more broadly, raising questions of diversity and openness. See, e.g., Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 112 n.39 (2009).

314. Supreme and Exchequer Courts Act, S.C. 1875, c 11, § 4 (Can.).

315. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, § 52(2), (U.K.).

316. JEAN-FRANCOIS CARDIN, A HISTORY OF THE CANADIAN CONSTITUTION: FROM 1864 TO THE PRESENT 26 (Diana Halfpenny trans., 1996).

Mulroney and Québec Premier Robert Bourassa. The demands Québec made, in exchange for its approval, focused on core – and broad – autochthony claims: most importantly, a statement to Québec’s status as a ‘distinct society’ within Canada.<sup>317</sup> Advancing a claim with many ramifications for Canadian federalism, Québec wanted this distinction to manifest in the judicial context through a *constitutionally* codified requirement “that at least three [of the nine] judges [of the Supreme Court] must come from either the superior courts or from the [civil] bar [of Québec],”<sup>318</sup> and that any Supreme Court vacancy be filled from a list of candidates proposed by the provinces.

Negotiations led to an agreement, concretized at a conference in 1987 between the Prime Minister and the Premiers of the ten provinces at Meech Lake. The Meech Lake Accord was submitted to the provincial legislatures for approval within three years, but by June 1990, it had not received ratification by all provinces.<sup>319</sup> It was resuscitated in 1992 at Charlottetown, but that Accord – with even more expansive terms – was defeated in a national referendum that year. It was rejected by “a majority of all Canadians, by majorities in six provinces (including Québec) and one territory, and by a majority of Aboriginal people living on reserve.”<sup>320</sup>

Québec’s constitutional relationship to the rest of Canada remains unresolved. A provincial role in the appointment of Québec judges to the Supreme Court has consistently been a condition for Québec’s acceptance of the constitutional reforms, including the Charter. But the processes of intergovernmental negotiation have not been successful. In part, the breadth and scope of Québec’s proposals raised anxieties in English Canada about the true meaning of Québec’s claims to be a “distinct society.” Not long after the defeat of the Charlottetown Accord came the next secession vote by Québec (in 1995).

In 2014, a reference question was presented to the Supreme Court arising out of the appointment to that Court of a former judge as one of the three justices from Québec.<sup>321</sup> A key interpretive issue was whether section 6 of the Supreme

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317. For an evaluation of the political negotiations, see generally Troy Q. Riddell & F.L. Morton, *Reasonable Limitations, Distinct Society and the Canada Clause: Interpretive Clauses and the Competition for Constitutional Advantage*, 31 CAN. J. POL. SCI. 467 (1998).

318. PETER H. RUSSELL, *THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION* 59 (1969) (prepared for the Royal Comm’n on Bilingualism & Biculturalism) (providing the foundation for the Meech Lake Accord negotiations).

319. Swinton, *supra* note 302, at 140 n.77.

320. JEREMY WEBBER, *THE CONSTITUTION OF CANADA: A CONTEXTUAL ANALYSIS* 52 (1st ed. 2015).

321. *In re Supreme Court Act*, ss. 5 and 6, [2014] 1 S.C.R. 433 (Can.). On October 22, 2013, the Governor General in Council referred two questions for hearing and consideration under Sec-



Court Act requires appointees to be current members of the Québec Bar or the Court of Appeal or Superior Court of Québec. While litigation was pending, the federal legislature passed an amendment to the Act, clarifying that former members of the Québec Bar are eligible for appointment.<sup>322</sup>

In its opinion, the Supreme Court recognized that Québec's anxiety about the Supreme Court threatened the legitimacy of the Court:

The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada.<sup>323</sup>

Further, the Court recounted the failed Meech Lake Accord and the Charlottetown Accord negotiations, and contextualized such negotiations as “only [part] of attempts at a broader reform of the [judicial] selection process”<sup>324</sup> by Québec that aimed to further the “purpose[s] of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court *and* that Quebec's confidence in the Court be maintained.”<sup>325</sup>

In its decision, the Supreme Court constitutionalized the 1985 Supreme Court Act, giving security to Québec that the requirement of three judges with civil-law expertise would be understood as an entrenched element of the federal compact.<sup>326</sup> Nevertheless, the process of appointment remained at issue and still today remains a live political question.

