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Federal Decentralization

Forthcoming, *Virginia Law Review*

David Fontana*

Abstract

Constitutional law relies on the diffusion of powers among different institutions to ensure that no one person or faction controls power. 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 to consider another form of diffusion: federal decentralization. Federal power cannot be appropriately diffused if it is geographically concentrated in those 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. 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 is considering legislation proposed by both parties that would increase federal decentralization.

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—or 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.

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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 the *third* security of diffusion: federal decentralization. Federal power cannot be appropriately diffused if it is geographically concentrated in those 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. While federalism is the “oldest question” of constitutional law,³ and separation of powers is a “sacred” element of constitutional law,⁴ federal decentralization has remained largely invisible as a tool of constitutional law sweeping across the ages and across the branches.

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, and agreed that it would be “nothing short of insanity” to locate the President and the Congress in the same building in Washington.⁵ During the height of the Great Depression, the regional Federal Reserve Bank in Atlanta advocated a distinctive monetary activism credited for helping to save the distinctive Southern economy.⁶ A federal district court judge in Hawaii

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.”). In a forthcoming article, Aziz Huq and I elaborate 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. (forthcoming 2017). 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 (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 OF RIGHTS L.J. 733, 738 (2015); David Fontana, *Placing the Government in Fragile Democracies*, 50 WAKE FOREST L. REV. 985 (2015).

³ *New York v. United States*, 505 U.S. 144, 149 (1992).

⁴ *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting James Madison, 1 ANNALS OF CONG. 581 (1789) (Joseph Gates ed., 1834)).

⁵ See FERGUS M. BORDEWICH, *THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT* 226 (2016). 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.* at 116.

⁶ 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

invalidated an executive order on immigration this year,⁷ with opponents criticizing the power of a federal judge that far from Washington.⁸ The experience of a senator from Alaska visiting with individuals in her home state shaped her actions on health care legislation.⁹ Indeed, the current Congress is considering legislation sponsored by both parties to expand federal decentralization.¹⁰

Federal decentralization is both timeless and timely. It is timeless because of its salience across generations and across jurisdictions. It has been a significant feature of state constitutional law.¹¹ Other countries have utilized federal decentralization, from Germany's distribution of officials across many metropolitan areas¹² to South Africa's utilization of three different metropolitan areas to house the legislative, executive and judicial branches.¹³ The federal decentralization utilized by the European Union was a motivating example in debates about Brexit.¹⁴ The sentiment locally and globally has always been and remains that where you stand politically depends on where you sit. While there may come a day when political behaviors are

regional banks). See generally Sarah Binder & Mark Spindel, *Monetary Politics: Origins of the Federal Reserve*, 27 STUD. AM. POL. DEV. 1 (2013) (describing congressional interest in creating regional banks and how that has affected federal banking policy).

⁷ *Hawai'i v. Trump*, No. 1:17-cv-00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017).

⁸ See Aaron Blake, *Jeff Sessions Criticizes Hawaii Judge*, WASH. POST, Apr. 20, 2017, at A16 (reporting on interview in which Attorney General Jeff Sessions criticized a judge exercising such power from "an Island in the Pacific")

⁹ See Carl Hulse, *Lisa Murkowski, A Swing Vote on Health Care, Isn't Swayed*, N.Y. TIMES, July 26, 2017, at A1 (describing the role that Senator Lisa Murkowski's background in Alaska played in shaping her vote).

¹⁰ See Ben Wofford, *Inside the Radical, Self-Destructive, and Probably Impossible Plan to Move the Government Out of Washington*, WASHINGTONIAN, July 2017, at 25 (referencing bolder legislation considered in the House and more widely supported Senate plans). See also Ross Douthat, *Break Up the Liberal City*, N.Y. TIMES, Mar. 25, 2017, at SR9 (mentioning the economic features of this debate); Jenna Portnoy, *Drain the Swamp? No, Let's Just Move It, Rep. Chaffetz Suggests*, WASH. POST, Mar. 8, 2017, at A2 (highlighting congressional action); 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> (considering the economic ramifications of this debate)

¹¹ See, e.g., 1 ANNALS OF CONG. 894 (1789) (Joseph Gales ed., 1834) (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, Jesse R. Hammond & John T. Scott, *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> ("[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.")

¹² See Alan Cowell, *Memo From Berlin: In Germany's Capitals, Cold War Memories and Imperial Ghosts*, Jan. 23, 2011, N.Y. TIMES, at A15.

¹³ See Alan Mabin, *South African Capital Cities*, in CAPITAL CITIES IN AFRICA: POWER AND POWERLESSNESS (Simon Bekker & Goran Therborn, eds., 2011).

¹⁴ See James Kanter, *"You are Ridiculous," E.U.'s Juncker Tells Parliament*, N.Y. TIMES, July 4, 2017, at A1 ("[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.")

not shaped by location, the available empirical evidence now points towards the continuing power of place.¹⁵

Federal decentralization is timely because it is emerging as one of the defining constitutional issues of our time. Americans have been saying across chronological and ideological boundaries that they distrust the federal government because it is composed so heavily of officials 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.¹⁶ 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.¹⁷ 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

¹⁵ 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 Stability*, 127 YALE L.J. (forthcoming 2017) (pointing to the evidence of “information spillovers between neighbors” 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 “work synergistically with face-to-face contact,” and therefore “our important interactions are arranged virtually and transacted physically.” Diana Mok et al., *Does Distance Matter in the Age of the Internet?*, 47 URB. STUD. 2747, 2750 (2010). 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 n.5 (1996) (finding different regulatory behavior across regional administrative offices); David M. Hedge, *A Spatial Model of Regulation*, 21 AM. POL. RES. 387 (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?* (2017) (manuscript on file with author) (“A residence change roughly doubles (1.7 times) the rate at which respondents change party in a four-year period.”).

¹⁶ See, e.g., Meric S. Gertler, *Tacit Knowledge and the Economic Geography of Context, or the Undefinable Tacitness of Being There*, 3 J. ECON. GEO. 75, 79 (2003) (identifying “language, conventions, codes, or communication, and trust” as hard to transmit across distance and generating distrust across distance) (emphasis added).

¹⁷ See THE PEW RESEARCH CENTER, BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/4-ratings-of-federal-agencies-congress-and-the-supreme-court/> [hereinafter, PEW, DISTRUST].

lacks.¹⁸ Federalism “allow[s] national minorities to constitute local majorities” by giving them control over state governments.¹⁹ Local majorities will never have the voice they need if they are merely “servants” (in Heather Gerken’s powerful framing) in state governments to federal officials exercising federal power far away.²⁰ Federal decentralization enhances the voice of local majorities by making them empowered neighbors rather than unfamiliar strangers to federal officials—or even making local majorities into federal officials themselves. The separation of powers aspires to empower “opposite and rival interests”²¹ to control different branches of the federal government, but 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 Administration²²—hold that the “federal government may not compel the States to enact or administer a federal regulatory program.”²³ 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 anchoring the Court’s anti-commandeering cases.

The Court’s executive power cases require that the President must have “clear and effective” control over agency officials exercising executive power.²⁴ 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 lower federal courts have questioned presidential control over agency officials located a short walk from the White House.²⁵ It is much harder to argue that the President lacks “clear and effective” control over officials when the President or his top advisors know these officials well from their location across the street as contrasted with rarely seeing them because they are across the country.

¹⁸ See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

¹⁹ Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All The Way Down*, 124 HARV. L. REV. 4, 12 (2010).

²⁰ 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 states”).

²¹ THE FEDERALIST NO. 47, *supra* note 1, at 302-03 (James Madison).

²² See *Chicago to File Lawsuit Over Sanctuary Cities Threat*, N.Y. TIMES, Aug. 6, 2017, at A1 (noting the lawsuits filed against the Trump Administration related to commandeering sanctuary cities).

²³ *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁴ *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 499 (2010).

²⁵ See *id.* See also *P.H.H. Corporation vs. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (questioning the constitutionality of the Consumer Financial Protection Bureau).

Federal decentralization provides diffusions of power that federalism and the separation of powers cannot, but in doing so risks injecting too many diffusions 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.²⁶ 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 their original articulation. The increasingly unique nature of Washington as a metropolitan area is 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 always “learn[] that Washington often changes you more than you change it.”²⁷ Ensuring that power is appropriately diffused has therefore involved ensuring that power is appropriately located in places distant from—and therefore different from—Washington. The lost history of these efforts is rendered visible by illustrating key moments in those efforts.²⁸

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 was designed incorporated federal decentralization, and the new federal government created by the Constitution incorporated federal decentralization in practice.

²⁶ See Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution and the Problem of Executive “Underenforcement,”* 146 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. (forthcoming 2017) (identifying structural tradeoffs in the First Amendment context).

²⁷ See Ashley Parker, *All The Obama 20-Somethings*, N.Y. TIMES, May 2, 2010, at MM46 (reporting on the unique nature of the Washington metropolitan area).

²⁸ 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 & Issachar Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. (forthcoming 2017); Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PENN. L. REV. (forthcoming 2017); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016).

1. Theory

Federal decentralization has largely escaped scholarly attention because of the intellectual energy dedicated to excavating the centralizing interests of the Founders²⁹ and the impressive capital city that resulted from those centralizing interests. One member of Congress in the early Republic referred to Washington as the “Metropolis of America,”³⁰ and argued that Washington “might be compared to the heart in the human body. It was a center from which the principles of life were carried to the extremities.”³¹ 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.³² The argument that a great nation needed a great capital was a big part of the debate before the House of Representatives in 2017.³³

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.³⁴ 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, though, it was also very much concerned with complimenting 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 *Federalist 10* mentioned the “less opportunity of communication and concert” across greater distances that made distinct places into different communities.³⁵ Because places were separated, two mechanisms generated durable differences across places. Different places attracted and maintained different types of people, producing different “selection effects.”³⁶ Geographical mobility was much less common and information about other places much less plentiful, suggesting that location generated a durable and stable population base. Virginia was a term that defined a stable political community in a physical

²⁹ 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).

