

## Regional Federal Administration

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### ABSTRACT

Conventional accounts of federalism and administrative law generally assume that the federal government is highly centralized in Washington, D.C. Judges, politicians, and academic commentators often speak of “bureaucrats in Washington,” and they often contrast the poor governance supposedly provided by those bureaucrats with more responsive, innovative, and democratically legitimate governance from states and municipalities. Beyond pejorative rhetoric, assumptions about federal centralization also lead to a variety of widely accepted policy prescriptions.

This Article questions that conventional wisdom. Using a detailed study of the U.S. Army Corps of Engineers’ regulatory program, it demonstrates that geographic decentralization within the federal government is a real and important phenomenon, with implications cutting across the fields of federalism and administrative law. Federal decentralization undercuts conventional wisdom about the relative advantages and disadvantages of state (or local) and federal governance. It offers nuance to theories explaining how a federalist system actually functions. And it offers new possibilities for policy reforms designed to promote innovative, responsive governance.

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## INTRODUCTION

*The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.*

—*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 576–77 (Powell, J. dissenting).

Federalism generates many of the seminal debates of American politics and law.<sup>1</sup> Underlying these debates are two recurrent premises: first, that federal governance means centralized governance, and, second, that decentralization means empowering state or local governments.<sup>2</sup> From those premises flow a series of conclusions. The federal government, according to conventional wisdom, can minimize interstate externalities, establish nationally consistent regulatory programs, and draw on greater expertise and institutional economies of scale. But the federal government is also less likely to take innovative approaches, or understand or respond to local conditions.<sup>3</sup> In contrast, conventional wisdom holds that states and municipalities are the classic “laboratories of democracy,” the places

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1. See *New York v. United States*, 505 U.S. 144, 149 (1992) (describing federalism as “our oldest question of constitutional law”).
  2. See *infra* Part I. A small minority of federalism scholars have vigorously contested that assumption, claiming that “[t]he most serious flaw in the federalism scholarship, and court decisions, is the false conflation of federalism with decentralization.” Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 18 (2002); see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20–22 (2008). But while these critics argue that a national government *could* decentralize, they have not examined the extent to which the U.S. federal government already *is* geographically decentralized. Similarly, Douglas Williams has argued that environmental regulation could be delegated to regional administrative offices. Douglas R. Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047 (2013). But his article also focuses on the possibility of a new governance system. *Id.*
  3. See, e.g., Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 254–57 (2013). See generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) (summarizing and critiquing arguments favoring different levels of governance).

where experimentation should reign and where local preferences will receive more nuanced understanding and response.<sup>4</sup>

With the rise of the administrative state, this belief in a centralized federal government has only grown stronger—as have the associated fears.<sup>5</sup> According to some warnings, federal agencies are particularly immune to the political safeguards of federalism.<sup>6</sup> Indeed, by some accounts, they are immune to any sort of political safeguard. In a common telling, the federal bureaucracy is unelected and unaccountable; its technical analyses, arcane procedures, and sheer enormity render it inaccessible to the very populace it ostensibly serves.<sup>7</sup> Under this understanding, if innovative, responsive governance is the goal, then empowering state and local governments, or the private sector, would be preferable to empowering bureaucrats in Washington.

But conventional wisdom elides a key fact: About 85 percent of federal employees do not work in Washington, D.C.<sup>8</sup> Many of those employees do report, directly or indirectly, to superiors in Washington, and federal employees in the D.C. area therefore do exert a disproportionate amount of influence on federal governance.<sup>9</sup> But they do not completely dominate it, and in many agencies, they do not even come close. In fields ranging from social services to fisheries management, individual agencies—and sometimes Congress—have delegated important decisionmaking authority to local and regional offices, often granting those offices duties that go far beyond mere ministerial execution of dictates from the capital.<sup>10</sup> Indeed, some federal agencies are almost entirely regional, with little Washington, D.C. presence at all.<sup>11</sup> Most policymakers and legal academics are at least vaguely aware of this; they know that regional offices exist, though

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4. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).
  5. See, e.g., J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1406, 1475–76 (1996) (linking “unmistakable centralization of lawmaking power in the federal government” to increased empowerment of “unelected, bureaucratic administrative agencies”).
  6. See Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 870 (2008) (“Agency action thus evades both the political and the procedural safeguards of federalism.”).
  7. E.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting).
  8. *Main Page*, FED. EXEC. BDS., <http://www.feb.gov/index.asp> [<http://perma.cc/DG5V-SRW6>] (last visited Nov. 5, 2015).
  9. See, e.g., HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (2006) (explaining how Forest Service administrators control regional staff).
  10. See, e.g., *Regional Offices*, U.S. DEPT HEALTH & HUMAN SERVS., <http://www.hhs.gov/about/agencies/regional-offices/index.html> [<http://perma.cc/922J-3P7Q>] (last visited Nov. 5, 2015); see also JOSH EAGLE ET AL., *TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS* 8–16 (2003).
  11. E.g., *About Us*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/news/AboutUs/Pages/default.aspx> [<http://perma.cc/ZHA4-PZYF>] (last visited Nov. 5, 2015).

they may not realize their prevalence or importance.<sup>12</sup> And this geographic decentralization is just a mundane daily reality for the federal employees who commute to regional offices every day. But in political rhetoric, judicial decisions, and academic analysis, overstatements about federal centralization are quite common, and discussion of the implications of federal decentralization is exceedingly rare.<sup>13</sup>

That rarity has persisted despite increasing attention to the intersections of administrative governance and federalism.<sup>14</sup> In recent years, federalism scholars have tackled the implications of administrative preemption,<sup>15</sup> the emergence of federalism themes within the U.S. Supreme Court's administrative law jurisprudence,<sup>16</sup> the consequences of reluctant state administration of "cooperative federalism" regulatory schemes,<sup>17</sup> the pitfalls of state interest group participation in federal administrative processes,<sup>18</sup> and the relationships between federal administrators and local government agencies.<sup>19</sup> On somewhat related fronts, recent work has considered the complex relationships among different agencies within the federal government.<sup>20</sup> All of this work reflects a recurring theme: American federalism and administrative governance are both very complicated—indeed, much more complicated than the Supreme Court's classic odes to federalism have let on—and nowhere is that complexity greater than where those two fields intersect. But all the new spotlights illuminating administrative federalism have yet to shine on the geographic structure of federal agencies themselves.

This Article therefore considers the importance of regional federal administration.<sup>21</sup> It does so by focusing primarily on one program: the U.S. Army

12. A handful of nonlegal scholars have studied variation among regional federal offices. See, e.g., Martin W. Doyle et al., *River Federalism*, 103 ANNALS ASS'N AM. GEOGRAPHERS 290, 292 (2013).

13. To the extent current literature focuses on federal decentralization, it considers the dispersion of authority among many different agencies. See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

14. See, e.g., Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

15. E.g., Young, *supra* note 6; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

16. See generally Metzger, *supra* note 14.

17. E.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); see also Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (using negotiation theory to explain how states and the federal government allocate authority).

18. See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

19. E.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

20. See, e.g., Freeman & Rossi, *supra* note 13; Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 56 DUKE L.J. 795 (2005).

21. In this Article, "regional administration" serves as an umbrella term for federal offices with subnational jurisdictions. Some agencies, like EPA, also use that terminology to describe some of their offices, while others do not. The U.S. Army Corps of Engineers (the Corps), for example, refers to its offices as headquarters, division offices, district offices, and field offices.

Corps of Engineers' implementation of section 404 of the Clean Water Act, which regulates the filling of "waters of the United States."<sup>22</sup> Though it represents just a small sliver of the federal bureaucracy, the 404 program implements one of the most consequential—and controversial—provisions in U.S. environmental law.<sup>23</sup> The Supreme Court recently observed, with some concern, that "[o]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits,"<sup>24</sup> while the dissenting justices in that same case repeatedly explained the important ecological functions the 404 program protects.<sup>25</sup>

An investigation of that program reveals much about the actual and potential roles of regional administrators. Of course, every government agency is a distinctive entity with its own structure and culture, and a study of one agency cannot produce truths that are generalizable, without qualification, across the entire sphere of federal governance. But even a brief examination of several other agencies demonstrates that regional administration within the Corps is not entirely unique.<sup>26</sup> In particular, an analysis of the Army Corps leads to several key conclusions.

*First*, it undercuts conventional assumptions about federal centralization. In the Army Corps regulatory program, thousands of discretionary decisions, many of them quite important, occur outside the Beltway. Other federal agencies function differently, of course, but the Army Corps example shows that power within the federal government need not be, and sometimes is not, centered in Washington, D.C.

*Second*, it weakens common assumptions about the comparative advantages and disadvantages of state and local governance within a federal system. Many of the traditional reasons for favoring state or local governance can also apply to efforts to regionalize authority within the federal government.

*Third*, it offers a new way to understand the relationships between federal administrative governance and the states. Much of the literature on federalism focuses on binary choices between federal and state governance, or on the management of conflict and disagreement within joint federal-state programs.

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22. 33 U.S.C. § 1344 (2012). The Corps also holds regulatory authority on what water quality lawyers refer to as navigable-in-fact waterways that is, waterways that some form of commercial boat could use under Section 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. § 403 (2012).

23. See generally ROYAL C. GARDNER, *LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS* (2011).

24. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (quoting David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 81 (2002)).

25. *E.g.*, *id.* at 798–99 (Stevens, J., dissenting) ("The importance of wetlands for water quality is hard to overstate.").

26. See *infra* notes 284–93 and accompanying text.

Those questions clearly do matter. But a study of regional federal offices reveals more symbiotic relationships than are evident in most of the federalism literature—and also reveals that regional offices are crucial facilitators of that symbiosis.<sup>27</sup>

*Fourth*, it reveals the need for more inquiry into the intersections between regional offices and administrative law. Traditional administrative law is essentially blind to the role of regional offices.<sup>28</sup> That blindness forecloses inquiries into both the implications that existing administrative law doctrines have for the geography of federal governance and, additionally, potential avenues of reform.<sup>29</sup>

All these conclusions underpin the primary thesis of this Article, which is that internal geographies of federal agencies deserve far more attention than they have traditionally received. At the most basic level, regional federal administration should matter to anyone who hopes to understand the workings of American government, or who hopes to teach students to work effectively with—or against—government agencies. More conceptually, an understanding of the promise and limitations of regional administrative governance should matter to anyone interested in federalism or institutional design. Regional federal administration is by no means the answer to all our governance challenges, but it is both an existing reality and, in some circumstances, an intriguing possibility.

This Article's analysis proceeds as follows. Part I explores the extent to which traditional legal literature views federal agencies as monolithic entities concentrated in Washington, D.C. Part I also explains key implications that flow from that view. Part II turns to qualitative empirical analysis and describes the findings of my inquiry into the practices of the Corps's division, district, and field offices. That analysis draws in large part on forty-one in-depth interviews and meetings with Corps staff, staff from partner agencies, and private sector businesses that work with the Corps—all of which I have used to supplement the extensive paper record left by the Corps's activities. Part III considers the implications of the inquiry in Part II, and the broader importance of regional offices for questions about federalism and institutional design. Finally, Part IV shifts from analyzing existing realities to exploring future possibilities, and begins an inquiry into administrative law reforms that might maximize the benefits of federal decentralization. The analysis in Part IV is preliminary; developing a comprehensive account of the ideal circumstances for regional federal governance

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27. See *infra* Part III.B.

28. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1141–54 (2014) (summarizing assumptions underlying traditional administrative law).

29. See *infra* Part IV.

is beyond the scope of this Article. But even an introductory foray into that subject should demonstrate that there are many interesting questions to explore.

## I. FEDERAL BUREAUCRATS IN WASHINGTON

Nearly every day, American political figures discuss the relationships between the federal government and the states, and their words reflect conventional views of federal administrative governance. Consider, for example, these recent controversies over education standards, healthcare reform, and national park management:

- The Common Core outlines learning goals in mathematics and English language arts, and prescribes what K–12 students should know at the end of each grade.<sup>30</sup> While states developed the Common Core and decide whether to implement it, the federal Department of Education recently declared that states adopting Common Core-like standards would enjoy favored status for federal grants.<sup>31</sup> The result has been a backlash from both left and right, with many conservative Republicans now referring to the program as “Obamacore.”<sup>32</sup> Their rhetoric has taken on a distinctly anti-Washington tinge. In a typical remark, Senator Tim Scott warned that “[e]ducational decisions are best made by parents and teachers—not bureaucrats in Washington.”<sup>33</sup>
- Congressman John Boehner referred to the Affordable Care Act as a “trillion-dollar government takeover of health care that increases costs and lets Washington bureaucrats make decisions that should be made by doctors and patients.”<sup>34</sup> Similarly, Senator Pat Roberts warned that “[u]nder Obamacare, Washington bureau-

30. *See About the Standards*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/> [<http://perma.cc/2KQZ-78G7>] (last visited Nov. 5, 2015).

31. Jonathan Martin, *Republicans See Political Wedge in Common Core*, N.Y. TIMES (Apr. 19, 2014), <http://www.nytimes.com/2014/04/20/us/politics/republicans-see-political-wedge-in-common-core.html> [<http://perma.cc/AP58-SVN4>].

32. *Id.*; see Peter Wallsten & Lyndsey Layton, *Tea Party Groups Rallying Against Common Core Education Overhaul*, WASH. POST (May 30, 2013), [http://www.washingtonpost.com/politics/tea-party-groups-rallying-against-common-core-education-overhaul/2013/05/30/64faab62-c917-11e2-9245-773c0123c027\\_story.html](http://www.washingtonpost.com/politics/tea-party-groups-rallying-against-common-core-education-overhaul/2013/05/30/64faab62-c917-11e2-9245-773c0123c027_story.html) [<http://perma.cc/M2CP-Q5N5>].

33. *Senators Introduce Resolution Denouncing Obama Administration's Coercion of States With Common Core*, MIKE LEE U.S. SENATOR FOR UTAH (Feb. 5, 2014), <http://www.lee.senate.gov/public/index.cfm/2014/2/senators-introduce-resolution-denouncing-obama-administration-s-coercion-of-states-with-common-core> [<http://perma.cc/QY2J-K8XV>].