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tion 53 of the Supreme Court Act: whether section 6 requires appointees to be current members of the Québec Bar or the Court of Appeal or Superior Court of Québec, and whether Parliament could enact legislation expanding eligibility requirements to formerly barred advocates. *Id.* at paras. 1-3.

322. *Id.* at para. 11 (citing Economic Action Plan 2013 Act, No. 2, S.C. 2003, c 40 (Can.)).

323. *Id.* at para. 49.

324. *Id.* at para. 103.

325. *Id.* at para. 18.

326. *Id.* at para. 19 (“The *Supreme Court Act* was enacted in 1875 as an ordinary statute under the authority of s. 101 of the *Constitution Act, 1867*. However, . . . Parliament's authority to amend the Act is now limited by the Constitution. Sections 5 and 6 of the *Supreme Court Act* reflect an essential feature of the Supreme Court of Canada—its composition—which is constitutionally protected under Part V of the *Constitution Act, 1982*.” (citation omitted)).

In 2016, after several failed attempts to restructure the process of appointments,<sup>327</sup> Prime Minister Justin Trudeau introduced a new system in which an “independent and non-partisan Advisory Board” would review applications for the vacancy, consult with the Federal Minister of Justice, and recommend a short list of three to five candidates to the Prime Minister.<sup>328</sup> The composition of the committee would take into consideration “la tradition juridique particulière du Québec.”<sup>329</sup> Although this process reflected some more provincial involvement and an effort to depoliticize judicial appointments, the Québec government considered it to fall short of providing Québec with a “decisive role in the [advisory] process.”<sup>330</sup>

In 2019, with the departure from the Supreme Court of Justice Gascon, one of the three Québec justices on the Court, a new arrangement was agreed between Prime Minister Trudeau and the Government of Québec (represented in part by its Premier, François Legault).<sup>331</sup> The agreement created a specific eight-person Advisory Board for Québec, which included two members appointed by the Justice Minister of Québec, and required all members of the Board to be bilingual. Furthermore, provisions were made for extensive consultations, including with the Premier of Québec. Upon receipt of recommendations from the Justice Minister of Canada and the Premier of Québec, the Prime Minister selects the candidate. This agreement, though much more solicitous of Québec, does not encompass the appointments processes for the provincial courts.

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327. WEBBER, *supra* note 320, at 50 (discussing changes proposed but not enacted under the Martin and Harper governments).

328. Press Release, Prime Minister of Canada, Prime Minister Announces New Supreme Court of Canada Judicial Appointments Process (Aug. 2, 2016), <https://pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process> [<https://perma.cc/4CZE-LCTV>]; Steven Chase, *Ottawa Overhauls Process for Selecting Supreme Court Justices*, GLOBE & MAIL (Aug. 2, 2016), <https://www.theglobeandmail.com/news/politics/ottawa-overhauls-process-for-selecting-supreme-court-justices/article31222331> [<https://perma.cc/S562-KXPL>].

329. Québec’s “distinct legal tradition.” Justin Trudeau, *Un Nouveau Processus Ouvert et Transparent*, LA PRESSE PLUS (Aug. 2, 2016), [https://plus.lapresse.ca/screens/9e91b4ce-e6a3-45co-804d-5d7c054b6804%7C\\_o.html](https://plus.lapresse.ca/screens/9e91b4ce-e6a3-45co-804d-5d7c054b6804%7C_o.html) [<https://perma.cc/UV8V-NTQG>].

330. Secrétariat aux Affaires Intergouvernementales Canadiennes, *Quebecers, Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations*, GOV’T OF QUEBEC 51 (June 2017), [https://www.sqrc.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf](https://www.sqrc.gouv.qc.ca/documents/rerelations-canadiennes/politique-affirmation-en.pdf) [<https://perma.cc/D4ZJ-4KQ3>].

331. Press Release, Prime Minister of Canada, Arrangement Concerning the Appointment Process to Fill the Seat that Will Be Left Vacant on the Supreme Court of Canada Following the Departure of Justice Clément Gascon (May 15, 2019), <https://pm.gc.ca/en/news/backgrounders/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left> [<https://perma.cc/GW9C-LPXQ>].