³⁰ See BORDEWICH, *supra* note 5, at 112 (quoting Georgia Congressman James Jackson).

³¹ *Id.* at 6.

³² *Id.* at 255 (quoting newspaper writers and members of Congress).

³³ See House Committee on Oversight & Government Reform, *Full Committee Business Meeting*, YouTube (Mar. 10, 2017), <https://www.youtube.com/watch?v=LK8PSM3edoA> (at 34:53) [hereinafter House Oversight, *Decentralization Hearing*] (featuring comments by Virginia Congressman Gerald Connolly that the American capital was “sacred ground” and that the “capital is iconic”).

³⁴ 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.”).

³⁵ THE FEDERALIST NO. 10, *supra* note 1, at 78 (James Madison).

³⁶ 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”).

place, not just a formal legal entity called a state.³⁷ 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.³⁸ James Madison articulated this concern about centralization in an important speech in the first Congress.³⁹

Different places also produced different “treatment effects.”⁴⁰ Madison wrote in *Federalist 46* that individuals will hear “more domestic and personal interests of the people” that are physically proximate, meaning that argument pools about what government should do will spillover more locally.⁴¹ Different places also produced place-based personal and professional reputational networks generating costs for defying the norms of those networks. Madison wrote 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.⁴² 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.⁴³

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”⁴⁴ 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.⁴⁵ The new constitutional experiment would only work if it did “[e]xtend the sphere”

³⁷ 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”) (emphasis added); U.S. CONST. 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.”).

³⁸ 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 11.

³⁹ 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.”)

⁴⁰ See Vermeule, *supra* note 36, 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”).

⁴¹ See THE FEDERALIST NO. 46, *supra* note 1, at 294 (James Madison).

⁴² See *id.*

⁴³ See Madison, *Location of Capital*, *supra* note 11, at 862 (“Those who are most adjacent to the seat of legislation, will always possess advantages over others. An earlier knowledge 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.”).

⁴⁴ THE FEDERALIST NO. 51, *supra* note 1, at 322 (James Madison).

⁴⁵ THE FEDERALIST NO. 10, *supra* note 1, at 82 (James Madison) (arguing that “local situation[s]” would always produce geographical ideological variations). See also James Madison, *Speech in Congress Proposing Constitutional Amendments, June 8, 1789*, in WRITINGS 437, 448-49 (Jack N. Rakove ed., 1999) (noting that “a common interest or passion is less apt to be felt” because of the extended republic).

within which power was exercised to ensure decentralized interests were given voice.⁴⁶ Madison argued that “there is no one right” more important than ensuring federal power was geographically accessible to everyone.⁴⁷

The failures of British colonial rule cited were often blamed on—as the Declaration of Independence phrased it—the fact that power was located “at places unusual, uncomfortable, and distant.”⁴⁸ 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 all factions could equally access state power, and distributed state offices within the state. 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.⁴⁹ The many locations of national power before the Constitution (at least eight for the Congress that preceded the Constitution⁵⁰) led Madison to remark in *Federalist 43* of the potential need to remove federal power to an entirely new capital altogether.⁵¹

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 branch⁵² and therefore speaking for the entire United States.⁵³ The Constitutional Convention debated whether “three members of the Executive to be drawn from different portions of the Country”⁵⁴ 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

⁴⁶ 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.”).

⁴⁷ Madison, *Location of Capital*, *supra* note 11, at 863 (“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 279 (James Madison) (noting concerns about “too great a public pledge to be left in the hands of a single state, and would create so many obstacles to a removal of the government”).

⁴⁸ UNITED STATES DECLARATION OF INDEPENDENCE (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 11, at 862.

⁴⁹ *See* Madison, *Location of Capital*, *supra* note 11, at 862.

⁵⁰ *See* KENNETH R. BOWLING, *THE CREATION OF WASHINGTON, D.C.: THE IDEA AND LOCATION OF THE AMERICAN CAPITAL* 14-72 (1993).

⁵¹ *See* THE FEDERALIST NO. 43, *supra* note 1, at 279 (James Madison) (noting concerns about “too great a public pledge to be left in the hands of a single state”).

⁵² U.S. CONST., art. II, § 1, cl.1 (“The executive power shall be vested in a President of the United States of America.”).

⁵³ *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.”).

⁵⁴ James Madison, *Proceedings of Committee of the Whole House, May 30-June 19*, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 88 (Max Farrand ed., 1911).

equal footing.”⁵⁵ The argument that carried the day was that “a single magistrate [w]as most likely to answer . . . the remote parts.”⁵⁶ One President would try to appeal to all parts of the country, and not just the place in the country that constituted their political home.⁵⁷ Presidential decentralization was rejected in design, but not the need to achieve something similar in practice.

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 adherence” to a central location for the new capital.⁵⁸

Washington was also to be permeable, the kind of place “equally open and available to all.”⁵⁹ Many thought that the capital should be located in one of America’s great cities, in a place like New York City or Philadelphia.⁶⁰ 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 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 we get piled upon one another in large cities, as in Europe, we shall become as corrupt as Europe.”⁶¹ 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.⁶²

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 “district” to become “the seat of the Government” also mentions other places that would house federal officials. There would be other “places” outside of the “district” that would feature “other needful buildings” that the federal government would

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (“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).

⁵⁸ Madison, *Location of Capital*, *supra* note 11, at 862. *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.”)

⁵⁹ *Id.*

⁶⁰ *See* BOWLING, *supra* note 50, at 15-16.

⁶¹ THOMAS JEFFERSON, WRITINGS 918 (1984). *See also* 10 THE WRITINGS OF THOMAS JEFFERSON 173 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904) (“I view great cities as pestilential to the morals, the health and the liberties of man.”).

⁶² *See* THE FEDERALIST No. 43, *supra* note 1, at 279 (noting concerns about “too great a public pledge to be left in the hands of a single state”).

utilize.⁶³ The decentralization would be seasonal but substantial at the highest levels of government. The Justices would be outside of Washington sometimes more than half of the year.⁶⁴ A federal government that did not engage in tasks of enormous complexity or in enormous quantities⁶⁵ meant that members of Congress and even the President could leave tiny Washington and return to their homes with great frequency during the year. Even the Attorney General did not move to Washington for many decades after that was position was created in 1789.⁶⁶

The decentralization would be permanent for many of those below the highest levels of federal office.⁶⁷ United States Attorneys were identified by the Judiciary Act of 1789 as being located in districts outside of Washington.⁶⁸ Federal marshals were located within geographically defined districts outside of Washington and were compensated based on their location.⁶⁹ The first Bank of the United States remained in Philadelphia even after other offices left for Washington.⁷⁰ 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.⁷¹ The United States Mint, an important federal office at the time, remained in Philadelphia.⁷² The Judiciary Act of 1789 divided the lower federal courts into thirteen geographically defined districts.⁷³ The district judge in each district was required to “reside in the district”⁷⁴ and to hold sessions in geographically defined places within that district.⁷⁵

Early debates about constitutional principles also focused on how best to decentralize as a means of complimenting for the deficiencies of federalism and the separation of powers. Federalism required federal decentralization so that the federal government could compete with

⁶³ 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”).

⁶⁴ See Maeva Marcus, *Introduction*, to 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 1, 3 (Maeva Marcus ed., 1988).

⁶⁵ See Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 4, 50 (2016) (“The government is not just visibly larger but—along countless dimensions in the military, economic, and social spheres—vastly more capable.”).

⁶⁶ See BORDEWICH, *supra* note 5, at 242.

⁶⁷ See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT* 112 (2009). See also LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 199 (1948) (demonstrating that field service officials “far outnumbered those in the central establishment”).

⁶⁸ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93 (“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.”).

⁶⁹ See *id.* § 27, 1 Stat. 74-75 (“That a marshal shall be appointed in and for each district”).

⁷⁰ PHILADELPHIA FEDERAL RESERVE BANK, *THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING* 11 (2012).

⁷¹ *Id.* at 15.

⁷² See The United States Mint, *About Us*, <https://www.usmint.gov/learn/history?action=history>.

⁷³ Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 74-75.

⁷⁴ *Id.* §3.

⁷⁵ *Id.* §§ 2-3. See also *id.* (requiring that these marshals “take an oath or affirmation . . . within their respective districts”).

state governments for local affections from local places.⁷⁶ 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. There were debates about whether to have the President located within the same building as the Congress in the decade that the federal government was in Philadelphia (before it moved to Washington in 1800). One commentator described it as “nothing short of insanity” to locate them in the same building, and a threat to the new Constitution.⁷⁷ 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.”⁷⁸ The new Department of the Treasury was to be in a different building than both the President and the Congress.⁷⁹ 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.”⁸⁰

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.⁸¹ 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.⁸² The worst was avoided, but this possibility made the Founding generation skeptical of being excessively dependent on factions not accountable to the entire nation. 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.⁸³ The exclusive power that Congress had over the seat of government was meant to forestall decentralized interests from dominating federal power too much in the future. 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—and so did its distance and differences from a country 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

⁷⁶ See THE FEDERALIST No. 46, *supra* note 1, at 294 (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).

⁷⁷ See BORDEWICH, *supra* note 5, at 226.

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* at 116.

⁸⁰ *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.”).

⁸¹ See, e.g., THE FEDERALIST No. 47, *supra* note 1, at 303 (James Madison) (“[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.”).

⁸² See BOWLING, *supra* note 50, at 30-34.

⁸³ *Id.* at 31.

officials.⁸⁴ Congress had only eight permanent and full-time staffers.⁸⁵ As one scholar of those years wrote, “[f]ourteen years after the arrival of the government [in Washington], there was still no *there* there.”⁸⁶ 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 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.⁸⁷ New limitations were placed on private and state power in the Thirteenth Amendment and on state power in the Fourteenth and 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.⁸⁸

The Reconstruction Amendments were often justified as reflective of an insufficient separation of place in the original constitutional document. After the capital moved to Washington in 1800, there were twenty-four straight years of Southern presidents, and many complained about that.⁸⁹ 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.⁹⁰

Some state legislatures therefore voted to instruct their federal Senators and Representatives to move parts of the federal government to someplace further West.⁹¹ In 1867,

⁸⁴ See BORDEWICH, *supra* note 5, at 242.

