

FEDERAL DECENTRALIZATION

DAVID FONTANA*

Abstract

Constitutional law relies on the diffusion of powers among different individuals in different institutions to produce many desirable institutional goods: checks and balances, democratic accountability, and effective government, for instance. Federalism and the separation of powers have been presented as the primary institutional arrangements generating this diffusion. Scholars and jurists alike, though, have largely neglected another form of diffusion: federal decentralization. Federal power cannot be appropriately diffused if it is geographically concentrated in a single place. Federal decentralization ensures that federal officials in places distant and therefore different from Washington compete with and constrain federal officials in Washington. This Article identifies and evaluates federal decentralization as a dimension of constitutional law.

This Article first uncovers the long but lost history of federal decentralization, and places it at the core of our constitutional experience from the Founding to its current moment on constitutional center stage. The First Congress located important federal officials in a different metropolitan area than the President and Congress, and arranged for the Congress and the White House to operate in different buildings in different neighborhoods. The current Congress has considered legislation proposed by both parties that would increase federal decentralization.

*Associate Professor of Law, George Washington University. My thanks for their helpful comments on this idea and/or this Article to Michael Abramowicz, Bruce Ackerman, Katharine Baker, Joseph Blocher, Jessica Bulman-Pozen, Naomi Cahn, Joshua Chafetz, Ming Hsu Chen, Joseph Fishkin, Stephen Gardbaum, Heather Gerken, Michael Gilbert, Tom Ginsburg, Tara Grove, Sarah Harding, Aziz Huq, David Landau, David Law, Gerard Magliocca, Lisa Manheim, William Marshall, Jud Matthews, Jon Michaels, Robert Mikos, Alan Morrison, Douglas NeJaime, Jennifer Nou, David Owen, David Pozen, David Schleicher, Christopher Schmidt, Naomi Schoenbaum, Richard Schragger, Micah Schwartzman, Brad Snyder, Hugh Spitzer, Kate Stith, Mila Versteeg and Phil Weiser. This Article forms the basis of a book, *The Place of Power: Deciding Where To Put Federal Officials*.

This Article then argues that federal decentralization makes visible the diffusions of power that federalism and separation of powers cannot provide and, executed properly, attempts to provide them. It gives federalism the voice it needs and separation of powers the exit it lacks. Federalism aspires to empower local majorities, and federal decentralization enhances the voice of local majorities by making them empowered neighbors rather than unfamiliar strangers to federal officials—and even permits local majorities to act as federal officials themselves. The separation of powers aspires to generate rivalrous branches, but rival interests can only be generated by ensuring that sometimes federal officials exit Washington rather than operate in it. Federal decentralization, though, risks injecting excessive diffusion into the American system. It therefore requires its own vocabulary to recognize and resolve the persistent set of institutional design challenges that it raises.

INTRODUCTION	729
I. FEDERAL DECENTRALIZATION IN THEORY AND PRACTICE.....	735
A. <i>Founding</i>	736
1. <i>Theory</i>	736
2. <i>Practice</i>	741
B. <i>Trajectories</i>	745
1. <i>Civil War and Reconstruction</i>	745
2. <i>Progressive Era</i>	748
3. <i>New Deal</i>	749
4. <i>The Second Reconstruction</i>	752
5. <i>Contemporary</i>	754
II. THE TOOLS OF FEDERAL DECENTRALIZATION.....	757
A. <i>What to Decentralize</i>	758
B. <i>How Much to Decentralize</i>	760
III. IMPLICATIONS.....	765
A. <i>Federalism</i>	765
1. <i>Design</i>	766
2. <i>Doctrine</i>	776
B. <i>Separation of Powers</i>	779
1. <i>Design</i>	780
2. <i>Doctrine</i>	789
CONCLUSION	794

INTRODUCTION

Constitutional law relies on the diffusion of powers among “distinct and separate departments” of government to ensure that no one person or faction controls power.¹ James Madison famously celebrated federalism and the separation of powers as combining together to provide the “double security” of diffusion.² Scholars and jurists alike, though, have largely neglected to consider a *third* security of diffusion: federal decentralization, or the location of federal officials outside of Washington. Federal power cannot be appropriately diffused if it is geographically concentrated in a single place. Federal decentralization ensures that federal officials in Washington *and* in places distant and therefore different from Washington compete with and constrain one another.³ While federalism is the “oldest question” of constitutional law,⁴ and separation of powers is a “sacred” element of constitutional law,⁵ federal decentralization has remained largely invisible as a tool of constitutional law sweeping across the ages and across the branches.

¹ The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). See also *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (“The declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

² The Federalist No. 51, *supra* note 1, at 323 (James Madison). Scholars have also argued that federalism and separation of powers reinforce one another. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 459 (2012) (“[S]tates check the federal executive in an era of expansive executive power . . . [by] relying on congressionally conferred authority and casting themselves as Congress’s faithful agents.”); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1323 (2001) (“[U]nconventional federal lawmaking implicates not only separation of powers, but also federalism—at least to the extent that such lawmaking purports to displace state law.”). Aziz Huq and I have elaborated on the causal mechanisms promoting these twin pillars of constitutional law. See David Fontana & Aziz Huq, *Institutional Loyalties in Constitutional Law*, 85 *U. Chi. L. Rev.* 1, 75 (2018).

³ For my previous reflections on particular features of federal decentralization in symposium or response essays, see David Fontana, *The Administrative Difference of Powers?*, 116 *Colum. L. Rev. Sidebar* 81, 82–83 (2016) (responding to Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515 (2015)); David Fontana, *The Narrowing of Federal Power by the American Political Capital*, 23 *Wm. & Mary Bill Rts. J.* 733, 737–38 (2015) [hereinafter Fontana, *Narrowing*]; David Fontana, *Placing the Government in Fragile Democracies*, 50 *Wake Forest L. Rev.* 985 (2015).

⁴ *New York v. United States*, 505 U.S. 144, 149 (1992).

⁵ *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting James Madison, 1 *Annals of Cong.* 581 (1789) (Joseph Gales ed., 1834)).

This Article identifies and evaluates federal decentralization as a dimension of constitutional law. Once we make federal decentralization visible, we can see it constantly debated and deployed as a tool of constitutional law. The First Congress located the Attorney General and other important federal officials in a different metropolitan area than the President and Congress, agreeing with George Washington's opinion that locating executive and legislative offices in the same building in Philadelphia had proved dysfunctional.⁶ During the height of the Great Depression, the regional Federal Reserve Bank in Atlanta advocated a distinctive monetary activism credited with helping to save the distinctive Southern economy.⁷ A federal district court judge in Hawaii invalidated an executive order on immigration in the early months of the presidency of Donald J. Trump,⁸ with opponents criticizing a federal judge that far from Washington having that much power.⁹ The experience of a senator from Alaska visiting with individuals in her home state shaped her actions on health care legislation.¹⁰ Indeed, the current Congress has considered legislation sponsored by both parties to

⁶ See Joshua Zeitz, *Jeff Sessions is the Canary in the Coal Mine*, *Politico Magazine* (July 27, 2017), <https://www.politico.com/magazine/story/2017/07/27/jeff-sessions-is-the-canary-in-the-coal-mine-215424> [<https://perma.cc/8SRX-35JZ>] (“Some of the earliest officeholders didn’t even bother to move to Washington, D.C., preferring to remain at home and travel to the capital as needed.”); see also Fergus M. Bordewich, *Washington: The Making of the American Capital* 226 (2008) (quoting George Washington); discussion *infra* Section I.A.2. One commentator captured the sentiment by stating that the legislative and executive branches must “eye each other with Constitutionally ordained respect and suspicion from the opposite ends of Pennsylvania Avenue.” *Id.*

⁷ See Gary Richardson & William Troost, *Monetary Intervention Mitigated Banking Panics During the Great Depression: Quasi-Experimental Evidence from a Federal Reserve District Border, 1929–1933*, 117 *J. Pol. Econ.* 1031 (2009) (examining the different responses and different outcomes generated by those responses across the regional banks). See generally Sarah Binder & Mark Spindel, *Monetary Politics: Origins of the Federal Reserve*, 27 *Stud. Am. Pol. Dev.* 1, 1–2 (2013) (describing congressional interest in creating regional banks and how that has affected federal banking policy).

⁸ *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1139–40 (D. Haw. 2017).

⁹ See Aaron Blake, *Jeff Sessions Doesn’t Think a Judge in Hawaii — a.k.a ‘An Island in the Pacific’ — Should Overrule Trump*, *Wash. Post* (Apr. 20, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/20/jeff-sessions-doesnt-think-a-judge-in-hawaii-a-k-a-an-island-in-the-pacific-should-overrule-trump/> [<https://perma.cc/Q6P Y-HFHE>] (reporting on interview in which Attorney General Jeff Sessions criticized a judge exercising such power from “an Island in the Pacific”).

¹⁰ See Carl Hulse, *Lisa Murkowski, a Swing Vote on Health Care, Isn’t Swayed*, *N.Y. Times* (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/lisa-murkowski-health-care.html> (describing the role that Senator Lisa Murkowski’s background in Alaska played in shaping her vote).

expand federal decentralization, and the General Services Agency has recently proposed relocating approximately 2,300 FBI employees from Washington to Alabama, Idaho, and West Virginia.¹¹

Federal decentralization is both timeless and timely. It is timeless because of its salience across generations and across jurisdictions. Decentralization has also been a significant feature of state constitutional law.¹² Other countries have decentralized their federal governments, from Germany's distribution of officials across

¹¹ For popular discussions of these debates—including some that discuss the constitutional arguments made in this Article—see Ross Douthat, Opinion, Break Up the Liberal City, *N.Y. Times* (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/break-up-the-liberal-city.html> (mentioning the economic features of this debate); Richard Florida, It's Time to Move Some Federal Agencies Outside of D.C., *CityLab* (Nov. 30, 2017), <https://www.citylab.com/equity/2017/11/its-time-to-move-some-federal-agencies-out-of-dc/547172/> [<https://perma.cc/MFD8-2LLK>] (discussing relationship between economic and political geography); Evan Halper, Spread the Swamp? Trump Administration Wants to Move Government Offices out of Washington, *L.A. Times* (Dec. 7, 2017), <http://www.latimes.com/politics/la-na-pol-spread-the-swamp-20171207-story.html> (discussing competing agency and legislative efforts) [<https://perma.cc/YK28-PWKS>]; Jenna Portnoy, Drain the Swamp? No, Let's Just Move It, Rep. Chaffetz Suggests, *Wash. Post* (Mar. 9, 2017), https://www.washingtonpost.com/local/dc-politics/drain-the-swamp-no-lets-just-move-it-rep-chaffetz-suggests/2017/03/08/384938ba-0426-11e7-ad5b-d22680e18d10_story.html [<https://perma.cc/MM9G-SMBY>] (highlighting congressional action); Robert J. Terry, The FBI Wants to Send 2,300 Employees out of the D.C. Region. Why This Might be a Sign of Things to Come, *Washington Business Journal* (February 14, 2018), <https://www.bizjournals.com/washington/news/2018/02/14/the-fbi-wants-to-send-2-300-employees-out-of-the-d.html> [<https://perma.cc/K9BL-GNSG>]; Ben Wofford, Inside the Radical, Self-Destructive, and Probably Impossible Plan to Move the Government Out of Washington, *Washingtonian* (July 16, 2017), <https://www.washingtonian.com/2017/07/16/radical-probably-impossible-plan-move-government-out-washington/> [<https://perma.cc/Y2DQ-S3BN>] (referencing bolder legislation considered in the House and more widely supported Senate plans); Matt Yglesias, Let's Relocate a Bunch of Government Agencies to the Midwest, *Vox* (Dec. 9, 2016), <https://www.vox.com/new-money/2016/12/9/13881712/move-government-to-midwest> [<https://perma.cc/9K46-V47D>] (considering the economic ramifications of this debate).

¹² See, e.g., *Annals of Cong.*, supra note 5, at 861 (statement by James Madison [hereinafter Madison, Location of Capital] (“We see the operation of this [decentralized] sentiment fully exemplified in what has taken place in the several states.”); Erik J. Engstrom et al., Capitol Mobility: Madisonian Representation and the Location and Relocation of Capitals in the United States, 107 *Am. Pol. Sci. Rev.* 225, 225 (2013) (noting the historical importance of state officials and state capitals being “as near as possible to the population centroid of the relevant political jurisdiction”); Bill Mahoney, A Rare Sight: Cuomo, in Public, in Albany, *Politico* (Dec. 15, 2016), <http://www.politico.com/states/new-york/albany/story/2016/12/cuomos-public-appearances-in-albany-still-rare-108097> [<https://perma.cc/7H7J-6B6T>] (“[T]his year there have been 201 days in which [New York Governor Andrew Cuomo] has spent at least some time in New York City and 88 ‘in the New York City area’ . . . [and] a significant number of days in Albany—62, to be specific . . .”).

metropolitan areas¹³ to South Africa's use of three different metropolitan areas to house the legislative, executive, and judicial branches.¹⁴ The federal decentralization of the European Union was a motivating example in debates about Brexit.¹⁵ The sentiment locally and globally has always been and remains that where you stand depends on where you sit. While there may come a day when political behaviors are not shaped by location, the available empirical evidence from the social sciences now points towards the continuing power of place more generally¹⁶ and in shaping the behavior of governmental officials specifically.¹⁷

Federal decentralization is timely because it is emerging as one of the defining constitutional issues of our time. Americans across time and ideological boundaries have consistently said that they distrust the federal government because it is composed so heavily of officials

¹³ See Alan Cowell, In Germany's Capitals, Cold War Memories and Imperial Ghosts, N.Y. Times (June 23, 2011), <http://www.nytimes.com/2011/06/24/world/europe/24berlin.html>.

¹⁴ See Alan Mabin, South African Capital Cities, in *Capital Cities in Africa: Power and Powerlessness* 168 (Simon Bekker & Göran Therborn eds., 2012).

¹⁵ See James Kanter, "You are Ridiculous," E.U.'s Juncker Tells European Parliament, N.Y. Times (July 4, 2017), <https://www.nytimes.com/2017/07/04/world/europe/eu-parliament-jean-claude-juncker.html> ("[T]he European Parliament has come in for particular criticism for the way it shuttles monthly between Brussels, the headquarters of union's administrative machinery, and Strasbourg, 270 miles away."); see also Stephen Castle, How "Brexit" Could End the European Parliament's "Traveling Circus," N.Y. Times (July 11, 2017), <https://www.nytimes.com/2017/07/11/world/europe/eu-parliament-strasbourg-brexit.html> (describing how decentralization motivated Brexit).

¹⁶ The economic geography literature has considered how knowledge spillovers are more substantial when individuals are located more proximately. See, e.g., David Schleicher, Stuck! The Law and Economics of Residential Stagnation, 127 Yale L.J. 78, 97 (2017) (pointing to the evidence of "information spillovers between neighbors" in explaining why some places are more productive than others). The empirical literature in the social sciences has found that political behavior is substantially shaped by the place-based networks that still define us. Our virtual interactions now work together with our interactions in person, so that we arrange important relationships virtually but conduct them in person. Diana Mok et al., Does Distance Matter in the Age of the Internet?, 47 Urb. Stud. 2747, 2750 (2010).

¹⁷ See, e.g., John Brehm & James T. Hamilton, Noncompliance in Environmental Reporting: Are Violators Ignorant, or Evasive, of the Law?, 40 Am. J. Pol. Sci. 444, 449–50 n.5 (1996) (finding different regulatory behavior across regional administrative offices); David M. Hedge, A Spatial Model of Regulation, 21 Am. Pol. Q. 387, 388 (1993) (providing a model and empirical evidence of different official behavior across metropolitan areas); William R. Hobbs, Age and Partisan Stability: How Much of the Association is Explained by Continuity in Social and Personal Life?, 18 (2017) (manuscript on file with author) ("A residence change roughly doubles (1.7 times) the rate at which [voters] change [voting] in a four-year period.").

different from them—officials so different from them in part because they are distant from them. Individuals that work in distant places are more likely to be perceived as different and therefore less deserving of trust.¹⁸ The reasons that citizens often give for distrusting the federal government sound in distance: that the federal government is out of touch with their problems, for instance.¹⁹ Political and legal leaders of both parties in all three branches are hearing this message, and are considering expanding federal decentralization as a means for constitutional law to respond.

Federal decentralization does not have a seat at the constitutional law table, and the account in this Article uses two primary frames through which to argue that it should. First, this Article provides an interpretive account, demonstrating the presence of federal decentralization at major moments in American constitutional law. My account is not meant to be exhaustive, but merely to provide salient examples of the role that the separation of places has played in designing and deciding American constitutional law. This history illustrates both the commonalities and complexities of federal decentralization, as well as its promise and perils.

Second, federal decentralization sheds light on doctrinal debates related to both federalism and the separation of powers. Federal decentralization makes visible the diffusions of power that federalism and separation of powers cannot provide and, executed properly, attempts to provide them. It gives federalism the voice it needs, and separation of powers the exit it lacks.²⁰ Federalism “allows national minorities to constitute local majorities” by giving them control over state governments.²¹ Local majorities will never have the voice they need if they are merely “servants” (in Dean Heather Gerken’s powerful framing) in state governments to federal officials exercising federal

¹⁸ See, e.g., Meric S. Gertler, Tacit Knowledge and the Economic Geography of Context, or the Undefinable Tacitness of Being (There), 3 *J. Econ. Geography* 75, 84 (2003) (identifying “language, common ‘codes’ of communication, shared conventions” and “trust” as hard to transmit across distance and generating distrust across distance).

¹⁹ See Florida, *supra* note 11 (“People are less likely to view the federal government as out of touch if a key agency is enmeshed in their community and employs their friends and neighbors.”).

²⁰ For an overview of the concept of “exit,” see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

²¹ Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 12 (2010).

power far away.²² Federal decentralization enhances the voice of local majorities by making them empowered neighbors rather than unfamiliar strangers to federal officials—and even making local majorities into federal officials themselves. The separation of powers aspires to empower “opposite and rival interests”²³ to control different branches of the federal government, but such rival interests can only be generated by ensuring that sometimes federal officials exit Washington rather than operate in it.

To make the analysis concrete, this Article provides new readings of controversial Supreme Court cases addressing federalism and the separation of powers. Doctrines long in duration and broad in significance need to be revisited once federal decentralization is made legible. The Court’s commandeering cases—now the subject of much attention during the Trump Administration²⁴—hold that the “[f]ederal [g]overnment may not compel the States to enact or administer a federal regulatory program.”²⁵ Many of the statutes that the Court has invalidated for commandeering states feature federal decentralization. When federal officials work near state officials, they are much more likely to work with them, though, calling into question the coercion analysis anchoring the Court’s anti-commandeering cases.

The Court’s executive power cases, which require the President to have “clear and effective” control over agency officials exercising executive power, also implicate federal decentralization.²⁶ This control will be contingent on the locations of those doing the supervising and of those being supervised. Recent decisions by the Supreme Court and by

²² Heather K. Gerken, *Of Sovereigns and Servants*, 115 *Yale L.J.* 2633, 2635 (2006) (“Unlike the sovereign, the servant lacks autonomy and, if push comes to shove, must cede to the higher authority. The power of the servant thus stems mainly from dependence: The fact that the higher authority needs the servant to perform a task creates space not just for discretionary decision-making, but also for bureaucratic pushback.”); see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *Yale L.J.* 534, 550 (2011) (noting the problems with the fact that “most of the existing federalism literature has considered federalism from the perspective of the states”).