The Section 96 provincial courts – Superior, District, and County Courts – have judges appointed by the federal government. While the integrative features of the system have been beneficial for integrity, it has been at the expense of Québec’s autochthony interests. Provincial-autonomy interests are reflected in provincial control over the administration of justice and procedure, and the ability to create specialized lower courts (Section 92(14)). Recent litigation has raised questions about the extent of provincial Section 92(14) authority. The Supreme Court has reinforced that this power must be used in a manner “consistent with s. 96 . . . and the requirements that flow by necessary implication from s. 96.”<sup>332</sup> Provinces may not use Section 92(14) to prevent Canadians from accessing the Section 96 courts of superior jurisdiction.<sup>333</sup> And the most recent efforts by Québec to temper bilingualism requirements and allow for monolingual (French) judges have similarly failed.<sup>334</sup>

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The Canadian experience demonstrates the challenge of accomplishing judicial federal redesign, given the unlikelihood of reopening only one aspect of a complex federal compromise. Where constitutional design has prioritized a more integrated form of judicial federalism, therefore, that integration may prove remarkably resistant to future readjustment – notwithstanding agitation for reform in the face of meaningful legitimacy concerns. Furthermore, although the Supreme Court constitutionalized the protections for Québec, it did so while simultaneously claiming for itself the authority to determine the content of the Canadian constitution – a more broadly power-enhancing decision that reinforces the judicial authority some in Québec fear.

## CONCLUSION

Federal judicial systems have long been assessed along the metrics of federalism: is the system integrationist or dualist? Centralized or decentralized? But

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332. *Trial Laws. Ass’n of B.C. v. Att’y Gen. of B.C.*, [2014] 3 S.C.R. 31, para. 24 (Can.).

333. See also *In re Code of Civil Procedure*, 2021 SCC 27 (Can.).

334. See *Conseil de la magistrature c. Ministre de la Justice du Québec*, 2022 Q.C.C.S. 266, paras. 288–92 (Can. Que.) (holding that the chief justice of the court of Québec can require bilingualism in judicial appointment processes over a provincial justice minister’s bar of such prerequisites); Luis Millán, *Quebec Justice Minister, Judiciary Locked in ‘Power Struggle,’ Says Law Prof*, LAW’S DAILY (Feb. 18, 2022, 9:28 AM), <https://www.thelawyersdaily.ca/articles/33659/quebec-justice-minister-judiciary-locked-in-power-struggle-says-law-prof> [<https://perma.cc/GE89-R4KA>].

constitutional designers and scholars have been less interested in the *judicial* aspects of the project: how does the design of the system affect judicial legitimacy? In this Article, we have introduced legitimacy to questions of federal judicial design and the management of judicial federalism. We argue that in a federation, judicial legitimacy should be understood to incorporate both judicial integrity and judicial autochthony. By highlighting both integrity and autochthony, we deepen and complicate the previously articulated design choices of integration and dualism and center the importance of judicial legitimacy, and provide a more nuanced explanation of the factors at play in resolving judicial legitimacy crises that emerge in established federal systems.

We then turned to case studies from the United States, Australia, and Canada, to provide context-driven examples of the design, practice, and recalibration of judicial federalism that show its salience for institutional and political actors. The case studies give a sense of the breadth of judicial legitimacy threats that can arise in federations, as well as the contextualized and historically contingent nature of many claims of bias. In these examples, we show how the balance between integrity and autochthony has been (or has been attempted to be) recalibrated in constitutional practice by the legislature, the judiciary, or through constitutional amendment. The case studies also generate some preliminary lessons for both constitutional designers and scholars, as well as for practitioners, those responsible for the ongoing management of systems of judicial federalism, including legislators, judges, and even the engaged populace in moments of constitutional amendment.

To begin at the beginning: founding moments are unpredictable. Judicial federalism will be complicated by the very process of negotiation and constitutional articulation among federating states or peoples. The extent to which framers can respond even to anticipated and direct judicial legitimacy concerns will be shaped by the other tensions and compromises being negotiated, so that some decisions might be dictated by broader concerns and others necessarily deferred either by explicit delegation or by silence. Although guidance on judicial federalism to constitutional designers should be enhanced and expanded, the messy reality of constitutional moments suggests the scope of impact may be limited. The very nature of federation, however, with its multiple and overlapping jurisdictional authorities, means there will be an ongoing need for active management of judicial federalism. Practitioners will benefit from a clearer understanding of the values at stake, as well as the strengths and challenges of leaving future management in the hands of legislators or judges.