⁸⁵ *Id.*

⁸⁶ *Id.* at 260. For a compelling examination of some of the events discussed below, see an excellent article by Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527 (1995).

⁸⁷ 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”).

⁸⁸ See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870) (“It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words of the Necessary and Proper Clause were “equivalent” to the word “appropriate” [in the Reconstruction Amendments].”). See also *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), *cited in* *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 439 (1968) (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.”).

⁸⁹ See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 51 (2000).

⁹⁰ CONG. GLOBE, 40th Cong., 2d Sess. 3174 (June 15, 1868).

⁹¹ 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, 1870); 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.

Federal Decentralization

Representative John A. Logan of Illinois called for a special congressional committee or even a Constitutional Convention to consider these issues.⁹² St. Louis became the favored, compromise location for the “Reconstruction” capital,⁹³ since it could be the new population centroid of the country. 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.”⁹⁴

The increase in federal power that dominates discussions about the Reconstruction Amendments 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 that authorized 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. Others in the South complained that federal officials would be *in* the South but *of* the North because so many appointed officials were veterans of the Union army.

Similar legal designs and objections were raised about other elements of Reconstruction. The Freedmen’s Bureau was coordinated by the Department of War and was intended to assist recently emancipated slaves. The Bureau 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 at least ten officials—and a military official—to oversee efforts in each state of the Confederacy from *within* each state of the Confederacy.⁹⁷

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. The Evarts Act created decentralized federal courts of

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); 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, 1870);

⁹² CONG. GLOBE, 40th Cong., 2d Sess. 209 (Dec. 16, 1987).

⁹³ *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.”).

⁹⁴ WALT WHITMAN, *DEMOCRATIC VISTAS* 165 (1871).

⁹⁵ Reconstruction Act of 1867, ch. 153, 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 history and logic of this).

⁹⁷ See Law Creating The Freedmen’s Bureau (1865), <http://www.freedmen.umd.edu/fbact.htm>.

appeals to supplement the decentralized district courts.⁹⁸ Later federal statutes even more explicitly required these judges to reside⁹⁹ and operate¹⁰⁰ in those circuits to avoid the grasps of Washington.¹⁰¹ If there was to be judicial independence—supporters of the Evarts Act argued—federal courts needed to be accessible (and thus decentralized) and not excessively integrated within Washington (and thus decentralized).¹⁰²

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.”¹⁰³ 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.¹⁰⁴ The result was the creation of regional banks located in several different metropolitan areas around the country.¹⁰⁵

3. *New Deal*

Similar constitutional debates characterized the New Deal era. The diagnosis of what had led to 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.¹⁰⁶ 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 Washington¹⁰⁷ and therefore the transformation of Washington itself.¹⁰⁸ The

⁹⁸ See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 100-01 (Transaction Publishers 2007) (1928) (summarizing these changes).

⁹⁹ See 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.”)

¹⁰⁰ See 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.”)

¹⁰¹ 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 case before them, not enlightened upon the laws of the several States, not seen by the people of the United States”).

¹⁰² See FRANKFURTER & LANDIS, *supra* note 98, at 100-01.

¹⁰³ See 1 PAUL WARBURG, *THE FEDERAL RESERVE SYSTEM: ITS ORIGIN AND GROWTH* 12 (1930).

¹⁰⁴ See CARTER GLASS, *AN ADVENTURE IN CONSTRUCTIVE FINANCE* 1-15 (1927).

¹⁰⁵ See H.R. REP. No. 63-69, 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.”)

¹⁰⁶ The recent articles by Yishai Blank & Issachar Rosen-Zvi, and then 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 28; Bulman-Pozen, *supra* note 28.

¹⁰⁷ 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.”).

Federal Decentralization

Pendleton Act—which laid the foundations for the modern civil service—mentions often that civil service officials will be concentrated in Washington.¹⁰⁹ 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.¹¹⁰

New Deal debates therefore debated decentralizing 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.”¹¹¹ A front-page story in *The New York Times Magazine* summarized the movement to move the entire capital to the Rocky Mountains.¹¹² In the early 1950’s, Representative Charles A. Buckley, a powerful committee chair in the House of Representatives, 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.¹¹³

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 Elena Kagan has argued, this Committee “established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy.”¹¹⁴ The Brownlow Committee’s ambition was for administrative agencies to “decentraliz[e] [so] that the Government servant remains himself [is] one of the people in touch with the people and does not degenerate into an isolated and arrogant bureaucrat.”¹¹⁵ 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). Others were headquartered in Washington but featured regional offices throughout the United States.¹¹⁶

Still others were located outside of the central area of Washington, including most significantly the emerging military infrastructure created by World War II and formalized after

¹⁰⁸ See Carl Abbott, *Dimensions of Regional Change in Washington, D.C.*, 95 AM. HIST. REV. 1367, 1371 (1990).

¹⁰⁹ See, e.g., Pendleton Act, ch. 27, 22 Stat. 403, §2 (“[A]ppointments to the public service at Washington shall be apportioned among the several States and Territories and the District of Columbia.”) (emphasis added).

¹¹⁰ 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] 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?”).

¹¹¹ *Id.* at 139-40 (proposing a capital in Mississippi).

¹¹² Richard L. Neuberger, *Should We Move the Capital to the Rockies?*, N.Y. TIMES MAGAZINE, Oct. 6, 1948, 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?”).

¹¹³ See *Hearings Before the Subcommittee on Public Buildings and Grounds of the Committee on Public Works, House of Representatives, Eighty-Second Congress, Second Session*, on H.R. 1728, 82d Cong., 2d Sess., at 144 (Feb. 14, 1951) (featuring letter from Sen. Alexander Wiley to Rep. Charles A. Buckley (Feb. 14, 1951)).

¹¹⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2271 (2001).

¹¹⁵ PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF THE ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 30 (1937).

¹¹⁶ See Blank & Rosen-Zvi, *supra* note 28, at 44-57; Bulman-Pozen, *supra* note 28, at 21-31.

it.¹¹⁷ Ensuring separation between the military-intelligence apparatus and the executive branch was an important design goal.¹¹⁸ 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.¹¹⁹ There were objections to this, particularly on constitutional grounds in the Senate.¹²⁰ The President argued that the Take Care Clause delegated him the power to decentralize when necessary.¹²¹ 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.”¹²² 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.¹²³ President John F. Kennedy and Richard Nixon later issued largely similar executive orders making decentralization within the executive branch a federal legal priority.¹²⁴

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.¹²⁵ Since and because of the Legislative Reorganization Act of 1946 and a similar statute in 1970, now members of Congress employ usually around half of their staff in the district or state.¹²⁶ The farther the member of Congress is from their district or state, the greater the budget they receive to employ staff in their district or state.¹²⁷

¹¹⁷ For a brilliant account of this, 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* (2013).

¹¹⁸ *See id.* at 53.

¹¹⁹ *See* ALFRED GOLDBERG, *THE PENTAGON: THE FIRST FIFTY YEARS* 5-9 (1992).

¹²⁰ *See* 87 CONG. REC. 7133-34, 7136 (Aug. 14, 1941) (statement by Senator McCarran).

¹²¹ *See id.*

¹²² 40 U.S.C §71(b) (1986).

¹²³ *See* U.S. CONST., Art. I., §8

¹²⁴ *See* EXEC. ORDER 11, 035, 27 FED. REG. 6519 (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 (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.”).

¹²⁵ *See* Congress of the United States, *A History of Congressional Staff*, <http://archives.democrats.rules.house.gov/archives/jcoc2s.htm>.

¹²⁶ *See id.*

¹²⁷ *See id.*

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.¹²⁸ In the sixty plus years after the New Deal and before *United States v. Lopez*¹²⁹ in 1995, the Supreme Court never invalidated a law as exceeding Congress's powers under the Commerce Clause. The unusual facts of *NFIB v. Sebelius* provided the Court with an opportunity to invalidate a law under the Spending Clause in ways it had never done so previously.¹³⁰ Even after *NFIB*, it is fair to label much of federalism more of the "puppy federalism" than the real federalism variety.¹³¹

During this moment of increasing federal power, though, it is important to note how much federal decentralization has still been 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 featured dramatic federal interventions, but federal interventions often defined by law as decentralized interventions. When President Dwight Eisenhower ordered troops to enforce a desegregation order in Arkansas, and President John F. Kennedy ordered troops to enforce a desegregation order in Alabama, they used federal officials located in those states.¹³² The Constitution suggests that militias will be primarily state entities, meaning they were primarily to be located within states.¹³³ 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.¹³⁴ The presidential executive orders in both situations specifically mentioned using those statutes and therefore using troops located in those states.¹³⁵ The federal judges ordering desegregation were

¹²⁸ 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").

¹²⁹ 514 U.S. 549 (1995).

¹³⁰ 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 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 *NFIB v. Sebelius*, 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., concurring in part, and dissenting in part) ("The Chief Justice therefore—for the first time ever— finds an exercise of Congress' spending power unconstitutionally coercive.").

¹³¹ 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.").

¹³² See 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 420 (1984).

¹³³ See, e.g., U.S. CONST. art. I, § 10, cl.3 (differentiating local militias from troops).

¹³⁴ See U.S. CONST. art. I, § 8, cl. 15 (empowering Congress to "call[]forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); U.S. CONST. art. II, § 2 (empowering the President to command state militias "when called into the actual service of the United States"); 32 U.S.C. §109(a) (1916) ("[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.").

¹³⁵ See Exec. Order 10,730 (1958), https://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock/Press_Release_EO_10730.pdf.

often figures like Frank Johnson, a federal judge, but one from the South and located in the South.¹³⁶

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.¹³⁷ The United States Attorney that made the decision to charge Lopez and that handled his appeal through the lower federal courts was located in Texas.¹³⁸ The district court and court of appeals that affirmed the constitutionality of his conviction were both located far outside of Washington.