34. Bernie Becker, *Boehner and Democrats Feud Over New Health Care Spot*, N.Y. TIMES (Aug. 3, 2009), <http://thecaucus.blogs.nytimes.com/2009/08/03/boehner-and-democrats-feud-over-new-health-care-spot> [<http://perma.cc/T9GG-Q45K>].



crats can dictate one uniform standard of health care that is designed to limit what private citizens are allowed to spend, with our own money, to save our own lives.”<sup>35</sup>

- For years, a wealthy Maine landowner has been trying to create a new national park. Her proposal is generous: She would donate the land *and* an endowment to support park management.<sup>36</sup> National parks are among the United States’ most beloved institutions, and a free park might seem very appealing.<sup>37</sup> But this proposal provoked outrage.<sup>38</sup> The opposition has been grounded in the fear that creating the park would, in the words of then-Senator Olympia Snowe, “cause a region of the state to be governed by decisions dictated from Washington.”<sup>39</sup>

If these stories sound banal, that is the point. Decrying the machinations of bureaucrats in Washington is old hat. And while the present arguments often have distinctly conservative and anti-regulatory undertones, liberal-leaning politicians and activists readily deploy the same rhetoric when it suits their purposes.<sup>40</sup> Nor are the arguments at all new.<sup>41</sup> Americans began bashing centralized bureaucracy when the lower Potomac River was a malarial wetland and some of the targeted bureaucrats still worked in London.<sup>42</sup>

This Part explores these views and their implications. I begin by showing that assumptions about federal centralization are widespread, and not just among politicians who are looking to score a few rhetorical points. I then explore the

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35. *Senator Roberts Introduces Bill to Protect Access to Life-Saving Health Care Threatened by Obamacare*, U.S. SENATOR FOR KAN. PAT ROBERTS (Apr. 1, 2014), [http://www.roberts.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=7cab7335-9e11-4454-b4a1-1d2c48ff57ee&ContentType\\_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group\\_id=d8ddb455-1e23-48dd-addd-949f9b6a4c1f](http://www.roberts.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=7cab7335-9e11-4454-b4a1-1d2c48ff57ee&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=d8ddb455-1e23-48dd-addd-949f9b6a4c1f) [http://perma.cc/MQ26-4DH6].
  36. See Katharine Q. Seelye, *National Park Proves a Hard Gift to Give*, N.Y. TIMES, Jan. 9, 2014, at A11.
  37. See generally *The National Parks: America's Best Idea* (PBS Haw. broadcast Sept. 27, 2009).
  38. Seelye, *supra* note 36, at A11 (“[M]any in this fiercely independent region loathe the idea of giving Washington a toehold.”).
  39. Nick Sambides Jr., *East Millinocket School Board Weighs Plan for National Park Feasibility Study*, BANGOR DAILY NEWS (July 25, 2011, 4:50 PM), <http://bangordailynews.com/2011/07/25/news/penobscot/katahdin-school-board-weighs-plan-for-national-park-feasibility-study> [http://perma.cc/LF29-8KRJ].
  40. See, e.g., Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 853 (1982) (“It is as if each western state were split in two, with part administered from the state capitol and the rest from the Interior Department on ‘C’ Street in Washington, D.C.”).
  41. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 88 (J.P. Mayer ed., 1968) (“[A]dministrative centralization only serves to enervate the people who submit to it.”).
  42. See R. Sam Garrett et al., *Assessing the Impact of Bureaucracy Bashing by Electoral Campaigns*, PUB. ADMIN. REV. 228 (2006) (describing the long history of antigovernmental rhetoric).

ways that those views influence debates about American governance and institutional design.

### A. Assumptions

The United States' federalism debates have generated many different schools of thought on the appropriate distribution of power among governing institutions. Nearly all of those schools associate federal governance with centralization.

#### 1. Dual Federalism and Regulatory Devolution

That emphasis on federal centralization is most prominent in the jurisprudence and literature of dual federalism and its close cousin, regulatory devolution. Dual federalism, which is most prominently championed by conservative Supreme Court justices, emphasizes the importance of preserving "a distinction between what is truly national and what is truly local."<sup>43</sup> Regulatory devolution describes the optimal distribution of authority within a dual federalist system, and argues that power ought to be devolved, to the maximum extent possible, to local or state governments.

A recurrent premise of dual federalism is that federal governance means centralized governance. Sometimes that premise is explicit. In *United States v. Lopez*, for example, the Court warned that a loss of limits on federal authority would "create a completely centralized government."<sup>44</sup> In other passages, proponents of dual federalism have offered functional rationales that implicitly assume that the federal government is highly centralized. In *Gregory v. Ashcroft*, for example, the Supreme Court asserted that a divided federalism,

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>45</sup>

The Court did not consider the possibility that some of those benefits might also flow from decentralization within the federal government itself. Instead,

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43. *United States v. Morrison*, 529 U.S. 598, 599 (2000).

44. *See United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

45. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

decentralized government, in the Court's telling, necessarily means government by the states.<sup>46</sup>

Similar assumptions inform devolution arguments. These arguments have found their simplest and most elegant articulation in the "matching principle,"<sup>47</sup> which has become, by one recent assessment, one of administrative law's "most influential strategies for addressing policy problems."<sup>48</sup> According to environmental law scholars Henry Butler and Jonathan Macey, "the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution."<sup>49</sup> In their view, because federal authority leads to "centralized, monopoly regulation,"<sup>50</sup> and because many regulatory problems are subnational in scale, devolution to state and local government is the primary way to give the matching principle proper effect.<sup>51</sup> In practice, that would mean a dramatic shift away from "[t]he extreme centralization of environmental regulation."<sup>52</sup>

Macey and Butler's description of the federal government is hardly unique. Richard Stewart, whose ideas helped frame the modern discourse of environmental federalism, has repeatedly characterized federal environmental governance as highly centralized, and therefore deeply flawed.<sup>53</sup> In a typical passage, he has claimed that "[t]he same problems that have plagued the Soviet effort at central management of the economy hamper American efforts to plan selected aspects of the economy through centralized regulations."<sup>54</sup> Jonathan Adler, another critic of federal environmental governance, has likewise asserted

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46. As many commentators have pointed out, the Court's federalism rhetoric has often lumped local and state governments together.

47. See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23 (1996).

48. See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1798 (2008) (describing the matching principle as "the orthodox view"); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 100 (2010). That orthodoxy has heretics, however, who argue that the matching principle "assumes away much of the inherent complexity of environmental problems." Adelman & Engel, *supra* note 48, at 1799.

49. Butler & Macey, *supra* note 47, at 25.

50. *Id.* at 35.

51. Butler and Macey also suggest reliance on incentive-based regulation, which they perceive as a decentralizing strategy. See *id.* at 27.

52. *Id.* at 24; see also Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1554-55 (1999) ("When the impacts are geographically concentrated . . . regulation should be left to local or state officials.").

53. Stewart's seminal article was *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

54. Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 343 (1990).

that “[t]he excessive centralization of environmental policy in the hands of a federal regulatory bureaucracy is the central failing of conventional environmental policy.” The list could easily go on, and the charges against federal governance are by no means limited to environmental law; law journals and judicial opinions have contained statements like this for a very long time, and on a range of subjects.<sup>55</sup>

## 2. New Governance, Dynamic Federalism, and Nationalist Federalism

Some of the most emphatic statements about federal centralization come from people who are skeptical of regulatory governance, regardless of its source. One therefore might suspect that some of their arguments are simply means to deregulatory ends.<sup>56</sup> Interestingly, however, scholars who are more sympathetic to energetic governance still often assume that federal governance means a very high degree of centralization.

One such school of thought, loosely referred to as “new governance” scholarship, emphasizes the potential to use alternative regulatory tools, public-private partnerships, and context-specific, discretionary decision making to improve governance outcomes.<sup>57</sup> Those prescriptions necessarily imply decentralization, and new governance scholars typically assume that such decentralization will mean moving power away from the federal government and toward state and local governments and private entities.<sup>58</sup> But just as with the dual federalists and devolutionists, the possibility that the federal government is already somewhat decentralized, and that its further decentralization could help facilitate reforms, usually receives no mention.

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55. See, e.g., Robert von Moschzisker, *Dangers in Disregarding Fundamental Conceptions When Amending the Federal Constitution*, 11 CORNELL L.Q. 1, 13 (1925) (“The danger is that we will burden Washington with a mass of powers . . . that, in most instances, properly belong to the several states, where they can be more effectively, because more sympathetically, handled than by what, of necessity, must always seem a comparatively distant national government.”).

56. See, e.g., Eric Lipton, *Energy and Regulators on One Team*, N.Y. TIMES, Dec. 7, 2014, at A1, A30–A31 (describing a state/industry “federalism” initiative designed to oppose federal regulation). Other critics of federal centralization hold more nuanced views. Stewart, for example, argues that federal environmental governance is an unavoidable response to public preferences. See Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199 (1997).

57. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

58. E.g., *id.* at 381 (“[T]he Renew Deal advocates . . . a transfer of responsibilities to the states and localities and to the private sector, including private businesses and nonprofit organizations.”); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288, 345 (1998).

Similar assumptions emerge from the left-leaning dynamic federalism literature. Dynamic federalism emphasizes the capacity of states to serve as catalysts for creative new regulatory initiatives at times when the federal government is slow to act.<sup>59</sup> It thus invokes federalism for pro-regulatory rather than anti-regulatory ends. Indeed, dynamic federalists generally are fond of federal law, so long as it does not preempt state regulatory initiatives.<sup>60</sup> But a key underlying assumption—that dangers arise “from the highly aggregated level at which federal regulators view environmental problems”—remains largely the same.<sup>61</sup>

In recent years, a new offshoot of dynamic federalism, self-styled as nationalist federalism, has inserted itself into federalism debates.<sup>62</sup> While there are variations on this theme, the nationalist federalists’ core thesis is that states can and do assert themselves primarily through cooperation and, often, contestation *within* spheres bounded by federal legislation.<sup>63</sup> Federalism, in other words, both flows from and supports nationalist goals, rather than existing primarily in the realms set aside from national influence.<sup>64</sup> In many ways, the nationalist federalists’ ideas are quite sophisticated and nuanced, and regional federal offices could have a place within their vision. But the nationalist federalists have not yet discussed that possibility. Instead, their predominant view echoes the traditional emphasis on states and local governments as the mechanisms of geographic decentralization within American governance.<sup>65</sup> Their conception, so far at least, is of a world in which states enliven governance by serving “as administrators of national programs, a sort of second executive branch operating alongside the President and the D.C. bureaucracy.”<sup>66</sup>

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59. See, e.g., Adelman & Engel, *supra* note 48, at 1802 (describing tenets shared by dynamic federalists); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

60. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1573, 1614 (2007) (arguing that deregulatory preemption is particularly suspect).

61. Adelman & Engel, *supra* note 48, at 1825.

62. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

63. E.g., Bulman-Pozen & Gerken, *supra* note 17 at 1256.

64. See, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922 (2014) (“The state and federal governments together produce national governance in the service of various national interests.”); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014).

65. See generally Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–26 (2010) (arguing that federalism should integrate more governmental institutions, but still focusing on states and their subdivisions).

66. Bulman-Pozen, *supra* note 64, at 1935.

### 3. Some Exceptions

The notion that decentralized governance necessarily means state or local governance has not gone completely unquestioned. Though the book is over fifty years old, Herbert Kaufman's *The Forest Ranger* remains the classic study of decentralization within a federal agency.<sup>67</sup> Kaufman focused primarily on the ways an agency's headquarters could maintain consistent policy in spite of geographic decentralization. Unlike many of today's writers and politicians, he treated centralized governance as something a federal agency must actually work very hard to achieve rather than an inevitable consequence of federal bureaucracy. He also discussed many ways in which regional and district staff exercised semi-independent discretion.<sup>68</sup> But Kaufman was not a legal theorist, and he made no attempt to connect his account to legal theories of administrative law and federalism. Nor have others drawn those connections. Kaufman's account is still often cited, but not for the principle that decentralized federal administration has implications for modern theories of federalism or administrative law.<sup>69</sup>

More recently, Frank Cross, Malcolm Feeley and Edward Rubin have argued that while federalism necessarily requires decentralization, the inverse does not necessarily hold—decentralization doesn't necessarily require federalism.<sup>70</sup> A single government, they argue, could easily function on the model of a geographically decentralized corporation in which regional offices enjoy substantial autonomy.<sup>71</sup> According to Feeley and Rubin, that decentralized model might reproduce many of the benefits traditionally attributed to a federalist structure;<sup>72</sup> Cross adds that a unitary government can actually produce *more* decentralization than a state-centered federalist system.<sup>73</sup> But none of these authors have examined the extent to which the United States' federal government *already* comports with this model.<sup>74</sup> Cross's article includes an empirical component, but his focus is on comparing the performance of governance in federalist and unitary nations. The primary goal of Feeley and Rubin's work is to debunk

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67. KAUFMAN, *supra* note 9.

68. *Id.*

69. See, e.g., Dorf & Sabel, *supra* note 58, at 364–71. Dorf and Sabel discuss Kaufman's research and see the Forest Service as a prototype for experimental governance. *Id.* But they still would rely on state or local governments to do the experimenting. *Id.* at 428.

70. Cross, *supra* note 2; FEELEY & RUBIN, *supra* note 2, at 20–22.

71. Cross, *supra* note 2, at 33; FEELEY & RUBIN, *supra* note 2, at 21–22.

72. FEELEY & RUBIN, *supra* note 2, at 21–22, 26.

73. Cross, *supra* note 2, at 45 (“[T]he national government is likely to give localities a ‘longer leash’ for discretionary policymaking than are states.”).

74. Douglas Williams' recent work on environmental federalism is similar in this regard. See Williams, *supra* note 2.

the notion that meaningful federalism does or should exist within the United States.<sup>75</sup> Consequently, they argue that even the devolution of power to the states only represents a feeble nod toward decentralization within a political system dominated by a “centralized, bureaucratic, highly regulated national government.”<sup>76</sup>

## B. Implications

It would be easy to dismiss assertions about federal centralization as rhetorical excess. And, no doubt, some are. But these assertions have consequences. Assumptions that the federal government is highly centralized lead to several subsidiary claims about federal governance, each of which holds important implications for the design of governance institutions.

### 1. Sensitivity and Accountability

First, assumptions about federal centralization lead to claims that state and local governments will better respond to local conditions and preferences.<sup>77</sup> As Michael McConnell has put it, “[t]he first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach.”<sup>78</sup> Politicians and judges often concur.<sup>79</sup> In *National Federation of Independent Business v. Sebelius*, for example, the Supreme Court asserted that the Framers’ system of federalism assured that key powers “were held by governments more local and more accountable than a distant federal bureaucracy.”<sup>80</sup>

That sensitivity, according to standard views, emerges in several ways. One is through the ability of different voting blocs to prevail in local elections.<sup>81</sup>

75. See FEELEY & RUBIN, *supra* note 2, at 127 (“[F]ederalism is essentially defunct in the United States.”).

76. *Id.* at 73.

77. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

78. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)); see also Stewart, *supra* note 54, at 343 (“Bureaucrats in Washington simply cannot gather and process the vast amount of information needed to tailor regulations to the nation’s many variations in circumstances and the constant changes in relevant conditions. In order to reduce decisionmaking costs, national officials adopt uniform regulations that are inevitably procrustean in application.”).

79. See *supra* notes 30–35 and accompanying text.

80. 132 S. Ct. 2566, 2578 (2012).