²³ *The Federalist* No. 51, *supra* note 1, at 322 (James Madison).

²⁴ See, e.g., *Chicago to File Lawsuit Over Sanctuary Cities Threat*, *U.S. News* (Aug. 6, 2017), <https://www.usnews.com/news/best-states/illinois/articles/2017-08-06/chicago-to-file-federal-lawsuit-over-sanctuary-cities-threat> (noting the lawsuits filed against the Trump Administration related to commandeering sanctuary cities).

²⁵ *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁶ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010).

lower federal courts have questioned presidential control over agency officials located a short walk from the White House.²⁷ It may be even easier to argue that the President lacks “clear and effective” control over officials that the President and his top advisors rarely see because they are located across the country.

Federal decentralization provides diffusions of power that federalism and the separation of powers cannot, but in doing so risks injecting too much diffusion into the American system. Institutional designers therefore face a complicated task in calibrating the quality and quantity of federal decentralization. Rather than disproving that federal decentralization deserves a place alongside federalism and the separation of powers, these complications prove that federal decentralization raises similar questions to those facing the two traditional pillars of structural constitutional law.²⁸ This Article provides a vocabulary to understand how to make comparable institutional estimates when it comes to federal decentralization. The hope is to take a first step towards demonstrating the utility of an analysis centered on federal decentralization, and to open the door to a new scholarly agenda that focuses on this third pillar of structural constitutional law.

This Article proceeds in three parts. Part I foregrounds federal decentralization as a foundational part of our constitutional experience. Part II identifies the analytical toolkit of federal decentralization. Part III considers the doctrinal implications of federal decentralization.

I. FEDERAL DECENTRALIZATION IN THEORY AND PRACTICE

Federal decentralization has been part of the constitutional debate at crucial moments in the American constitutional experience. The urgency of its efforts has only increased since its original articulation. The increasingly unique nature of Washington as a metropolitan area is

²⁷ See *id.* at 495–98 (holding that presidential control was not “clear and effective” over the SEC despite it being located in Washington, D.C.); see also *PHH Corp. vs. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (questioning the constitutionality of the Consumer Financial Protection Bureau), *rev’d en banc*, 881 F.3d 75 (D.C. Cir. 2018).

²⁸ See Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution and the Problem of Executive “Underenforcement,”* 164 *U. Pa. L. Rev.* 1677, 1677 (2012) (“Balance-of-powers arguments are ubiquitous in judicial opinions and academic articles . . . [yet] the concept of the balance of powers has never received a satisfactory theoretical treatment.”); see also David Fontana, *The Geography of Campaign Finance Law*, 90 *S. Cal. L. Rev.* 1247, 1282–85 (2017) (identifying structural tradeoffs in the First Amendment context).

inevitably paired with the unique nature of the federal government. As *The New York Times* reported early in the Obama Administration, officials in the federal government “learn[] that Washington often changes you more than you change it.”²⁹ Ensuring that power is appropriately diffused has therefore involved ensuring that power is appropriately located in places distant from—and thus different from—Washington. The lost history of these efforts is rendered visible by illustrating their key moments.³⁰

A. Founding

Separation of places as a feature of structural constitutional law was imagined and implemented at the constitutional beginning. Theories of how the Constitution should be designed incorporated federal decentralization, and the new federal government created by the Constitution incorporated federal decentralization in practice.

1. Theory

Federal decentralization has largely escaped scholarly attention because of the intellectual energy dedicated to excavating the centralizing interests of the Founders³¹ and the impressive capital city that resulted from those centralizing interests. Early “[p]romoters” of the new city of Washington referred to it as “the ‘Metropolis of America.’”³² One member of Congress in the early Republic argued that Washington “might be compared to the heart in the human body . . . [and that it] was a center from which the principles of life were carried to the

²⁹ See Ashley Parker, All the Obama 20-Somethings, *N.Y. Times Magazine* (Apr. 29, 2010), <http://www.nytimes.com/2010/05/02/magazine/02obamastaff-t.html> (reporting on the unique nature of the Washington metropolitan area).

³⁰ Scholars have produced compelling and important work identifying the category of “regions” in administrative law, but have not yet considered how federal decentralization transcends the ages and branches (and regions) in practice, and therefore challenges constitutional law in theory. See Yishai Blank & Issi Rosen-Zvi, Reviving Federal Regions, 70 *Stan. L. Rev.* (forthcoming 2018) (manuscript at 9–10); Jessica Bulman-Pozen, Our Regionalism, 166 *U. Pa. L. Rev.* 377, 380–81 (2018); Dave Owen, Regional Federal Administration, 63 *UCLA L. Rev.* 58, 62–64 (2016).

³¹ See, e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 168–69 (1996) (explaining some of the reasons for and symptoms of this concern about enhancing federal power); Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 528–31 (1969) (same).

³² See Bordewich, *supra* note 6, at 112.

extremities.”³³ Some at the Founding spoke of the location of federal power in a great national capital as something so important as never to be changed—an unamendable constitutional commitment.³⁴ Contemporary politicians in the House of Representatives have similarly claimed that a great nation needed a great capital.³⁵

Constitutional theory is always “impure” in the sense that it features several complicated, and at times antagonistic, theoretical claims by the same theorists addressing the same concerns.³⁶ Founding constitutional theory was certainly interested in enhancing federal power and creating a federal capital that could handle a capable federal government. At the same time it was also very much concerned with complementing that with a healthy dose of federal decentralization in theory—and, as the next Section discusses, in practice. There was agreement that federal decentralization was an important dimension of structural constitutional law, even if there was debate about how much to decentralize.

First, a defining unit of political life at the Founding was the geographically defined political community. James Madison in *The Federalist No. 10* mentioned the fewer political connections across greater distances that made distinct places into different communities.³⁷ Because places were separated, two mechanisms generated durable differences across places. Different places attracted and maintained different types of people, producing different “selection effects.”³⁸ Geographical mobility was much less common and information about other places much less plentiful, suggesting that location generated a

³³ Id. at 6 (quoting Georgia Congressman James Jackson).

³⁴ See id. at 255 (quoting John Adams).

³⁵ See House Comm. on Oversight & Gov’t Reform, Full Committee Business Meeting, YouTube (Mar. 8, 2017), <https://www.youtube.com/watch?v=EcUdFDvCLTQ> (at 34:45) [hereinafter House Oversight, Decentralization Hearing] (featuring comments by Virginia Congressman Gerald Connolly that the American capital is “sacred ground” and that “America’s capital is iconic”).

³⁶ See Jeremy K. Kessler & David E. Pozen, Working Themselves Impure: A Life Cycle Theory of Legal Theories, 83 U. Chi. L. Rev. 1819, 1819 (2016) (“Prescriptive legal theories . . . become not only increasingly complicated but also increasingly compromised[.] by their own normative lights . . . [t]he theories work themselves impure.”).

³⁷ *The Federalist No. 10*, supra note 1, at 83 (James Madison) (mentioning the benefits of a large republic over a small republic as being in part that as you “[e]xtend the sphere” there will be “a greater variety of parties and interests”).

³⁸ See Adrian Vermeule, Selection Effects in Constitutional Law, 91 Va. L. Rev. 953, 953 (2005) (highlighting “selection effects” as those that regulate “which (potential) officials are selected” and treatment effects or “incentive-based” effects as those focused “on the creation of optimal incentives for those who happen to occupy official posts at any given time”).

durable and stable population base. Virginia, for example, was a term that defined a stable political community in a physical place, not just a formal legal entity called a state.³⁹ The problem of placing the federal capital in one place and having all federal officials there was that it would rely on the narrowing selection effects of a single place.⁴⁰ James Madison articulated this concern about centralization in an important speech in the first Congress.⁴¹

Different places also produced different “treatment effects.”⁴² Madison wrote in *The Federalist No. 46* that individuals will hear “more domestic and personal interests of the people” that are physically proximate, meaning that federal officials’ argument pools will expand to include more local viewpoints.⁴³ Different places also produced place-based personal and professional reputational networks, generating costs for defying the norms of those networks. Madison further argued that individuals will have “ties of personal acquaintance and friendship, and of family and party attachments” with “a greater proportion of the people” who are physically proximate.⁴⁴ Individuals would be most concerned about their local reputation. Individuals would not want to alienate those with whom they are closest, and those with whom they are closest would be located closely.⁴⁵

³⁹ The Federal Constitution codifies this link between states and the geographical spaces that they occupy. See U.S. Const. art. I, § 8, cl. 17 (providing to Congress the power “to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be”); id. art. IV, § 3 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

⁴⁰ James Madison remarked that those located distantly from the capital would have to be given more “powerful inducements” and “liberal compensations” to get them to come to a capital located distantly, and that would violate equality of representation. See Madison, *Location of Capital*, supra note 12, at 862.

⁴¹ See id. (“The more remote the Government is, the greater will be the necessity of making liberal compensations, and holding out powerful inducements, in order to obtain the services of fit characters, from every part of the Union.”)

⁴² See Vermeule, supra note 38, at 953 (highlighting treatment effects or “incentive-based” effects as those focused “on the creation of optimal incentives for those who happen to occupy official posts at any given time”).

⁴³ See *The Federalist No. 46*, supra note 1, at 294–95 (James Madison).

⁴⁴ See id. at 295.

⁴⁵ See Madison, *Location of Capital*, supra note 12, at 863 (“Those who are most adjacent to the seat of Legislation, will always possess advantages over others. An earlier knowledge

Second, the perpetually geographically distributed nature of political ideologies was seen as a feature of a successful American constitutional experiment to be leveraged, rather than a bug that would doom it. The separation of places was foundational to American constitutional success rather than threatening to its existence. The famous Madisonian principle that “[a]mbition must be made to counteract ambition”⁴⁶ required that place be made to counteract place. The virtue of the American experiment was that its “greater sphere of country” meant there will be many “local situations” and therefore inevitably conflicting place-based political factions.⁴⁷ The new constitutional experiment would only work if it “[e]xtend[ed] the sphere” within which power was exercised to ensure decentralized interests were given voice.⁴⁸ Madison argued that “there is no one right” more important than ensuring federal power was geographically accessible to everyone.⁴⁹

The failures of British colonial rule were often blamed on, as the Declaration of Independence phrased it, the fact that power was located “at places unusual, uncomfortable, and distant.”⁵⁰ The state constitutions that shaped the backdrop for the Federal Constitution made sure to locate their capitals in the population centroid of the state so that

of the laws, a greater influence in enacting them, better opportunities for anticipating them, and a thousand other circumstances will give a superiority to those who are thus situated.”)

⁴⁶ The Federalist No. 51, *supra* note 1, at 322 (James Madison).

⁴⁷ The Federalist No. 10, *supra* note 1, at 81–82 (James Madison) (arguing that “local situation[s]” would always produce geographical ideological variations); see also James Madison, *Vices of the Political System of the United States*, April 1787, *in* James Madison: Writings 69, 78–79 (Jack N. Rakove ed., 1999) (noting that “a common interest or passion is less apt to be felt” because of the extended republic).

⁴⁸ The Federalist No. 10, *supra* note 1, at 83 (James Madison); see also *id.* (“[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.”).

⁴⁹ Madison, *Location of Capital*, *supra* note 12, at 861 (“If these great rights be the basis of republics, and if there be a double necessity of attending to them in a Federal Republic, it is further to be considered, that there is no one right, of which the people can judge with more ease and certainty, and of which they will judge with more jealousy, than of the establishment of the permanent seat of Government[.]”); see also The Federalist No. 43, *supra* note 1, at 272 (James Madison) (noting concerns about “too great a public pledge to be left in the hands of a single State, [which] would create so many obstacles to a removal of the government”).

⁵⁰ The Declaration of Independence ¶ 6 (U.S. 1776). Madison stated during the debate about capital location in the First Congress that “[i]t is important that every part of the community should have the power of sending, with equal facility, to the seat of Government such representatives to take care of their interests” Madison, *Location of Capital*, *supra* note 12, at 862.

all factions could equally access state power, and distributed state offices within the state.⁵¹ Madison's important floor speech in the House of Representatives on capital location made note of these state efforts to ensure power was appropriately located.⁵² The many locations of national power before the Constitution (at least eight for the Congress that preceded the Constitution)⁵³ led Madison to remark in *The Federalist No. 43* of the potential need to remove federal power to an entirely new capital altogether.⁵⁴

Given this concern with federal decentralization as a matter of Founding constitutional theory, it should not be surprising that federal decentralization was constantly raised as a topic of constitutional debate. The scholarly debate about the treatment of the presidency at the Founding has focused on the significance of a single individual heading the executive branch⁵⁵ and therefore speaking for the entire United States.⁵⁶ The Constitutional Convention debated whether “three members of the Executive to be drawn from different portions of the Country”⁵⁷ would be necessary for the President to fulfill this role. One delegate argued that a single President could not govern for the entire country because their “appointments would generally be in favor of . . . the center of the Community, and consequently the remote parts would not be on equal footing.”⁵⁸ The argument that carried the day, though, was that “a single magistrate [w]as most likely to answer the purpose of the remote parts.”⁵⁹ One President would try to appeal to all

⁵¹ See Engstrom et al., *supra* note 12, at 225–227, 230 (“No fewer than 11 of the original 13 states decided to relocate their capitals within the first 30 years of independence, and states that later entered the union all faced the question of where to establish a permanent capital.”).

⁵² See Madison, *Location of Capital*, *supra* note 12, at 861–62.

⁵³ See Kenneth R. Bowling, *The Creation of Washington, D.C.: The Idea and Location of the American Capital* 15–67 (1991).

⁵⁴ See *The Federalist No. 43*, *supra* note 1, at 272 (James Madison) (noting concerns about “too great a public pledge to be left in the hands of a single State”).

⁵⁵ U.S. Const. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

⁵⁶ See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1167 (1992) (“All unitary executive theorists base their constructions in part on the Article II Vesting Clause.”).

⁵⁷ 1 *The Records of the Federal Convention of 1787*, at 88 (Max Farrand ed., 1911) (remarks of James Madison at the Proceedings of Committee of the Whole House, May 30–June 19).

⁵⁸ *Id.*

⁵⁹ *Id.*

parts of the country, and not just the place in the country that constituted their political home.⁶⁰ While presidential decentralization was rejected in design, the need to achieve something similar in practice was not.

2. *Practice*

This constitutional commitment to federal decentralization was made real through several different features of constitutional practice in the early Republic. First, federal power would be decentralized because of the location and nature of the federal capital. Washington was equally accessible because of its central location within the new country. During the heated debates in the first session of Congress about the constitutional dimensions of capital location, James Madison argued for a “strict attention” to a central location for the new capital.⁶¹

Washington was also to be permeable, the kind of place to which “every part of the community should have the power of sending, with equal facility” and which all should be able to access.⁶² Many thought that the capital should be located in one of America’s great cities, in a place like New York City or Philadelphia.⁶³ These cities were the most comprehensive places in the United States at the time, and both housed the federal government for periods of time before it moved to Washington. The argument was that these cities were big enough places that they contained within them aspects of each region of the new country: a little Massachusetts and a little Virginia. Thomas Jefferson disagreed, and argued that the experience of residing in one of these cities transformed people, making them no longer truly sensitive to the interests of people in other places. Jefferson specifically had in mind the great European capitals of the time—London and Paris—when he wrote that “[w]hen they get piled upon one another in large cities, as in

⁶⁰ *Id.* at 88–89. (“If one man should be appointed he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages.” (quoting Pierce Butler)).

⁶¹ Madison, *Location of Capital*, *supra* note 12, at 861–62; see also *id.* (quoting Madison as arguing for the importance of “plac[ing] the Government in that spot which will be least removed from every part of the empire”).

⁶² Debates in the House of Representatives (Sept. 4, 1789), *in* 11 *Documentary History of the First Federal Congress of the United States 1436* (Charlene Bangs Bickford et al. eds., 1992).

⁶³ See Bowling, *supra* note 53, at 15–16.

Europe, they shall become corrupt as in Europe.”⁶⁴ By contrast, Washington was not much of a place at the time. A new location would not have established prejudices towards one part of the country or another.⁶⁵

Second, important federal officials would be decentralized either seasonally or permanently. The text of Article I was thought to contemplate this type of decentralization. The same paragraph that creates the “[d]istrict” to become “the Seat of the Government” also mentions other “[p]laces” outside of the “district” that would house federal officials and feature “other needful [b]uildings” for federal use.⁶⁶ The decentralization would be seasonal but substantial at the highest levels of government. The Justices of the Supreme Court, for example, would be outside of Washington sometimes more than half of the year.⁶⁷ A federal government that did not engage in tasks of enormous complexity or in enormous quantities of work⁶⁸ meant that members of Congress and even the President could leave tiny Washington and return to their homes with great frequency during the year. Many Attorney Generals did not work in Washington for many decades after that was position was created in 1789.⁶⁹

The decentralization would be permanent for many of those below the highest levels of federal office.⁷⁰ United States Attorneys were identified

⁶⁴ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* Thomas Jefferson: Writings 918 (1984); see also Letter from Thomas Jefferson to Dr. Benjamin Rush (Sep. 23, 1800), *in* 10 The Writings of Thomas Jefferson 173 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903) (“I view great cities as pestilential to the morals, the health and the liberties of man.”).

⁶⁵ See *The Federalist* No. 43, *supra* note 1, at 272 (noting concerns about “too great a public pledge to be left in the hands of a single State”).

⁶⁶ Compare U.S. Const. art. I, § 8, cl. 17 (granting to Congress “exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States”) with U.S. Const., Art. I, § 8, cl. 17 (granting to Congress “like Authority over all Places . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”).

⁶⁷ See 2 *Documentary History of the Supreme Court of the United States, 1789–1800*, at 1, 3 (Maeva Marcus ed., 1988).

⁶⁸ See Daryl J. Levinson, *The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law*, 130 *Harv. L. Rev.* 31, 50 (2016) (noting a total federal workforce of 153 at the start of the Jefferson Administration).

⁶⁹ See Zeitz, *supra* note 6 (“Some of the earliest officeholders didn’t even bother to move to Washington, D.C., preferring to remain at home and travel to the capital as needed.”).

⁷⁰ See Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* 112 (2009); see also Leonard D. White, *The Federalists: A*

by the Judiciary Act of 1789 as being located in districts outside of Washington.⁷¹ Federal marshals were located within geographically defined districts outside of Washington and were compensated based on their location.⁷² The first Bank of the United States remained in Philadelphia even after other offices left for Washington.⁷³ Washington and other metropolitan areas received regional banks in the years to come, but the primary Federal Bank office remained in Philadelphia for many years.⁷⁴ The United States Mint, an important federal office at the time, also remained in Philadelphia.⁷⁵ The Judiciary Act of 1789 divided the lower federal courts into thirteen geographically defined districts.⁷⁶ The district judge in each district was required to “reside in the district”⁷⁷ and to hold sessions in geographically-defined places within that district.⁷⁸

Early debates about constitutional principles also focused on how best to decentralize as a means of compensating for the deficiencies of federalism and the separation of powers. Federalism required federal decentralization so that the federal government could compete with state governments for local affections from local places.⁷⁹ Separation of powers required branches that would cooperate but not entirely collude, and the physical location of the branches was a crucial means of ensuring that. Congress debated whether to locate the President within the same building as the legislature in the decade that the federal government was in Philadelphia (before it moved to Washington in

Study in *Administrative History* 199 (1948) (demonstrating that field service officials “far outnumbered those in the central establishment”).