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 initiatives to decentralize. 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 big 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.¹³⁹ It is therefore notable that one important study found nearly 30 percent of political appointees lived in the Washington metropolitan area at the time of their nomination.¹⁴⁰ Congress created a label—Divest D.C.—to capture these reasons to increase federal decentralization.¹⁴¹ 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.”¹⁴²

¹³⁶ See Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 *YALE L.J.* 1237, 1238 (2000) (highlighting the role of Judge Johnson in Alabama).

¹³⁷ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

¹³⁸ 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.”).

¹³⁹ Statement by Timothy Ryan (D-Oh), *Congressman Tim Ryan Introduces Legislation to Decentralize the Federal Government*, <https://timryan.house.gov/press-release/congressman-tim-ryan-introduces-legislation-decentralize-federal-government> (noting the complexity generated by “more than 300,000 federal workers . . . in 100 federally-owned buildings and 500 leased buildings”).

¹⁴⁰ 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).

¹⁴¹ See Portnoy, *supra* note 10.

¹⁴² See House Oversight, *Decentralization Hearing*, *supra* note 33, at 36:21.

Federal Decentralization

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. As an Obama Administration official stated, the worry was that federal policy related to technology was captured by “the usual Washington contractors” instead of empowering innovators in Silicon Valley.¹⁴³ The Department of Defense therefore created an important new office in Silicon Valley entitled Defense Innovation Unit—Experimental (“DIUx”).¹⁴⁴ DIUx was designed to be “far removed from the Beltway”¹⁴⁵ and therefore generate more of a “bridge” with Silicon Valley.¹⁴⁶ DIUx would report directly to the Secretary of Defense.¹⁴⁷ Because Boston has a similarly sophisticated technology network, DIUx now has an office in Boston as well.¹⁴⁸ Obama Administration efforts extended to other agencies and departments, because of a similar concern that what these separate agencies and departments require—and that administrative law prioritizes—cannot be provided exclusively from Washington.

Second, a continuing motivation to decentralize federal power has been complimented 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.¹⁴⁹ The twenty largest metropolitan areas were all located on major waterways because access to transportation was crucial for economic success.¹⁵⁰ Centralization was often an obligation rather than a choice. The creation of the combustion engine and the rise of airplane travel transformed organizational structures.¹⁵¹

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.”¹⁵² While it used to take two days to get communication from New York to Washington, now it takes less than two seconds to

¹⁴³ See John Markoff, *Pentagon Shops in Silicon Valley for Game Changers*, N.Y. TIMES, Feb. 26, 2015, at A3.

¹⁴⁴ Cheryl Pellerin, *DoD’s Silicon Valley Innovation Experiment Begins*, DEFENSE NEWS, Oct. 29, 2015, https://www.defense.gov/News/Article/Article/626602/_redir/1/.

¹⁴⁵ Somni Sengupta, *The Pentagon as Silicon Valley’s Incubator*, N.Y. TIMES, Aug. 22, 2013, at B1.

¹⁴⁶ Ash Carter, *Rewiring the Pentagon: Charting a New Path on Innovation and Cybersecurity*, DEFENSE NEWS, 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/>.

¹⁴⁷ John Markoff, *Pentagon Turns to Silicon Valley for Edge in Artificial Intelligence*, N.Y. TIMES, May 11, 2016, at B1.

¹⁴⁸ Dan Lamothe, *Pentagon Chief Overhauls Silicon Valley Office, Will Open Similar Unit in Boston*, WASH. POST, May 11, 2016, at A17.

¹⁴⁹ See Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, 83 PAPERS REGIONAL SCI. 197, 198-99 (2004).

¹⁵⁰ See *id.*

¹⁵¹ See MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* 12 (2006).

¹⁵² *Congressman Tim Ryan Introduces Legislation to Decentralize the Federal Government*, (Apr. 20, 2017), <https://timryan.house.gov/press-release/congressman-tim-ryan-introduces-legislation-decentralize-federal-government>. See *id.* (noting how that technology “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.RES. 38, 115th Cong. (2017) (noting the possibility of decentralization because of “the development of modern communication technologies and the increased ease of travel”).

communicate electronically between the places.¹⁵³ The modern organizational form across the private and public sectors is increasingly decentralized with specialized regional hubs.¹⁵⁴ 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.”¹⁵⁵ Constitutional concerns even led one Republican member of the House of Representatives to vote against their party and oppose decentralization efforts.¹⁵⁶ Supporters of decentralization efforts not only see it as constitutionally possible, but constitutionally necessary.¹⁵⁷

II. The Tools of Federal Decentralization

This Part identifies the tools available to institutional designers interested in federal decentralization. Federal decentralization is an umbrella term—similar to federalism and separation of powers—in that it is used to describe many institutional practices.¹⁵⁸ 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 is how much to decentralize that target. The quantity of decentralization will itself turn on two sub-questions. (1) How many 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?

¹⁵³ See Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSPECTIVES 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.”).

¹⁵⁴ 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).

¹⁵⁵ See Portnoy, *supra* note 10.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) (describing the conventional scholarly and doctrinal wisdom as featuring “a freestanding separation of powers principle” 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).

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.¹⁵⁹ 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.¹⁶⁰

Federal decentralizations across the branches have been the most salient form of decentralization. The West German system created after World War II placed the legislative and executive branches in Bonn while the two chief courts were in Karlsruhe.¹⁶¹ The European Union likewise has three capital cities housing three different branches of the government.¹⁶² The South African Constitution specifies that “[t]he seat of Parliament is Cape Town.”¹⁶³ Subsequent legislation made Pretoria the executive capital and Bloemfontein the judicial capital.¹⁶⁴ American federal decentralization likewise features external decentralization, though nothing of the magnitude of most other countries. The Evarts Act placed lower federal courts outside of Washington in part to distance them from the legislative and executive branches in Washington. The regional Federal Reserve Banks were placed outside of Washington to distance them from the legislative and executive branches in Washington.

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 *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.”¹⁶⁵ It is most common in comparative constitutional law to see the legislature and the executive co-located, and the judiciary located someplace differently. This was the West German approach, and one that was widely copied. In the Czech Republic, for instance, the legislative and the executive are in Prague but the Constitutional Court is located in Brno.¹⁶⁶ The Supreme Court’s entanglement with the other two branches in Brazil has generated proposals to move the Court to Rio de Janeiro from its current location in Brasilia.¹⁶⁷ In some countries, the executive and the judiciary are co-located, but concerns about the autonomy of the legislature are significant

¹⁵⁹ See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426 (2009) (defining the external separation of powers as about “relations between the branches”).

¹⁶⁰ 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-contradictory).

¹⁶¹ See Cowell, *supra* note 12.

¹⁶² See Kanter, *supra* note 14.

¹⁶³ SOUTH AFRICA CONST. 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.”).

¹⁶⁴ See Mabin, *supra* note 13.

¹⁶⁵ THE FEDERALIST No. 48, *supra* note 1, at 308 (James Madison). See also *id.* (“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.”).

¹⁶⁶ See HEIN MARAIS, LIMITS TO CHANGE: THE POLITICAL ECONOMY OF TRANSITION 150 (2001).

¹⁶⁷ See *Death of A Brazilian Justice*, THE ECONOMIST, Jan. 28, 2017, at 32.

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, and Valparaiso to the legislative branch.¹⁶⁸

The Supreme Court Justices in the United States rode circuit because of the concern that judicial independence could not co-exist with judicial co-location with the executive and legislative branches.¹⁶⁹ Once the Justices centralized in Washington, decentralized lower federal courts of appeals were created to ensure decentralized federal judges.¹⁷⁰ 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.¹⁷¹ 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 in Washington from the moment the federal government moved to Washington if the legislature was to resist the President.¹⁷²

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 a branch. In West Germany, for instance, Cologne was marked as the location of the domestic intelligence agency, while Pullach was the location of the foreign intelligence agency.¹⁷³ The Department of Treasury was located in a different building than the President at the Founding.¹⁷⁴ Administrative agencies feature regional offices to diffuse power within the executive branch.¹⁷⁵

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, or the same floor, or the same building, or the same street, or the same Metro stop. The question therefore is inevitable: what degree of decentralization is desired? Resolving this question involves the consideration of two dimensions.

First, one feature of resolving the “how much” question is resolving *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 American Constitution identifies as the

¹⁶⁸ See Shirley Christian, *Valparaiso Journal; Home Port for Lawmakers*, N.Y. TIMES, Mar. 2, 1989, at A10.

¹⁶⁹ See David R. Stras, *Why the Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1712-17 (2007) (identifying the logic and history of this rationale).

¹⁷⁰ See 1893 ATTORNEY GENERAL ANNUAL REPORT, at iv (1893). The Evarts Act of 1891 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.” Evarts Act of 1891, ch. 517, § 3, 26 Stat. 826.

¹⁷¹ 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 (2001) (describing efforts by Taft to generate the building by noting that “[i]n 1921, when William Howard Taft became Chief Justice, the Supreme Court did not occupy the serene and imposing marble building that has since become its contemporary icon”).

¹⁷² See BORDEWICH, *supra* note 5, at 116 (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.”).

¹⁷³ See Cowell, *supra* note 12.

¹⁷⁴ See BORDEWICH, *supra* note 5, at 226.

¹⁷⁵ See Blank & Rosen-Zvi, *supra* note 28; Bulman-Pozen, *supra* note 28.

core of the federal government?¹⁷⁶ One historian has found that the American answer has been a fairly constant answer—somewhere between 80 and 90 percent of federal officials have always been located outside of Washington.¹⁷⁷ 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.¹⁷⁸

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 Grant¹⁷⁹—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).¹⁸⁰ The Supreme Court as recently as this past term in *Ziglar v. Abassi* stated that coordination of the most important officials (at least in the executive branch) is a concern of the highest constitutional magnitude.¹⁸¹

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 the Speaker’s Office or nearby to it, and the most important judicial branch officials are in the Supreme Court building. The Federal Reserve Bank in New York City has an outsized importance, but one less than its counterpart in Washington does, just as does the office of the Department of Health and Human Services in New York City.