81. See, e.g., Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1355–56 (2013); John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal*

Another is through the awareness that comes from geographic proximity. Under this theory, state and local government officials will be more sensitive to local preferences because they live closer to those preferences, and therefore read about them in the news and hear about them from friends and neighbors.<sup>82</sup> An additional and closely related reason for sensitivity is accountability. Any individual's vote is a rather small drop in a nationwide, or even state-wide, bucket.<sup>83</sup> But in many state and local elections, the reduced number of votes means increased influence for each individual—and, in theory, more ability to hold elected officials accountable. Finally, administrative access might also be better under a decentralized system. Washington, D.C., from the perspective of most Americans, is impersonal and remote. Most of us cannot pick up the phone and have a conversation with an agency director, and trips to Washington, D.C., to attend committee hearings are generally out of the question. But with state and, particularly, local officials, more direct contact is possible. Attending a local planning board meeting, for example, may require a few hours on a weeknight. All of these considerations lead to a widespread view, bluntly summarized by Cass Sunstein, that “[c]entralization at the national level diminishes opportunities for citizen participation.”<sup>84</sup>

## 2. Innovation

Assumptions about federal centralization also support claims that states, local governments, and the private sector are the key generators of innovation.<sup>85</sup> That theme also has a long history within judicial rhetoric, dating back to Justice Brandeis's classic description of the states as laboratories of democracy.<sup>86</sup> And commentators of all stripes continue to echo that view. “The attractiveness of the federal supremacy power,” as Adelman and Engel put it, “threatens policy diversity at the state and local levels that is essential to the adaptability of a federal system.”<sup>87</sup> Sunstein has likewise decried the federal government's “use of rigid, highly bureaucratized ‘command-and-control’ regulation, which dictates, at the national level, control strategies for hundreds, thousands, or millions of

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*System*, 99 NW. U. L. REV. 89, 106 (2004). Regionalized federal administration generally cannot reproduce this mechanism. See *infra* notes 306–09 and accompanying text.

82. See, e.g., Lobel, *supra* note 57, at 383–84 (extolling geographic proximity).

83. See Andrew Gelman et al., *What Is the Probability Your Vote Will Make a Difference?*, 50 ECON. INQUIRY 321, 323–25 (2012).

84. Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 629 (1991).

85. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

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

87. Adelman & Engel, *supra* note 48, at 1831.



companies and individuals in an exceptionally diverse nation.”<sup>88</sup> The dichotomy between rigid federal governance and experimentalist states also has its detractors; for years, some dissenting scholars have offered both theoretical and empirical arguments against the claim that states are centers of innovation.<sup>89</sup> But the conventional view of the states as innovators, and the federal government as anything but, continues to exert a powerful hold on legal discourse.<sup>90</sup>

That view isn’t just a descriptive claim; it also animates many proposals for reform. For example, in their widely cited exegesis on governmental innovation, Michael Dorf and Charles Sabel envision “an experimentalist democracy, in [which] decisionmaking is from the first presumptively decentralized, hence adjusted to local circumstance, and fragmented, for rules originate in the deliberations of distinct local governments.”<sup>91</sup> The federal government’s chief role would be to facilitate, not innovate: “Congress authorizes and helps finance experimental elaboration of programs, and the state and local governments actually do the experimenting.”<sup>92</sup> While many dual federalists envision a less activist government than that described by Dorf and Sabel, their prescriptions for allocating authority are generally quite similar.<sup>93</sup> Related notions animate many proposals that transfer authority to the private sector. For example, advocates of incentive-based regulatory systems often claim that transferring decisionmaking responsibilities from the sclerotic federal government to creative private markets will help spur innovation.<sup>94</sup> The actual reforms advocated by these commentators can be quite different, but a common theme within much of the regulatory reform literature is that innovation requires getting power away from the centralized federal government.<sup>95</sup>

All of these ideas have their critics. But arguments against non-federal actors’ relative capacity for sensitivity or innovation rarely tout the federal government’s

88. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 323 (1997).

89. *E.g.*, Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (“[L]ow-level governments remain flawed mechanisms to rely on in the search for new ideas.”).

90. *E.g.*, *Bond v. U.S.*, 131 S. Ct. 2355, 2364 (2011) (“The federal structure . . . permits ‘innovation and experimentation . . .’” (quoting *Ashcroft*, 501 U.S. at 458)).

91. Dorf & Sabel, *supra* note 58, at 340.

92. *Id.* at 428. Dorf and Sabel do envision a somewhat different role for agencies that manage public lands. *Id.*

93. *See, e.g.*, Lipton, *supra* note 56 (describing a joint industry-state “federalism” initiative designed to limit federal power).

94. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1342–43 (1985).

95. *See, e.g.*, David J. Barron & Todd D. Rakoff, *In Defense of big Waiver*, 113 COLUM. L. REV. 265, 301 (2013) (asserting that experimentation within “the national regulatory system. . . requires relaxing strictures on what states and localities may do”).

capacity to generate its own geographically distinct spheres of creativity.<sup>96</sup> Instead, critiques of states' capacity generally flow from questions about other actors' incentives to experiment, or from the observation that innovation could be squelched, or at least hijacked, by other entities interested in national uniformity.<sup>97</sup> Federal intervention, then, might be necessary to undo regulatory capture and set state or local creativity loose.<sup>98</sup> But that argument is quite different from asserting that a regional or local federal office itself might be the source of innovation.

### 3. Intergovernmental Competition

Third, and relatedly, conventional views hold that the federal government has very different competitive incentives from state and local governments. One classic theory of federalism holds that "it makes government more responsive by putting the States in competition for a mobile citizenry."<sup>99</sup> State and local governments, according to this theory, exist in a competitive market for population and businesses, and they will succeed in that market by providing better governance.<sup>100</sup> That, in turn, will lead to both innovation and better government service. The federal government, by contrast, is a monopoly (except when it must compete with the states), or so the theory goes.<sup>101</sup> And, as standard economic theory would predict, monopoly leads to complacency, stasis, and poor performance.

Like the other theoretical justifications discussed above, this one has its detractors. Critics question whether state and local government officials really are responsive to competitive incentives;<sup>102</sup> whether, if they are responsive, that responsiveness is good or bad;<sup>103</sup> and whether individual citizens—particularly those who aren't already wealthy or influential—have sufficient knowledge and

96. See, e.g., Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009); Rose-Ackerman, *supra* note 89, at 594.

97. See, e.g., James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1 (2013); Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 484–85 (2011) (observing that commercial interests' domination of local politics can lead to uniformity).

98. See Owen, *supra* note 97, at 484–85.

99. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

100. McConnell, *supra* note 78, at 1499; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

101. See McGinnis & Somin, *supra* note 81, at 107–08.

102. See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 944–46 (2005).

103. See, e.g., McConnell, *supra* note 78, at 1499–1500 (noting that competition could cause underproduction of social services); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (arguing that interstate competition reduces environmental protection).

mobility to play their part in the competitive game.<sup>104</sup> But the theory nevertheless remains influential.<sup>105</sup> And in all these debates, the focus is on states and local governments, with the federal government generally playing the role of the monolithic foil. The possibility of regional differentiation *within* the federal government generally receives no mention.

#### 4. Executive Oversight

Even as centralization offers fodder for critiques, assumptions that the federal government is highly centralized also often lead, ironically, to calls for it to become even more so. The primary argument flows from concerns about accountability—and, more particularly, accountability within agencies that are physically removed from the daily lives of the regulated. As then-Professor Elena Kagan put it: If “the bureaucratic form—in its proportions, its reach, and its distance—is impervious to full public understanding, much less control,” then perhaps the only way to preserve democratic governance is to lodge authority over the bureaucracy in a central, highly visible, and highly accountable figure.<sup>106</sup> To Kagan—and to some of her typical adversaries—that means increasing presidential authority over bureaucratic functions, which would represent the ultimate commitment to centralization.<sup>107</sup> Of course, if some of the federal regional offices’ operations are not actually distant, removed from public preferences, and impervious to public understanding, the advantages of presidential control might seem less clear. But advocates of more centralized executive control generally do not discuss that possibility.

This emphasis on centralized accountability has other ironic consequences. On the rare occasions when commentators do acknowledge regional variation in the implementation of federal law, a common reaction is concern.<sup>108</sup>

104. *E.g.*, FEELEY & RUBIN, *supra* note 2, at 81 (“There is something a bit fanciful in the image of people choosing a place to live the way shoppers choose their favorite breakfast cereal . . .”).

105. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“The federal structure . . . makes government ‘more responsive by putting the States in competition for a mobile citizenry.’”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

106. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001).

107. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is . . .”). *But see* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463 n.3 (2003) (citing critiques of this “presidential control model”).

108. *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003). DeShazo and Freeman uncover regional variation in the Endangered

Such variation is typically framed as a problem of inconsistent, and therefore unequal, justice, or as a symptom of principal-agent slack.<sup>109</sup> While standard federalist theory treats *state* variation as a virtue, *federal* variation, when we acknowledge its existence, is a vice, a problem to be solved.<sup>110</sup> And some federal law does in fact anticipate and attempt to respond to that perceived problem. The Environmental Protection Agency's (EPA's) Clean Air Act regulations, to provide one example, direct the agency "to... [a]ssure fair and uniform application by all Regional Offices" and to "[p]rovide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees...."<sup>111</sup> Federal centralization, then, isn't just an assumption about empirical realities or a premise for policy recommendations. It also becomes a normative goal.

## 5. Legitimacy

All of these assumptions support another widely shared view: that federal government action is less legitimate than actions by state or local government. If federal administrative centralization creates an inattentive, insensitive, and unaccountable government, it logically follows that federal administrative governance will be less democratic than governance by state or local governments.<sup>112</sup> And that view, in turn, can lead to questions any time federal officials threaten to take action. At the margins, the reactions can be extreme; political movements like the County Supremacy movement have led directly to threats and, sometimes, outright violence against federal officials.<sup>113</sup> And even when the views are expressed more moderately, they are utterly pervasive, and they color the daily activities of federal agency employees across the country.<sup>114</sup> To some of those federal

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Species Act's implementation, and connect that variation to the composition of interested Congressional committees, a conclusion they describe as "alarming." *Id.* at 1448.

109. See, e.g., *id.* at 1506–09; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION (2004) (treating regional variation as a problem to be solved).

110. See KAUFMAN, *supra* note 9, at xxv (describing the "major dilemma of the central office of a federal resource management agency: how to devise . . . an agency which will operate consistently . . . while at the same time preserving individuality and stimulating creative thinking and action on the part of its men").

111. 40 C.F.R. § 56.3 (2014); see also Nat'l Envtl. Dev. Association's Clean Air Project v. EPA, 752 F.3d 999 (D.C. Cir. 2014) (rejecting EPA's attempt to allow regional differentiation).

112. See, e.g., SUNSTEIN, *supra* note 88, at 325 ("The extraordinary concentration of regulation in Washington has hampered democratic deliberation both in localities and in the private sphere.").

113. William Chaloupka, *The County Supremacy and Militia Movements: Federalism as an Issue on the Radical Right*, 26 *PUBLIUS* 161, 169 (1996).

114. See *supra* notes 30–35 and accompanying text (providing several recent examples).

employees, the notion that they are remote, insensitive, and impervious to the pressures of federalism must occasionally sound like a utopian fantasy.<sup>115</sup>

Of course, not everyone views federal governance as less legitimate than state or local governance. From the New Deal through the civil rights movement and the emergence of modern environmental law, lawmakers and academics have often argued that federal governance is often more legitimate, and more democratic, than governance by state or local authorities.<sup>116</sup> Some proponents of this view trace their arguments directly to James Madison's warnings about the dangers of local factionalism, while others emphasize the federal government's potentially greater resources and expertise.<sup>117</sup> Either argument is often rooted in similar premises about federal centralization. Indeed, one common version of this argument holds that federal actions are more legitimate because the federal government is less likely to be oversensitive to the preferences of local special interests, and instead will ground its decisions in statutory requirements, science, or (relatively) impartial policy analysis.<sup>118</sup> The premise of federal insensitivity thus remains the same; all that has shifted is the attached value judgment.

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One could easily conclude, after reading through reams of federalism and administrative law articles and judicial decisions, that legal thinkers all think the federal government is a geographically concentrated monolith. The reality is almost certainly more nuanced. Legal literature does contain case studies of innovations achieved, at least in part, by federal regional offices.<sup>119</sup> While the authors of those studies rarely focus on the implications of regional agency involvement, they obviously are aware that regional offices played key roles. Similarly, federal agency staff and their counterparts in state and local government, industry, and nongovernmental organizations all confront federal decentralization on a daily basis. Nevertheless, in political debates, judicial decisions, and academic discussion,

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115. See Brad Knickerbocker, *Government Employees Feel the Danger of Anti-Government Anger*, CHRISTIAN SCI. MONITOR (Mar. 27, 2010), <http://www.csmonitor.com/layout/set/print/USA/Politics/2010/0327/Government-employees-feel-the-danger-of-anti-government-anger> [<http://perma.cc/M8DL-HW2U>] (describing threats); Garrett et al., *supra* note 42, at 235 (quoting an unnamed federal employee: "We've actually had people shot at and offices burned.").

116. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 22 (1990).

117. See Davidson, *supra* note 19, at 1023–25 (summarizing these arguments).

118. See generally George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 *ECOLOGY L.Q.* 602 (1999).

119. See, e.g., Freeman & Farber, *supra* note 20, at 837–76 (describing a complex environmental planning process involving national and regional federal officials); Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 *ECOLOGY L.Q.* 233, 243–44 (2006).

consideration of the implications of regional federal governance is largely absent.<sup>120</sup> Even as federalism debates have in other ways become increasingly nuanced, conventional descriptions of the federal government itself still often border upon caricature.

## II. FEDERAL BUREAUCRATS OUTSIDE WASHINGTON

On a typical weekday, between 1200 and 1300 staff members of the Army Corps of Engineers' regulatory branch go to work.<sup>121</sup> About ten of them (though the numbers vary) will commute to an office on G Street in Washington, D.C.<sup>122</sup> Of those ten, two are typically "on detail," which means they have left their home offices elsewhere in the country to work on a temporary project in Washington.<sup>123</sup> The vast majority of Corps employees, however, will report to dozens of division, district, and field offices spread across the entire country.<sup>124</sup> This Part discusses the work those employees do. It begins with a brief overview of the section 404 regulatory program. It then explains how agency geography affects decision making at each stage of the regulatory process, and then steps back to draw broader conclusions about agency structure. I close the Part with a few words about other agencies.

The key point of Part II—which, readers should be warned, does go deep into the weeds—is straightforward: The Army Corps bears little resemblance to the conventional view of federal governance described above. Instead, each regional staff has the ability to, and often does, tailor the Corps's regulatory programs to the

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120. Again, the leading exception to this claim remains KAUFMAN's *THE FOREST RANGER*.