⁷¹ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (“And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district”); see also id. § 2, 1 Stat. 73.

⁷² See id. § 27, 1 Stat. at 87 (“That a marshal shall be appointed in and for each district . . .”).

⁷³ Fed. Reserve Bank of Phila., *The First Bank of the United States: A Chapter in the History of Central Banking* 11 (2009).

⁷⁴ Id. at 4–5.

⁷⁵ See History, The U.S. Mint, <https://www.usmint.gov/learn/history> [<https://perma.cc/CX B9-SY5H>] (last updated December 6, 2017).

⁷⁶ Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73.

⁷⁷ Id. § 3, 1 Stat. at 73.

⁷⁸ Id. § 3, 1 Stat. at 74 (requiring that these marshals “attend the district and circuit courts when sitting therein . . .”).

⁷⁹ See *The Federalist* No. 46, *supra* note 1, at 294–95 (James Madison) (arguing that state governments would dominate popular affections and there needed to be efforts to ensure that the federal government could at least compete for some of their affections).

1800).⁸⁰ When the government was located in Philadelphia, the new Department of the Treasury was to be in a different building than both the President and the Congress.⁸¹ As the government moved to the new capital, no less than President George Washington argued against locating them in the same building, considering doing so a threat to the new executive.⁸² It was seen as important, once the federal government moved to Washington, that the legislative and executive branches continue to “eye each other with Constitutionally ordained respect and suspicion from the *opposite* ends of Pennsylvania Avenue.”⁸³ The Supreme Court eventually had to have its own building because for it to share a building would “symbolically but significantly imperil the balance of powers.”⁸⁴

To be clear, while decentralization played a central role, it was to be balanced against the important role that centralized federal power was to play in the new Republic.⁸⁵ Founding constitutional theory featured many arguments that decentralization could go too far. When the Continental Congress met in Philadelphia in 1783, local soldiers seeking monetary compensation rebelled and threatened the Continental Congress.⁸⁶ The worst was avoided, but this possibility made the Founding generation skeptical of being excessively dependent on factions not accountable to the entire nation.⁸⁷ Some historians even believe that Alexander Hamilton arranged for the Continental Congress to meet in a distant place that was unsafe to reiterate the need for centralized federal power.⁸⁸ The exclusive power that Congress had over

⁸⁰ See Bordewich, *supra* note 6, at 225.

⁸¹ *Id.* at 226.

⁸² *Id.*

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* at 225. See also *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.”).

⁸⁵ See, e.g., Madison, *Location of Capital*, *supra* note 12 (“[W]hether we consider the subject with regard to the Executive, the Legislative, or the Judicial departments, we see the soundest reasons for fixing the Government in that place which may be the most permanent centre of territory and population.”).

⁸⁶ See Bowling, *supra* note 53, at 30–34.

⁸⁷ See generally *The Federalist No. 10*, *supra* note 1 (James Madison) (discussing factions).

⁸⁸ Bowling, *supra* note 53, at 31 (“In all probability, Hamilton and his centralist allies deemed it inappropriate that continental soldiers be allowed to settle their claims against Congress with a state government.”).

the seat of government was meant to forestall decentralized interests from dominating federal power too much in the future.⁸⁹ There was to be a capital away from everyone else for part of what the federal government did in the new American Republic.

B. Trajectories

As the federal government grew in size and complexity, so did the metropolitan area housing the federal government—as well as its distance and differences from a country that was itself growing in size and complexity. When the federal government relocated from Philadelphia to Washington in 1800, it was a permeable institution located in the center of the country. The largest executive agency that was relocated was the Treasury Department—with a mere 69 officials.⁹⁰ Congress had only eight permanent and full-time staffers.⁹¹ As one scholar of those years has written, “[f]ourteen years after the arrival of the government [in Washington], there was still no *there* there.”⁹² Debates about federal decentralization therefore focused on how much decentralization was necessary to ensure that federal power exercised in an increasingly distinctive Washington would be pitted against the increasingly distinctive way that federal power would be exercised in other places.

1. Civil War and Reconstruction

In the years after the Civil War, the constitutional changes created by the Reconstruction Amendments were viewed partly through the lens of federal decentralization. By now it is a statement of constitutional conventional wisdom that the Reconstruction Amendments generated a substantial reallocation of power from state governments to the federal government.⁹³ New limitations were placed on private and state power in the Thirteenth Amendment and on state power in the Fourteenth and

⁸⁹ Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 *Dick. L. Rev.* 527, 529–30 (1995).

⁹⁰ See Bordewich, *supra* note 6, at 242.

⁹¹ *Id.*

⁹² *Id.* at 260. For a compelling examination of some of the events discussed below, see the excellent article by Whit Cobb, *supra* note 89.

⁹³ See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 85 (2000) (referencing the effect of the Reconstruction Amendments on increasing “broad federal power”).

Fifteenth Amendments. The enforcement power granted to Congress in the Reconstruction Amendments was meant to resemble the broad power granted to Congress in the Necessary and Proper Clause.⁹⁴ The reactions to these constitutional changes were filtered through the lens of federal decentralization.

The increase in federal power following the Reconstruction Amendments was justified as acceptable because it was not entirely an increase in centralized federal power. Many of the most significant legislative efforts after the Civil War featured federal decentralization to mitigate the limitations that the Reconstruction Amendments would place on state governments. The Reconstruction Acts enacted in 1867, authorizing military occupation of the South, featured five military districts, each with federal officials placed in the actual districts in the South.⁹⁵ Some believed that the federal government would once again be too dominated by the South if federal officials were located there.

Similar legal designs and objections were raised about other elements of Reconstruction. The Freedmen's Bureau, coordinated by the Department of War, was intended to assist recently emancipated slaves and was visualized as a crucial part of realizing the promise of the Reconstruction Amendments.⁹⁶ The statute creating the Freedmen's Bureau provided for the President to appoint, with the advice and consent of the Senate, a military official and at least ten other officials to oversee efforts in each state of the Confederacy from *within* each state of the Confederacy.⁹⁷

For others, though, these federal decentralizations were insufficient. The Civil War was reflective of an insufficient separation of place in the

⁹⁴ See *Hepburn v. Griswold*, 75 U.S. 603, 614–15 (1870) (“It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words ‘all laws necessary and proper for carrying into execution’ powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate [mirroring the “appropriate” language in the Reconstruction Amendments’ enforcement clauses].”). See also *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (stating that the Thirteenth Amendment “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States”).

⁹⁵ Reconstruction Act of 1867, ch. 153, § 1, 14 Stat. 428 (1867).

⁹⁶ See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1043–46 (1995) (discussing the Bureau in the context of education for freedpeople).

⁹⁷ An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, §3, 13 Stat. 507, 508 (1865).

original constitutional document. After the capital moved to Washington in 1800, there were twenty-four straight years of Southern presidents, causing many Northerners to express frustration.⁹⁸ How could there be a due concern for all state governments if those in federal office were all from one part of the country? How could there be separation of powers if all three branches were controlled by the same part of the country? One member of Congress spoke controversially on the floor of Congress about the federal government featuring a “disloyal element” that prejudiced it in favor of the South.⁹⁹

Some state legislatures therefore voted to instruct their federal senators and representatives to move parts of the federal government to someplace further West.¹⁰⁰ In 1867, Representative John A. Logan of Illinois called for a special congressional committee or even a Constitutional Convention to consider these issues.¹⁰¹ St. Louis became the favored, compromise location for the “Reconstruction” capital, since it could be the new population centroid of the country.¹⁰² Walt Whitman’s *Democratic Vistas* essay in 1871 captured the mood when he wrote that “[o]ur future national capital may not be where the present one is. It is possible, nay likely, that it will migrate a thousand or two miles [so our country can be] re-founded, and every thing belonging to it made on a different plan . . . far more superb.”¹⁰³

⁹⁸ See Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 51 (2000); see generally Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (2016).

⁹⁹ Cong. Globe, 40th Cong., 2d Sess. 3174 (June 15, 1868).

¹⁰⁰ See Resolution of the Legislature of Kansas in Favor of the Removal of the National Capital from Washington to Fort Leavenworth Military Reservation, Kansas, S. Misc. Doc. No. 28, 41st Cong., 2d Sess. (Jan. 26, 1869); Resolution of the Legislature of Iowa in Favor of Removing the Capital of the United States, and Opposing any Appropriations for Buildings in the District of Columbia, S. Misc. Doc. No. 73, 41st Cong., 2d Sess. (Mar. 7, 1870); Resolution of the Constitutional Convention of the State of Illinois in Favor of the Removal of the National Capital to Some Point in the Mississippi Valley, S. Misc. Doc. No. 135, 41st Cong., 2d Sess. (May 13, 1870).

¹⁰¹ Cong. Globe, 40th Cong., 2d Sess. 209 (Dec. 16, 1867).

¹⁰² Removal of the Capital, Chi. Trib., July 5, 1869, at 2 (“It is time that the public mind, at least in the Western, Southwestern and Pacific States, were definitely turned to the question of the future location of our National Capital, as one demanding not merely discussion, but speedy action.”).

¹⁰³ Walt Whitman, *Democratic Vistas* 28 (1871).

2. *Progressive Era*

The Progressive Era featured two of the most significant decentralizations in American constitutional history because of the significance of the institutions involved. Those designing these decentralizations argued that the separation of places was indispensable to the success of these institutions. The Evarts Act of 1891 expanded the footprint of the federal courts outside of the Washington metropolitan area, creating decentralized federal courts of appeals to supplement the decentralized district courts.¹⁰⁴ Later federal statutes even more explicitly required these judges to reside¹⁰⁵ and operate¹⁰⁶ in those circuits to avoid the grasps of Washington.¹⁰⁷ Supporters of the Evarts Act argued that if there was to be judicial independence, federal courts needed to be accessible (and thus decentralized) and not excessively integrated within Washington (and thus decentralized).¹⁰⁸

National banking policy also took a decentralizing turn. When the Federal Reserve Act was being debated in the early twentieth century, Paul Warburg, an influential theorist of banking independence at the time, stated that “[t]he view was generally held that centralization of banking would inevitably result in one of two alternatives: either complete governmental control, which meant politics in banking, or control by ‘Wall Street,’ which meant banking in politics.”¹⁰⁹ Carter Glass, the member of Congress primarily responsible for the Act, was even clearer: he worried that a Federal Reserve Bank located entirely in Washington would be unduly influenced by Congress.¹¹⁰ The result was

¹⁰⁴ See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 100-01 (Transaction Publishers 2007) (1928) (summarizing these changes).

¹⁰⁵ 28 U.S.C. § 44(c) (2005) (“Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.”).

¹⁰⁶ 28 U.S.C. § 48(a) (2005) (“The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule.”).

¹⁰⁷ See Cong. Globe, 30th Cong., 1st Sess. 596 (1848) (statement of Senator George Badger) (criticizing the Justices for “not mingling with the ordinary transactions of business . . . not seeing the rules of evidence practically applied to the cases before them— not enlightened upon the laws of the several States . . . not seen by the people of the United States”).

¹⁰⁸ See Frankfurter & Landis, *supra* note 104, at 100–01.

¹⁰⁹ 1 Paul Warburg, *The Federal Reserve System: Its Origin and Growth* 12 (1930).

¹¹⁰ See Carter Glass, *An Adventure in Constructive Finance* 1–15, 249–50 (1927).

the creation of regional banks located in several different metropolitan areas around the country.¹¹¹

3. *New Deal*

Similar constitutional debates characterized the New Deal era. The diagnosis of what catalyzed the Great Depression was a concentration of power in a few places in the country. The creation of the administrative state over the several decades of the middle of the twentieth century featured a comprehensive attempt to remedy perceived geographical concentrations.¹¹² The administrative state would be a separate fourth branch, and that fourth branch would sometimes need to place officials outside of Washington for it to be separate.

The period from the 1880's until the 1920's featured substantial growth in the federal government in Washington¹¹³ and therefore a transformation of Washington itself.¹¹⁴ The Pendleton Act—which laid the foundations for the modern civil service—mentions often that civil service officials will be concentrated in Washington.¹¹⁵ This concentration of federal power in Washington was blamed for the easy capture of that federal power by business leaders concentrated in and around Washington that led to the Great Depression.¹¹⁶

¹¹¹ See H.R. Rep. No. 68-69, at 12 (1913) (“In the United States, with its immense area, numerous natural divisions, still more numerous competing divisions, and abundant outlets to foreign countries, there is no argument either of banking theory or of expediency which dictates the creation of a single central banking institution, no matter how skillfully managed, how carefully controlled, or how patriotically conducted.”).

¹¹² The recent landmark articles by Yishai Blank & Issachar Rosen-Zvi, and by Jessica Bulman-Pozen, are particularly helpful in their discussion of the New Deal as a creation moment for administrative federalism. See Blank & Rosen-Zvi, *supra* note 30, at 32–36; Bulman-Pozen, *supra* note 30, at 401–09.

¹¹³ See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L.J.* 1362, 1362 (2010) (“State capacities built steadily throughout the post-Reconstruction era. Congress created multiple new departments, bureaus, and programs, and federal civilian employment grew much more rapidly than population.”).

¹¹⁴ See Carl Abbott, *Dimensions of Regional Change in Washington, D.C.*, 95 *Am. Hist. Rev.* 1367, 1372–73 (1990).

¹¹⁵ See, e.g., Pendleton Act, ch. 27, § 2, ¶ 3, 22 Stat. 403 (“[A]ppointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia . . .”).

¹¹⁶ John Crowe Ransom, *A Capital for the New Deal*, 2 *Am. Rev.* 129, 142 (1933) (“The fight which Mr. Roosevelt makes every day is chiefly against an opposition which has its centre in the money markets of the East, where private capitalism makes its most desperate and dangerous gamble. . . . How could he better claim to represent [Southern and Western]

New Deal debates therefore considered decentralization plans both big and small to produce a new separation of places. Some argued that there needed to be what one advocate called “a capital for the New Deal.”¹¹⁷ A front-page story in *The New York Times Magazine* summarized the movement to move the entire capital to the Rocky Mountains.¹¹⁸ In the early 1950’s, some members of Congress tried to mitigate congressional opposition to new agencies and departments by proposing legislation to decentralize many of them—as well as the Supreme Court and the Executive Office of the President.¹¹⁹

While major decentralization efforts like this were defeated, the new administrative state did feature smaller decentralizations. President Franklin Delano Roosevelt created the “Brownlow Committee” to make suggestions about reorganizing the executive branch; as then-Professor Elena Kagan argued, this committee “established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy.”¹²⁰ The Brownlow Committee’s ambition was for administrative agencies to “decentraliz[e] [so] . . . the Government servant remains himself one of the people in touch with the people and does not degenerate into an isolated and arrogant bureaucrat.”¹²¹ Some offices were concentrated outside of Washington, such as official efforts to control the spread of malaria (located in Atlanta in an early version of the Centers for Disease Control).¹²² Others were headquartered in

sections against the East . . . than by setting in to move the seat of government to a place where it will be fairly representative of the national geography?”).

¹¹⁷ *Id.* at 139–40 (proposing a capital along the Mississippi River).

¹¹⁸ Richard L. Neuberger, *Should We Move the Capital to the Rockies?*, *N.Y. Times Magazine*, Oct. 6, 1946, at 49 (“Washington, which was to have been the compact, friendly capital of a rural nation, has long since burst the breeches cut for it. Why not a return to the Arcadian ideal of the Founding Fathers? Why not a fresh start somewhere along the eastern ramparts of the Rockies, not many miles from the geographic center of the United States?”).

¹¹⁹ See *Dispersal of Federal Agencies: Hearing on H.R. 1728 Before the Subcomm. on Pub. Bldgs. and Grounds of the H. Comm. on Pub. Works*, 82d Cong. 144 (Feb. 14, 1951) (featuring letter from Sen. Alexander Wiley to Rep. Charles A. Buckley).

¹²⁰ Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2274–75 (2001).

¹²¹ *President’s Comm. on Admin. Mgmt., Report of the Committee with Studies of the Administrative Management in the Federal Government* 33 (1937).

¹²² *Our History—Our Story*, Centers for Disease Control and Prevention, <https://www.cdc.gov/about/history/ourstory.htm> [<https://perma.cc/D6F5-N6EA>] (last updated July 22, 2015).

Washington but featured regional offices throughout the United States.¹²³

Still others were located outside of the central area of Washington but still in the larger metropolitan area, including most significantly the emerging military infrastructure created by World War II and formalized after it.¹²⁴ Ensuring separation between the military-intelligence apparatus and other executive departments was an important design goal.¹²⁵ But an entirely separate military-intelligence apparatus that was in another metropolitan area would be too disconnected from the civilian executive leadership to understand and follow their commands.

A compromise was reached: use the Washington suburbs in Virginia and Maryland.¹²⁶ There were objections to this, particularly on constitutional grounds in the Senate,¹²⁷ but the political branches eventually moved to endorse the constitutionality of decentralization. Congress enacted a statute purporting to interpret the District Clause in Article I, and to demonstrate the constitutionality of these decentralizations. The new law indicated that the “district” identified in Article I as the capital would be defined by federal law as constituting “the District of Columbia; Montgomery and Prince Georges Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities now or hereafter existing in Maryland or Virginia within the geographic area bounded by the outer boundaries of the combined area of said counties.”¹²⁸ Congress argued that it was acting consistently with Article I, and that the Washington metropolitan area was the contemporary version of the capital of “ten miles square” specified in Article I.¹²⁹ President John F. Kennedy and Richard Nixon

¹²³ See Blank & Rosen-Zvi, *supra* note 30, at 48; Bulman-Pozen, *supra* note 30, at 405–06.

¹²⁴ For a brilliant account of this development, and the geographical dimensions of it, see the excellent book by Andrew Friedman, *Covert Capital: Landscapes of Denial and the Making of U.S. Empire in the Suburbs of Northern Virginia* 30–33 (2013).

¹²⁵ See *id.* at 52–53.

¹²⁶ See *id.* See also Alfred Goldberg, *The Pentagon: The First Fifty Years* 5–9 (1992).

¹²⁷ See 87 Cong. Rec. 7132–34, 7136 (Aug. 14, 1941) (statement by Senator McCarran).

¹²⁸ National Capital Transportation Act of 1960, Pub. L. No. 86-669, § 103, 74 Stat. 537, 614 (1960) (codified as amended at 40 U.S.C. § 71(b) (1986)).