This answer to the question of locating important officials distinguishes the American approach from many comparative approaches, which are defined by their insistence that some of the most important officials be decentralized. For instance, when the West German Basic Law was drafted, it was said that “whoever took Berlin ruled Germany,” and the only means to address that concern was to locate important officials elsewhere.¹⁸² The South African system

¹⁷⁶ 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”).

¹⁷⁷ See Carl Abbott, *Dimensions of Regional Chance in Washington, D.C.*, 95 AM. HIST. REV. 1367, 1371 (1990).

¹⁷⁸ See Drain the Swamp Act of 2017, H.R. 826, 115th Cong. (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”).

¹⁷⁹ President Grant argued that federal official relocations “should go through the same process . . . as amendments to the Constitution.” *The “Welcome” Demonstration*, EVENING STAR (Wash., D.C.), Dec. 22, 1870, at 4; *The Boys in Blue*, N.Y. TRIB., Dec. 22, 1870, at 1.

¹⁸⁰ See, e.g., *United States v. Germaine*, 99 U.S. (9 Otto) 508, 509 (1879) (“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.”).

¹⁸¹ *Ziglar v. Abassi*, 2017 WL 2621317, at *21 (Supreme Court, June 19, 2017) (referencing this logic as the reason why “courts have shown deference to what the Executive Branch has determined is essential to national security”) (citations and quotations omitted);

¹⁸² See Gordon A. Craig, *Berlin, the Hauptstadt: Back Where It Belongs*, 77 FOR. AFF. 161, 163 (1998).

was intended to ensure that factions around the country all felt invested in the federal government, and this would have been impossible if all that was located in their home area was an insignificant part of the federal government.¹⁸³

Second, another feature of resolving the “how much” question is resolving *how far* these decentralizations will be. The most relevant geographical unit in the United States now is the metropolitan statistical area.¹⁸⁴ It is still relatively costly to move people, particularly within congested metropolitan areas (like Washington).¹⁸⁵ The direct cost of spending time in traffic traveling places can be substantial, and that time commuting generates major opportunity costs because it is (as of now) largely wasted time.¹⁸⁶ The result is that the “average number of local interactions per person . . . is affected by their spatial distance.”¹⁸⁷

This intra-metropolitan decentralization is significant enough as a structural feature to be constitutionalized in other countries. The Tunisian Constitution purposefully places parts of the Tunisian government outside of the center of Tunis but still within the same metropolitan area.¹⁸⁸ Bardo, a suburb of Tunis, features important governmental offices.¹⁸⁹ 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.¹⁹⁰

Decentralizing *within* a metropolitan area can have some substantial effects, but often not as much as decentralizing *across* metropolitan areas. The greater costs incurred in transporting individuals across metropolitan areas will reduce 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 in another part of Washington, but in other parts of the country is reflective of this distance as difference mechanism.

Inter-metropolitan federal decentralizations will also vary in the magnitude of its effects. Metropolitan areas vary in their degree of connection to the rest of the country, and in their degree of similarity to other metropolitan areas. Compare the relative ease of going from the

¹⁸³ See MARAIS, *supra* note 166, at 18.

¹⁸⁴ 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, <http://www.census.gov/population/metro/about> (last visited Apr. 1, 2017) [hereinafter Census Bureau, *Metropolitan and Micropolitan*].

¹⁸⁵ See Glaeser & Kohlhase, *supra* note 149, at 208.

¹⁸⁶ See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1521 (explaining how market depth operates).

¹⁸⁷ See Luis M.A. Bettencourt, *The Origins of Scaling in Cities*, 340 SCIENCE 1438, 1439 (2013).

¹⁸⁸ See TUNISIA CONST. Art. 50 (“The headquarters of the Chamber of Deputies shall be located in Tunis *and the suburbs thereof*”) (emphasis added).

¹⁸⁹ See Roua Khlifi, *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://web.archive.org/web/20130803171125/http://www.tunisia-live.net/2013/07/31/ennahdha-and-others-reject-calls-for-nca-dissolution/>]].

¹⁹⁰ See Spencer C. Hsu & Neil Irwin, *Homeland Security Settles on D.C.*, WASH. POST, Jan. 23, 2003, at A1.

Federal Reserve Bank in Washington to the one in Chicago than it is the one in Kansas.¹⁹¹ A federal official located in Kansas will be more decentralized in practice than one located in Chicago. The political scientists Chris Tausanovitch & Christopher Warshaw have found meaningful differences in political preferences across metropolitan areas, with Oklahoma City being the metropolitan area on the other ideological end of the spectrum from Washington.¹⁹² 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).¹⁹³ Within metropolitan areas, though, there are major variations. It has different implications to locate a federal office in suburban Tysons Corner than in downtown Washington.¹⁹⁴ It has different implications to locate a federal office outside of a metropolitan area altogether. Placing a federal official in Keene, New York (population 1,105) is different than placing them in Albany, New York (population 1.1 million) or in New York City, New York (population 8.2 million).

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 the “double security” that James Madison mentioned.¹⁹⁵ Federal decentralization supplies part of the diffusion that constitutional law demands, and that federalism and separation of powers are incapable of providing.

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]”¹⁹⁶ that pits 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 forces sufficiently centripetal in nature as well. As part of this analysis, this Part provides new reads on two of the most significant areas of constitutional law: commandeering and executive power.

¹⁹¹ See Zachary R. 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 R. Neal, *Differentiating Centrality and Power in the World City Network*, 48 URB. STUD. 2733 (2011) (same).

¹⁹² Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605 (2014).

¹⁹³ See Census Bureau, *Metropolitan and Micropolitan*, *supra* note 184.

¹⁹⁴ See Nicholas A. Phelps & Andrew M. Wood, *The New Post-Suburban Politics*, 48 URB. STUD. 2591, 2561 (2011) (presenting information about the different political ecosystem of Tysons Corner).

¹⁹⁵ THE FEDERALIST NO. 51, *supra* note 1, at 323 (James Madison).

¹⁹⁶ THE FEDERALIST NO. 51, *supra* note 1, at 298-99 (James Madison).

A. Federalism

Federalism, as Heather Gerken has written, diffuses power to state governments outside of Washington to “allow[s] national minorities to constitute local majorities.”¹⁹⁷ 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 government in a way ensuring that these local majorities have voice in a more consistent way.

The power of federal decentralization also generates perils for federalism. If federal decentralization is so effective it can pose some risk of not just *complimenting* federalism but *substituting* for it. From the other perspective, 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

a. 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 said 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.”¹⁹⁸ 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.

The sovereignty model has focused on ensuring that state governments have discrete areas of policy that they can administer.¹⁹⁹ 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 compromised of state and local officials located outside of Washington—

¹⁹⁷ Gerken, *supra* note 19, at 12.

¹⁹⁸ *Gregory v. Ashcroft*, 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, 1567 (2006) (explaining this rationale); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 784 (2016) (same).

¹⁹⁹ See Gerken, *supra* note 19, 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.”).

convince those in Washington to respect local majorities.²⁰⁰ 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.²⁰¹

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 it²⁰² and Justices whose Washington experiences shape their decisions,²⁰³ 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- and west-coast States. Only one hails from the vast expanse in-between.”²⁰⁴

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.²⁰⁵ The brilliant framing of the literature by Heather 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

²⁰⁰ 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).

²⁰¹ See, e.g., Gerken, *supra* note 19, 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.”).

²⁰² 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).

²⁰³ See, e.g., CONG. GLOBE, 30TH CONG., 1ST SESS. 596 (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 case before them, not enlightened upon the laws of the several States, not seen by the people of the United States”); Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 LAW & SOC’Y REV. 889 (2012) (providing empirical evidence of judicial behavior being influenced by Washington network).

²⁰⁴ *Obergefell v. Hodges*, 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.”).

²⁰⁵ See Gerken, *supra* note 19, at 7-8 (“[T]he power minorities wield is that of the servant, not the sovereign; the insider, not the outsider . . . [t]hey enjoy a muscular form of voice—the power not just to complain about national policy, but to help set it.”).

important federal government—a federal government that has the Supremacy Clause at its disposal—if state governments are distant from federal power.²⁰⁶ 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 about this during the First Congress.²⁰⁷ Alexander Hamilton wrote in *Federalist 14* that the American Republic will cease to be a democracy when federal power was so far away from the people that they could not easily access federal power anymore.²⁰⁸

The citizen outside of Washington faces a “make or buy” decision in terms of political influence,²⁰⁹ 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.²¹⁰ Republicans and Democrats alike, for instance, have complained that President Trump has been inaccessible because he has rarely traveled West of the Mississippi River.²¹¹

Local citizens can more 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 are therefore are not particularly close to state or local officials anyway.²¹² Citizens living closer to Washington, by contrast, can more easily access federal power. Nearly one in three residents of the District of Columbia have directly protested the Trump Administration since President Trump was inaugurated in January of 2017.²¹³

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

²⁰⁶ See *Gregory*, 501 U.S. at 460 (“The Federal Government holds a decided advantage the Supremacy Clause.”).

²⁰⁷ See Madison, *Location of Capital*, *supra* note 11. See also 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, at A22 (reporting on the transition to Congress for elected officials moving from other parts of the country).

²⁰⁸ THE FEDERALIST No. 14, *supra* note 1, at 101 (Alexander Hamilton) (“[T]he natural limit of a republic is that distance from the center which will barely allow the representations of the people.”).

²⁰⁹ 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 33 (1988).

²¹⁰ 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).

²¹¹ See Adam D. Nagourney & Michael D. Shaer, *Call from California: President Trump, Where Are You?*, N.Y. TIMES, July 3, 2017, at A1 (“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.”).