121. Telephone Interview with Army Corps Headquarters Staff (Nov. 17, 2014). In preparing this analysis, I interviewed the following people:

Army Corps Total	32
Army Corps of Engineers Headquarters Staff	2
Army Corps of Engineers Division Chiefs	3
Army Corps of Engineers District Chiefs	17
Other Army Corps (project managers, field staff)	10
EPA Staff	4
FWS Staff	4
Environmental group staff	1
Other (consultants, mitigation bankers)	4

The totals add up to more than my total number of interviews because some people have worked for significant periods within and outside the federal government or for multiple federal agencies. The analysis is also informed by background, off-record conversations with other agency and environmental group staff members and with fellow academic researchers.

122. *Id.*

123. *Id.*

124. See *Army Corps of Engineers Office Locator*, U.S. ARMY CORPS ENG'RS, <http://www.usace.army.mil/Locations.aspx> [<http://perma.cc/Z7YB-8SEH>] (last visited Nov. 5, 2015).

circumstances before it. And while the Army Corps's managerial and regulatory systems are distinctive—no two federal agencies are exactly the same—regionalized structures recur across the federal government.<sup>125</sup> Exactly how those other agencies function is a question for other studies, but the prevalence of regional federal offices suggests, at the very least, that decentralized federal administration is not unique to the Corps.

## A. The Army Corps and the 404 Program: An Overview

### 1. A Brief History

The 404 program arose out of a curious history.<sup>126</sup> The Army Corps is one of the oldest federal agencies, and its primary task at first was to build public works projects.<sup>127</sup> In the late nineteenth century, it added a regulatory role: Congress passed the Rivers and Harbors Act, which gave the Corps authority over the dredging and filling of navigable waters.<sup>128</sup> At the time, the Corps's sole regulatory purpose was to protect navigation; rivers and coastal waters were then central to the nation's commerce.<sup>129</sup> Wetlands, meanwhile, were widely perceived as mosquito-ridden nuisances, better drained or filled than preserved, and non-navigable streams were often mere inconveniences and flood risks.<sup>130</sup>

Over the course of the twentieth century, increased environmental awareness led to a sea change. In 1972, when Congress enacted the Federal Water Pollution Control Act—now better known as the Clean Water Act—it prohibited any filling of “waters of the United States” without a permit.<sup>131</sup> Because of

125. See *infra* notes 284–292 and accompanying text.

126. For more detail, see Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 699–713 (1989).

127. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-819, ARMY CORPS OF ENGINEERS: ORGANIZATIONAL REALIGNMENT COULD ENHANCE EFFECTIVENESS, BUT SEVERAL CHALLENGES WOULD HAVE TO BE OVERCOME 4–8 (2010) (describing the Corps's structure).

128. *The U.S. Army Corps of Engineers: A Brief History*, U.S. ARMY CORPS ENG'RS, <http://www.usace.army.mil/About/History/BriefHistoryoftheCorps/EnvironmentalActivities.aspx> [<http://perma.cc/S65U-PEXT>] (last visited Nov. 5, 2015).

129. Navigation expenditures were a major component of federal construction budgets in the nineteenth century. Blumm & Zaleha, *supra* note 126, at 700.

130. See GARDNER, *supra* note 23, at 5–13.

131. 33 U.S.C. § 1344 (2012). To be more precise, Clean Water Act section 301 prohibits the discharge of pollutants without a permit. 33 U.S.C. § 1311(a) (2012). Because filling waterways almost unavoidably involves releasing pollutants, that general prohibition applies to any activity that fills waters of the United States. Section 404 creates one of the permitting programs that allow

the Corps's traditional role in regulating navigable-in-fact waters, Congress expanded the Corps's authority to include this new regulatory initiative (which this Article refers to as the 404 program, after the Clean Water Act section responsible for its creation).<sup>132</sup> With its new powers, the Corps also got a new partner. The EPA jointly administers the 404 program, which means that it coauthors some regulations and guidance, holds veto authority over permits, and plays an extensive advisory role.<sup>133</sup> But across the country (with the partial exception of Michigan and New Jersey<sup>134</sup>), Corps staff do the day-to-day work of administering the 404 program.<sup>135</sup>

## 2. Permitting

The 404 program is a permitting program, and the Corps issues tens of thousands of permits every year.<sup>136</sup> It does so in accordance with several key policies, some of which arise from the Clean Water Act itself and others from the Corps's and EPA's regulations and guidance.<sup>137</sup> One key overarching policy is a commitment to avoid a "net loss" of wetland and waterway habitats.<sup>138</sup> To implement that broad goal, the Corps requires permit applicants to avoid impacting wetlands, to

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dischargers to release pollutants without violating section 301's blanket prohibition. 33 U.S.C. § 1344 (2012).

132. Blumm & Zaleha, *supra* note 126, at 702–03. The Corps still retains regulatory authority under the Rivers and Harbors Act, and many permits are subject to that statute as well as Clean Water Act section 404.
133. *Id.* at 703. For an overview of the resulting relationship, see GARDNER, *supra* note 23, at 73–92.
134. Section 404 allows a "cooperative federalism" system, in which state environmental agencies assume responsibility for implementing federal environmental law. See 33 U.S.C. § 1344(g)–(h) (2012); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1262 (1995). But states can assume that authority only for a subset of their waters, and only Michigan and New Jersey have done so. *State, Tribal, Local, and Regional Roles in Wetlands Protection*, U.S. ENVTL. PROTECTION AGENCY, <http://water.epa.gov/type/wetlands/outreach/fact21.cfm> [<http://perma.cc/A9JN-3XTZ>] (last visited Nov. 5, 2015).
135. *Section 404 Permitting*, U.S. ENVTL. PROTECTION AGENCY, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis> [<http://perma.cc/WDU7-WLP7>] (last visited Nov. 5, 2015).
136. RYAN W. TAYLOR, *FEDERALISM OF WETLANDS* 88 (2013) ("During the time of this study, the USACE approved an average of 86,427 permits per year.").
137. The Corps's website describes the overall program goals in the following terms: "The Regulatory Program is committed to protecting the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions." *Regulatory Program and Permits*, U.S. ARMY CORPS ENG'RS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx> [<http://perma.cc/Q5EP-944Z>] (last visited Nov. 5, 2015).
138. See J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 VAND. L. REV. 1, 29–35 (2011) (describing the "no net loss" policy's history).



minimize impacts that cannot be avoided, and to compensate for remaining impacts by creating, enhancing, restoring, or preserving other wetlands.<sup>139</sup>

The Corps's permits come in a variety of shapes and sizes. Some are "individual permits," which means they authorize only one specific project.<sup>140</sup> Others are "general permits," which establish standardized permitting requirements for large classes of similar projects.<sup>141</sup> The Corps generally uses individual permitting authority for large projects with larger environmental impacts.<sup>142</sup> But in sheer numbers, general permits are more significant; according to one recent study, about 95 percent of the Corps permits fall into this category.<sup>143</sup>

### 3. The Regulatory Partners

Like many federal agencies, the Corps does not work in isolation. The EPA is the Corps's primary partner, though by no means the only one.<sup>144</sup> Where threatened or endangered species are present, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have regulatory authority over Corps permits.<sup>145</sup> Even where those species are absent, the Fish and Wildlife Coordination Act requires collaboration with these agencies.<sup>146</sup> States also hold authority over projects permitted by the Corps. Section 401 of the Clean Water Act requires applicants for federal permits involving "discharges" to navigable waterways to obtain state certifications that the permits will be consistent with state water quality standards.<sup>147</sup> That provision gives state regulators

139. *Section 404 Permitting*, *supra* note 135. A wide variety of activities impacts aquatic resources. Among the impacts regulated by the 404 program, the placing of infrastructure, like docks or bridges, within waterways is particularly common, as is filling streams and wetlands to create dry areas where development can occur.

140. *See, e.g., Individual Permits*, U.S. ARMY CORPS ENG'RS, <http://www.swf.usace.army.mil/Missions/Regulatory/Permitting/IndividualPermits.aspx> [<http://perma.cc/N5UT-SCTY>] (last visited Nov. 5, 2015).

141. 33 U.S.C. § 1344(e) (2012) (setting forth requirements for general permits). *See generally* CLAUDIA COPELAND, CONG. RESEARCH SERV., NO. 97-223, *THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS* (2012). For discussion of permit types, see Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 155–64 (2014).

142. *See* 33 U.S.C. § 1344(e) (2012) (limiting general permits to activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment").

143. TAYLOR, *supra* note 136, at 94.

144. *See supra* note 133 and accompanying text.

145. *See* 16 U.S.C. 1536(a)(2) (2012) (requiring federal agencies to "consult" with FWS or NMFS when federal projects may affect listed species).

146. *Section 404 Permitting*, *supra* note 135.

147. 33 U.S.C. § 1341(a) (2012).

the authority, which they sometimes use, to influence the Corps's permits.<sup>148</sup> These relationships represent only a partial sampling. In several other ways, some discussed in more detail below, implementing the 404 program involves extensive work with other government agencies and the private sector.

#### 4. The Controversies

Even a brief overview of the Corps's 404 program must highlight one further feature: It is controversial.<sup>149</sup> In some parts of the country, it is difficult to build anything big or long without impacting wetlands or streams.<sup>150</sup> Consequently, the 404 program affects the activities of thousands of economic actors (and their lawyers), ranging from state highway departments to coal companies and from major developers to individual homeowners.<sup>151</sup> Some of these entities see the resulting regulation as an acceptable, or at least unavoidable, consequence of operating in a nation committed to environmental protection. But others despise the program, and many challenge it, both through traditional administrative law litigation and through takings claims.<sup>152</sup> In recent decades, wetlands disputes have generated a surprising amount of Supreme Court jurisprudence, including some colorful opinions.<sup>153</sup> Justice Scalia, for example, has railed against the costs of the program and analogized the Corps to "an enlightened despot."<sup>154</sup>

148. See TAYLOR, *supra* note 136, at 49 (describing state approaches to section 401); Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 *ECOLOGY L.Q.* 583, 593–95 (2013).

149. See Houck & Rolland, *supra* note 134, at 1243 ("Wetlands regulation may be the most controversial issue in environmental law.").

150. For example, wetlands cover almost 30 percent of the state of Florida, even though the state has lost approximately 45 percent of its wetland area. THOMAS E. DAHL, U.S. DEPT OF THE INTERIOR, FISH & WILDLIFE SERV., *WETLANDS: LOSSES IN THE U.S. 1780S TO 1980S* at 6 (1990).

151. One indicator of this range is the set of nationwide general permits issued by the Army Corps. See *Summary of the 2012 Nationwide Permits*, U.S. ARMY CORPS ENG'RS, [http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012\\_sumtable\\_15feb2012.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_sumtable_15feb2012.pdf) (describing a wide variety of regulated activities) [<http://perma.cc/5EU5-TS7S>].

152. See, e.g., Ilya Shapiro, *Stopping the EPA From Regulating Puddles*, *CATO AT LIBERTY* (May 10, 2013, 9:10 AM), <http://www.cato.org/blog/stopping-epa-regulating-puddles> [<http://perma.cc/79UN-DA22>] ("The EPA imposes huge costs on people who want to do anything on their property, claiming the agency has the authority to regulate 'wetlands.'").

153. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (takings claim); *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (same); *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (administrative law challenge); *Rapanos v. United States*, 547 U.S. 715 (2006) (jurisdictional challenge); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (takings claim); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (jurisdictional challenge); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (same).

154. *Rapanos*, 547 U.S. at 721.

## B. Decentralization and the Army Corps

The description above might seem to comport with conventional stories of federal agency decision making. In those stories, Congress delegates authority to an administrative agency, which (presumably operating from its Washington, D.C., headquarters) then promulgates rules, policy statements, and guidance documents.<sup>155</sup> That legal regime goes into effect and, inevitably, controversy results. The presence of other agencies with overlapping authority also might not seem surprising, for many recent articles have made a persuasive case that this kind of overlap is commonplace.<sup>156</sup> Nothing in that description would compel any reassessment of conventional assumptions about the geographic centralization of federal administrative governance.

But there is much more to the 404 story than this brief overview. The discussion that follows explains how that general legal structure becomes specific, on-the-ground constraints. That account is necessarily intertwined with a description of the Army Corps's geographic decentralization. It begins by explaining how the agency's structure and culture promote decentralization, and then explains how that decentralization manifests itself at key stages of the agency's regulatory processes.

### 1. Agency Structure and Culture

The geographic dispersion of agency staff is one straightforward way in which section 404 implementation is decentralized. Other than the roughly eight Corps regulatory staff who work full-time in Washington, D.C.,<sup>157</sup> agency staff are dispersed among eight division offices, thirty-eight "district" offices, and many field offices across the country.<sup>158</sup> Some of those field offices are heavily staffed, while other offices are simply individual employees working out of their homes.<sup>159</sup> Decisions about office placement are themselves partly decentralized. While the Corps's D.C. headquarters exercises budgetary control,

155. See Farber & O'Connell, *supra* note 28, at 1141–54 (summarizing traditional understandings of administrative law).

156. *E.g.*, Freeman & Rossi, *supra* note 13.

157. These D.C. employees may also have substantial field experience. As one district chief explained: [O]ver the years . . . the people who have gotten in managerial positions have gotten there through the ranks. So they know . . . the real world, and that is [] even consistent with the people in headquarters. Most of those people have come from the district offices [and] were at one point a project manager processing permit applications. Telephone Interview with Regulatory District Chief (Aug. 25, 2014).