The interconnectivity of judicial federalism with other aspects of the broader federation may be particularly relevant in the life of a federation if legitimacy crises or concerns are spurred by insufficient *autochthony*. As the Canadian example suggests, a sense that subnational courts are not (or are no longer) of the

community may well be only a component part of dissatisfaction with the broader federal balance. It may be difficult for a federation to return autochthonous judicial power to subnational units – particularly in a context where a single unit (province or state) is seeking accommodation or asymmetrical benefits. And thus, unwinding a highly integrated system may be challenging, or even dangerous to the ongoing stability of the federation. In this way, the integrated judiciary – which initially served to strengthen the nascent Canadian federation – may now serve as part of the straitjacket preventing meaningful constitutional evolution in Canada, possibly contributing to the appeal of secessionist arguments in Québec.<sup>335</sup>

When legitimacy crises or concerns arise from *integrity* issues, there may be a danger of centralization. Federal or central-level institutions – whether empowered by the constitution or self-empowered – are likely to seek to impose uniform standards. In our examples, both federal legislatures and federal apex courts centralized when presented with challenges to judicial integrity. We do not here enter into the debate as to which institution might be the more legitimate to work out these questions of value-balancing or which might better accommodate autochthony as a matter of principle.<sup>336</sup> In practice, that determination in any individual federation will depend on highly contextual elements of the constitutional and political system, including the operation of executive and fiscal federalism, and the presence and role of political parties within the federation.

Turning to apex courts, when they operate to resolve *integrity* issues, they may centralize, but our examples showcase differing approaches. By drawing on an individual-rights paradigm to promote integrity in state courts, the Supreme Court has allowed for more institutional variation and judicial autochthony. But it now may have boxed itself in regarding any efforts to monitor judicial elections at the wholesale level. In Australia, in contrast, informed by its interpretative formalism, the High Court's focus on a set of minimum or core institutional factors that is required for courts to adjudicate federal claims has led to more explicit concerns that integrity has been prioritized to the detriment of autochthony in ways that might undermine overall judicial legitimacy. It has also led to claims that individual injustices lay largely beyond the reach of the doctrine. In each case, the judicial response to recalibrating the integrity-autochthony balance is shaped and restricted by underlying legal culture.

Of course, integrity crises may also be solved through efforts at the subnational level, demonstrating the ways in which integrity and autochthony can be

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335. Cf. Delaney, *supra* note 292, at 294–99.

336. See generally Delaney, *supra* note 13.

mutually reinforcing. In both the United States and Canada, judicial autochthony operated to promote integrity when there was little appetite for solutions at the central level. While federal institutions were further separating state and federal responsibilities to isolate (but not resolve) state-level judicial misbehavior, American states sought to use judicial elections to counteract partisan and corrupt courts. In turn, while appointments to federal courts in Australia continue to be undertaken behind the veil of executive authority, Australian states have redesigned their judicial appointments processes to address concerns over transparency and quality as well as diversity, demonstrating a combined local responsiveness to integrity as well as autochthony concerns.

Judicial legitimacy may be threatened on both integrity and autochthony grounds, and it is impossible to say which set of threats may be most dangerous at any given time in any particular federation. Our case studies do provide, however, a moment of pause in relation to the adoption of integrated systems. Integrated systems are more likely to throw up tensions around judicial autochthony that can threaten the federal compact writ large and the many compromises on which it hangs. Addressing autochthony tensions through institutional recalibration by the legislature or the courts is highly limited in a constitutionally integrated system, requiring redress to the difficult and fraught mechanism of amendment. Thus, we would tentatively suggest that dualist systems, which include mechanisms for future institutional recalibration either through legislative or judicial intervention, are likely to be more successful than integrated systems in their durability in responding to legitimacy challenges and the rebalancing of integrity-autochthony concerns as the federal system evolves and responds to contemporary obstacles.