¹²⁹ See *id.* (defining “National Capital Region”); see also U.S. Const. art. I, § 8, cl. 17.

later issued largely similar executive orders making decentralization within the executive branch a federal legal priority.¹³⁰

Congress also formalized its own decentralizing efforts during this period. Members of Congress would themselves travel back and forth to their districts and states, but did not have a substantial permanent presence outside of Washington. The common practice was for one small office in the district or state.¹³¹ Since (and because of) the Legislative Reorganization Act of 1946 and a similar statute in 1970, members of Congress now employ usually around half of their staff in the district or state.¹³² The farther the member of Congress's district is from Washington, D.C., the greater the budget they receive to employ staff in the district.¹³³

4. *The Second Reconstruction*

Scholars have explained the decades after World War II as manifesting a substantial increase in federal power, some of it in service of a Second Reconstruction trying to pursue equality.¹³⁴ In the sixty plus years after the New Deal and before *United States v. Lopez* in 1995, the Supreme Court never invalidated a law as exceeding Congress's powers under the Commerce Clause.¹³⁵ The unusual facts of *National Federation of Independent Businesses v. Sebelius (NFIB)* provided the Court with an opportunity to invalidate a law under the Spending Clause in ways it had never done previously.¹³⁶ Even after *NFIB*, though, it is

¹³⁰ See Exec. Order No. 11,035, 27 Fed. Reg. 6519, 6520 (July 9, 1962) (requiring the executive branch to focus on the “feasibility of decentralizing services or activities which can be carried on elsewhere without excessive costs or significant loss of efficiency”); Exec. Order No. 11,512, 35 Fed. Reg. 3979, 3980 (Feb. 27, 1970) (“The heads of executive agencies shall . . . review continuously their needs for space in and near the District of Columbia, taking into account the feasibility of decentralizing services or activities which can be carried on elsewhere without excessive costs or significant loss of efficiency.”).

¹³¹ See Congress of the United States, A History of Congressional Staff, <https://archives-democrats-rules.house.gov/Archives/jcoc2s.htm> [<https://perma.cc/U24N-RC3W>].

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See, e.g., Ernest Young, Federalism as a Constitutional Principle, 83 U. Cin. L. Rev. 1057, 1076 (2015) (documenting a “pretty inexorable expansion of national power vis-à-vis the States over the past two centuries”).

¹³⁵ *U.S. v. Lopez*, 514 U.S. 549, 556–59 (1995).

¹³⁶ See *South Dakota v. Dole*, 483 U.S. 203, 209 (1987) (“*United States v. Butler* . . . established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.”); *United*

fair to label much of federalism more of a “puppy federalism” than the real federalism variety.¹³⁷

During this moment of increasing federal power, though, it is important to note the degree to which federal decentralization has remained a part of the constitutional landscape. The increase in federal power has often featured efforts to mitigate that increase by decentralizing that federal power. The civil rights movement, for example, featured dramatic federal interventions, but federal interventions were often defined by law as decentralized interventions. When President Dwight Eisenhower ordered troops to enforce a desegregation order in Arkansas, he used federal officials located in those states.¹³⁸ The Constitution suggests that militias will be primarily state entities, meaning they are to be located primarily within states.¹³⁹ A series of federal statutes (implementing constitutional language) provides that the President can federalize state militias located in these states and turn them into federal officials in certain emergency situations.¹⁴⁰ The presidential executive order specifically mentioned using those statutes and therefore using troops located in that state.¹⁴¹

States v. Butler, 297 U.S. 1, 66 (1936) (“While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”). See also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 625 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.”) (emphasis omitted).

¹³⁷ Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 37, 47 (2001) (“What we have . . . is puppy federalism, a thin patina of rights talk draped across the areas where we have opted for decentralization as an administrative strategy.”).

¹³⁸ See 2 Stephen E. Ambrose, *Eisenhower: The President* 419–20 (1984).

¹³⁹ Compare U.S. Const. art. I, § 10, cl. 3 (barring states from keeping “troops”) with U.S. Const. art. I, § 8, cl. 15 (providing for the organization of local “[m]ilitia[s]”).

¹⁴⁰ See U.S. Const. art. I, § 8, cl. 15 (empowering Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); id. art. II, § 2, cl. 1 (empowering the President to command state militias “when called into the actual service of the United States”); 32 U.S.C. § 109(a) (2012) (“[A] State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, or the Virgin Islands may maintain no troops other than those of its National Guard and defense forces . . .”).

¹⁴¹ See Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

Additionally, the federal judges who ordered desegregation, like Frank Johnson, were often Southerners located in the South.¹⁴²

Likewise, the cases that were to mark the return of power to state governments outside of Washington revealed how much *federal* power was already outside of Washington. In *Lopez*, Antonio Lopez was charged with a federal crime for carrying a concealed firearm near his high school in San Antonio.¹⁴³ The United States Attorney that charged Lopez and that handled his appeal through the lower federal courts was located in Texas.¹⁴⁴ The district court and court of appeals that affirmed the constitutionality of his conviction were both located far outside of Washington.¹⁴⁵

5. *Contemporary*

The past few years have featured something of a critical juncture for federal decentralization. The last years of the Obama Administration featured several major decentralization initiatives, and Congress has considered bills sponsored by members of both parties commanding major federal decentralizations. While so much of this activity is new, it is worth considering how many of their arguments are still based in the same constitutionally derived concern with the separation of places that Madison and his colleagues articulated several centuries ago.

First, the fact that places still generate and maintain different political communities outside of Washington has been a significant feature of the recent discussion about federal decentralization. One of the pieces of legislation considered by Congress in 2017 makes specific reference to the differences in political communities across places as the motivation to decentralize.¹⁴⁶ It is therefore notable that one important study found

¹⁴² See Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 *Yale L.J.* 1237, 1238–39 (2000) (highlighting the role of Judge Johnson in Alabama).

¹⁴³ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

¹⁴⁴ See 28 U.S.C. § 545 (2002) (“Each United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia, the Southern District of New York, and the Eastern District of New York may reside within 20 miles thereof. Each assistant United States attorney shall reside in the district for which he or she is appointed or within 25 miles thereof.”).

¹⁴⁵ See *United States v. Lopez*, 2 F.3d 1342, 1342 (5th Cir. 1993).

¹⁴⁶ Press Release, Congressman Timothy Ryan (D-OH), Congressman Tim Ryan Introduces Legislation to Decentralize the Federal Government (Apr. 20, 2017), <https://timryan.house.gov/press-release/congressman-tim-ryan-introduces-legislation->

nearly 30 percent of political appointees lived in one specific metropolitan area—Washington—at the time of their nomination.¹⁴⁷ Members of Congress created a label—Divest D.C.—to capture these reasons to increase federal decentralization.¹⁴⁸ During hearings in the House of Representatives about one legislative effort to decentralize in 2017, for instance, Representative Rod Blum from Iowa noted that the Department of Agriculture “impact[s]” farmers but that he has “yet to see a cow or hog in Washington, D.C.”¹⁴⁹

Likewise, in the second term of the Obama Administration, officials in the White House and the Department of Defense worried that the distinctive innovation transpiring in Silicon Valley was not spilling over into insights in the federal government. The concern was that federal policy related to technology was captured by “the usual Washington contractors” instead of empowering innovators in Silicon Valley.¹⁵⁰ The Department of Defense therefore created an important new office in Silicon Valley entitled Defense Innovation Unit—Experimental (“DIUx”).¹⁵¹ DIUx was designed to be a “virtual outpost”¹⁵² that would serve as a “bridge” between the “different missions and different perspectives” of D.C. and Silicon Valley.¹⁵³ DIUx reports directly to the

decentralize-federal-government [<https://perma.cc/7T96-48UD>] (noting the complexity generated by “more than 300,000 federal workers . . . in 190 federally-owned buildings and 500 leased buildings”).

¹⁴⁷ Anne Joseph O’Connell, Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014, 64 *Duke L.J.* 1645, 1646 (2015).

¹⁴⁸ See Portnoy, *supra* note 11.

¹⁴⁹ *Id.*

¹⁵⁰ See John Markoff, Pentagon Shops in Silicon Valley for Game Changers, *N.Y. Times* (Feb. 26, 2015), <https://www.nytimes.com/2015/02/27/science/pentagon-looking-for-edge-in-the-future-checks-in-with-silicon-valley.html>.

¹⁵¹ Cheryl Pellerin, DoD’s Silicon Valley Innovation Experiment Begins, *DoD News* (Oct. 29, 2015), https://www.defense.gov/News/Article/Article/626602/_reidit/1/ [<https://perma.cc/YDP7-4Y8P>].

¹⁵² Nicholas Thompson, The Former Secretary of Defense Outlines the Future of Warfare, *Wired* (Feb. 19, 2017), <https://www.wired.com/2017/02/former-secretary-defense-outlines-future-warfare/> [<https://perma.cc/37R4-HRDM>].

¹⁵³ Ash Carter, U.S. Sec’y of Defense, Rewiring the Pentagon: Charting a New Path on Innovation and Cybersecurity, *Drell Lecture at Stanford University* (Apr. 23, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/606666/drell-lecture-rewiring-the-pentagon-charting-a-new-path-on-innovation-and-cyber/> [<https://perma.cc/3MUY-NRZS>].

Secretary of Defense.¹⁵⁴ Because Boston has a similarly sophisticated technology network, DIUx now has an office in Boston as well.¹⁵⁵

Second, a continuing motivation to decentralize federal power has been complemented by greater opportunities to do so. The demand for federal decentralization has increased alongside the cheaper supply of decentralized federal officials. At the turn of the twentieth century, transportation costs were much more substantial than they would be just half a century later.¹⁵⁶ The twenty largest metropolitan areas were all located on major waterways because access to transportation was crucial for economic success.¹⁵⁷ Centralization was often an obligation rather than a choice. The creation of the combustion engine and the rise of airplane travel transformed organizational structures.¹⁵⁸

The rise of the Internet has only contributed to these trends. When Democratic Representative Tim Ryan introduced his decentralization legislation in 2017, he indicated that it was motivated by “the technology available to us today.”¹⁵⁹ While centuries ago it would take days or sometimes weeks to get from New York to Washington, now it takes seconds to communicate electronically between the places.¹⁶⁰ As a result, the modern organizational form across the private and public

¹⁵⁴ John Markoff, *Pentagon Turns to Silicon Valley for Edge in Artificial Intelligence*, N.Y. Times (May 11, 2016), <https://www.nytimes.com/2016/05/12/technology/artificial-intelligence-as-the-pentagons-latest-weapon.html>.

¹⁵⁵ Dan Lamothe, *Pentagon Chief Overhauls Silicon Valley Office, Will Open Similar Unit in Boston*, Wash. Post (May 11, 2016), <https://www.washingtonpost.com/news/checkpoint/wp/2016/05/11/pentagon-chief-overhauls-silicon-valley-office-will-open-similar-unit-in-boston/> [https://perma.cc/9L25-PY4G].

¹⁵⁶ See Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, 83 *Papers Reg'l Sci.* 197, 198–99 (2004).

¹⁵⁷ *Id.*

¹⁵⁸ See Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* 12 (2006).

¹⁵⁹ Ryan, *supra* note 146 (“The technology available to us today allows for seamless communication and collaboration regardless of geographic location, and is already allowing a web of federal offices and agencies across the US. . . .”). See also H.R. 38, 115th Cong. (1st Sess. 2017) (noting the possibility of decentralization because of “the development of modern communication technologies and the increased ease of travel”).

¹⁶⁰ See Edward L. Glaeser, *Are Cities Dying?*, 12 *J. Econ. Persp.* 139, 145 (1998) (“While transport costs for goods continue to matter, they have become much less important . . . Today, the costs of urban location for most manufacturing industries are clearly much higher than the benefits. If cities’ only advantage was eliminating transport costs for manufactured goods, then cities would indeed cease to exist.”).

sectors is increasingly decentralized with specialized regional hubs.¹⁶¹ Large organizations locate their finance offices in New York City, their lobbying offices in Washington, and their technology offices in Silicon Valley.

Federal decentralization continues to be debated as a constitutional issue. During the most extensive recent discussion of federal decentralization in Congress—in the House of Representatives in the spring of 2017—several opponents of federal decentralization argued that it would be unconstitutional to do so. One member stated, “I’m sorry, everybody, the framers decided—just like every other part of the world—there would be a capital and in the capital would be located the major agencies that run your government.”¹⁶² Constitutional concerns even led one Republican member of the House of Representatives to vote against their party and oppose decentralization efforts.¹⁶³

II. THE TOOLS OF FEDERAL DECENTRALIZATION

This Part identifies the tools available to institutional designers interested in federal decentralization. Similar to federalism and separation of powers,¹⁶⁴ federal decentralization is an umbrella term, in that it is used to describe many institutional practices. Unbundling federal decentralization by identifying its component parts can generate greater analytical clarity.

Federal decentralization essentially asks two design questions: *what* is to be decentralized, and *how much* is to be decentralized? The former question focuses on whether decentralization will transpire across branches, within branches, or some combination of the two.

Once the target of decentralization is identified, the question becomes how much to decentralize that target. The extent of decentralization will itself turn on two sub-questions. (1) How many officials are to be

¹⁶¹ See Gilles Duranton & Diego Puga, *Nursery Cities: Urban Diversity, Process Innovation, and the Life Cycle of Products*, 91 *Am. Econ. Rev.* 1454, 1456 (2001) (highlighting the reasons for this emerging organizational form).

¹⁶² Portnoy, *supra* note 11.

¹⁶³ See *id.*

¹⁶⁴ See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1943–45 (2011) (describing the conventional scholarly and doctrinal wisdom as featuring “a freestanding separation of powers doctrine” grouping together several discrete constitutional questions) [hereinafter Manning, *Separation of Powers*]; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2037–47 (2009) (making similar claims about the federalism bundle).

decentralized and how important are the officials being decentralized? (2) How far away are these officials being placed? Is the decentralization within the same metropolitan or in a different metropolitan area? Is the other metropolitan area quite similar or quite different than the one locating other federal officials?

A. What to Decentralize

Federal decentralization can be motivated by the desire to diffuse power *across* branches of the federal government and/or to diffuse power *within* branches of the federal government. Scholars commonly differentiate between “external” separation of powers diffusing power among the branches, and the “internal” separation of powers diffusing power within a branch.¹⁶⁵ Federal decentralization likewise features decentralizations across branches in different locations, or within branches in different locations. There is no logical inconsistency with both being utilized, so that there is both internal and external decentralization.¹⁶⁶

Federal decentralizations across the branches have been the most salient form of decentralization abroad. The West German system created after World War II placed the legislative and executive branches in different locations¹⁶⁷ from the Federal Constitutional Court in Karlsruhe. The European Union likewise has three capital cities housing three different branches of the government.¹⁶⁸ Similarly, the South African Constitution specifies that “[t]he seat of Parliament is Cape Town,”¹⁶⁹ but subsequent legislation made Pretoria the executive capital and Bloemfontein the judicial capital.¹⁷⁰

¹⁶⁵ See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423, 426–27 (2009) (defining the external separation of powers as about “relations between the branches”).

¹⁶⁶ But see Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. Chi. L. Rev.* 865, 898 (2007) (arguing that internal separation of powers can be self-defeating).

¹⁶⁷ Cowell, *supra* note 13.

¹⁶⁸ Kanter, *supra* note 15; see also Luxembourg, *European capital and seat of E.U. institutions, Government of Luxembourg*, <http://www.eu2015lu.eu/en/la-presidence/luxembourg-et-ue/luxembourg-siege-institutions-europeennes/index.html> [<https://perma.cc/6WVY-SD2Z>] (last updated June 29, 2015).

¹⁶⁹ S. Afr. Const., 1996 art. 42(6). Note that this can be changed. *Id.* (“[A]n Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere.”).

¹⁷⁰ Mabin, *supra* note 14, at 168–69.

American federal decentralization likewise features external decentralization, though nothing of the magnitude of most other countries. Regional Federal Reserve Banks were placed outside of Washington to distance them from the legislative and executive branches in Washington and centralized banking in the Northeast.¹⁷¹

External decentralizations are primarily motivated by a concern that one branch has been, or could be, unduly influenced by another branch. As James Madison wrote in *The Federalist 48*, “[i]t is equally evident that none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”¹⁷² It is most common in comparative constitutional law to see the legislature and the executive co-located, and the judiciary located someplace different. In the Czech Republic, for instance, the legislature and the executive are in Prague while the Constitutional Court is located in Brno.¹⁷³ The Brazilian Supreme Federal Court’s entanglement with the other two branches has generated proposals to move the Court to Rio de Janeiro from its current location in Brasilia.¹⁷⁴ In some countries, the executive and the judiciary are co-located, but concerns about the autonomy of the legislature are significant enough that the legislature is located in a different metropolitan area. In Chile, for instance, Santiago is home to the executive branch and the judicial branch, while Valparaiso hosts the legislative branch.¹⁷⁵

The Supreme Court Justices in the United States rode circuit because of the concern that judicial independence could not exist if there were judicial co-location with the executive and legislative branches.¹⁷⁶ Once

¹⁷¹ See Binder and Spindel, *supra* note 7, at 3 (discussing disagreements over centralization in determining structure of Federal Reserve system); see also Glass, *supra* note 110, at 261, 267–68 (discussing drafters’ intent).

¹⁷² *The Federalist* No. 48, *supra* note 1, at 308 (James Madison) (“After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.”).

¹⁷³ *The Origins of the Constitutional Judiciary*, Ústavní Soud, <https://www.usoud.cz/en/history/> [<https://perma.cc/GPN5-VRNG>] (noting location of Constitutional Court in Brno).

¹⁷⁴ See *Death of a Justice*, *The Economist*, Jan. 28, 2017, at 30.

¹⁷⁵ See Shirley Christian, *Valparaiso Journal*; *Home Port for Lawmakers: Seafarers’ Old Haunt*, *N.Y. Times* (Mar. 2, 1989), <http://www.nytimes.com/1989/03/02/world/valparaiso-journal-home-port-for-lawmakers-seafarers-old-haunt.html>.

¹⁷⁶ David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 *Minn. L. Rev.* 1710, 1726, 1729 (2007) (quoting then-Representative James Buchanan that “[i]f the

the Justices centralized in Washington, decentralized lower federal courts of appeals were created.¹⁷⁷ Chief Justice William Howard Taft viewed a separate building for the Supreme Court as on par with the Court having control of its docket in its importance in producing an independent Supreme Court.¹⁷⁸ Chief Justice Taft's arguments resembled those of many of the Framers worried about executive power. For them, the legislative branch had to have its own building from the moment the federal government moved to Washington, if the legislature was to resist the President's influence.¹⁷⁹

Internal decentralization is a more commonly used tool, particularly in the American system. The desire to diffuse power within a branch motivates a decision to distance parts of that branch. For example, when the executive branch was established in Founding-era Philadelphia, the Department of Treasury was located in a different building than the President.¹⁸⁰ Likewise, administrative agencies feature regional offices to diffuse power within the executive branch.¹⁸¹

B. How Much to Decentralize

The second question that institution-designers must answer is *how much* to decentralize. It is a truism that decentralization will transpire; not every official can share the same office, the same floor, the same building, the same street, or the same Metro stop. The question therefore

Supreme Court should ever become a political tribunal, it will not be until the Judges shall be settled in Washington, far removed from the People, and within the immediate influence of the power and patronage of the Executive.”)

¹⁷⁷ See 1893 Att’y Gen. Ann. Rep. iii-iv. The Judiciary Act of 1891, also known as the Evarts Act, removed the obligation of circuit riding, but still did permit the Justices to “sit as judges of the circuit court of appeals within their respective circuits.” The Judiciary Act of 1891, ch. 517, § 3 26 Stat. 826 (1891).

¹⁷⁸ See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn. L. Rev. 1267, 1267–68 (2001) (describing efforts by Taft to generate the building by noting that “It was Taft who, with great skill and patience, seized the occasion to extract from Congress the resources to construct and design the present structure, which . . . was intended to combine ‘all the beauty, charm and dignity of the Lincoln Memorial’ with ‘the practical qualities of a first-rate office building.’”).