158. See *Army Corps of Engineers Office Locator*, *supra* note 124.

159. See Telephone Interview with former District Chief (Sept. 9, 2014).

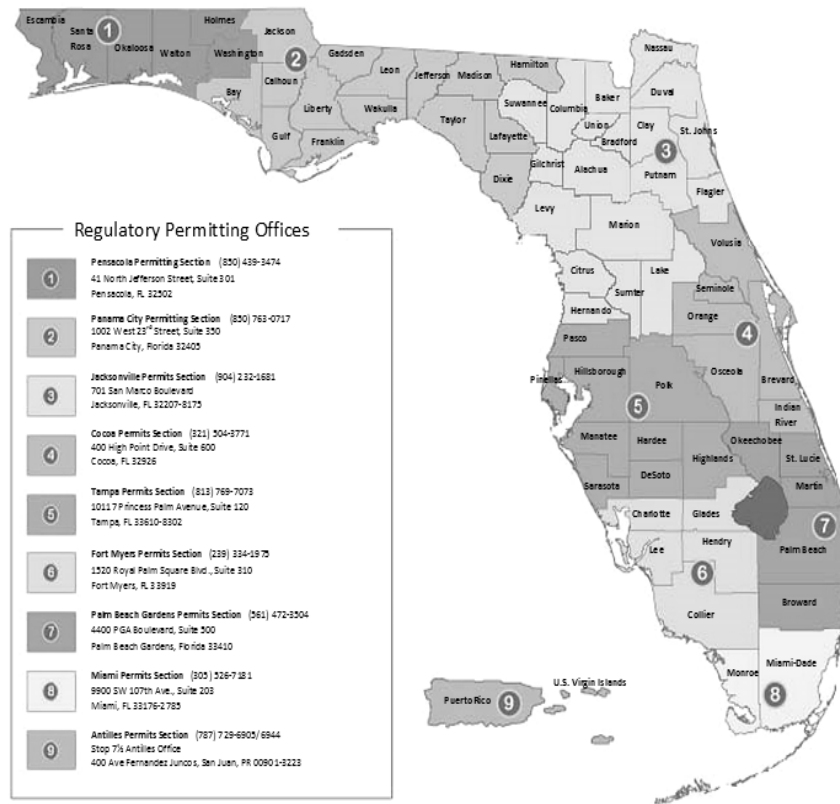
district commanders may choose whether and where to open field offices and how to staff them.<sup>160</sup>

FIGURE 1: LOCATION OF LOCATION OF ARMY CORPS OF ENGINEERS  
DIVISION AND DISTRICT OFFICES<sup>161</sup>



160. See Telephone Interview with headquarters staff (Nov.17, 2014).

161. *Army Corps of Engineers Office Locator*, *supra* note 124.

FIGURE 2: ARMY CORPS FIELD OFFICES IN FLORIDA<sup>162</sup>

#### a. Geographic Dispersion, Communication, and Understanding

Geographic dispersion affects agency operations in several ways, one of which is to facilitate decentralization of communications and professional relationships. State agency partners, for example, will generally work with Corps offices in, or at least close to, their own state. In some circumstances, Corps staff are literally a desk away from their state counterparts; several members of the staff I spoke to sat at desks within state agency buildings.<sup>163</sup> The Water Resources Development Act of

162. *Jacksonville District*, U.S. ARMY CORPS ENG'RS, <http://www.saj.usace.army.mil/Missions/Regulatory/OfficeLocations.aspx> [<http://perma.cc/EZ9N-6VE9>] (last visited Nov. 5, 2015).

163. *E.g.*, Telephone Interview with Army Corps Field Staff Member (Sept. 9, 2014) (“Our office is in the same building as [state agencies]. So we are, on a routine basis, comparing notes with the other agencies coordinating on mitigation, project design, those sort of things.”).

2000 also allows state agencies to obtain expedited processing of their permits by funding Corps staff, and some state agencies therefore have a dedicated Corps staff member devoted to their work.<sup>164</sup> And while Corps staff regularly work with other federal agency staff, many of those communications take place between regional offices.<sup>165</sup> Particularly for district and field office staff, interagency coordination is a major component of the job.<sup>166</sup>

The geographic distribution of Corps staff also facilitates more localized communication with the public.<sup>167</sup> People seeking (or opposing) permits from the Corps will generally work with a Corps office not too far from their activities.<sup>168</sup> Often they will be talking to a Corps staffer who has worked for years in that particular geographic area.<sup>169</sup> The staff person may have been born and raised there; of the twenty-nine regional office staff I interviewed, eighteen were from either the state where they now work or its immediate neighbors, and many were working in the same metropolitan areas where they were raised.<sup>170</sup> That has consequences. As one staff person explained:

[W]hen you deal with the mom and pop applications, it certainly matters because a lot of times we help them with drawings and things like that[,] and it's just a built in understanding and empathy . . . because you know the culture[,] you were raised here and know the challenges that people are having and you want to help them as much as you can. Even just hearing the voice, you know, people are used to the accent . . .<sup>171</sup>

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164. Water Resources Development Act of 2000 § 214, 33 U.S.C. § 2201 (2000); *see, e.g., Water Resources Development Act (WRDA) Section 214*, U.S. ARMY CORPS ENG'RS, <http://www.nws.usace.army.mil/Missions/CivilWorks/Regulatory/WaterResourcesDevelopmentActSec214.aspx> [<http://perma.cc/2DD2-JJAH>] (last visited Nov. 5, 2015) (explaining these arrangements). One district chief described the consequence of colocation: “[W]e really understand how they work. We get it.” Telephone Interview with Regulatory District Chief (Aug. 26, 2014).
165. *See* Telephone Interview with Army Corps Field Staff Member (Sept. 23, 2014) (describing communications with other field office staff).
166. Telephone Interview with Regulatory District Chief (Aug. 25, 2014) (“[I]f you look at the regulatory branch staff, that’s a daily basis. There’s always communication going back and forth all the time.”).
167. *See* Telephone Interview with Regulatory District Chief (Aug. 22, 2014) (“[M]y project managers, they deal with the public every day.”).
168. Those contacts are frequent. One district chief explained, “I would say my project managers average . . . fourteen to seventeen calls a day. . . . [S]ome of those might be state agencies so I would say a dozen from the public per day.” Telephone Interview with District Chief (Aug. 21, 2014).
169. On average, the staff I interviewed had spent twenty years in their present location. Across the regulatory program, however, the number is probably lower; I only interviewed relatively senior staff.
170. Many interviewees observed that their offices included a mix of long-time residents and relative newcomers, so these statistics may overstate the stability of the Corps’s workforce.
171. Telephone Interview with Regulatory District Chief (Sept. 16, 2014). She also noted that larger national companies did not seem to care where she was from.

Similarly, a district chief who worked—and had lived her whole life—in an area where Corps staff often work with Indian Tribes, explained:

[U]ntil you actually live through and understand some of the tribal issues, you don't get how it's different from other parts of the country . . . It is something you can teach people, but there's something—I don't know if innate is the right word—but you just have absorbed the situation more having lived here for a longer period of time.<sup>172</sup>

In many other exchanges, Corps staff echoed these points about understanding the environment and culture of the place where they worked. Two other exchanges were particularly telling. First, a staff person who worked at a small field office (and who had previously worked for a state agency) had been discussing differences between geographically dispersed state agency staff and a nearby Corps district in which staffing was concentrated at the district headquarters. But he did not seem to be suggesting that his state counterparts knew more than he did. I followed up by asking:

Q: So, to make sure I understand. It sounds like you're saying . . . that decentralization is key to understanding local conditions and it's not necessarily the distinction between federal and state?

A: Right. Yes, definitely. You nailed it there.<sup>173</sup>

The second comes from an interview with a district chief whose district included one of the two states with delegated authority to implement part of the 401 program:

In terms of [the states] knowing the resource better than the feds, my sense of it is that's not necessarily true because . . . the way our geographic jurisdictions are established our staffs are very familiar with the resources and . . . our applications are very sensitive to the region. I don't think . . . their administration is any better than ours or any more sensitive to the environment or any more sensitive politically.<sup>174</sup>

That sort of close relationship can improve governance, but it also can raise reasonable concerns about agency capture.<sup>175</sup> Nevertheless, Corps staff felt that

172. Telephone Interview with Regulatory District Chief (Sept. 9, 2014). Other Corps staff emphasized the importance of familiarity with local conditions, but also noted, as one put it, that “those things can be learned.” Telephone Interview with Regulatory District Chief (Sept. 12, 2014).

173. Telephone Interview with Corps Field Staff Member (Sept. 9, 2014).

174. Telephone Interview with Regulatory District Chief (Aug. 25, 2014).

175. *E.g.*, *N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502, at \*15–16 (N.D. Cal. Jan. 23, 2004) (describing an unprofessional and, in the court's view, “biased” email written by an Army Corps staff member on behalf of an industrial company, employees of which “he admitted at trial were his personal friends”).

their geographic decentralization also affected the 404 program's reach and improved its success in protecting the environment. As one former district chief explained:

Our own experience . . . had shown us that every time we created a new field office we 'found' more work. It might start out as an increase in violations as our field office folks got more familiar with their new territories, but it soon led to a general awareness of our Regulatory Program among people who may not have heard of it before, or who had ignored us since our office was eight hours away and we only sent someone out there once or twice a year. We would soon see increases in requests for site visits . . . to talk about things people wanted to do with their property, and then an increase in permit applications. It was pretty obvious that our new presence in a locality wasn't stimulating people to develop their property; our presence was just helping to advance the goal of providing regulation over the waters and wetlands of the United States instead of just the waters and wetlands of major metropolitan areas and their suburbs.<sup>176</sup>

#### b. Geographic Dispersion of Authority

On their own, decentralized staffing and communication systems might not sound like genuine decentralization. Mail carriers, after all, are geographically dispersed, and they often have conversations as they travel through their neighborhoods, but that does not translate into meaningful discretion about how to deliver the mail. But the Corps's geographic dispersion corresponds with deliberate dispersion of authority.

This dispersion of authority results partly from the inherent imprecision of statutes and regulations. Corps staff readily acknowledged that "the regulations are written pretty vaguely . . . [with] a lot of gray area," which leads to on-the-ground flexibility.<sup>177</sup> Where that flexibility exists, the Corps often delegates interpretive authority to its districts.<sup>178</sup> District commanders (who often sub-delegate their regulatory authority to district chiefs) "are the ones who make the decision," one staff member in the D.C. headquarters explained, "and we reinforce that every chance

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176. Email from former Dist. Chief to Dave Owen, Professor of Law, Univ. of Me. Sch. of Law (Sept. 9, 2014, 5:01 PM) (on file with author).

177. Telephone Interview with Corps Field Staff Member (Sept. 5, 2014).

178. *See, e.g.*, 40 C.F.R. § 230.91(d) (2014) (delegating authority to implement policies on compensatory mitigation).



we get.”<sup>179</sup> District and field staff repeatedly concurred. “In terms of management stuff,” one district chief explained, “they pretty much stay out of our business, and we’d just as soon keep it that way.”<sup>180</sup> External observers agree as well.<sup>181</sup> One private entrepreneur, for example, told a story of confronting a policy interpretation he thought was mistaken. At his behest, the rule’s primary author, a D.C. employee,

wrote an email for me to the . . . district for me and said, ‘Hey guys, the rule does give you this flexibility. . . . Go ahead, that’s totally within your discretion.’ And the . . . district wrote the headquarters back and said . . . ‘We don’t agree. . . . [T]hat’s our position here in the . . . district and we really appreciate your feedback.’ . . . I learned . . . that [headquarters is] a nice sounding board but they don’t have control over districts and their interpretations.<sup>182</sup>

One result, not surprisingly, is institutional variation within the agency.<sup>183</sup> People outside the Corps stressed the differences from district to district, identifying a particular district that they viewed as “such an anomaly,”<sup>184</sup> claiming that “certain Corps districts . . . tend to be more environmentally protective and . . . less solicitous of applicants than others,”<sup>185</sup> or, at the extreme, commenting that “[t]hey all do it so differently that it’s just like going to a whole other planet when you start with a new district.”<sup>186</sup>

Nevertheless, there are boundaries on that dispersion of authority. In interviews, staff often stated that “consistency is first and foremost.”<sup>187</sup> Consequently, staff at all levels work to ensure that their operations are consistent with those of their counterparts in other areas.<sup>188</sup> Headquarters (often in partnership with the

179. See Telephone Interview with Regulatory District Chief (Sept. 16, 2014) (“The decisional authority for individual permits . . . is extremely protected and kept at the district level. I know with certainty now headquarters folks . . . work very hard to protect that.”); Telephone Interview with EPA Staff Member (Sept. 16, 2014) (“[T]he Corps’ leadership is focused on the local [level] . . .”).

180. Telephone Interview with Regulatory District Chief (Aug. 21, 2014).

181. *E.g.*, Telephone Interview with EPA Staff Member (Sept. 16, 2014) (“So my sense is that Corps headquarters plays a less directive or guiding role . . . on the decisions made by Corps districts than EPA does on decisions by the EPA regions.”); Telephone Interview with EPA Staff Member (Sept. 19, 2014) (“[B]ecause of the autonomy of the districts there is a little bit less ability for Corps headquarters to implement strategies . . . on a countrywide basis.”).

182. Telephone Interview with Mitigation Banker (Sept. 5, 2014).

183. One field staff member did complain that district-level authority is “a problem because I do think it stifles a lot of innovation that you could see from the field office.” Telephone Interview with Project Manager (Aug. 22, 2014).

184. Telephone Interview with Former FWS Staff Member (Aug. 26, 2014).

185. Telephone Interview with Former EPA Staff Member (Sept. 12, 2014).

186. Telephone Interview with Mitigation Banker (Sept. 5, 2014).

187. Telephone Interview with Corps Field Staff Member (Sept. 5, 2014).

188. *E.g.*, Telephone Interview with Regulatory District Chief (Aug. 25, 2014) (“[W]e’re very sensitive to consistency to the extent we can have it.”).

EPA) also promulgates regulations and national guidance, and those national documents constrain many of the details of program implementation.<sup>189</sup> Advances in communications technology have facilitated these efforts; periodic conference calls and email blasts help staff coordinate and collaborate across geographic boundaries.<sup>190</sup> The private sector also plays a role. Many environmental consulting firms work in multiple districts, and these consultants often notify Corps staff when they perceive differences from district to district.<sup>191</sup> Due to all of these factors, interviewees generally agreed that the Corps has become a more consistent regulator over the years.<sup>192</sup> Gone are the days, as one longtime district chief put it, when “everybody had their own kingdom, or queendom.”<sup>193</sup>

But even when there is internal consistency, that consistency can evolve through ways other than top-down dictates from Washington. National rules and guidance reflect regional knowledge and preferences. The Corps often writes its guidance and rules by convening temporary teams composed of staff from around the country.<sup>194</sup> Those teams then seek additional input and comments from their regional office colleagues.<sup>195</sup> The results of those processes vary; some regional and field office staff complained that rules and guidance documents were disconnected

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189. See, e.g., *Regulatory Guidance Letters*, U.S. ARMY CORPS ENG'RS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx> [<http://perma.cc/2KKT-HX4D>] (last visited Nov. 5, 2015).

190. Telephone Interview with Project Manager (Aug. 22, 2014) (“[W]e’re pretty well connected. I think it’s gotten better over the years with technology too because we can do webinars and things like that pretty easily.”); Telephone Interview with Regulatory District Chief, (Sept. 3, 2014) (“We all know each other. We all get along very well. I’ll call up another regulatory chief and say, ‘how do you handle this situation’ or ‘how do you guys do this’ just to get an idea of how other districts are working and handling certain issues.”).

191. See Telephone Interview with Regulatory Division Chief (Nov. 24, 2014) (describing how consultants’ claims of inconsistency can initiate division-level inquiries).