²¹² See Hedge, *supra* note 15.

²¹³ See Paul Schwartzman & Emily Guskin, *Washington Has Become the Capital of Political Dissent*, WASH. POST, July 6, 2017, at A1.

Washington since branches are concentrated there.²¹⁴ Large numbers of individuals in Washington can 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.²¹⁵ Rents on K Street are therefore enormous because of the greater access this physical proximity to so much power provides.²¹⁶ Local interests—such as state governments—are important consumers purchasing these influence services, but purchasing these services is quite expensive.²¹⁷

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.²¹⁸ 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. State governments even applied creative labels to frame their Medicaid expansion as being decentralized, using titles like “TennCare” (Tennessee) and “Husky Health” (Connecticut).²¹⁹

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.²²⁰ 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, let alone 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 these concerns. Empirical studies of federal agency

²¹⁴ See Schleicher, *supra* note 186, at 1521.

²¹⁵ 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.”).

²¹⁶ 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.”).

²¹⁷ See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014) (detailing the role that organizations like the National Governors Association play in representing state officials in Washington).

²¹⁸ See, e.g., Abbe R. Gluck, *Federalism From Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1750 (2013) (citing the ACA as an example of how “[f]ederalism proponents may be doing their own cause a disservice with their reluctance to see federalism in federal statutes.”).

²¹⁹ See *Connecticut’s Health Care for Children & Adults*, <http://www.huskyhealth.com/hh/site/default.asp>; *What’s New with TennCare*, TENNCARE, <http://www.tn.gov/tenncare/index.shtml>.

²²⁰ *Printz v. United States*, 521 U.S. 898, 959 (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.”).

behavior in agencies like the Environmental Protection Agency (“EPA”)—agencies with substantial regional offices—have found regional variation among agency behavior. Agency behavior varied across regions because EPA officials learned about local needs more efficiently and more quickly from across the street rather than across the country, and adapted their regulatory behavior accordingly.²²¹

Local majorities also can *become* federal officials, rather than just neighbors influencing them. Federal and state offices that are co-located generate market depth in that particular policy area.²²² 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.

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.²²³ Federal officials early in their career 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 one’s career. 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.²²⁴ State and local officials likewise develop the capacity to resist 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, and that assisted his negotiations with the federal government on behalf of New York City once he became mayor.²²⁵

Citizens appreciate this federal decentralization as more respectful of local majorities. Federal decentralization makes local majorities *think* that the federal government understands them. The most popular federal agencies are the ones that are the most decentralized—the

²²¹ Brehm & Hamilton, *supra* note 15. For additional evidence of the network generated between federal officials located outside of Washington and state officials, see, for instance, Hedge, *supra* note 15; John T. Scholz et. al., *Street-Level Political Controls Over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 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.”).

²²² See Schleicher, *supra* note 186, at 1521-22 (identifying the empirical research about market depth and how it reduces risk and thereby increases specialization).

²²³ 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 BEHAVIOR 745 (1998). See also Georgia T. Chao et. al., *Organizational Socialization: Its Causes and Consequences*, 79 J. APPLIED PSYCH. 730, 731 (1994) (noting the evidence related to lingering behaviors stemming from early “successful and satisfying work relationships”).

²²⁴ See Adam Nagourney, *A Trump Ally in Congress Warns His State, California, to Make Nice*, N.Y. TIMES, Feb. 18, 2017, at A1.

²²⁵ See James Warren, *De Blasio’s Early Audition*, N.Y. DAILY NEWS, Nov. 6, 2013, at A1.

United States Postal Service, the National Parks Service, and the Centers for Disease Control.²²⁶ 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 that were able to meet with their members of Congress when they returned home to their districts and states.²²⁷

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.²²⁸ A federal government more sensitive to local majorities or even employing them “does not exercise lightly” its Supremacy Clause power to disregard local majorities.²²⁹ If the federal government excessively introduces 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,”²³⁰ 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.²³¹ Economists have noted that this labor specialization needed to innovate is geographically distributed.²³² 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 imprimatur behind them, shaping the behavior of other federal—as well as state—officials.

b. Costs

Federal decentralization could pose threats to federalism if it is either too successful or insufficiently successful. If it is too successful, federalism might not just be as a partial but a

²²⁶ PEW, DISTRUST, *supra* note 17.

²²⁷ See, e.g., Matt Kibbe, *Wake Up, Republicans: This Could be the Democrats' Tea Party*, POLITICO MAGAZINE, Mar. 2, 2017 (explaining the role these town halls played and the similarities between these summer protests eight years apart), <http://www.politico.com/magazine/story/2017/03/tea-party-protests-town-hall-forums-republicans-trump-resistance-indivisible-214850>.

²²⁸ Young, *supra* note 128, at 1076.

²²⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 529, 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.”).

²³⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²³¹ See K. Anders Ericsson, *The Acquisition of Expert Performance: An Introduction to Some of the Issues*, in *THE ROAD TO EXCELLENCE: EMPIRICAL EVIDENCE FROM THE ARTS AND SCIENCES, SPORTS, AND GAMES 1* (K. Anders Ericsson ed., 1996).

²³² For two significant and recent empirical and historical discussions, see Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined*, J. URB. ECON. (forthcoming 2017); Elisa Giannone, *Skilled-Biased Technical Change and Regional Convergence*, http://home.uchicago.edu/~elisagiannone/files/JMP_ElisaG.pdf

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.²³³ Talented localized human capital could be attracted to the greater policy returns generated by a federal office empowered with the Supremacy Clause²³⁴ and the greater financial returns from federal as compared to state employment.²³⁵

There are reasons to doubt that federal decentralization could ever truly substitute for federalism. The market for decentralized power is elastic. Labor markets are notably elastic, pulling and pushing talented people into new and different places as desirable employment opportunities exist.²³⁶ 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 important offices in Silicon Valley, and the Patent and Trademark Office has had an important office there for some time.²³⁷ 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,²³⁸ and if they wish to displace state action they often must endure Bicameralism and Presentment and pass legislation—never an easy thing to do.²³⁹

Federal decentralization also creates a risk in the opposite direction: the threat of excessive decentralization. Washington was made the seat of government because officials working there—a city without a state—would shed some of their state allegiances.²⁴⁰ If federal

²³³ See MARAIS, *supra* note 166, at 150.

²³⁴ 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* (2008); Anthony M. Bertelli, *Determinants of Bureaucratic Turnover Intention: Evidence from the Department of the Treasury*, 17 J. PUB. ADMIN. RES. & THEORY 235 (2007).

²³⁵ Federal legislators, for instance, make approximately three times more than do state legislators. See IDA A. BRUDNICK, CONG. RESEARCH SERV., RL 30065, CONGRESSIONAL SALARIES AND ALLOWANCES 1 (2016).

²³⁶ See Schleicher, *supra* note 15.

²³⁷ See Scott Ard, *Inside the Patent and Trademark Office's New Silicon Valley Branch*, BIZ JOURNAL, Oct. 14, 2015, <http://www.bizjournals.com/sanjose/blog/techflash/2015/10/inside-the-patent-and-trademark-office-s-new.html> (“[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.”).

²³⁸ 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”).

²³⁹ *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.”).

²⁴⁰ 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 5th ed., 1891) (stating that

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 produce efficient bargains between the two, rather than the federal official abandoning his or her federal concerns for purely local ones.²⁴¹ Federal decentralization has sometimes utilized something like the “principle of subsidiarity” that is common in the constitutional law of many countries.²⁴² Some policy domains work better when centralized. Constitutional law has traditionally ranked foreign policy as one of those areas,²⁴³ and recent congressional legislation to decentralize has largely exempted foreign policy and national security from its coverage.²⁴⁴ 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 the 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 supporting 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.”²⁴⁵ 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.²⁴⁶ Compulsion is much less likely to transpire, though, when federal officials are working together with state officials from across the street rather than working against them from

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”).

²⁴¹ See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1597 (2014) (“[I]nstitutions such as states or branches bargain over their constitutional entitlements”).

²⁴² 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.”).

²⁴³ See, e.g., *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2087-90 (2015) (explaining the doctrine and logic behind this principle).

²⁴⁴ See Portnoy, *supra* note 10 (noting sense of Representatives that national security would be largely exempted from statutory decentralization rules).

²⁴⁵ *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁴⁶ *Printz v. United States*, 521 U.S. 898, 930 (1997). See also *NFIB v. Sebellius*, 132 S.Ct. 2566, 2602 (2012) (noting the constitutional problems with federal officials “coerc[ing] [state officials] into adopting a federal regulatory system as their own”).

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.²⁴⁷

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, assuming that only “state governments” could act as “regional offices of the Federal Government.”²⁴⁸ 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.”²⁴⁹

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.²⁵⁰ The “residents of the State” could only influence “elected state officials.”²⁵¹ Federal officials, by contrast, were presumed not to be “responsive to the local electorate’s preferences.”²⁵²

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.”²⁵³ 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* 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.”²⁵⁴ 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. The costs can also include 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 Bill De Blasio, who used his stint in the regional office of the Department of

²⁴⁷ 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, 1296 (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.

²⁴⁸ *New York*, 505 U.S. at 188.

²⁴⁹ *Id.* at 206 (White, J., dissenting in part and concurring in part).

²⁵⁰ *New York*, 505 U.S. at 168.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 169.

Housing and Urban Development to help launch his successful campaign for Mayor of New York City.²⁵⁵

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.²⁵⁶ The Trump Administration issued its executive order after consulting primarily with lawyers in the White House and a few select lawyers in Justice Department headquarters. There was little opportunity for substantial local engagement.²⁵⁷ Given those facts, the Supreme Court could reasonably doubt whether local officials were being coerced, as local 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”²⁵⁸ control different branches of the federal government. These rivalrous interests ensure that no one individual or party pushes the federal government to extremes by ensuring 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.²⁵⁹ 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.²⁶⁰ 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.²⁶¹ Federal decentralization also risks *over* 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.