¹⁷⁹ Bordewich, *supra* note 6, at 226 (noting sentiment that the legislative and executive branches should “eye each other with Constitutionally ordained respect and suspicion from the opposite ends of Pennsylvania Avenue.”).

¹⁸⁰ *Id.* at 116.

¹⁸¹ See Blank & Rosen-Zvi, *supra* note 30, at 1; Bulman-Pozen, *supra* note 30, at 1.

is inevitable: what degree of decentralization is desired? Resolving this question involves the consideration of two dimensions.

First, one must determine *how many* federal officials will be decentralized. In the American context, what is the number of federal officials located outside of the central “ten miles square” that the Constitution identifies as the core of the federal government?¹⁸² One historian has found that the answer has been fairly consistent throughout the Capital’s history—somewhere between 80 and 90 percent of federal officials have always been located outside of Washington.¹⁸³ The current bill before the House of Representatives proposes something even more dramatic: moving at least 90 percent of administrative agency staff outside of Washington.¹⁸⁴

Another means of answering the question of how many federal officials are decentralized is more qualitative than quantitative. How many of the most important federal officials are located outside of Washington? In the United States, some—including President Ulysses S. Grant¹⁸⁵—have argued that important officials must be located in Washington as a matter of federal constitutional and statutory law. Outside of debates about the District Clause in Article I, many have made similar arguments about the greater importance of policy coordination among the most important federal officials. The Constitution differentiates between more important officials (principal) and less important officials (inferior).¹⁸⁶ The Supreme Court as recently as this past term in *Ziglar v. Abbasi* stated that coordination of the most

¹⁸² See U.S. Const. art. I, § 8, cl. 17 (granting to Congress “exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States”).

¹⁸³ See Carl Abbott, *Dimensions of Regional Change in Washington, D.C.*, 95 *Am. Hist. Rev.* 1367, 1370 (1990).

¹⁸⁴ H.R. 826, 115th Cong. (1st Sess. 2017) (stating that after legislation is implemented “no more than 10 percent of the employees of the agency [can be] based in the Washington metropolitan area”).

¹⁸⁵ President Grant argued that federal official relocations “should go through the same process . . . as amendments to the Constitution.” *The “Welcome” Demonstration*, *Evening Star* (D.C.), Dec. 22, 1870, at 4; *The Boys in Blue*, *N.Y. Trib.*, Dec. 21, 1870, at 1.

¹⁸⁶ See, e.g., *United States v. Germaine*, 99 U.S. 508, 509 (1878) (“The Constitution for purposes of appointment . . . divides all its officers into two classes.”); see also *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.”).

important officials (at least in the executive branch) is a concern of the highest constitutional magnitude.¹⁸⁷

A defining feature of American federal decentralization has therefore been its answer to the qualitative part of the “how many” question more than its answer to the quantitative part. American federal decentralization is essentially horizontal. If you want to know how important an official is—a good portion of the time at least—look at where they are located. The most important executive branch officials are near the President or cabinet heads, the most important legislative branch officials are in or near the Speaker’s Office, and the most important judicial branch officials are in the Supreme Court building. The Federal Reserve Bank in New York City has outsized importance, but its importance is less than its counterpart in Washington, just as the regional office of the Department of Health and Human Services in New York City has less importance than the Washington headquarters.

This manner of locating important officials in Washington distinguishes the American approach from many others, which insist that some of the most important officials be decentralized. For instance, in the years after World War II, it was said that “whoever took Berlin ruled Germany,” and the only means to address that concern was to locate important officials elsewhere.¹⁸⁸ The South African system makes it easier for factions around the country to feel invested in the federal government, which would have been much harder to do if what was located in their home area was an insignificant part of the federal government.¹⁸⁹

Second, another feature of resolving the “how much” question is determining *how far* to decentralize. The most relevant geographical unit in the United States is the metropolitan statistical area.¹⁹⁰ It is still

¹⁸⁷ 137 S. Ct. 1843, 1861 (2017) (referencing this logic as the reason why “courts have shown deference to what the Executive Branch has determined . . . is essential to national security” (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 26 (2008)) (citations and internal quotation marks omitted)).

¹⁸⁸ See Gordon A. Craig, *Berlin, the Hauptstadt: Back Where It Belongs*, 77 *Foreign Aff.* 161, 167 (1998).

¹⁸⁹ See *supra* notes 169–170 and accompanying text.

¹⁹⁰ The United States Census Bureau uses “metropolitan” and “micropolitan” statistical areas as its relevant units of geographically integrated places. See About Metropolitan and Micropolitan Statistical Areas, U.S. Census Bureau, <https://www.census.gov/programs-surveys/metro-micro/about.html> [<https://perma.cc/D7FN-ZF34>] (last visited Jan. 14, 2018) [hereinafter Census Bureau, Metropolitan and Micropolitan].

relatively costly to move people, particularly within congested metropolitan areas (like Washington),¹⁹¹ and the direct cost of spending time in traffic can be substantial, generating major opportunity costs.¹⁹² The result is that the “average number of local interactions per person” is affected by their spatial distance.¹⁹³

This intra-metropolitan decentralization is significant enough as a structural feature to be constitutionalized in other countries. A 2013 draft of the Tunisian Constitution purposefully places parts of the Tunisian government outside of the center of the capital, Tunis, but still within the same metropolitan area.¹⁹⁴ Bardo, a suburb of Tunis, features important governmental offices.¹⁹⁵

There are certainly salient examples of purposefully decentralized federal offices within the Washington metropolitan area. The decision to locate the Department of Homeland Security in Tenleytown in more suburban, upper northwest Washington, D.C., was done to find a middle ground between the centralization of other parts of the executive branch in downtown Washington and the decentralization provided by suburban Virginia and Maryland.¹⁹⁶

Decentralizing *within* a metropolitan area can have substantial effects but often not as much as decentralizing *across* metropolitan areas. The greater costs incurred in transporting individuals across metropolitan areas reduces the exposure of officials in one metropolitan area to the argument pools and the reputational oversight of another metropolitan area. The decision to place the regional Federal Reserve Banks not just

¹⁹¹ See Glaeser & Kohlhase, *supra* note 156, at 208.

¹⁹² See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. Ill. L. Rev. 1507, 1521 (explaining how market depth operates).

¹⁹³ See Luis M.A. Bettencourt, *The Origins of Scaling in Cities*, 340 *Science* 1438, 1439 (2013).

¹⁹⁴ See Draft Constitution of the Tunisian Republic Apr. 22, 2013, art. 50, *translated in* Constitutional History of Tunisia, ConstitutionNet, International Institute for Democracy and Electoral Assistance, <http://www.constitutionnet.org/country/constitutional-history-tunisia> (“The headquarters of the Chamber of Deputies shall be located in Tunis and the suburbs thereof”).

¹⁹⁵ See Roua Khelifi, *Ennahdha and Allies Reject Calls for NCA Dissolution*, TUNISIALIVE (July 31, 2013, 4:26 PM), <http://www.tunisia-live.net/2013/07/31/ennahdha-and-others-reject-calls-for-nca-dissolution/> [<https://perma.cc/9AMF-XRDD>].

¹⁹⁶ See Spencer C. Hsu & Neil Irwin, *Homeland Security Settles on D.C.*, *Wash. Post*, Jan. 23, 2003, at A1. (“Officials said the agency’s security and operational needs are too pressing for it to lease space in the Washington suburbs, as first proposed.”).

in another part of Washington, but in other parts of the country is reflective of this distance as difference mechanism.¹⁹⁷

Inter-metropolitan federal decentralizations will also vary in the magnitude of their effects. Metropolitan areas vary in their degree of connection to the rest of the country and similarity to other metropolitan areas. Compare the relative ease of traveling from the Federal Reserve Bank in Washington to the one in Chicago as opposed to the one in Kansas.¹⁹⁸ A federal official located in Kansas will be more decentralized in practice than one located in Chicago. Professors Chris Tausanovitch and Christopher Warshaw have found meaningful differences in political preferences across metropolitan areas, with Oklahoma City on the other ideological end of the spectrum from Washington.¹⁹⁹ A federal official located in Oklahoma City will be more decentralized than one located in New York City.

Some locations cannot even be classified as equally metropolitan in the first place. Metropolitan areas are defined by their populations (a core urban area of over 50,000) and their commuting patterns (surrounding areas connected to that core urban area are included within the metropolitan area).²⁰⁰ Within metropolitan areas, though, there are major variations. There are different implications to locating a federal office in suburban Tysons Corner than in downtown Washington.²⁰¹ Similarly, there are different implications to locating a federal office outside of a metropolitan area altogether. Placing a federal official in Keene, New York (population about 1,100) is different than placing it in Albany, New York (metropolitan area population about 1.1 million) or in New York City, New York (metropolitan area population about 23.7 million).

¹⁹⁷ See Hedge, *supra* note 17, at 393.

¹⁹⁸ See Zachary P. Neal, *The Causal Relationship Between Employment and Business Networks in U.S. Cities*, 33 *J. Urb. Aff.* 167 (2011) (presenting empirical data related to the transportation networks connecting different metropolitan areas); Zachary P. Neal, *Differentiating Centrality and Power in the World City Network*, 48 *Urb. Stud.* 2733 (2011) (same).

¹⁹⁹ Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 *Am. Pol. Sci. Rev.* 605, 609 (2014).

²⁰⁰ See Census Bureau, *Metropolitan and Micropolitan*, *supra* note 190.

²⁰¹ See Nicholas A. Phelps & Andrew M. Wood, *The New Post-Suburban Politics?*, 48 *Urb. Stud.* 2591, 2600–01 (2011) (presenting information about the different political ecosystem of Tysons Corner).

III. IMPLICATIONS

Federal decentralization provides normative relief to federalism and the separation of powers. No longer is each doctrine responsible for providing fifty percent of the diffusion constitutional law requires—half of James Madison’s “double security.”²⁰² Federal decentralization supplies part of the diffusion that constitutional law demands, which federalism and separation of powers are incapable of providing. Increasing diffusion via federal decentralization, however, risks providing too much diffusion.

Federalism can only provide the voice that local majorities need if local majorities are sometimes speaking to federal officials from across the street—or if local majorities are speaking *as* federal officials. Separation of powers can only provide the competing “ambition[s]”²⁰³ that pit the branches against one another if officials in these branches can sometimes exit to different parts of the country. The additional diffusion that federal decentralization provides, though, requires careful calibration to ensure that there are sufficient centripetal forces. As part of this analysis, this Part provides new reads on two of the most significant areas of constitutional law: commandeering and executive power.

A. Federalism

Federalism, as Professor Heather Gerken has written, diffuses power to state governments outside of Washington to “allow[] national minorities to constitute local majorities.”²⁰⁴ Existing discussions of federalism rely heavily on state governments and citizens far from Washington to persuade, cajole, and even coerce the federal government in Washington to protect local majorities. Interactions by federal officials in Washington with those outside of Washington every few days or every few months—or with voters outside of Washington every two, four, or six years—are presumed to provide sufficient voice to those local majorities. Federal officials that are distant and different from these local majorities will inevitably undersupply decentralization. Federal decentralization integrates local majorities into the federal

²⁰² The Federalist No. 51, *supra* note 1, at 323 (James Madison).

²⁰³ *Id.*, No. 46, at 298–99 (James Madison).

²⁰⁴ Gerken, *supra* note 21, at 12.

government in a way that ensures these local majorities have voice in a more consistent way.

The power of federal decentralization also generates perils for federalism. Federal decentralization could be so effective as to pose some risk of not just *complimenting* federalism but *substituting* for it. If both persist, federal decentralization added to federalism can generate excessive (rather than efficient) diffusion. This Part provides an initial discussion of how institution designers have addressed concerns about federal decentralization.

1. Design

Benefits

Courts and commentators have constantly debated how to empower local majorities. Virtually every vision of empowering local majorities involves empowering state officials because local majorities have cheaper access to state officials. As the Supreme Court wrote in *Gregory v. Ashcroft*, state government is “more sensitive to the diverse needs of a heterogeneous society” because it features more “opportunity for citizen involvement in democratic processes.”²⁰⁵ Courts and commentators have therefore often focused on ensuring both that local majorities have voice within state government and that local majorities have voice in the federal government by virtue of their voice in state government and the influence state officials have over federal officials.²⁰⁶

The sovereignty model has focused on ensuring that state governments have discrete areas of policy that they can administer.²⁰⁷ Because local majorities have a voice in state government, their perspectives will be represented when state governments legislate in certain areas protected as state domains. Process federalists argue that institutions like political parties—heavily composed of state and local

²⁰⁵ 501 U.S. 452, 458 (1991). See also Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *Yale L.J.* 1564, 1633–43 (2006); David Schleicher, *Federalism and State Democracy*, 95 *Tex. L. Rev.* 763, 784 (2017) (same).

²⁰⁶ See, e.g., Gerken, *supra* note 21, at 7–8 (“Minorities are instead part of a complex amalgam of state and local actors who administer national policy. . . . They enjoy a muscular form of voice—the power to not just complain about national policy, but to help set it.”).

²⁰⁷ See *id.* at 7 (“Even as scholars resist the ‘separate spheres’ approach that so often accompanies a sovereignty account, floating in the background of their work is the sense that states should have control over ‘their’ policies.”).

officials located outside of Washington—convince those in Washington to respect local majorities.²⁰⁸ Cooperative and uncooperative federalists argue that state and local governments outside of Washington enforcing—or declining to enforce—federal law convince those in Washington to respect local majorities.²⁰⁹

Each of these accounts of federalism, though, inevitably limits local majorities because local majorities are distant from—and therefore more limited by—federal officials. The sovereignty model presumes that a federal government concentrated in Washington will adequately consider and internalize the interests of distant and different local majorities. A Supreme Court dominated by Washington-based Supreme Court advocates appearing before it²¹⁰ and Justices whose Washington experiences shape their decisions,²¹¹ though, cannot be sufficiently sensitized to local majorities. As Justice Antonin Scalia wrote about the Supreme Court in his dissent in *Obergefell v. Hodges*, “[f]our of the nine [Justices] are natives of New York City. Eight of them grew up in east-

²⁰⁸ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1078 (2014) (“Competition between [both of] today’s ideologically coherent, polarized parties leads state actors to make demands for autonomy, to enact laws rejected by the federal government, and to fight federal programs from within. States thus check the federal government by channeling partisan conflict through federalism’s institutional framework.”); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 269 (2000) (updating and expanding theory about parties as intermediaries between federal and state power); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 546, 558–59 (1954) (pointing to several features of constitutional design that ensure decentralized interests are considered by the federal government).

²⁰⁹ See, e.g., Gerken, *supra* note 22, at 2635 (“Unlike the sovereign, the servant lacks autonomy and, if push comes to shove, must cede to the higher authority. The power of the servant thus stems mainly from dependence: The fact that the higher authority *needs* the servant to perform a task creates space not just for discretionary decision-making, but also for bureaucratic pushback.”).

²¹⁰ See, e.g., Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L.J.* 1487, 1497–98 (2008) (detailing the rise and success of a small number of Washington Supreme Court lawyers).

²¹¹ See, e.g., *Cong. Globe*, 30th Cong., 1st Sess. 596 (Apr. 7, 1848) (statement of Senator George Badger about the failures of riding circuit, criticizing the Justices for “not mingling with the ordinary transactions of business . . . not seeing the rules of evidence practically applied to the cases before them—not enlightened upon the laws of the several States . . . not seen by the people of the United States”); see also Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 *Law & Soc’y Rev.* 889, 889 (2012) (providing empirical evidence of judicial behavior being influenced by prior executive experience).

and west-coast States. Only one hails from the vast expanse in-between.²¹²

Other visions of protecting local majorities focus on giving local majorities voice not just in their state governments, but in ensuring that state governments have voice in federal deliberations.²¹³ The brilliant framing of the literature by Gerken—about the power of the *servant*—captures the limitations of using those outside of Washington to shape federalism inside of Washington. Federalism limits the ability of local majorities to influence the far more important federal government—a federal government that has the Supremacy Clause at its disposal—if state governments are distant from federal power.²¹⁴ The expansion of the country since the Founding means that Washington is no longer “nearer [the] centre than any part” of the country, as James Madison praised Washington as being when he spoke during the First Congress.²¹⁵ Madison further wrote in *Federalist 14* that the American Republic will cease to be a democracy when federal power becomes so far away from the people that they could not easily access federal power anymore.²¹⁶

²¹² 135 S. Ct. 2584, 2629 (Scalia, J. dissenting); see also A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 Va. L. Rev. 231, 251 (2015) (“Geography has obviously not played a significant part in recent presidents’ nomination calculus Even those justices who are ostensibly from outside of the mid-Atlantic and northeastern parts of the country have spent the bulk of their professional careers in the BosWash corridor.”).

²¹³ See Gerken, *supra* note 21, at 7–8 (“[T]he power minorities wield is that of the servant, not the sovereign; the insider, not the outsider. They enjoy a muscular form of voice—the power not just to complain about national policy, but to help set it.”).

²¹⁴ See *Gregory*, 501 U.S. at 460 (“The Federal Government holds a decided advantage[:] the Supremacy Clause.”).

²¹⁵ Madison, *Location of Capital*, *supra* note 12, at 865; see also Cong. Mgmt. Found. & Soc’y for Human Res. Mgmt., *Life in Congress, The Member Perspective* 13 (2013) (reporting results of survey of members of House of Representatives that “[m]embers from the mid-Atlantic region can commute home daily and sleep in their own beds [But] [t]ravel time is especially lengthy for those Members representing the West Coast, those representing the non-contiguous states and territories, as well as those without major transportation hubs in their district”); Sheryl Gay Stolberg, *After Victory Laps, Settling In As Rookies*, N.Y. Times (Nov. 12, 2014), <https://www.nytimes.com/2014/11/13/us/politics/rookies-prepare-for-life-at-bottom-of-congress-food-chain.html> (reporting on the transition to Congress for elected officials moving from other parts of the country).

²¹⁶ The *Federalist* No. 14, *supra* note 1, at 101 (James Madison) (“[T]he natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand.”).

The citizen outside of Washington faces a “make or buy” decision in terms of political influence,²¹⁷ but a decision in which either making or buying influence is costly. If local citizens decide to influence federal officials themselves, they must endure the direct costs of traveling to Washington to interact with the most important federal officials. Infrequent interactions, like the occasional visit, will be ineffective as compared to the benefits of repeat player, constant interactions.²¹⁸ Republicans and Democrats alike, for instance, have complained that President Trump has been inaccessible because he has rarely traveled West of the Mississippi River.²¹⁹

Local citizens can cheaply influence more proximate state or local officials, and then hope that these state or local officials in turn influence more powerful federal officials. However, federal officials are often located far away from and therefore are not particularly connected to state or local officials either.²²⁰ Citizens living closer to Washington, by contrast, can more easily access federal power. For example, nearly one in three residents of the District of Columbia have directly protested the Trump Administration since President Trump was inaugurated in January of 2017.²²¹

Alternatively, local citizens can purchase services from those inside of Washington specializing in accessing federal power. There is a form of lobbying “market depth” in Washington since branches are concentrated there.²²² Large numbers of individuals in Washington can

²¹⁷ For the initial foundation for this theory, see Ronald H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937), *reprinted in* Ronald Coase, *The Firm, The Market, and The Law* (1988).