192. E.g., Telephone Interview with Project Manager (Sept. 5, 2014) (describing an initiative to bring more consistency to his district); Telephone Interview with Retired FWS Staff Member (Sept. 3, 2014) (“[I]n the early days of the program . . . everybody was very much figuring things out as you went along, but there was so much independence in the district . . .”). Mitigation bankers saw things differently. One, for example, argued that “[b]ecause they have been told they have some latitude, it’s a free-for-all.” Telephone Interview with Mitigation Banker (Sept. 5, 2014).

193. Telephone Interview with Regulatory District Chief (Aug. 27, 2014).

194. Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (“[W]e actually establish . . . a national development team which would have representatives from each division. . . . [a] lot of that is . . . to consider the regional implications of different policy changes and the second part is in the headquarters office . . . . I think they’re six or seven people. So they physically don’t have the staff to move forward an action like that . . .”).

195. *Id.* (“[I]t’s [their] responsibility to get input from their division, both the division program managers as well as the regulatory staff . . . .”); Telephone Interview with Regulatory District Chief (Sept. 12, 2014) (“We convened in D.C. and each had different perspectives on ‘this is what our region thinks is important.’”).

from their daily experiences.<sup>196</sup> But more often, staff emphasized the existence of procedures that ensure regional input into national policy, and the effectiveness with which those procedures are implemented.<sup>197</sup> Similarly, consistency often evolves through contact among district or division-level staff.<sup>198</sup> While they weren't always satisfied with the extent of lateral contact within the agency—cuts in training programs were a source of recurring complaints<sup>199</sup>—interviewees repeatedly described both formal and informal communication systems designed to help staff compare notes and share ideas.<sup>200</sup>

The net result is that the Corps's regulatory program is, as one district chief put it, "very decentralized."<sup>201</sup> Power is less disaggregated than in a system of fifty separate state governments, but the arrangement is still quite different from the common stereotypes often found in federalism scholarship, political rhetoric, or jurisprudence.

## 2. Agency Actions

This geographic dispersion of authority has consequences for both the objects and beneficiaries of the Corps's regulatory program. The agency routinely adjusts its regulatory program to local conditions, much like a judge applying national law to a geographically distinct set of facts. And it also adjusts the law itself

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196. *E.g.*, Telephone Interview with Regulatory Branch Chief (Sept. 5, 2014) ("We never hear about things . . . for the most part until we see some proposal in the federal register."); Telephone Interview with Regulatory Section Chief (Aug. 22, 2014) (describing an interpretive rule that "came out [of] the blue as far as I was concerned").

197. *E.g.*, Telephone Interview with Regulatory District Chief (Aug. 25, 2014) ("It may be decentralized but there's a lot of opportunity to provide input."); Telephone Interview with Regulatory Dist. Chief (Aug. 26, 2014) ("[W]e really like our headquarters folks. They are responsive, they're smart, and they listen to the field. So, we don't [feel] disconnected from national policy, regulations, [and] guidance."); Telephone Interview with Regulatory District Chief (Sept. 3, 2014) ("I feel like if our comments are substantive enough and are supported by actual data, either qualitative or quantitative, that that information can make a difference in what the final outcome would be.").

198. *See, e.g.*, Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (explaining multiple techniques, including spot checks, site visits, and webinars, her division office uses to ensure consistency).

199. *See, e.g.*, Telephone Interview with Regulatory Branch Chief (Sept. 5, 2014) ("[W]hen we are allowed to go to trainings, which [are] becoming less available these days, we would have significant interaction with regulators from across the nation, which is a significant value."); Telephone Interview with Regulatory District Chief (Sept. 16, 2014) ("It's unfortunate because we were meeting and it was a good benefit and I've never been to Las Vegas.").

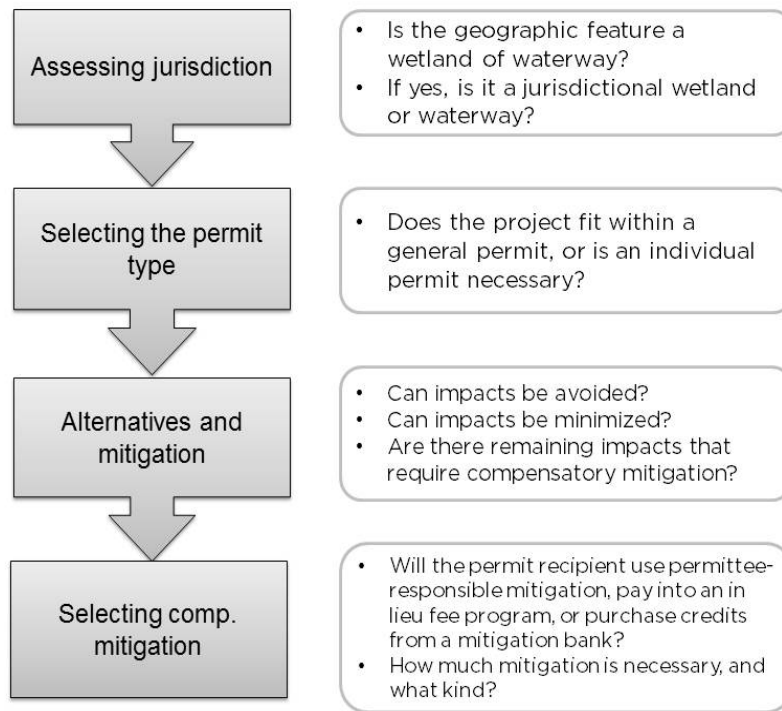
200. *E.g.*, Telephone Interview with Headquarters Staff (Nov. 17, 2014) (describing a culture of "shamelessly stealing good ideas"); Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (describing multiple techniques).

201. Telephone Interview with Regulatory District Chief (Aug. 25, 2014) ("Headquarters gets involved in establishing overall policies but they don't get involved in the day-to-day activities of the districts.").

by allowing, and sometimes encouraging, regional variation in regulatory approaches.<sup>202</sup> The Subparts below describe examples of that variation at nearly every stage of the regulatory process.

Understanding that process, and the various discretionary decisions it entails, is somewhat easier with a visual diagram, and the figure below provides a slightly oversimplified flowchart of the regulatory process that begins when someone embarks on a project that might involve filling jurisdictional waters. In the interests of legibility, the diagram leaves out some nuance; for example, it does not describe the roles of interagency coordination or public interest review. But for readers not familiar with the details of the process, it should provide a starting point for understanding.

**FIGURE 3: THE SECTION 404 REGULATORY PROCESS**



202. To be clear, I am not claiming that regional offices don't follow the Clean Water Act or its implementing regulations. Instead, operating within the sideboards defined by the Act and regulations, they implement the program in ways that still differ from place to place.

### a. Jurisdictional Determinations

The section 404 regulatory process begins, and sometimes ends, with a decision about whether the aquatic feature at issue is even subject to regulation under the Clean Water Act.<sup>203</sup> In making those determinations, Army Corps field staff clearly take into account variations in local conditions. Whether the actual law of regulatory jurisdiction currently varies from place to place is a more disputed question.

The Clean Water Act grants the Army Corps jurisdiction over “navigable waters,”<sup>204</sup> a phrase the act defines, somewhat confusingly, as “the waters of the United States.”<sup>205</sup> Because of that language, the Army Corps must determine where on the continuum from dry land to open ocean the jurisdictional boundaries lie.<sup>206</sup> That determination in turn necessitates two inquiries: first, where the physical boundary between a wetland, river, or stream and the surrounding land is; and second, whether federal regulatory authority extends to that boundary. In other words, the Corps must “delineate” the wetland or waterway, and it must also make a “jurisdictional determination” for the delineated feature.<sup>207</sup> The importance of these decisions is hard to overstate. Jurisdictional waters are subject to the 404 program, with all the requirements that program entails, while impacts to nonjurisdictional waters will only be regulated under state or local law. In much of the country, that means no regulation at all.<sup>208</sup>

In making those delineations, local conditions matter. In 1987, the Corps first published a national wetland delineation handbook, and for almost twenty years, that handbook provided a standardized national approach.<sup>209</sup> In the mid-1990s, however, a National Academy of Sciences study called for regionalized tailoring, and the Corps began developing regional supplements to that handbook.<sup>210</sup> The resulting supplements are not designed to change the

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203. GAO, *supra* note 109, at 7. Sometimes, the Corps also might determine that the activity at issue does not involve any form of “discharge” and therefore is not subject to regulation.

204. 33 U.S.C. § 1344(a) (2012).

205. *Id.* § 1362(7) (2012).

206. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (“Where on this continuum to find the limit of ‘waters’ is far from obvious.”).

207. *See Rapanos v. United States*, 547 U.S. 715 (2006) (setting forth dueling jurisdictional tests).

208. *See* ENVTL. LAW INST., STATE WETLAND PROTECTION: STATUS, TRENDS & MODEL APPROACHES 13 (2008).

209. ENVTL. LAB., CORPS OF ENGINEERS WETLAND DELINEATION MANUAL (1987).

210. *See Actual or Anticipated Release Dates for Regional Supplements (as of 13 Jan 2012)*, U.S. ARMY CORPS ENG’RS, [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_supp/supp\\_sched2012.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/supp_sched2012.pdf) [http://perma.cc/2EJC-28LK] (last visited Nov. 5, 2015); *see also* JAMES S. WAKELY, DEVELOPING A “REGIONALIZED” VERSION OF THE CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL: ISSUES AND RECOMMENDATIONS 1–3 (2002). The supplements are

law, but instead to allow the Corps to apply a consistent set of principles to distinctive regional facts.<sup>211</sup> But even that level of adaptation and regional sensitivity is more than some descriptions of centralized, “procrustean” federal governance might lead one to expect.<sup>212</sup>

Whether legal approaches to jurisdictional determinations vary from place to place is a more fraught question. In 2004, the General Accounting Office found that they did. “In certain circumstances,” it concluded, “Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government.”<sup>213</sup> In *Rapanos*, Justice Scalia charged that “[t]he Corps’ enforcement practices vary somewhat from district to district because ‘the definitions used to make jurisdictional determinations’ are deliberately left ‘vague.’”<sup>214</sup> After *Rapanos*, many environmental advocates shared Justice Scalia’s consternation, though they generally charged that the Corps was regulating too little rather than too much.<sup>215</sup> One EPA staff member agreed, albeit with a more measured perspective, based on extensive analysis of data from the Corps:

When you look in the east and the northeast and [the] mid-Atlantic, what you see is a very comprehensive assertion of jurisdiction over stream resources, including headwater streams that aren’t even intermittent, some of them that are ephemeral. . . . I think you see that very infrequently in the Midwest and the plains. . . . I believe that in the Northeast it’s not at all uncommon that some of these smaller vernal pools have been found to have Clean Water Act jurisdiction. I think a lot of western vernal pools<sup>[216]</sup> in California have been found in jurisdictional determinations to be subject to the Clean Water Act. And in contrast, there’s almost no assertion

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available at *Regional Supplements to Corps Delineation Manual*, U.S. ARMY CORPS ENG’RS, [http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg\\_supp.aspx](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx) [<http://perma.cc/SX7S-FN7R>] (last visited Nov. 5, 2015).

211. See, e.g., U.S. ARMY CORPS ENG’RS, REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: ATLANTIC AND GULF COASTAL PLAIN REGION (VERSION 2.0) 1 (2010) (describing this limited purpose).

212. Stewart, *supra* note 54, at 343.

213. GAO, *supra* note 109, at 3.

214. *Rapanos v. United States*, 547 U.S. 715, 727 (2006).

215. See, e.g., Jon Devine, *Everything You Wanted to Know About the EPA/Army Corps Proposed Clean Water Rules but Were Afraid to Ask*, SWITCHBOARD: NRDC STAFF BLOG (Mar. 25, 2014), [http://switchboard.nrdc.org/blogs/jdevine/everything\\_you\\_wanted\\_to\\_know.html](http://switchboard.nrdc.org/blogs/jdevine/everything_you_wanted_to_know.html) [<http://perma.cc/9Y8W-2GLB>].

216. A vernal pool is an ephemeral wetland without a surface connection to permanent waterways.

of jurisdiction over prairie potholes and many other types of quote isolated waters.<sup>217</sup>

Nevertheless, Corps staff strongly resisted that view, at least as it applies to recent practices. Most staff members acknowledged regional variations in outcomes, but they told me that these variations simply reflected the application of similar laws and guidance to different kinds of streams and wetlands.<sup>218</sup> As one Midwestern district chief put it, “if someone from the arid west were to come here and look at a similar situation . . . they might declare jurisdiction further up the topography than we would just because of their experience with the much dryer climate in their district.” But in a follow-up remark that captures the general view, she noted that these differences depend upon “the regional resource” and are “not really a difference in policy.”<sup>219</sup> Indeed, when I asked Corps staff about a major new rule ostensibly designed, among other purposes, to bring greater consistency to jurisdictional determinations, many seemed to think the effort was somewhat superfluous.<sup>220</sup>

For this study, I did not conduct the kind of extensive empirical analysis necessary to assess which of these perspectives is correct. The view of the EPA staff member quoted above seems plausible, as it was derived from an extensive review of nationwide empirical data and corroborates the GAO’s past conclusions. And the Corps staff I spoke with were generally most familiar with practices within their own districts, which might explain the discrepancy between their views and those of an EPA staff member with nationwide responsibilities.<sup>221</sup> Nevertheless, Corps staff were emphatic in their contrary position. But even if the Corps is right about present practices, the story of jurisdictional determinations would demonstrate that regional variation can ebb and flow over time. It can emerge after legal changes—like the Supreme Court’s jurisdictional decisions—introduce uncertainty into the legal landscape, and then diminish as agency practices become increasingly coordinated.<sup>222</sup>

217. Telephone Interview with EPA Staff Member (Sept. 16, 2014). He prefaced these comments by saying, “I don’t want to be dismissive of the perception that you’re hearing from the Corps . . . I hold them in high regard.” *Id.*

218. *E.g.*, Telephone Interview with Project Manager (Aug. 22, 2014).

219. Telephone Interview with Regulatory Section Chief (Aug. 22, 2014).

220. For a blog post discussing this point in more detail, see Dave Owen, *How Much Difference Will the WOTUS Rule Make?*, ENVTL. L. PROF BLOG (June 4, 2015), [http://lawprofessors.typepad.com/environmental\\_law/2015/06/how-much-difference-will-the-wotus-rule-make.html](http://lawprofessors.typepad.com/environmental_law/2015/06/how-much-difference-will-the-wotus-rule-make.html) [<http://perma.cc/UZ9B-PDUW>].

221. *E.g.*, Telephone Interview with Regulatory District Chief (Aug. 25, 2014) (“I can’t speak to like the Midwest, West Coast . . .”).

222. GAO, *supra* note 109, at 9 (discussing SWANCC’s effects).

## b. Permits

While Army Corps staff asserted that their legal and procedural approaches to jurisdictional determinations were nationally consistent, they made no such claim about their approach to issuing permits. Every year, the Army Corps issues tens of thousands of permits, and the Corps goes to great lengths to tailor those permits to state preferences and regional conditions. Consequently, the same basic activity can be permitted in different ways in different parts of the country.