²⁵⁵ See Warren, *supra* note 225.

²⁵⁶ County of Santa Clara v. Trump, 2017 WL 1459081 (N.D. Cal. 2017).

²⁵⁷ See Vivian Yee, *Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities*, N.Y. TIMES, Apr. 25, 2017, at A1.

²⁵⁸ THE FEDERALIST NO. 47, *supra* note 1, at 302-03 (James Madison).

²⁵⁹ Manning, *Separation of Powers*, *supra* note 158, 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.”).

²⁶⁰ See M. Elizabeth Magill, *Beyond Branches and Powers in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001) (identifying these two tools as the key tools used in separation of powers debates).

²⁶¹ See THE FEDERALIST NO. 51, *supra* note 1, at 320 (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

a. 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 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.”²⁶² 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.²⁶³ Information travels less well across greater distances.²⁶⁴ 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.²⁶⁵ 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 government can lead to greater influence in one’s current branch.²⁶⁶ A positive reputation in other branches generates future employment opportunities in other branches.²⁶⁷ 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.²⁶⁸

²⁶² Steven G. Calabresi, *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).

²⁶³ For information about this “friends and neighbors” effect, see, for instance, Shaun Bowler, Todd Donovan & Joseph Snipp, *Local Sources of Information and Voter Choice in State Elections: Microlevel Foundations of the “Friends and Neighbors” Effect*, 21 AM. POL. Q. 473 (1993); 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).

²⁶⁴ See Bettencourt, *supra* note 187, at 1439 (“[The] average number of local interactions per person. . . is affected by their spatial distance”).

²⁶⁵ 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.”)

²⁶⁶ Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (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, at A1 (describing the “too-cozy relationship” between Speaker Paul D. Ryan and the White House Chief of Staff Reince Priebus).

²⁶⁷ See, e.g., Jason Horowitz, *Antony Blinken Steps Into the Spotlight with Obama Administration Role*, WASH. POST, Sept. 15, 2013, at A1 (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 . . . integral part of a small circle of national security experts, including [Jose[h] Biden, [Thomas] Donilon, his deputy Denis McDonough and counterterrorism chief John Brennan [in the executive branch]”).

²⁶⁸ Consider, for instance, Justice Stephen Breyer. Justice Breyer was a clerk on the United States Supreme Court, an important staffer in the Senate, and through both efforts built relationships with those who served in the executive branch as well. See Gwen Ifill, *The Supreme Court; President Chooses Breyer, An Appeals Judge in Boston, For Blackmun’s Court Seat*, N.Y. TIMES, May 14, 1994, at A1 (“[Breyer] already has bipartisan support in the Senate,

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 federal officials across the parties are more like one another than they are like the rest of the country. 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 were and are largely supportive of free trade across borders, while the rest of the country was much more skeptical.²⁶⁹ Federal officials based in Washington would only hear a limited number of anti-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.²⁷⁰ When power is unified in a single political party, there is a substantial risk of the federal government acting without constraint.²⁷¹ 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 meant to be independent so as to constrain power face more challenges being independent from across the street. The Supreme Court is meant to be independent from the other branches of the federal government.²⁷² Other offices within the federal government, such as inspectors general, are likewise meant to be independent so that they can constrain other actors.²⁷³ 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 are often transmitted by law clerks (for courts) or lawyers (for inspectors

where he worked as an aide during the 1970's and helped build coalitions across party lines to deregulate the airlines.”).

²⁶⁹ See Brittany H. Bramlett, James G. Gimpel & Frances E. Lee, *The Political Ecology of Opinion in Big-Donor Neighborhoods*, 33 POL. BEHAV 565, 565–66 (2011).

²⁷⁰ See *id.* at 567.

²⁷¹ 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.”).

²⁷² 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).

²⁷³ 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.”).

general) who arrive at their positions in independent offices from their work across town with those who they are supposed to be constraining.

Independent actors have incentives to care about their reputations with other branches 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).²⁷⁴ Lawyers in inspector general offices leave their positions to work elsewhere in the legislative or executive branches.²⁷⁵ Empirical studies have documented how this influences the behavior of the Supreme Court Justices.²⁷⁶ 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.²⁷⁷

Federal decentralization generates more forces diffusing power to mitigate any concerns about accumulations of power. It ensures that federal officials exit from Washington to expose them to more argument pools and to place 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.²⁷⁸ The sorting of our polarized era means that essentially all liberals are Democrats and all conservatives are Republicans.²⁷⁹ 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 distributed.²⁸⁰ 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 areas or suburban areas.²⁸¹ Concentrations of individuals also develop their own unique properties that differentiate them even from *other* concentrations.

²⁷⁴ See Neil A. Lewis, *Abner Mikva, Judge and Mentor to Obama, Dies at 90*, N.Y. TIMES, Jul. 5, 2016, at A18 (“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.”).

²⁷⁵ See Sinner, *supra* note 273, at 1042.

²⁷⁶ See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1537 (2010).

²⁷⁷ See Robinson, *supra* note 203 (providing empirical evidence of judicial behavior being influenced by Washington network).

²⁷⁸ See Levinson & Pildes, *supra* note 271, at 2325.

²⁷⁹ See MORRIS P. FIORINA ET AL., *CULTURE WAR?*, at xiii, 9, 61-69 (3d ed. 2011).

²⁸⁰ 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, 1935-80 (2012); Tausanovitch & Warshaw, *supra* note 192.

²⁸¹ See P.E. CERUZZI, *INTERNET ALLEY: HIGH TECHNOLOGY IN TYSONS CORNER 1945-2005*, at 103 (2008); See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 278 (2007); Nicholas A. Phelps & Andrew M. Wood, *The New Post-Suburban Politics*, 48 URB. STUD. 2591, 2561 (2011).

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. Chris Tausanovitch and Christopher Warshaw have found significant differences in political behavior across metropolitan areas.²⁸² 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.²⁸³ Generating effective administration in a singular location generates substantial costs. Washington does not have the market depth in many industries.²⁸⁴ 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.²⁸⁵ 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.”²⁸⁶

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.²⁸⁷ Being in Washington means the official will not benefit from the continued knowledge spillovers of co-location with other technology stalwarts.²⁸⁸

²⁸² Tausanovitch & Warshaw, *supra* note 192.

²⁸³ 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 Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 342, 351, 383-85 (2016) (identifying “effective administration” as a goal of separation of powers); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 275 (2011) (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, 418 (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.”).

²⁸⁴ See Stephen F. Fuller, *Market Conditions and Dynamics in the Washington Metropolitan Area: 1990-2003*, http://cra.gmu.edu/pdfs/research_reports/other_research_reports/NVBIA_report_2007/Market_Conditions_and_Dynamicsin_WMA.pdf (“The Washington area economy is different than any other metropolitan area economy in the nation. Federal spending is what differentiates it from the others.”).

²⁸⁵ See Fontana, *supra* note 2, at 738 (“Most metropolitan areas are relatively narrow, focusing on a singular industry and creating a metropolitan area that relates to that industry.”).

²⁸⁶ See House Oversight, *Decentralization Hearing*, *supra* note 33.

²⁸⁷ For the leading studies explaining and documenting the importance of these strong professional ties—and their limited portability—see, for instance, 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).

²⁸⁸ See, e.g., Schleicher, *supra* note 17, at 16 (“In Silicon Valley, for example, software developers and venture capitalists learn just by having coffee with friends.”).

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 Washington—for instance, those working on medical research at the National Institutes of Health.²⁸⁹ The federal government must endure all of these costs generated via relocation by either compensating relocating officials with substantial monetary and/or policy returns, or simply cannot 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.

b. Costs

Federal decentralization poses the opposite risk of federalism. If a rough generalization can be made that federal decentralization could *substitute* for federalism, federal decentralization could *overpower* separation of powers. The separation of places has been viewed by some as adding *another* vetogate to an already constrained federal system.²⁹⁰ It is more difficult for officials to coordinate policy action from across the country than from across the street. The argument is then that the separation of powers generates too many vetogates on federal action, particularly during periods of divided government, but even during periods of unified government.²⁹¹ Many of the Tea Party supporters of federal decentralization have embraced this claim that federal decentralization generates another vetogate as accurate and as more virtue than vice.²⁹² 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 things done.²⁹³ 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

²⁸⁹ See Annie Lowery, *Washington's Economic Boom, Financed By You*, N.Y. TIMES, Jan. 10, 2013, at MM30 (“Th[e] 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.”).

²⁹⁰ See *id.* (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?”).

²⁹¹ See Levinson & Pildes, *supra* note 271, at 2339 (discussing the evidence about greater vetogates during divided government but still real vetogates during unified government).

²⁹² See *id.* (quoting statements by members of Congress).

²⁹³ See Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015).

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 derives from reduced knowledge of how government works.

The policy expertise generating more action can be supplemented by the generative function of distance. Geographical distance can facilitate the kind of critical distance and fresh perspective-taking that can both stimulate new ideas and lower the temperature with those one must work with in order to transformative these ideas into reality.²⁹⁴ 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.²⁹⁵

Federal decentralization can and has attempted to resolve this agglomeration tradeoff—not always or even necessarily mostly successfully—in one or both of two ways. First, it can endure 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 to know, 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.²⁹⁶

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.²⁹⁷ This logic can justify the creation of several company towns besides just Washington, and company towns specializing in

²⁹⁴ See Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1449 (2011) (referencing the literature finding that opinions from a distance have the benefit of “cooling off”).

²⁹⁵ See Jackie Calmes & Steven Lee Myers, *Obama and Xi Tackle Cybersecurity as Talks Begin in California*, N.Y. TIMES, June 8, 2013, at A5 (noting the choice by the Obama Administration to meet in California as part of an effort to create a “fresh start” in diplomatic relations).

²⁹⁶ See Portnoy, *supra* note 10 (quoting one member of Congress as stating that “it makes sense for security agencies, including the Pentagon and the departments of Justice and Homeland Security” to remain in Washington).