²¹⁸ See, e.g. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 *Tex. L. Rev.* 515, 564–68, 579–81, 584–88, 590–91 (2004) (identifying how these mechanisms operate in different legal settings).

²¹⁹ See Adam D. Nagourney & Michael D. Shaer, *Call from California: President Trump, Where Are You?*, *N.Y. Times* (July 3, 2017), <https://www.nytimes.com/2017/07/03/us/politics/california-trump-visit.html> (“Or maybe it’s the president’s apparent aversion to long trips. Despite having the luxury of traveling on Air Force One—no taking off your shoes for a security line—Mr. Trump has stayed close to the East Coast since he took office, crossing the Mississippi River only once, briefly, for an Iowa rally last month.”).

²²⁰ See Hedge, *supra* note 17, at 398.

²²¹ See Paul Schwartzman & Emily Guskin, *Washington Has Become the Capital of Political Dissent*, *Wash. Post* (July 6, 2017), https://www.washingtonpost.com/local/dc-politics/washington-has-become-the-capital-of-political-dissent/2017/07/05/e39281f6-5b4f-11e7-a9f6-7c3296387341_story.html [<https://perma.cc/83HZ-47HX>].

²²² See Schleicher, *supra* note 192, at 1521.

specialize in walking through the revolving door in and out of government because there are many employment opportunities in which to utilize human capital related to the federal government. This even plays out on a street-by-street basis in Washington. K Street in Washington is the center of the political influence industry because it is located proximately to the primary locations of power for each of the three branches of government.²²³ Rents on K Street are therefore enormous because of the greater access this physical proximity to power provides.²²⁴ Local interests—such as state governments—are important consumers purchasing these influence services,²²⁵ but purchasing them is quite expensive.

Consider the enactment of the Affordable Care and Patient Protection Act (“ACA”) in 2010. Scholars rightly made much of the fact that the ACA was respectful of federalism.²²⁶ The Medicaid expansion was enacted through the Spending Clause, meaning that state governments had to willfully accept federal money and would act cooperatively (or uncooperatively) in the implementation of the expansion.²²⁷ State governments even applied creative labels to frame their Medicaid expansion as being decentralized, using titles like “Insure Tennessee” (Tennessee) and “Husky Health D” (Connecticut).²²⁸

²²³ See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 *Geo. Mason L. Rev.* 637, 651 (2012) (“An office in residential Cleveland Park does not provide a law firm, small investment firm, or lobbying shop with the same benefits that an office on K Street can provide.”).

²²⁴ See *id.* at 652 (“Office space in downtown D.C. is now nearly as expensive as space in downtown New York City, even though D.C. is much smaller than New York and does not have the same type of super-rich financial institutions.”).

²²⁵ See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 *Va. L. Rev.* 953, 968 (2014) (detailing the role that organizations like the National Governors Association play in representing state officials in Washington).

²²⁶ See, e.g., Abbe R. Gluck, *Federalism From Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *Fordham L. Rev.* 1749, 1749–50 (2013) (citing the ACA as an example of how “federalism proponents may be doing their own cause a disservice with their reluctance to see federalism in federal statutes”).

²²⁷ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575 (2012) (reviewing the ACA as a Spending Clause statute).

²²⁸ See Andrea Zelinski, *State Unveils Details of ‘Insure Tennessee’ Plan*, *Nashville Post* (Jan. 8, 2015), <https://www.nashvillepost.com/business/health-care/article/20480974/state-unveils-details-of-insure-tennessee-plan> [<https://perma.cc/RGY3-2KM9>]; Healthinsurance.org, *Connecticut and the ACA’s Medicaid Expansion* (Oct. 2, 2016), <https://www.healthinsurance.org/connecticut-medicaid/> [<https://perma.cc/9VTJ-TGFS>].

Despite these best and impressive efforts, though, the Medicaid expansion faced criticism for being excessively centralized. A citizen in Tennessee could complain directly to their health department about the conditions applied on Medicaid funds, but many of these conditions were imposed by Washington officials hundreds of miles away.²²⁹ The citizen could travel to Washington or hire a lobbying firm in Washington to lobby the Department of Health and Human Services (“HHS”) to remedy these conditions, but not many citizens can afford to, let alone do so on a regular enough basis to be effective.

By contrast, federal decentralization makes local majorities into *neighbors* of federal officials, rather than *servants* to them. Neighbors have more voice than servants. Federal officials hear more and hear better about the concerns of locals once they live amongst them and come to care more about addressing their concerns. Agency behavior varies across regions because decentralized federal officials learn about local needs more efficiently and more quickly from across the street than across the country, and adapt their regulatory behavior accordingly.²³⁰

Local majorities also can *become* federal officials, rather than just neighbors influencing them. Co-locating federal and state offices would generate market depth in that particular policy area.²³¹ Individuals can specialize in a policy area and know that there are ample opportunities in that policy area that do not require enduring the costs of relocation to realize these opportunities. Local citizens can therefore go *between* federal and state offices, rather than having to stay local and work for the state government or go national by moving to Washington to work for the federal government.

²²⁹ See *Printz v. United States*, 521 U.S. 898, 959–60 (1997) (Stevens, J., dissenting) (“By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself.”).

²³⁰ See Brehm & Hamilton, *supra* note 17, at 473. For additional evidence of the network generated between federal officials located outside of Washington and state officials, see Hedge, *supra* note 17, at 393; John T. Scholz et. al., *Street-Level Political Controls Over Federal Bureaucracy*, 85 *Am. Pol. Sci. Rev.* 829, 829 (1991). See generally Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 146 (1985) (“Ideally regional offices might be viewed as necessary communication links between federal and state cultures, translating the former into a vernacular that is useful and effective in the latter.”).

²³¹ See Schleicher, *supra* note 192, at 1521–22 (identifying empirical research about market depth and how it reduces risk causing increased specialization).

The result is a class of federal and state officials with unique capacities to mediate between federal and state power and ensure that both are respected. Federal officials, like other professionals, develop human capital related to their earliest professional experiences.²³² Federal officials early in their careers learn how to harmonize the interests of those outside of Washington with the interests of those inside of Washington in a fashion that will persist later in their careers. House Majority Leader Kevin McCarthy from California, for instance, served in the California office of Representative Bill Thomas earlier in his career. From that early experience, he gained an understanding of the interests of that part of California, an understanding that he has carried with him during his time now serving in the Congress in Washington.²³³ State and local officials likewise develop the capacity to manage federal power more effectively when they earlier exercised federal power from the same place that they exercise state or local power. Bill De Blasio was the regional head of the Department of Housing and Urban Development in New York City during the Clinton Administration,²³⁴ and that assisted his negotiations with the federal government on behalf of New York City once he became mayor.

Citizens appreciate this federal decentralization as more respectful of local majorities. Federal decentralization makes local majorities *think* that the federal government understands them. Consider how meaningful it was to the Tea Party activists during the summer of 2009 and the Democratic Party activists during the summer of 2017 that they were able to meet with their members of Congress when they returned home to their districts and states.²³⁵

²³² See Helena D.C. Thomas & Neil Anderson, Changes in Newcomers' Psychological Contracts During Organizational Socialization: A Study of Recruits Entering the British Army, 19 J. Organizational Behav. 745, 745 (1998). See also Georgia T. Chao et. al., Organizational Socialization: Its Content and Consequences, 79 J. Applied Psychol. 730, 731 (1994) (noting the evidence related to lingering behaviors stemming from early "successful and satisfying work relationships").

²³³ See Adam Nagourney, A Trump Ally in Congress Warns His State, California, to Make Nice, N.Y. Times (Feb. 18, 2017), <https://www.nytimes.com/2017/02/18/us/a-trump-ally-in-congress-warns-his-state-california-to-make-nice.html>.

²³⁴ See James Warren, De Blasio's Early Audition, N.Y. Daily News (Oct. 27, 2013), <http://www.nydailynews.com/opinion/de-blasio-early-audition-article-1.1496691>.

²³⁵ See, e.g., Matt Kibbe, Wake Up, Republicans: This Could be the Democrats' Tea Party, Politico Magazine (Mar. 2, 2017), <http://www.politico.com/magazine/story/2017/03/tea-party-protests-town-hall-forums-republicans-trump-resistance-indivisible-214850>

Federal decentralization therefore supplements the pursuit of many of the institutional ambitions of federalism. State governments have faced a “pretty inexorable expansion of national power vis-à-vis the States over the past two centuries” because of their incapacity to resist federal power from outside of the federal government.²³⁶ A federal government more sensitive to local majorities or even employing them “does not exercise lightly”²³⁷ its Supremacy Clause power to disregard local majorities. If the federal government excessively intrudes on local majorities, local majorities have a cheap and effective means of addressing their grievances to the federal government.

Federal decentralization also supplements the pursuit of policy experimentation. Since Justice Louis Brandeis argued that federalism permits states to “try novel social and economic experiments,”²³⁸ ensuring that power is located outside of Washington has been part of ensuring that policy innovation transpires. Innovations generally require higher and more specialized levels of human capital in the particular issue domains where the innovation could be generated.²³⁹ Economists have noted that this labor specialization needed to innovate is geographically distributed.²⁴⁰ Federal decentralization empowers those outside of Washington to innovate by granting them greater returns for innovating by granting them *federal* powers to innovate. Federally decentralized innovation is innovation that immediately has the Supremacy Clause behind it. A policy innovation from within the federal government can bind large parts of the country or the entire country, and not just a single state. The returns to innovations are also greater because they will diffuse faster with the more salient federal

[<https://perma.cc/ZZV4-3XVN>] (explaining the role these town halls played and the similarities between these summer protests eight years apart).

²³⁶ See Young, *supra* note 134, at 1076.

²³⁷ *Gregory*, 501 U.S. at 460. See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (“[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”).

²³⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²³⁹ See K. Anders Ericsson, *The Acquisition of Expert Performance: An Introduction to Some of the Issues*, in *The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports, and Games* 1, 3 (K. Anders Ericsson ed., 1996).

²⁴⁰ For two significant and recent empirical and historical discussions, see Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined*, 102 *J. Urb. Econ.* 76, 78 (2017); Elisa Giannone, *Skilled-Biased Technical Change and Regional Convergence*, 3 (Jan. 4, 2017) (unpublished manuscript) http://home.uchicago.edu/~elisagiannone/files/JMP_ElisaG.pdf [<https://perma.cc/SA4N-DU33>].

imprimatur behind them, shaping the behavior of other federal—as well as state—officials.

Costs

Federal decentralization could pose threats to federalism if it is either too successful or insufficiently successful. If it is too successful, federal decentralization might not just be a partial but a perfect substitute for federalism. The result is *either* federal decentralization *or* federalism. While in Germany federal decentralization coexists with federalism, in South Africa federal decentralization largely substitutes for it.²⁴¹ Talented localized human capital could be attracted to the greater policy returns generated by a federal office empowered with the Supremacy Clause²⁴² and the greater financial returns from federal as compared to state employment.²⁴³

There are reasons to doubt that federal decentralization could ever truly substitute for federalism. The market for decentralized power is elastic. Labor markets themselves are traditionally elastic, pulling and pushing talented people into new and different places as desirable employment opportunities exist.²⁴⁴ If a location delivers significant policy returns, then that could encourage *more* regulation from that location of both a state *and* federal variety, and therefore enough employment opportunities to attract enough talent to staff both federal and state efforts. Consider, for instance, the intervention of the Department of Defense into Silicon Valley. The State of California maintains offices in Silicon Valley, and the Patent and Trademark Office

²⁴¹ See Hein Marais, *South Africa: Limits to Change: The Political Economy of Transition* 18 (2001).

²⁴² Returns to public employment can be in the form of policy influence or reputational rewards. See David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 5 (2008); Anthony M. Bertelli, *Determinants of Bureaucratic Turnover Intention: Evidence from the Department of the Treasury*, 17 *J. Pub. Admin. Res. & Theory* 235, 236 (2007).

²⁴³ Federal legislators, for instance, make substantially more than do state legislators. Texas provides an example. Compare Ida A. Brudnick, *Cong. Research Serv.*, RL30065, *Congressional Salaries and Allowances: In Brief* 1 (2016) (noting \$174,000 annual salary for Members of Congress) with *Government Salaries Explorer*, *Tex. Trib.* (last updated April 24, 2017), <https://salariesv.texastribune.org/state-comptroller-payroll/departments/house-of-representatives/> [<https://perma.cc/AJ5E-WW2F>] (noting \$7200 median salary for members of the Texas House of Representatives).

²⁴⁴ See Schleicher, *supra* note 16, at 82.

has had an important office there for several years.²⁴⁵ There could still be enough local human capital to staff Defense Department initiatives.

Federal decentralization is also analytically distinct from federalism in important ways that would preclude one from ever perfectly substituting for the other. Federal decentralization provides the federal government with greater control over the actions of local majorities. Local majorities are the agents of principals in Washington. If a United States Senator does not like how their staff in Anchorage is behaving, they can fire them. By contrast, federalism limits the control the federal government has over the actions of local majorities. Federal officials cannot commandeer local officials,²⁴⁶ and if they wish to displace state action they often must endure Bicameralism and Presentment and pass legislation—never an easy thing to do.²⁴⁷

Federal decentralization also creates a risk in the opposite direction: the threat of excessive decentralization if both federalism and federal decentralization persist. Washington was made the seat of government because officials working there—a city without a state—would shed some of their state allegiances.²⁴⁸ If federal officials shed the experience of investing in a *national* place, will the federal government *and* state governments be dominated by local majorities?

Institution-designers confronting this issue have found several mechanisms effective in addressing this concern. If federal and state officials generate strong ties in a decentralized location, these ties can

²⁴⁵ See Scott Ard, Inside the Patent and Trademark Office's New Silicon Valley Branch, *Silicon Valley Bus. J.* (Oct. 14, 2015), <http://www.bizjournals.com/sanjose/blog/techflash/2015/10/inside-the-patent-and-trademark-office-s-new.html> [<https://perma.cc/3GTJ-296A>] (“[T]he new digs for the U.S. Patent and Trademark Office within San Jose[] . . . open[ed] . . . with a host of dignitaries, including some famous inventors.”).

²⁴⁶ See *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)) (deciding that the “[f]ederal [g]overnment may not compel the States to enact or administer a federal regulatory program” (internal quotation marks omitted)).

²⁴⁷ *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government . . . will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”).

²⁴⁸ Justice Joseph Story was one of many to note this concern. See 2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1216–23, at 127–31 (Melville M. Bigelow ed., 5th ed. 1891) (stating that federal decentralization “might subject the favored State to the most unrelenting jealousy of the other States, and introduce earnest controversies from time to time respecting the removal of the seat of government”).

produce efficient bargains between the two, rather than the federal official abandoning his or her federal concerns for purely local ones.²⁴⁹ Federal decentralization has sometimes utilized something like the “principle of subsidiarity” that is common in the constitutional law of many countries.²⁵⁰ Some policy domains work better when centralized. Constitutional law has traditionally ranked foreign policy as one of those areas,²⁵¹ and recent congressional legislation to decentralize has largely exempted foreign policy and national security from its coverage.²⁵² For policy domains where the risks of excessive diffusion are greatest, then, federal decentralization can be more limited.

2. Doctrine

The Supreme Court’s anti-commandeering doctrine has missed the voice that federal decentralization provides. The Court has therefore invalidated statutes for depriving local majorities of their voice without considering how local majorities had voice through proximity to federal power rather than just distant opposition to it. The Court also has not generated an analytical toolkit to help understand when federal decentralization overwhelms local voice rather than supports it.

The Supreme Court has stated that the “[f]ederal [g]overnment may not compel the States to enact or administer a federal regulatory program.”²⁵³ The essence of this constitutional problem is that local majorities do not have enough voice. Federal policies “force” state officials to do things, thereby depriving local majorities of the ability to elect and evaluate their own officials.²⁵⁴ Compulsion is much less likely

²⁴⁹ See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *Colum. L. Rev.* 1595, 1598 (2014) (“[I]nstitutions such as states or federal branches might negotiate over their constitutional entitlements.”).

²⁵⁰ The most notable jurisdiction to use this principle is the European Union. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331, 339 (1994) (“Subsidiarity expresses a preference for governance at the most local level consistent with achieving government’s stated purposes.”).

²⁵¹ See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087–90 (2015) (explaining the doctrine and logic behind this principle).

²⁵² See Portnoy, *supra* note 11 (noting sense of Representatives that national security would be largely exempted from statutory decentralization rules).

²⁵³ *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁵⁴ *Printz v. United States*, 521 U.S. 898, 930 (1997). See also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (noting the constitutional problems with federal officials “coerc[ing] [state officials] to adopt a federal regulatory system as [their] own”).

to transpire, though, when federal officials are working together with state officials from across the street rather than working against them from across the country. Federal decentralization amplifies voice in a way that calls into question the coercion at the center of the Court's anti-commandeering cases.²⁵⁵

The assumption in many federalism cases—including the anti-commandeering cases—is that the federal government only acts centrally and therefore coercively on local majorities, and that state and local governments act locally and therefore consensually involving local majorities. In *New York v. United States*, the majority did contemplate federal decentralization, but ultimately stressed that state governments “are neither regional offices nor administrative agencies of the Federal Government.”²⁵⁶ Justice Byron White, joined by Justices Harry Blackmun and John Paul Stevens, wrote an opinion concurring in part and dissenting in part, arguing that a federal statute involved “imposing a solution from Washington.”²⁵⁷ Importantly, a significant yet largely neglected feature of the debate at the Court was its consideration of the question along the dimension of decentralization.

This assumption of centralized federal power permits the Court to frame federal action as depriving local majorities of voice. If federal officials are located distantly from and thereby disconnected from local interests, then local interests did not have their voices heard in the federal process producing the federal policy. In *New York*, the Court noted that “the residents of the State [must] retain the ultimate decision as to whether or not the State will comply” with federal policies.²⁵⁸ The “residents of the State” could only influence “elect[ed] state officials.”²⁵⁹

²⁵⁵ Jessica Bulman-Pozen and Heather Gerken have likewise presented a more sympathetic account of commandeering based on the increased engagement between federal and state officials that it generates. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1297 (2009) (“[C]ommandeering would create more channels for the peculiar form of dissent that we have termed uncooperative federalism—dissent that . . . allows state bureaucrats to serve as ‘connected critics’ within the federal system.”). The threat of a putting a gun to the federal head every now and then from the other side of the country does not build anywhere near the kind of connective tissue that is constructed when federal and state officials live and work across the street from one another.

²⁵⁶ 505 U.S. at 188.

²⁵⁷ *Id.* at 206 (White, J., dissenting in part and concurring in part).

²⁵⁸ *Id.* at 168.