Tailoring occurs with all permits, but the most readily apparent example involves general permits, which established standardized permitting requirements for large classes of similar projects.<sup>223</sup> Even nationwide general permits are written by teams of regional staffers (though the teams also include a leader from the D.C. headquarters), and those teams receive substantial feedback from other field office staff.<sup>224</sup> Once the permits are completed, individual districts can add “regional conditions” to the nationwide permits.<sup>225</sup> They also can suspend nationwide permits and substitute alternative “regional general permits” with different requirements.<sup>226</sup> That tailoring can occur across a region or on smaller geographic scales. A few Corps districts, for example, have pioneered the use of “special area management plans,” which allow for expedited permits in narrow geographic areas governed by land use management plans.<sup>227</sup> Others have created general permits for specific redevelopment or highway projects.<sup>228</sup> And while some of these mechanisms are relatively rare—special area management plans, for example, have seen widespread use primarily in southern California—

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223. Individual permits also reflect substantial tailoring to local conditions. And, as one district chief noted, “[t]he decision authority for individual permits . . . is extremely protected and kept at the district level.” Telephone Interview with Regulatory Dist. Chief (Sept. 16, 2014).

224. Telephone Interview with Regulatory Dist. Chief (Aug. 22, 2014) (“We have input every five years into the re-issuance of the nation-wides. Each region has representatives on that.”). In comments on an earlier draft of this article, an Army Corps headquarters staff member explained headquarters’ role on these teams.

225. *See, e.g.*, SACRAMENTO DIST., L.A. DIST., & S.F. DIST. U.S. ARMY CORPS OF ENG’RS, FINAL SACRAMENTO DISTRICT NATIONWIDE PERMIT REGIONAL CONDITIONS FOR CALIFORNIA, EXCLUDING THE LAKE TAHOE BASIN, (2014) [http://www.spk.usace.army.mil/portals/12/documents/regulatory/nwp/2012\\_nwps/2012-NWP-RC-CA.pdf](http://www.spk.usace.army.mil/portals/12/documents/regulatory/nwp/2012_nwps/2012-NWP-RC-CA.pdf) [<http://perma.cc/UM2T-W7NX>].

226. COPELAND, *supra* note 141, at 14–15.

227. *See generally* L.A. DIST. U.S. ARMY CORPS ENG’RS, SPECIAL AREA MANAGEMENT PLANS. <http://mtwatercourse.org/www/PDF%27s/Innovations%20and%20Spec%20Topics%20PDFs/WesternwetlandJB.pdf> [<http://perma.cc/RG9X-BHVV>].

228. *See, e.g.*, JACKSONVILLE DIST., U.S. ARMY CORPS ENG’RS, REGIONAL GENERAL PERMIT SAJ-103 (2010), [http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general\\_permits/RGP/gen\\_SAJ-103\\_20101008.pdf](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/RGP/gen_SAJ-103_20101008.pdf) [<http://perma.cc/4PPM-K34W>] (authorizing fill associated with a single development project).



others are common.<sup>229</sup> Indeed, regional tailoring has become so prevalent that some regulated entities complain that there is too much of it.<sup>230</sup>

These regionalized permitting processes also authorize substantial, and consequential, involvement from states. Section 401 of the Clean Water Act allows states to veto or condition federal “discharge” permits, and this authority extends to general permits as well.<sup>231</sup> States often use their section 401 authority to negotiate state-specific changes to nationwide permits,<sup>232</sup> and sometimes have used it to reject nationwide permits that the state deems insufficiently protective.<sup>233</sup> That legal leverage, along with the Corps’s desire to expedite regulatory processes, leads to significant state input:

When we develop a regional permit for any specific activity . . . [w]e work those out specifically with the state agencies and the federal agencies involved and [ask] ‘ok, if we’re going to develop this permit, are there any special conditions you’d like to see on it,’ and hammer those out just to make it easier to issue that permit in a way that the state’s good with it.<sup>234</sup>

In addition to regional conditions and regional general permits, district offices also work with some states to develop “state programmatic general permits.” These are state-specific federal permits, sometimes managed and issued by state offices, designed to simultaneously fulfill federal and state permitting requirements.<sup>235</sup> Again, the process of developing those permits offers states substantial input into the design of federal regulatory requirements, and the resulting permits do vary in meaningful ways from state to state.<sup>236</sup> State input also can lead to novel permitting approaches. In New England, for example, state preferences for more stringent wetlands protection not only led to the creation of new permitting requirements, but also generated an entirely new approach to

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229. For SAMP locations, see L.A. DIST. U.S. ARMY CORPS ENG’RS, *supra* note 227.

230. See COPELAND, *supra* note 141, at 15.

231. See 33 U.S.C. § 1341 (2012).

232. Telephone Interview with District Chief (Aug. 21, 2014) (“[W]e work out conditions with the state to attach to our nationwide permits so they can basically be blanket authorized by the state.”).

233. Telephone Interview with Regulatory Section Chief (Aug. 22, 2014) (“Through the 401 certification process they can have a great influence on the final terms of a permit.”).

234. Telephone Interview with Division Chief (Aug. 21, 2014). I then asked if he saw differences in state preferences. He answered: “Yes we do.” *Id.*

235. See, e.g., Philadelphia Dist., Marine Design Center, *State Programmatic General Permits*, U.S. ARMY CORPS ENG’RS, <http://www.nap.usace.army.mil/Missions/Regulatory/Permits/SPGP.aspx> [<http://perma.cc/76GS-42XC>] (last visited Nov. 5, 2015).

236. See Telephone Interview with Division Chief (Aug. 21, 2014).

the permitting process, in which agencies outside the Corps could demand heightened review of questionable permitting decisions.<sup>237</sup>

State and local preferences can inform permitting in other ways. In California, for example, Army Corps permits are often folded into larger land use planning exercises. In a typical exercise, state, local, and federal government actors all work together to identify areas where they wish to permit development and other areas where they wish to protect or restore natural habitats.<sup>238</sup> They then assess the plan's overall compliance with the Clean Water Act, the Endangered Species Act, and other federal and state laws, and create consolidated permits that, if consistent with the plan, establish compliance with a suite of state and federal laws.<sup>239</sup> In Maine, I was a peripheral participant in a similar permitting approach. Under the plan—which has developed with the support and active involvement of the Army Corps New England District's staff—the Corps and the State of Maine would delegate their permitting authority to two local governments, which would then implement a permitting scheme concordant with local zoning and growth planning as well as with the dictates of the Clean Water Act.<sup>240</sup>

All of this may sound arcane, for permitting is hardly the stuff of poetry. But it is crucially important.<sup>241</sup> While lawyers tend to focus on court cases and, to a lesser extent, statutes and regulations, permits are the applied end of the law, the infantry of the regulatory state. And within the Army Corps, permitting involves ample and deliberate regional tailoring.

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237. See Telephone Interview with former EPA staff member (Sept. 12, 2014). While this example involves increased regulatory stringency, stronger protection is not always the goal of permit tailoring. Instead, many of the Corps staff I spoke with emphasized that a primary reason for adopting general permits is to increase the efficiency of the regulatory process. Telephone Interview with Regulatory Dist. Chief (Sept. 12, 2014) (“[W]e want to look at the workload and decide if there is a category of work that could be handled more efficiently through a regional permit.”).

238. E.g., L.A. DIST. U.S. ARMY CORPS ENG'RS, *supra* note 227 (explaining how SAMPs do this); John Prettyman & John Kopchik, *First-of-Its-Kind Permit Supports 175,000 Acre Contra Costa Conservation Plan*, U.S. ARMY CORPS ENG'RS, SACRAMENTO DIST. (May 14, 2012), <http://www.spk.usace.army.mil/Media/NewsReleases/tabid/1034/Article/479240/first-of-its-kind-permit-supports-175000-acre-contra-costa-conservation-plan.aspx> [<http://perma.cc/5LQQ-PXD5>].

239. E.g., U.S. ARMY CORPS ENG'RS, SACRAMENTO DIST., GENERAL PERMIT 1 (2012), <http://www.spk.usace.army.mil/Portals/12/documents/regulatory/gp/GP-01-w-encls.pdf> [<http://perma.cc/M4R5-YTCE>].

240. *Using Vernal Pools to Study Natural Resource Management Issues*, U. ME., <http://umaine.edu/mitchellcenter/using-vernal-pools-to-study-urbanization-climate-change-and-forest-management> [<http://perma.cc/MZE8-MH3N>] (last visited Nov. 5, 2015) (describing the project).

241. See generally Biber & Ruhl, *supra* note 141 (emphasizing this importance).

### c. Compensatory Mitigation

If a permit authorizes the destruction of aquatic resources, the Corps will generally require the permittee to compensate for those impacts by creating, restoring, enhancing, or protecting aquatic resources elsewhere. That basic requirement exists across the country. But there is substantial regional variation in the legal instruments used to secure mitigation and the extent to which it is required.

#### i. Legal Instruments

The Corps relies on three legal instruments to secure compensatory mitigation. One, known as permittee responsible mitigation, requires the permittee to take responsibility for creating, restoring, or protecting other wetlands.<sup>242</sup> Another, known as an in-lieu fee program, requires permittees to pay an impact fee into a consolidated fund, which a third party then will use to secure mitigation at a location of its choosing.<sup>243</sup> Under the third mechanism, known as mitigation banking, an entrepreneur (often a private business) will create, enhance, restore, or protect aquatic features somewhere and then will sell credits that allow for aquatic ecosystem destruction.<sup>244</sup>

Some of the law governing mitigation instrument choice comes from Washington, D.C., and is national in scope. For example, the “no net loss” policy that underpins compensatory mitigation requirements originated as a presidential campaign promise.<sup>245</sup> More recently, in 2008, the Corps published regulations establishing a preferred hierarchy of compensatory mitigation choices.<sup>246</sup> But the rule’s language reserved discretion to regional staff, and enormous variation remains in the approaches used.<sup>247</sup> In some parts of the country—all of New England, for example—mitigation banks are nearly nonexistent.<sup>248</sup> In others, in-lieu

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242. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (Apr. 10, 2008) (to be codified at 40 C.F.R. pt. 230).

243. *Id.* at 19,594–95. Those choices are subject to oversight by “Interagency Review Teams,” which are discussed in more detail below.

244. *Id.*

245. Ruhl & Salzman, *supra* note 138, at 29.

246. See 40 C.F.R. § 230.93(b) (2014) (establishing this hierarchy, with mitigation banks as the preferred option, followed by in-lieu fee programs, and then permittee-responsible mitigation); 33 C.F.R. § 332.3(b) (2014).

247. *E.g.*, 33 C.F.R. § 332.3(b) (2014) (emphasizing district engineers’ authority to override default preferences).

248. Todd K. BenDor et al., *Risk and Markets for Ecosystem Services*, 45 ENVTL. SCI. & TECH. 10322, 10326 (2011) (mapping mitigation banks).

fee programs are quite rare.<sup>249</sup> And preferences on using these options vary from district to district. Mitigation bankers, who were placed at the top of the hierarchy, often complain that some districts are much more diligent than others in implementing the 2008 rule.<sup>250</sup> Some Corps staff contested that characterization, but others emphasized their discretion.<sup>251</sup>

These variations are not mere happenstance, but instead reflect deliberate adaptations by the Corps, government partners, and private-sector actors to local conditions. In some circumstances, the Corps program simply allows private entrepreneurs the flexibility to take advantage of local opportunities. Consequently, mitigation banks tend to arise where bankers perceive favorable conditions.<sup>252</sup> In other circumstances, the initiators are other government entities, environmental nonprofits, or even universities.<sup>253</sup> One of the most successful in-lieu fee programs, for example, evolved as a collaboration between the Corps, the state of Virginia, and The Nature Conservancy's Virginia chapter.<sup>254</sup> Under the program, federal wetlands permittees in Virginia can pay into a fund administered by The Nature Conservancy, which then seeks high-ecological return, cost-effective opportunities to spend the money on wetlands conservation.<sup>255</sup> In other words, federal environmental law is tailored on a state-specific basis and implemented by

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249. See ENVTL. L. INST., *THE STATUS AND CHARACTER OF IN-LIEU FEE MITIGATION IN THE UNITED STATES* 17–18 (2006) (listing programs by state).

250. Interview with Mitigation Banker, Portland, Maine (Sept. 12, 2014) (“Discretion is widely abused.”). The banker described regulators in one east coast state as having “a historic prejudice against approving banks” and mentioned another state where he thought a strong preference for on-site mitigation still exists. *Id.*

251. Telephone Interview with Regulatory District Chief (Aug. 27, 2014) (“The point of the mitigation rule is to outline what types of mitigation there are. But it’s really up to the applicant to suggest what best works for them on a cost basis . . . I look at [it] as, banks are a possibility, yes, but so is permittee-responsible mitigation.”).

252. *E.g.*, Telephone Interview with Regulatory Section Chief (Aug. 22, 2014) (“Mitigation banks are strictly a commercial venture. . . . [T]hat is a business decision on their part.”).

253. *See, e.g.*, Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (describing an experimental program, developed in conjunction with a state, to allow testing coral reef restoration techniques); Ctr. for Env’tl. Restoration, *Northern Kentucky Stream and Wetland Restoration Program*, N. KY. U., <http://environmentalrestoration.nku.edu/program.html> [<http://perma.cc/P5F5-GCM8>] (last visited Nov. 5, 2015). States also can impede compensatory mitigation programs. *See, e.g.*, Telephone Interview with Regulatory Division Chief (Nov. 24, 2014) (describing how a northeastern state’s apprehensions inhibited in-lieu fee programs and mitigation banking).

254. *See* U.S. ARMY CORPS ENG’RS, NORFOLK DIST., VA. DEP’T OF ENVTL. QUALITY & NATURE CONSERVANCY OF VA., *VIRGINIA AQUATIC RESOURCES TRUST FUND PROGRAM INSTRUMENT*, [http://www.nature.org/media/virginia/vartf\\_program\\_instrument\\_7.14.11\\_low.pdf](http://www.nature.org/media/virginia/vartf_program_instrument_7.14.11_low.pdf) [<http://perma.cc/VM4K-ATKL>] (last visited Nov. 5, 2015) (setting forth operating rules for the program).