²⁹⁷ See J. Vernon Henderson, *The Sizes and Types of Cities*, 64 AM. ECON. REV. 640 (1974) (“[C]ities will probably specialize in bundles of goods They may use a common specialized labor force or a common intermediate input.”).

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 in other countries. South Africa, for instance, has a judicial capital with a deep market for legal positions, an executive capital with a deep market for executive positions, and a legislative capital with a deep market for legislative positions.²⁹⁸ The primary governmental cities in the United States now outside of Washington already use this approach. Metropolitan areas like Colorado Springs and Virginia Beach have many military officials, officials whose expertise combines military policy and how to run and operate within a federal office.²⁹⁹ Clarksburg, West Virginia has become the primary location specializing in a number of important investigative tasks performed by the Federal Bureau of Investigation.³⁰⁰

Second, policy coordination is not always the ambition of the separation of powers. As Heather Gerken has written, there are “two competing accounts” of separation of powers, one dependent on “independence” and one dependent on “integration and interdependence.”³⁰¹ Federal decentralization provides institution-designers with the opportunity to achieve “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, were sufficient to derail Fortas’s nomination to become Chief Justice.³⁰²

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.³⁰³ Opponents of presidential power have expressed the opposite concern, arguing that presidential power needs to be limited more rather than less.³⁰⁴ Both sides, though, are missing the point. Without considering *where* executive power is located, it is impossible for constitutional doctrine

²⁹⁸ See MARAIS, *supra* note 168, at 152.

²⁹⁹ See Richard Florida, *America’s Federal Employment Belt*, THE ATLANTIC MONTHLY CITY LAB, Nov. 15, 2013, <http://www.citylab.com/work/2013/11/americas-government-employment-belt/7576/> (last visited Aug. 15, 2017).

³⁰⁰ See Wofford, *supra* note 10.

³⁰¹ Gerken, *supra* note 19, at 11.

³⁰² See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 328-55 (1990).

³⁰³ See *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010); *P.H.H. Corporation vs. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

³⁰⁴ 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).

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.³⁰⁵ Only when agency officials exit Washington can they truly be free “to some degree” of presidential control.³⁰⁶

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).³⁰⁷ Relying on similar logic as *Free Enterprise Fund*, the D.C. Circuit recently invalidated one of the signature initiatives of the Obama Administration, the creation of the Consumer Financial Protection Bureau (“CFPB”).³⁰⁸ CFPB is “an independent agency headed not by a multi-member commission but rather by a single Director” removable only for cause.³⁰⁹

These cases are ultimately about a single principle: administrative agencies cannot “slip from the Executive’s control.”³¹⁰ Executive branch officials must be “accountable” to the President.³¹¹ Executive branch officials located in Washington will always be more accountable to the 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.³¹² 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. The Public Company Accounting Oversight Board (“PCAOB”) framed as beyond presidential control in *Free Enterprise Fund* is relatively geographically concentrated in Washington, with few regional

³⁰⁵ 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.”).

³⁰⁶ *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (stating that as acceptable level of official separation from the President).

³⁰⁷ *Free Enterprise Fund*, 561 U.S. at 487.

³⁰⁸ *P.H.H.*, 839 F.3d at 12-13.

³⁰⁹ *Id.* at 14.

³¹⁰ *Free Enterprise Fund*, 561 U.S. at 499. See also *P.H.H.*, 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 v. Olson*, 487 U.S. 654, 689-90 (1988) (“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’”).

³¹¹ *Free Enterprise Fund*, 561 U.S. at 483.

³¹² See Bettencourt, *supra* note 187, at 1439 (“[The] average number of local interactions per person. . . is affected by their spatial distance”).

officials of any importance.³¹³ Its Board of Directors and 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.³¹⁴

The Consumer Financial Protection Bureau (“CFPB”) framed as beyond presidential control in *PHH* is likewise relatively geographically concentrated, although less so than PCAOB. When 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 CFPB, praised the proximity as indicating that CFPB was “to have a very tangible presence” in the White House.³¹⁵ A prominent opponent to CFPB from the House of Representatives criticized CFPB’s proximity to the White House as undermining its independence from the White House.³¹⁶ The most important officials in CFPB’s earliest years have been high-powered Washington lawyers with experience in and with the executive branch, many of whom (like Warren) performed well enough at CFPB that they were able to obtain opportunities in other branches (including in the Obama White House). CFPB features regional offices, but the D.C. Circuit viewed these regional offices as less powerful than its Washington director³¹⁷—without noting why the importance of the Washington head of CFPB might *support* CFPB’s argument for constitutionality rather than undermine it.

The best evidence about the importance of federal decentralization for executive power from the behavior of federal officials themselves. In cases as old and foundational as the *Steel Seizure Cases*,³¹⁸ or as recent and important as *Noel Canning*,³¹⁹ 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 to him are located most closely to him. One of the most important decisions a President makes is who gets an office close to the Oval Office.³²⁰ 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.³²¹

³¹³ See About The Public Company Accounting Oversight Board, <https://pcaobus.org/About/Staff/Pages/default.aspx>

³¹⁴ See *id.* (documenting the backgrounds of key staff).

³¹⁵ *Republicans Say New Consumer Agency Too Powerful*, ASSOCIATED PRESS, Mar. 16, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/16/AR2011031600220.html?nav=rss_politics

³¹⁶ See Keith Rothfus, *Make Consumer Protection Agency More Accountable to Taxpayers*, PHIL. INQ., Apr. 18, 2017, <https://rothfus.house.gov/taxonomy/term/42/philadelphia-inquirer-make-consumer-protection-agency-more-accountable-taxpayers>.

³¹⁷ See *P.H.H. Corporation vs. Consumer Financial Protection Bureau*, 839 F.3d 1, 15, 17 (D.C. Cir. 2016).

³¹⁸ *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).

³¹⁹ *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2553 (2014) (stating that “in interpreting the [Recess Appointments] Clause . . . the Court puts significant weight upon historical practice”). Scholars have started to expand on these doctrines about gloss. See, for instance, 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.”).

³²⁰ See Jeff Zeleny, *West Wing Real Estate: Who Has Proximity to Trump*, <http://www.cnn.com/2017/02/03/politics/west-wing-office-map-oval-office-real-estate/> (noting that who gets office closest to President can provide “a telling look at the pecking order inside the Trump White House”).

³²¹ See Eisenhower Executive Office Building, *History*, <https://www.whitehouse.gov/1600/eeob>

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.³²² 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.³²³ By contrast, Edward Snowden undermined presidential power by leaking information that he uncovered while working in Japan for several years³²⁴ and then in Hawaii.³²⁵ Reality Leigh Winner leaked details of potential executive overreach by the Trump Administration from Georgia.³²⁶

Conclusion

James Madison believed that the concentration of power was “the very definition of tyranny.”³²⁷ 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.”³²⁸

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 American large republic would be neglected, and a narrow group of individuals would control the country. While the identity of the protagonists and antagonists of

³²² 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”).

³²³ 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, *Two Presidencies*, 4 *TRANS-ACTION* 7-14 (1966). On matters of national security law, the two presidencies argument still holds weight. See, e.g., Jack Goldsmith, *The Cheney Fallacy*, *THE NEW REPUBLIC*, May 18, 2009 (“The new administration has copied most of the Bush program, has expanded some of it, and has narrowed only a bit.”), <https://newrepublic.com/article/62742/the-cheney-fallacy>; Aziz Z. Huq, *What Good is Habeas?*, 26 *CONST. COMMENTARY* 385, 418 (2010) 418 (“[T]he effect of the change in Administration on security policy more generally has been ambiguous.”)

³²⁴ See Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, *THE GUARDIAN*, June 9, 2013.

³²⁵ Bonnie Malkin & Raf Sanchez, *Edward Snowden’s Girlfriend Revealed to Be Former Ballet Dancer*, *THE TELEGRAPH*, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10111992/Edward-Snowdens-girlfriend-revealed-to-be-former-ballet-dancer.html>.

³²⁶ See Charlie Savage, *Intelligence Contractor is Charged in First Leak Case Under Trump*, *N.Y. TIMES*, June 5, 2017, at A1.

³²⁷ *THE FEDERALIST* No. 47, *supra* note 1, at 301 (James Madison).

³²⁸ *THE FEDERALIST* No. 51, *supra* note 1, at 349 (James Madison).

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.”³²⁹ Just twenty-two years earlier, the President whose legacy Reagan promised to destroy—President Franklin Delano Roosevelt—ordered 30,000 federal officials distributed throughout the Midwest, arguing that Washington was an “isolated” capital in need of decentralization.³³⁰ Rohit Khanna, the new and progressive Democratic member of the House of Representatives from Silicon Valley, supports more federal decentralization,³³¹ as does a more conservative Democratic member from Ohio (Tim Ryan) critical of many of the policies that Khanna supports.³³² Republicans in the House affiliated with the Tea Party have supported more federal decentralization.³³³ 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.

³²⁹ See Ronald Reagan, *Address on Behalf of Senator Barry Goldwater* (Oct. 27, 1964), <http://www.reaganfoundation.org/reagan/speeches/rendezvous.asp>) (“It’s time we asked ourselves if we still know the freedoms 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 can plan our lives for us better than we can plan them ourselves.”)

³³⁰ For a discussion of President Roosevelt’s efforts, see *President Shifts 10,000 Employees Out of Washington*, N.Y. TIMES, Dec. 20, 1945, at 1.

³³¹ See Annie Lowery, *Ro Khanna Wants to Give Working-Class Households \$1 Trillion*, THE ATLANTIC MONTHLY ONLINE, Apr. 28, 2017, https://www.theatlantic.com/business/archive/2017/04/ro-khanna-trillion-dollar-plan/524754/?utm_source=atlfb.

³³² See Sabrina Eaton, *Rep. Tim Ryan Suggests Relocating Federal Agencies Outside Washington, D.C.*, CLEVELAND PLAIN DEALER, Apr. 20, 2017, at A1.

³³³ See Portnoy, *supra* note 10.