²⁵⁹ *Id.*

Federal officials, by contrast, were presumed not to be “responsive to the local electorate’s preferences.”²⁶⁰

Federal decentralization provides local majorities with *federal* voice in a way that mitigates these concerns that local majorities were coerced. The Court in *New York* was concerned that federal officials would not understand “local interests.”²⁶¹ By contrast, federal officials located proximately to local residents are participating in the same argument pools, thereby hearing the voices of locals about local interests. *New York* further assumes that it will be “state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated.”²⁶² With federal decentralization, federal officials located within local communities fear the disapproval of those communities. The costs of disapproval can include the loss of personal relationships within the community, as well as the destruction of crucial local professional relationships. Many decentralized federal officials trade on their good name locally to seek future professional opportunities. Consider current New York City Mayor De Blasio, whose experience in the regional office of the Department of Housing and Urban Development helped launch his successful campaign for Mayor of New York City.²⁶³

Rather than undermining the entire doctrine of anti-commandeering, federal decentralization suggests that we look to the specifics of the policies being questioned to see if these policies were crafted featuring enough local federal voice. Consider, for instance, the recent lawsuits brought against the Trump Administration for its executive order to cut federal funding to so-called sanctuary cities.²⁶⁴ The Trump Administration issued its executive order after consulting primarily with lawyers in the White House and a few select lawyers at Justice Department headquarters. There was little opportunity for substantial local engagement.²⁶⁵ Given those facts, the Supreme Court could reasonably conclude that local officials were being coerced, as local

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 169.

²⁶³ See Warren, *supra* note 234.

²⁶⁴ *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

²⁶⁵ See Vivian Yee, Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities, *N.Y. Times* (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html>.

officials were not being heard during the process leading up to the executive order.

B. Separation of Powers

The separation of powers requires that “opposite and rival interests”²⁶⁶ control different branches of the federal government. These rivalrous interests ensure that no one individual or party pushes the federal government to extremes by guaranteeing that competing perspectives are represented within the federal government. Two approaches have dominated modern doctrinal approaches to producing rivalrous interests with federal power: formalism and functionalism.²⁶⁷ With all of their differences, though, both formalists and functionalists examine how federal officials are selected and how they are empowered as the primary constitutional tools to generate difference among the branches of the federal government.²⁶⁸ There is no account of *where* federal officials operate once selected and empowered.

Federal decentralization supplements separation of powers by adding another mechanism to ensure that power is sufficiently diffused among and within branches. It provides the constant exit necessary to ensure the requisite back and forth between branches and offices.²⁶⁹ Federal decentralization also risks *overly* separating powers, so this Section theorizes institutional designs that have been used to minimize diffusion risks. This account is made more concrete by highlighting constitutional doctrines that find federal policies problematic without considering the important role that federal decentralization plays in their operation.

²⁶⁶ The Federalist No. 51, *supra* note 1, at 322 (James Madison).

²⁶⁷ Manning, Separation of Powers, *supra* note 164, at 1951 (stating that functionalists “view their job as primarily to ensure that Congress has respected a broad background purpose to establish and maintain a rough balance or creative tension among the branches”); *id.* at 1958 (“Conventional wisdom further holds that, in contrast with functionalism, formalism calls upon interpreters to adhere to the conventional meaning of the text *instead of* resorting to the broad purposes underlying it.”).

²⁶⁸ See M. Elizabeth Magill, Beyond Branches and Powers in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 605–06 (2001) (identifying these two tools as the key tools used in separation of powers debates).

²⁶⁹ See The Federalist No. 51, *supra* note 1, at 322 (James Madison) (“[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other . . .”).

*1. Design*Benefits

The separation of powers features different mechanisms to ensure that rivalrous interests are generated across and within the branches of the federal government. As Professor Steven Calabresi has written, a common defense of the separation of powers is that it is “more sophisticated in its mechanisms for sampling the popular will.”²⁷⁰ The three branches of government each represent different constituencies and are selected at different times. Once in office, these federal officials are granted different powers in the first three Articles of the Constitution. The result is meant to be heterogeneity across and within the branches at all times.

While federal officials are selected by many different places and at many different times, if all of them then go to the same location, voters elsewhere face inevitable agency costs in monitoring them. Voters are less likely to pay attention to those farther from them.²⁷¹ Information travels less well across greater distances.²⁷² Meanwhile, officials are immersed in the networks of another location for the majority of their time in office. Federal officials across the branches are exposed to the same argument pools in Washington.²⁷³ When branches are co-located, officials face greater incentives to invest in their reputations with officials across the branches. A positive reputation in another branch of

²⁷⁰ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 *Const. Comment.* 51, 57 (2001). For similar arguments, see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 *Colum. L. Rev.* 531, 564–65 (1998).

²⁷¹ For information about this “friends and neighbors” effect, see, e.g., Shaun Bowler et al., *Local Sources of Information and Voter Choice in State Elections: Microlevel Foundations of the “Friends and Neighbors” Effect*, 21 *Am. Pol. Q.* 473 (1993) (using statistics concerning geographic distribution of candidates to argue that the further a voter is from a candidate’s home media market, the more unlikely it is that he/she knows of the candidate); Seth C. McKee & Jeremy M. Teigen, *Probing the Reds and Blues: Sectionalism and Voter Location in the 2000 and 2004 U.S. Presidential Elections*, 28 *Pol. Geography* 484 (2009) (contending that section and location trended significantly in the 2000 and 2004 elections).

²⁷² See Bettencourt, *supra* note 193, at 1439 (“The average number of local interactions per person” is affected by their spatial distance.).

²⁷³ See Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 78 (2000) (“What other people do, or say, carries an informational externality.”) (emphasis omitted).

government can lead to greater influence in one's current branch.²⁷⁴ A positive reputation in one branch generates future employment opportunities in other branches.²⁷⁵ Investments in relationships across the branches can also generate returns from lucrative employment in the private sector premised on credible commitments to clients of access to all branches of the federal government.²⁷⁶

Branches, in other words, face incentives to converge towards a more finite number of ideological positions than are reflected in the many different types of ideological positions present in the United States. The 2016 presidential election made clear to many Americans what political scientists had been demonstrating for some time: on some issue dimensions, political elites across the parties are more like one another than they are like the rest of the country.²⁷⁷ The “Washington consensus”—note the name—extolled the virtues of free trade across the borders of nation-states. Federal officials across both parties in Washington have recently been largely supportive of free trade across borders, while the rest of the country is much more skeptical.²⁷⁸ Federal officials based in Washington would only hear a limited number of anti-

²⁷⁴ Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in *Solutions to Political Polarization in America* 248 (Nathaniel Persily ed., 2015); see, e.g., Glenn Thrush & Maggie Haberman, *Second Chance for “Obamacare” Repeal*. And for Reince Priebus, N.Y. Times (May 5, 2017), <https://www.nytimes.com/2017/05/05/us/politics/reince-priebus-health-care.html> (describing the “too-cozy relationship” between Speaker Paul D. Ryan and the White House Chief of Staff Reince Priebus).

²⁷⁵ See, e.g., Jason Horowitz, *Tony Blinken Rising*, Wash. Post, Sept. 16, 2013, at C1 (describing how former Deputy Secretary of State Antony Blinken obtained important positions in the executive branch by using his work in as a Senate aide to “become close to . . . an integral part of a small circle of national security experts, including [Joe] Biden, [Thomas] Donilon, his deputy Denis McDonough and counterterrorism chief John Brennan [in the executive branch]”).

²⁷⁶ Consider, for instance, Justice Stephen Breyer. Justice Breyer was a clerk on the United States Supreme Court and an important staffer in the Senate; through both efforts, he built relationships with those who served in the executive branch as well. See Gwen Ifill, *President Chooses Breyer, An Appeals Judge in Boston, for Blackmun’s Court Seat*, N.Y. Times (May 14, 1994), <http://www.nytimes.com/1994/05/14/us/supreme-court-president-chooses-breyer-appeals-judge-boston-for-blackmun-s-court.html> (“[Breyer] already has bipartisan support in the Senate, where he worked as an aide during the 1970’s and helped build coalitions across party lines to deregulate the airlines.”).

²⁷⁷ See Brittany H. Bramlett et al., *The Political Ecology of Opinion in Big-Donor Neighborhoods*, 33 *Pol. Behav.* 565, 565–66 (2011).

²⁷⁸ See id.; see also *The Threat to World Trade*, *The Economist*, March 10, 2018, at 13.

trade arguments, and would be concerned about pleasing their colleagues and neighbors who were skeptical of anti-trade arguments.

On issues that federal officials do differ across the parties within Washington—such as abortion or affirmative action—their differences in Washington are still bimodal rather than a reflection of the many ideal points that predominate throughout the country.²⁷⁹ When power is unified in a single political party, there is a substantial risk of the federal government acting without constraint.²⁸⁰ This is partially because the centralized parts of a party are those most likely to urge the party to proceed forward without considering the party in opposition. When power is divided among the two political parties, there is a substantial risk of the federal government not acting enough at all. This is because the centralized parts of a party are those most likely to urge the party to proceed forward without compromising with the party in opposition.

Offices or branches within the federal government that are meant to be independent so as to constrain power face more challenges being independent from across the street than they would from a distance. The judicial branch is meant to be independent from the other branches of the federal government.²⁸¹ Other offices within the federal government, such as inspectors general, are likewise meant to be independent so that they can constrain other actors.²⁸² When these independent actors operate primarily in Washington, they are exposed to the same argument pools as those in the other branches and offices they are meant to be reviewing. These shared argument pools are more than just abstract, but rather are structural features of these offices: law clerks (for courts) and lawyers (for inspector generals) often arrive at their positions in independent offices from their work across town with those whom they are supposed to be constraining.

²⁷⁹ See Bramlett et al., *supra* note 277, at 567.

²⁸⁰ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2315 (2006) (“We emphasize that the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”).

²⁸¹ See *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (“The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement” in other contexts.).

²⁸² See Shirin Sinnar, *Protecting Rights From Within? Inspectors General and National Security Oversight*, 65 *Stan. L. Rev.* 1027, 1030 (2013) (“Congress created IGs, which now exist in over fifty federal agencies, for the explicit purpose of monitoring agencies.”).

Independent actors have incentives to care about their reputations with other branches more because they are across town. Justices want to place their law clerks in important positions in the legislative and executive branches. Lower federal court judges will sometimes leave to join the other branches (think of Abner Mikva, a judge on the D.C. Circuit, who left to work as the White House Counsel for President Clinton).²⁸³ Lawyers in inspector general offices have enormous powers in their positions,²⁸⁴ but also can move branches without having to move towns. Empirical studies have documented how this influences the behavior of Supreme Court Justices.²⁸⁵ Other federal courts located in Washington also tend to feature judges with the same backgrounds and the same networks as those in the other two branches of government and so are less inclined to constrain them.²⁸⁶

Federal decentralization generates more forces that diffuse power, mitigating any concerns about accumulations of power. It ensures that federal officials exit from Washington, exposing them to more argument pools and placing them in different reputational networks. In an era of increasingly coherent and polarized political parties, almost everyone can be classified as affiliating with one of the two political parties.²⁸⁷ The sorting of our polarized era means that essentially all liberals are Democrats and all conservatives are Republicans.²⁸⁸ This does not mean that all Democrats are equally liberal, nor does it mean that all Republicans are equally conservative. There is variation within the parties, and this intra-party variation is often geographically

²⁸³ See Neil A. Lewis, Abner Mikva, Lawmaker, Judge and Mentor to Obama, Dies at 90, *N.Y. Times*, Jul. 5, 2016, <https://www.nytimes.com/2016/07/06/us/abner-mikva-lawmaker-judge-and-mentor-to-obama-dies-at-90.html> (“Mikva represented the Chicago area in Congress for nearly nine years, became the chief judge of the United States Court of Appeals for the District of Columbia—widely regarded as second in importance only to the Supreme Court—and concluded his federal service with a stint as White House counsel under President Bill Clinton during a tumultuous period in the executive branch.”).

²⁸⁴ See Sinner, *supra* note 282, at 1042.

²⁸⁵ See Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 *Geo. L.J.* 1515, 1537–38 (2010).

²⁸⁶ See Robinson, *supra* note 211, at 913 (providing empirical evidence of judicial behavior being influenced by prior executive experience).

²⁸⁷ See Levinson & Pildes, *supra* note 280, at 2325.

²⁸⁸ See Morris P. Fiorina et al., *Culture War?: The Myth of a Polarized America*, at xiii, 9, 61–69 (3d ed. 2011).

distributed.²⁸⁹ Empowering decentralized officials from within the same party can generate cross-cutting ideological pressures across and within the branches regardless of whether the branches are controlled by the same parties or different parties.

Decentralizing federal officials also ensures rivalrous interests not just because federal officials are *distant* from those they serve, but also because these officials are not at all or equally *concentrated*. Political behavior in dense locations is different than political behavior in more sparsely populated locations, like rural or suburban areas.²⁹⁰ Even within dense locations, Tausanovitch and Warshaw have found significant differences in political behavior across metropolitan areas.²⁹¹ Concentrations of individuals also develop their own unique properties that differentiate them even from *other* concentrations. Agglomeration gains from being proximately located to other financial professionals in New York City are different than agglomeration gains from being proximately located to other technology professionals in Silicon Valley. Rather than all metropolitan areas being the same, federal officials in Washington even across the branches will not represent the perspectives of those in other *metropolitan areas* as well.

Federal decentralization not only helps produce the *constraint* that rivalrous interests produce, but also the *competence* that separation of powers is meant to encourage.²⁹² Generating effective administration in a singular location generates substantial costs. Washington does not

²⁸⁹ See Jonathan Rodden, *The Geographic Dimension of Political Preferences*, 2010 *Ann. Rev. Pol. Sci.* 321, 321–27; Nicholas Stephanopoulos, *Spatial Diversity*, 125 *Harv. L. Rev.* 1903, 1941 (2012); Tausanovitch & Warshaw, *supra* note 199, at 621.

²⁹⁰ See Phelps & Wood, *supra* note 201, at 2591, 2592; Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 *Mich. L. Rev.* 277, 278 (2007).

²⁹¹ Tausanovitch & Warshaw, *supra* note 199, at 620–21.

²⁹² See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 702–19 (2000) (noting “professionalism” as a separation of powers goal); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *Yale L.J.* 346, 383–85 (2016) (identifying “effective administration” as a goal of separation of powers); Daphna Renan, *Pooling Powers*, 115 *Colum. L. Rev.* 211, 275 (2015) (noting “efficacy” as a separation of powers goal); see generally Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 *S. Cal. L. Rev.* 1281, 1370 (2002) (identifying constitutional doctrines that “steer policy choices away from one decisionmaker to another, on account of institutional capacities with regard to particular constitutional choices”); Aziz Z. Huq, *The Institution Matching Canon*, 106 *Nw. U. L. Rev.* 417, 419 (2012) (“[A] court should determine whether the component of government that made the decision has actual competence in or responsibility for the policy justifications invoked to curtail the interest.”).

have market depth in many industries.²⁹³ Officials therefore make their careers in the federal government without the exposure to leading technocrats in many industries and the knowledge spillovers that would result from those industries.²⁹⁴ During congressional hearings in 2017 considering federal decentralization, one Republican member of Congress from Iowa noted the technical deficits facing federal officials regulating agriculture by virtue of the fact that they are never regulating from near “a corn plant or a soybean plant.”²⁹⁵

Officials can be relocated from elsewhere to Washington to provide this technical expertise, but this can be costly. The technology stalwart from Silicon Valley relocating to Washington to serve in the federal government endures opportunity costs. Being in Washington means their relationships with other technology stalwarts will wither from a distance, or will never commence in the first place.²⁹⁶ Being in Washington means the official will not benefit from the continued knowledge spillovers of co-location with other technology stalwarts.²⁹⁷

These costs can be greater because Washington does not have competing industries to supplement for lost industry-specific investments from relocation to Washington. Benefits forsaken by departing a past location are not remunerated through gains in Washington. There are the exceptional industries that have sufficient market depth in Washington to provide compensating industry returns in

²⁹³ See Stephen S. Fuller, Market Conditions and Dynamics in the Washington Metropolitan Area: 1990–2003, Expert Report in *City of Bowie v. Mie, Inc.*, in the Circuit Court of Maryland for Prince George’s County, No. CAE 02-25274, February 2004, http://cra.gmu.edu/pdfs/research_reports/other_research_reports/NVBIA_report_2007/Market_Conditions_and_Dynamicsin_WMA.pdf [<https://perma.cc/8T77-2HYG>] (“The Washington area economy is different than any other metropolitan area economy in the nation. Federal spending is what differentiates it from the others.”).

²⁹⁴ See Fontana, *Narrowing*, *supra* note 3, at 738 (“Most metropolitan areas are relatively narrow, focusing on a singular industry and creating a metropolitan area that relates to that industry.”).

²⁹⁵ See House Comm. on Oversight & Gov’t Reform, Full Committee Business Meeting, YouTube (Mar. 8, 2017), <https://www.youtube.com/watch?v=EcUdFDvCLTQ> (at 37:00) (statement of Rep. Rod Blum).

²⁹⁶ For the leading studies explaining and documenting the importance of these strong professional ties—and their limited portability—see, e.g., Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *Am. J. Soc.* 481, 490 (1985); Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 *Admin. Sci. Q.* 35, 41–42 (1997).

²⁹⁷ See, e.g., Schleicher, *supra* note 16, at 100 (“In Silicon Valley, for example, software developers and venture capitalists learn just by having coffee with friends.”).

Washington—for instance, those working on medical research at the National Institutes of Health.²⁹⁸ The federal government must endure all of these costs generated via relocation by compensating relocating officials with substantial monetary and/or policy returns, or it simply will not be able to lure enough of the officials it needs.

Federal decentralization permits the federal government to employ talented officials in their natural habitats. Federal power is granted to those with technical expertise in the places that helped them cultivate that technical expertise. Federal officials need not compensate these officials for relocating away from the home base of their technical expertise.

Costs

The separation of places has been viewed by some as adding *another* veto gate (i.e. legislative chokepoint) to an already constrained federal system.²⁹⁹ It is more difficult for officials to coordinate policy action from across the country than from across the street. The argument, then, is that the separation of powers generates too many veto gates on federal action, particularly during periods of divided government, but even during periods of unified government.³⁰⁰ There are reasons to be skeptical that federal decentralization always constrains more, and that this additional constraint is always undesirable.

First, it is unclear if policy coordination is positively, negatively, or simply uncorrelated with decentralization. Federal decentralization certainly reduces how much government-specific human capital federal officials possess. Political scientists have found that federal officials with close relationships across the branches are more effective at getting

²⁹⁸ See Annie Lowrey, *Washington's Economic Boom, Financed By You*, N.Y. Times Mag. (Jan. 10, 2013), <http://www.nytimes.com/2013/01/13/magazine/washingtons-economic-boom-financed-by-you.html> (“[T]he infusion of human capital, combined with proximity to the Federal tap, proved attractive to a huge number of other businesses looking to hire The health care sector, with its proximity to the National Institutes of Health, has greatly expanded, too.”).

²⁹⁹ See Wofford, *supra* note 11 (quoting political scientist arguing that federal decentralization causes problems because “[t]he President [might] want[] to have a meeting of the Cabinet. Can they no longer gather the Cabinet together because the Secretary of the Interior has his headquarters out in Denver? Or the Secretary of Health and Human Services is in Kansas City?”).

³⁰⁰ See Levinson & Pildes, *supra* note 280, at 2339 (noting that risks accompany both extremes, with divided party government resulting in deadlock and unified party control becoming too ideologically aggressive).

things done.³⁰¹ Federal decentralization undermines these relationships and the knowledge about how to get things done in government that comes from them by placing federal officials in different locations. The cyber-terrorism official located in Silicon Valley will not learn as much about how the federal appropriations process operates, or how to get regulations through the Department of Defense, as the cyber-terrorism official in Washington will.

Policy coordination could also be positively correlated with federal decentralization because policy coordination benefits from specialized expertise. Federal decentralization increases the capacity to understand what government *should* do, albeit at the cost of the capacity to understand *how* to do it. Federal decentralization increases policy spillovers for federal officials by placing them near specialized labor markets outside of Washington. The cyber-terrorism official located in the Department of Defense office in Silicon Valley, for instance, will learn more about technology from more interactions with those in the industry there. Greater technical understanding about cyber-security can lead to better tools to ensure cyber-security, and the additional value of these tools can overcome any costs from reduced knowledge of how government works.

The policy-generating aspect of specialized expertise can be supplemented by the generative function of distance. Social science research suggests geographical distance can facilitate the kind of critical distance and fresh perspective that can both stimulate new ideas and lower the temperature with those one must work with in order to transform these ideas into reality.³⁰² When President Obama met with Chinese leader Xi Jinping in 2013, for instance, the meeting was purposefully held in California to generate new ideas for cooperation and distance from officials who might undermine cooperation.³⁰³

Federal decentralization can and has attempted to resolve this agglomeration tradeoff—not always or even necessarily mostly

³⁰¹ See Binder & Lee, *supra* note 274, at 240–61.

³⁰² See Lawrence J. Grossback et al., *Ideology and Learning in Policy Diffusion*, 32 *Am. Pol. Res.* 521, 522 (2004) (noting research “build[ing] on the idea that geographic proximity drives communication and learning. . . .”)

³⁰³ See Richard C. Bush, *Barack Obama and China’s Xi Jinping to Meet in California*, Brookings Institute (May 21, 2013) <https://www.brookings.edu/blog/up-front/2013/05/21/barack-obama-and-chinas-xi-jinping-to-meet-in-california/> [<https://perma.cc/6U5B-QBSA>] (describing California as a more “informal environment” that would facilitate dialogue).

successfully—in one or both of two ways. First, it can accept the tradeoff as worthwhile for some class of federal officials. When the need for technical expertise outweighs the need for knowledge of government, then locations outside of Washington can be relatively more desirable. Knowledge of the congressional appropriations process might not be terribly important for a computer scientist interested in preventing Russian hacking, but it can be very important for a member of the White House Office of Domestic Policy to know. Contemporary congressional legislation to decentralize federal power has focused on national security officials in particular as those that benefit from knowledge of how the federal government operates.³⁰⁴

Federal decentralization can balance technical expertise and governmental expertise by creating several governmental cities. Economists have long noted the logic leading to metropolitan areas specializing in discrete areas of human capital.³⁰⁵ This logic can justify the creation of several company towns besides just Washington, and company towns specializing in a particular policy area. Think, again, of the cyber-terrorism official in the Department of Defense in Silicon Valley. If officials working on those issues from across the federal government were relocated to Silicon Valley, the policy/governmental knowledge spillover tradeoff would not be as significant. The market depth of technology jobs would mean that officials there have the incentive to invest in that particular policy expertise. The market depth for governmental jobs means that officials there are benefitting from informational spillovers about how the federal government operates from the many other federal officials located in the same place.

This logic is often utilized in practice both abroad and domestically. South Africa, for instance, has a judicial capital that therefore creates a deep market for legal positions, an executive capital that creates a deep market for executive positions, and a legislative capital that creates a deep market for legislative positions.³⁰⁶ The primary governmental cities in the United States outside of Washington also already use this

³⁰⁴ See Portnoy, *supra* note 11 (quoting one member of Congress as saying that “it makes sense for security agencies, including the Pentagon and the departments of Justice and Homeland Security” to remain in Washington).

³⁰⁵ See J. Vernon Henderson, *The Sizes and Types of Cities*, 64 *Am. Econ. Rev.* 640, 641 (1974) (“[C]ities will probably specialize in bundles of goods They may use a common specialized labor force or a common intermediate input.”).

³⁰⁶ See Marais, *supra* note 241, at 152.

approach. Metropolitan areas like Colorado Springs and Virginia Beach have many military officials,³⁰⁷ officials whose expertise combines military policy and how to run and operate within a federal office. Clarksburg, West Virginia, has become the primary location specializing in a number of important investigative tasks performed by the Federal Bureau of Investigation.³⁰⁸

Second, policy coordination is not always the ambition of the separation of powers. As Gerken has written, there are “two competing accounts” of governmental checks, one dependent on separation of powers, or “separat[ion] and independence,” and the other dependent on checks and balances, or “integration and interdependence.”³⁰⁹ Federal decentralization provides institution designers with the opportunity to achieve “separation and independence” and not just achieve “integration and interdependence.” Judicial independence, for instance, is the opposite of policy coordination. The “independence” part of separation of powers is enhanced rather than undermined by federal decentralization. When Justices coordinate too much with those they are reviewing, we see this as constitutionally problematic. Revelations of the policy coordination between Justice Abe Fortas and President Lyndon B. Johnson related to the Vietnam War, for instance, helped derail Fortas’s nomination to become Chief Justice.³¹⁰

2. *Doctrine*

In the past several years, the Supreme Court and several lower courts have issued decisions expressing concerns that the President is losing control of the executive branch.³¹¹ Opponents of presidential power have expressed the opposite concern, arguing that presidential power needs to be limited more rather than less.³¹² Both sides, though, are missing the point. Without considering *where* executive power is located, it is

³⁰⁷ See Richard Florida, *America’s Federal Employment Belt*, CityLab (Nov. 15, 2013), <http://www.citylab.com/life/2013/11/americas-government-employment-belt/7576/>.

³⁰⁸ See Wofford, *supra* note 11.

³⁰⁹ Gerken, *supra* note 21, at 9.

³¹⁰ See Laura Kalman, *Abe Fortas: A Biography* 337–42, 349, 355 (1990).

³¹¹ See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 495–96 (2010); *PHH Corp. vs. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 12–15 (D.C. Cir. 2016), *rev’d en banc*, 881 F.3d 75 (D.C. Cir. 2018).

³¹² See, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (2010) (identifying and examining the reasons for the increase in presidential power and proposing reforms to stem the tide).

impossible for constitutional doctrine to decide *how much* of that executive power the President controls. Indeed, the economists Alberto Ades and Edward Glaeser have found that greater geographical concentrations of power around the world have a causal relationship with autocratic executives.³¹³ Only when agency officials exit Washington can they truly be free “to some degree”³¹⁴ of presidential control.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Supreme Court invalidated the parts of a congressional statute authorizing removal of members of the Public Company Accounting Oversight Board (“PCAOB”) only for cause and only by Commissioners of the Securities and Exchange Commission (themselves only removable by the President under limited circumstances).³¹⁵ Relying on similar logic as *Free Enterprise Fund*, a three-judge panel of the D.C. Circuit recently invalidated the governance structure of one of the signature initiatives of the Obama Administration, the Consumer Financial Protection Bureau (“CFPB”) (this was later overruled by an en banc panel and seems likely to be decided by the Supreme Court).³¹⁶ The CFPB is an independent agency headed not by a multi-member commission but rather by a single Director removable only for cause.³¹⁷

These cases are ultimately about a single principle: administrative agencies cannot “slip from the Executive’s control.”³¹⁸ Executive branch officials must be “accountable” to the President.³¹⁹ Executive branch officials located in Washington will always be more accountable to the

³¹³ Alberto F. Ades & Edward L. Glaeser, Trade and Circuses: Explaining Urban Giants, 110 Q.J. Econ. 195, 195 (1995) (“Dictatorships have central cities that are, on average, 50 percent larger than their democratic counterparts.”).

³¹⁴ See *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (recognizing “some degree [of] ‘independ[ence]’” as acceptable level of official separation from the President).

³¹⁵ 561 U.S. at 486–87, 492.

³¹⁶ *PHH*, 839 F.3d at 12–13, rev’d en banc, 881 F.3d 75 (D.C. Cir. 2018).

³¹⁷ *Id.* at 15.

³¹⁸ *Free Enterprise Fund*, 561 U.S. at 499. See also *PHH*, 839 F.3d at 12 (“In order to maintain control over the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct those subordinate executive officers.”). See generally *Morrison*, 487 U.S. at 689–90 (“The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President,” but rather asks whether, given the functions of the officials in question, a removal provision “interfere[s] with the President’s exercise of the ‘executive power. . . .’”).

³¹⁹ *Free Enterprise Fund*, 561 U.S. at 483.

President. The behavior of agency officials is easier for the President to monitor from across the street or across town because information about agency behavior will travel more quickly and more precisely from closer rather than from farther.³²⁰ Agency officials are less likely to stray from the President's regulatory preferences because they are hearing the same universe of arguments about desirable regulatory actions as the President is. Agency officials are also concerned about their reputations within the same networks as the President and the President's key staff, the networks that will shape their personal and professional futures.

Paradoxically, then, the recent cases invalidating federal statutes are misdirected because those federal statutes feature uniquely geographically concentrated officials. PCAOB, framed as beyond presidential control in *Free Enterprise Fund*, is relatively geographically concentrated in Washington, with few regional officials of any importance.³²¹ The Board and its key enforcement staff are dominated by those whose careers have been made in Washington and who therefore share the same networks as the presidential staff overseeing them.³²²

The CFPB, framed as beyond presidential control by the three-judge panel in *PHH*, is likewise relatively geographically concentrated, although less so than the PCAOB. When the CFPB was created in 2010, its initial location across the street from the White House was quite controversial because of the amount of presidential control it generated. Elizabeth Warren, the intellectual architect of the CFPB, praised the proximity as indicating that the CFPB was "to have a very tangible presence" in the White House.³²³ A prominent opponent to the CFPB from the House of Representatives criticized the CFPB's proximity to the White House and lack of independence from the White House.³²⁴ The most important officials in the CFPB's earliest years have been

³²⁰ See Bettencourt, *supra* note 193, at 1439 ("[The] average number of local interactions per person" is affected by their spatial distance.).

³²¹ See Senior Staff, Public Company Accounting Oversight Board, <https://pcaobus.org/About/Staff/Pages/default.aspx> [<https://perma.cc/D4M6-TTV3>].

³²² See *id.* (documenting the backgrounds of key staff).

³²³ Republicans Say New Consumer Agency Too Powerful, *Wash. Post* (Mar. 16, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/16/AR2011031600220.html> [<https://perma.cc/82D2-LVRH>].

³²⁴ See Keith Rothfus, Make Consumer-Protection Agency More Accountable to Taxpayers, *Phila. Inquirer* (Apr. 18, 2017), http://www.philly.com/philly/opinion/commentary/20170418_Make_consumer-protection_agency_more_accountable_to_taxpayers.html [<https://perma.cc/8AE2-39GS>].

high-powered Washington lawyers with experience in and with the executive branch, many of whom (like Warren) performed well enough at the CFPB that they were able to obtain opportunities in other branches (including in the Obama White House).³²⁵ The CFPB features regional offices, but the D.C. Circuit viewed these regional offices as less powerful than its Washington director³²⁶—without noting why the importance of the Washington head of the CFPB might *support the* CFPB’s argument for constitutionality rather than undermine it.

The best evidence about the importance of federal decentralization for executive power comes from the behavior of federal officials themselves. In cases as old and foundational as the *Steel Seizure Case*,³²⁷ or as recent and important as *N.L.R.B. v. Noel Canning*,³²⁸ the Court has highlighted the role of past practice in understanding branch boundaries. A common and conscious tool of presidential control has always been to ensure that the most important officials are located closest to him; one of the most important decisions a President makes is who gets an office close to the Oval Office.³²⁹ The Old Executive Office Building adjacent to the White House originally housed key parts of the national security apparatus to ensure coordination and now houses other important officials in the Executive Office of the President, such as the Vice President and the Office of Management and Budget.³³⁰

³²⁵ See generally Senior Staff, Public Company Accounting Oversight Board, <https://pcaobus.org/About/Staff/Pages/default.aspx> [<https://perma.cc/D4M6-TTV3>] (describing backgrounds).

³²⁶ See *PHH Corp. vs. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 12–15 (D.C. Cir. 2016), rev’d en banc, 881 F.3d 75 (D.C. Cir. 2018) (focusing only on the single Director).

³²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (noting the role that past practice can play as a “gloss” on proper institutional boundaries).

³²⁸ 134 S. Ct. 2550, 2559 (2014) (stating that “in interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice” (emphasis omitted)). Scholars have started to expand on these doctrines about gloss. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 412, 414 (2012) (“Our aim in this Article is to think more systematically about the role of historical practice in discerning the separation of powers.”).

³²⁹ See Jeff Zeleny, *West Wing Real Estate: Who Has Proximity to Trump*, CNN (Feb. 3, 2017), <http://www.cnn.com/2017/02/03/politics/west-wing-office-map-oval-office-real-estate/> [<https://perma.cc/JZJ7-UXAE>] (noting that who gets office closest to President can provide “a telling look at the pecking order inside the Trump White House”).

³³⁰ See Eisenhower Executive Office Building, The White House, <https://www.whitehouse.gov/about-the-white-house/eisenhower-executive-office-building/> [<https://perma.cc/52>]

Likewise, those concerned about excessive presidential power must redirect their arguments because of their neglect of federal decentralization. A common critique of presidential power is that it has become expansive and unconstrained.³³¹ The common remedy to mitigate this critique is to further empower a centralized federal actor—usually Congress or the Supreme Court—to rein in presidential power. However, several of the most significant actions of resistance to presidential power recently have been by those outside of Washington. Majorities in both parties, for instance, have taken aggressive approaches on matters of national security across the branches, and federal courts (in Washington) have largely validated most of these actions.³³² By contrast, Edward Snowden undermined presidential power by leaking information that he uncovered while working in Japan for several years³³³ and then in Hawaii.³³⁴ Reality Leigh Winner leaked details of potential executive overreach by the Trump Administration from Georgia.³³⁵

H8-PP2S]; OMB Office and Branch Files, The White House, https://obamawhitehouse.archives.gov/omb/gils_gil-files [<https://perma.cc/2RU4-L9LX>].

³³¹ See, e.g., Matthew Crenson & Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced* 11 (2007) (“Sometime in the second half of the twentieth century, the president moved into the driver’s seat of our political system.”).

³³² The original empirical evidence for this proposition was the classic “two presidencies” thesis, the argument that presidents faced conflict with the other party on domestic issues and agreement on foreign policy issues. See Aaron Wildavsky, *The Two Presidencies*, 4 *Trans-Action* 7 (1966). On matters of national security law, the two presidencies argument still holds weight. See, e.g., Aziz Z. Huq, *What Good is Habeas?*, 26 *Const. Comment.* 385, 418 (2010) (“[T]he effect of the change in Administration on security policy more generally has been ambiguous.”); Jack Goldsmith, *The Cheney Fallacy*, *The New Republic* (May 18, 2009), <https://newrepublic.com/article/62742/the-cheney-fallacy> [<https://perma.cc/9CE5-GGU2>] (“The new administration has copied most of the Bush program, has expanded some of it, and has narrowed only a bit.”).

³³³ See Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, *The Guardian* (June 11, 2013), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<https://perma.cc/8WNX-W3FC>].

³³⁴ *Id.* See also Bonnie Malkin & Raf Sanchez, *Edward Snowden’s Girlfriend Revealed to Be Former Ballet Dancer*, *The Telegraph* (June 11, 2013), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10111992/Edward-Snowdens-girlfriend-revealed-to-be-former-ballet-dancer.html> [<https://perma.cc/U8U3-TYDP>].

³³⁵ See Charlie Savage, *Intelligence Contractor is Charged in First Leak Case of the Trump Era*, *N.Y. Times*, June 6, 2017, at A4.

CONCLUSION

James Madison believed that the concentration of power was “the very definition of tyranny.”³³⁶ The double security of federalism and the separation of powers would diffuse power across institutions to prevent concentrations of sovereign authority. Madison also believed that diffusing power would not just be an institutional design from the top that trickled down to shape the lives of citizens, but also had to be supported by citizens themselves for diffusion to work. Madison, in other words, believed that a “dependence on the people” would be the “primary control on the government.”³³⁷

Citizens have always believed that a “primary control” on the federal government has been and should be federal decentralization. Citizens understand institutions and individuals by their locations. If all or the most important parts of the federal government were in Washington, then the rich diversity of the large American republic would be neglected, and a narrow group of individuals would control the country. While the identity of the protagonists and antagonists of federal decentralization has constantly shifted, one commonality is that Americans have shared a belief that federal decentralization in one way or another at some point or another must be employed for constitutional law to work.

Consider the strange bedfellows of federal decentralization that illustrate the breadth and depth of support for it. President Ronald Reagan made his political name nationally by delivering a famous speech in 1964 urging the election of Barry Goldwater as President. In this speech, President Reagan decried the “far-distant capital.”³³⁸ Just twenty-two years earlier, the President whose legacy Reagan promised to destroy—President Franklin Delano Roosevelt—had ordered 10,000 federal officials distributed throughout the Midwest, arguing that Washington was an isolated capital in need of decentralization to

³³⁶ The Federalist No. 47, *supra* note 1, at 301 (James Madison).

³³⁷ The Federalist No. 51, *supra* note 1, at 322 (James Madison).

³³⁸ See Ronald Reagan, Address on Behalf of Senator Barry Goldwater (A Time for Choosing) (Oct. 27, 1964), http://home.reaganfoundation.org/site/DocServer/A_Time_for_Choosing_-_OFFICIAL_TRANSCRIPT.pdf?docID=2864 [https://perma.cc/V593-P4V2] (“[I]t’s time we ask ourselves if we still know the freedoms that were intended for us by the Founding Fathers. . . . Whether we believe in our capacity for self-government or whether we abandon the American Revolution and confess that a little intellectual elite in a far-distant capital [sic] can plan our lives for us better than we can plan them ourselves.”).

accommodate the war effort.³³⁹ Contemporary politicians are no exception to this historical trend. Ro Khanna, the new and progressive Democratic member of the House of Representatives from Silicon Valley, supports more federal decentralization,³⁴⁰ as does a more conservative Democratic member from Ohio (Tim Ryan) critical of many of the policies that Khanna supports.³⁴¹ Republicans in the House affiliated with the Tea Party have also supported more federal decentralization.³⁴² From Roosevelt to Reagan, from today's left to today's right, the arguments for federal decentralization have been varied in their content but uniform in their sentiment: the separation of places is foundational to the American system. It is time that legal scholars join this conversation.

³³⁹ For a discussion of President Roosevelt's efforts, see President Shifts 10,000 Employees [sic] Out of Washington, N.Y. Times (Dec. 20, 1941), <http://www.nytimes.com/1941/12/20/archives/president-shifts-10000-employes-out-of-washington-dozen-bureaus.html>.

³⁴⁰ Annie Lowrey, Ro Khanna Wants to Give Working-Class Households \$1 Trillion, *The Atlantic* (Apr. 28, 2017), <https://www.theatlantic.com/business/archive/2017/04/ro-khanna-trillion-dollar-plan/524754/> [<https://perma.cc/M6HA-2BZZ>].

³⁴¹ Sabrina Eaton, Rep. Tim Ryan Suggests Relocating Federal Agencies Outside Washington, D.C., *The Plain Dealer* (Apr. 20, 2017), http://www.cleveland.com/metro/index.ssf/2017/04/rep_tim_ryan_suggests_relocati.html [<https://perma.cc/642G-2TFR>].

³⁴² See Portnoy, *supra* note 11.