255. *See Virginia Aquatic Resources Trust Fund*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/virginia/explore/the-virginia-aquatic-resources-trust-fund-home.xml> [<http://perma.cc/78NL-L25P>] (last visited Nov. 5, 2015).

a federal-state-private partnership. The whole arrangement is difficult to reconcile with accusations that federal environmental governance is an exercise in Soviet-style centralization.<sup>256</sup>

Acknowledging that this diversity of approaches exists is quite different from claiming that it is uniformly successful. In the early years of the program, compensatory mitigation earned a reputation only slightly better than fraud. It was, in the words of one regulatory district chief, “for the most part failing miserably,” with the restored or created wetlands offering poor substitutes for those that had been lost.<sup>257</sup> The Army Corps and its regulatory partners have invested years of work to improve the program, but controversy still persists.<sup>258</sup> Nevertheless, even if no one claims that compensatory mitigation is perfect, there is widespread agreement that it is getting better, and regional initiatives had something to do with that improvement.<sup>259</sup> As one district chief put it, headquarters “didn’t get in the way . . . [and] let the districts experiment,” and the agency learned from the resulting innovations.<sup>260</sup>

## ii. Mitigation Types and Amounts

When permittees engage in compensatory mitigation, Corps staff must decide the relationship between habitat destruction and habitat protection or improvement. They must assess, in other words, how much the destroyed habitat was worth and how much value to assign to the compensatory habitats.<sup>261</sup> Again, these determinations tend to be highly localized, and deliberately so.<sup>262</sup>

256. See Stewart, *supra* note 54, at 343.

257. Telephone Interview with Regulatory District Chief (Nov. 20, 2014). For a comprehensive critique of early compensatory mitigation efforts, see COMM. ON MITIGATING WETLAND LOSSES, NAT’L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001).

258. See, e.g., GARDNER, *supra* note 23, at 105–09 (describing problems with permittee-responsible mitigation). In all my interviews with mitigation bankers, I heard similar complaints about in-lieu fee programs.

259. For example, one district chief, when asked about changes during her time in the Corps, responded, “[m]ajor . . . changes as protecting the environment. And if you said that to environmental groups, they’d probably laugh, but they don’t have the perspective of what the program was before all this started.” Telephone Interview with Regulatory District Chief (Sept. 16, 2014). She cited compensatory mitigation as an example of that improvement. *Id.*

260. Telephone Interview with former District Chief (Sept. 9, 2014).

261. An alternative is to measure acres (or, with streams, linear feet). But acres are often a poor “currency,” because two different acres of wetlands can have very different ecological value. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 657–68 (2000).

262. See 40 C.F.R. § 230.91(d) (2014) (“Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.”).

The phrase “wetlands trading” may conjure up connotations of markets, with buyers and sellers wheeling and dealing wetlands from all over the country, and with regulatory involvement kept to a minimum, but the reality is quite different.<sup>263</sup> Approving mitigation credits often requires regulators to put on boots, visit sites, and make complex discretionary judgments.<sup>264</sup> That emphasis on individualized judgment necessarily leads to variation. And even when mitigation can be more systematized, guidance documents and protocols still often vary from office to office.<sup>265</sup>

One particularly intriguing example of that variation involves mitigating impacts to streams. In a 2013 study, several researchers examined stream mitigation guidance documents used by Corps offices in thirteen different states.<sup>266</sup> They found significant differences in the criteria used to judge mitigation success.<sup>267</sup> “Our review of regulatory documents,” the authors concluded, “shows that despite a few strongly similar outcomes (as in compensation ratios), there is no consistent national practice or policy for stream mitigation assessment.”<sup>268</sup> In fact, the paper trail might understate the range of approaches: “Interview data also showed that the similarity of regulatory documents was deceptive, and obscured the way that regulatory personnel actually balanced local conditions and national policy, approaching each stream compensation project as a unique case.”<sup>269</sup>

Some of these variations simply reflect individualized judgments or random variation.<sup>270</sup> Often, however, they arise from deliberative processes in which Corps staff, staff from other federal agencies, and state regulators all have a say. When assessing stream impacts, for example, the Corps relies on stream assessment metrics to assign ecological values to both impacted and restored lengths of streams. Many of those metrics were developed either by or in partnership with states. Similarly, Interagency Review Teams composed of staff from multiple federal and state agencies review proposals for mitigation banks and in-lieu fee programs.<sup>271</sup> These teams

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263. See Morgan Robertson, *The Work of Wetland Credit Markets: Two Cases in Entrepreneurial Wetland Banking*, 17 WETLANDS ECOLOGY & MGMT. 35, 36 (2009).

264. *Id.* at 47 (describing the site-specific work involved in approving a wetland mitigation bank).

265. See, e.g., BenDor et al., *supra* note 248, at 10325–27 (documenting regional variation in “credit release schedules”).

266. See Doyle et al., *supra* note 12.

267. See *id.* at 293.

268. *Id.* at 296.

269. *Id.*

270. See *id.* (“There were also no readily apparent geographic patterns, such as consistent western versus eastern or mountain versus plain mitigation practices; the scale of difference was finer.”).

271. One regulatory district chief explained this process:

[W]e had multiple meetings with various companies that were coming into our area proposing banks. We had multiple meetings with . . . our interagency review team, a team that helps us review potential mitigation banks. That’s two or three fed agencies

allow the Corps's partners, including the states, an important voice in determining which areas will be targeted for restoration or protection, which can align the Corps's work with state priorities and goals.<sup>272</sup>

### iii. What Gets Mitigated

As that last example illustrates, the Corps's programs are not static, and new ideas can start with regional offices and propagate through the agency, sometimes with dramatic consequences for the program as a whole. An important example of this phenomenon involves the emergence of stream mitigation.

The 404 program is widely described as "the wetlands program," but in reality a huge number of 404 permits involve impacts to streams. Until the last fifteen years, those impacts were rarely mitigated. The national "no net loss" goal, which helped drive the compensatory mitigation program, initially applied to wetlands, and, as one former district chief explained, wetlands were "all the Corps of Engineers districts were mitigating . . . streams that were lost were just lost."<sup>273</sup> Indeed, the Corps's nationwide general permits allowed up to one acre of fill, without even a notification requirement, of headwater streams—which, in the field, sometimes meant any stream a Corps staff person could jump across.<sup>274</sup> That has changed dramatically, and compensatory mitigation for stream impacts is now a huge part of the Corps's work.<sup>275</sup> The importance of that shift is hard to overstate.<sup>276</sup>

How did it happen? There is no simple answer, but much of the change was bottom-up. One former district chief, for example, told a story of visiting a site where, in the mid-1990s, a field staffer had required compensatory mitigation for

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and two or three state agencies . . . and then ultimately we had joint meetings that included both of those agencies as well as . . . those potential bankers to try and hone in on the guidelines . . .

Telephone Interview with Regulatory District Chief (Aug. 22, 2014).

272. Interview with Mitigation Banker, Portland, Maine (Sept. 12, 2014) (observing that restoration criteria are "all very state-driven"); Telephone Interview with Regulatory District Chief (Sept. 12, 2014) (describing working with two states, which "were very different, so I automatically saw . . . how much of an effect a state agency can have on a program").

273. Telephone Interview with former District Chief (Sept. 9, 2014).

274. Telephone Interview with EPA Staff Member (Sept. 19, 2014) ("Their test for five [cubic feet per second of flow] was whether they could jump over it or not. We never even got into ephemeral or intermittent.").

275. See Telephone Interview with Regulatory Division Chief (Nov. 24, 2014) ("[I]t's something that I've really seen a big change in since I've been here.").

276. See Rebecca Lave et al., *Why You Should Pay Attention to Stream Mitigation Banking*, 26 ECOLOGICAL RESTORATION 287 (2008).

stream impacts.<sup>277</sup> It was “something he came up with entirely on his own... all without any sort of mandate from headquarters.”<sup>278</sup> The idea soon spread (and probably started in multiple places).<sup>279</sup> Advances in stream assessment metrics, many of which were pioneered by state agency scientists, accelerated the transition.<sup>280</sup> Other districts began adopting the concept, with the eventual blessing of headquarters and, later, incorporation of stream mitigation requirements into national rules.<sup>281</sup> Not every district chief embraced the change; and the fact that they changed anyway illustrates that the choices weren’t left to local discretion forever.<sup>282</sup> Nevertheless, the evolution of stream mitigation exemplifies the complicated way change can propagate through a federal agency, with regional and field staff, headquarters, and federal and state partners all playing key roles.<sup>283</sup>

### C. Other Agencies

The central point of this Part so far has been that the Army Corps’s regulatory program does not comport with conventional stereotypes of federal administrative agencies. Its operations and decisionmaking structure are deliberately decentralized, with consequences throughout the regulatory process. That raises a question, however: Is the Corps unique? There are reasons why one might expect the Corps to be distinctive; most importantly, other regulatory agencies are not embedded within the military. But even a cursory examination of a few other federal agencies demonstrates that the Corps’s decentralization is shared—even exceeded—elsewhere in the federal government.

The fields of environmental regulation and natural resource management abound with examples. Federal land management agencies like the Forest

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277. Telephone Interview with former District Chief (Sept. 9, 2014).

278. *Id.*

279. Lave et al., *supra* note 276, at 287 (“Over the last eight years, the practice has become increasingly common.”). Another interviewee credited state regulators with a key role in initiating this process: “[T]he State of North Carolina, through their 401 Water Quality Certifications, began requiring stream mitigation for impact to streams.” Telephone Interview with Regulatory District Chief (Sept. 12, 2014).

280. *Id.* (crediting scientists at North Carolina State University for providing key scientific support); *see also* Telephone Interview with EPA Staff Member (Sept. 19, 2014) (“I also think that the science . . . from academia moved itself upstream.”).

281. *See* Telephone Interview with Regulatory District Chief (Sept. 12, 2014) (describing how headquarters encouraged the change by shifting permitting thresholds).

282. Telephone Interview with Regulatory District Chief (Sept. 16, 2014) (“[H]eadquarters had directed him to require mitigation and he didn’t want to and so he was more or less being forced to do some things and he retired.”).

283. *See also* Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (describing a similar learning initiative involving coral reef impacts).



Service, the National Park Service, and the Bureau of Land Management all have offices charged with managing specific geographic areas.<sup>284</sup> Through both law and tradition, those regional authorities have assumed significant discretion, and federal lands within the same general category can be managed in dramatically different ways.<sup>285</sup> Federal fisheries regulation is even more decentralized. Primary authority for developing fishery management plans and annual fishing quotas rests with Regional Fishery Management Councils, each composed of representatives from that particular region of the country.<sup>286</sup> Regional office staff within the National Marine Fisheries Service and the Fish and Wildlife Service do the day-to-day work of implementing the Endangered Species Act, often in consultation with regional office staff at agencies like the Corps.<sup>287</sup> And while EPA staff told me their agency was more centralized than the Army Corps, that centralization is only partial.<sup>288</sup> The EPA also has regional offices, and those offices set regional enforcement priorities and play important roles as partners to state environmental regulatory programs.<sup>289</sup> This list easily could go on. As a consequence, the day-to-day reality of many environmental lawyers and consultants involves working with the regional office staff of various federal agencies.

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284. *What We Do*, U.S. FOREST SERV., <http://www.fs.fed.us/fsjobs/forests-service/whatdo.html> [<http://perma.cc/U6CT-TEVT>] (last visited Nov. 5, 2015) (“The NFS has 9 regional offices, 116 Forest headquarters (called Forest Supervisor Offices), and approximately 570 ranger districts or grasslands.”); *see also* PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 61 (1981) (describing the Forest Service’s managerial structure); NAT’L PARK SERV., NEW EMPLOYEE/SUPERVISOR ORIENTATION HANDBOOK 12–13, [http://www.nps.gov/diversity/NEO/NEO\\_Handbook.MAV.6-20-12%5B1JSmgs%5D.mav.WEB.pdf](http://www.nps.gov/diversity/NEO/NEO_Handbook.MAV.6-20-12%5B1JSmgs%5D.mav.WEB.pdf) [<http://perma.cc/VH7X-E4QC>] (last visited Nov. 5, 2015); BUREAU OF LAND MGMT., TABLE OF ORGANIZATION, [http://www.blm.gov/style/medialib/blm/wo/Business\\_and\\_Fiscal\\_Resources.Par.33189.File.dat/blm\\_org\\_chart.pdf](http://www.blm.gov/style/medialib/blm/wo/Business_and_Fiscal_Resources.Par.33189.File.dat/blm_org_chart.pdf) [<http://perma.cc/N59Y-EFGX>] (last visited Nov. 5, 2015).
285. *See, e.g.*, Martin Nie & Emily Schembra, *The Important Role of Standards in National Forest Planning, Law, and Management*, 44 ENVTL. L. INST. 10281, 10282–83 (2014) (describing the national forest management regime’s emphasis on location-specific planning processes); Sax & Keiter, *supra* note 119, at 243–44 (describing actions taken by a park supervisor).
286. EAGLE ET AL., *supra* note 10.
287. *See About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., [http://www.fws.gov/help/about\\_us.html](http://www.fws.gov/help/about_us.html) [<http://perma.cc/G94L-RPPE>] (last visited Nov. 5, 2015) (“The Service is a decentralized organization with a headquarters office in Washington, D.C., with regional and field offices across the country.”).
288. Telephone Interview with Former EPA Staff Member (Sept. 12, 2014) (describing “increasing headquarters involvement in the regions.”); *see also* Telephone Interview with Army Corps Field Office Staff Member (Sept. 23, 2014) (noting EPA’s lack of field offices, and saying, “I think they’re at a disadvantage there and they would agree . . .”).
289. *See* Dave Owen, *How Enforcement Works*, ENVTL. L. PROF BLOG (Mar. 4, 2014), [http://lawprofessors.typepad.com/environmental\\_law/2014/03/how-enforcement-works.html](http://lawprofessors.typepad.com/environmental_law/2014/03/how-enforcement-works.html) [<http://perma.cc/LUD5-DGGE>] (describing a regional enforcement initiative).

Whether similar degrees of decentralization exist in other regulatory fields is a question beyond the scope of my expertise, and of this particular study. And, again, one might expect more centralization in agencies that do not deal with the nation's huge variety of environmental conditions. But regionalized administrative structures clearly are not unique to the environmental and natural resources realms. Law enforcement agencies like the FBI, ATF, and DEA all have regional offices and staff, as does the U.S. Attorney system.<sup>290</sup> Financial regulation is partly the province of heavily Washington-based entities, but regional banks within the Federal Reserve system also have roles.<sup>291</sup> Federal social service agencies have regional offices, and the day-to-day work of processing claims is often done far from Washington, D.C.<sup>292</sup>

Not every agency uses regional offices. In some, governance really does come from relatively insulated bureaucrats in Washington.<sup>293</sup> And among those that do have regional offices, the level of autonomy enjoyed by those offices probably differs dramatically. For those reasons, one cannot simply transpose lessons from the Corps elsewhere in the federal government. But if those differences place limits upon the reach of this particular study, they also open promising paths for future inquiries. Researchers could learn much from comparing different federal agencies' approaches to regionalization. And even with that caveat, the Army Corps still illustrates a broader, if not universal, theme: Understanding federal governance requires attention to all the work done by the many bureaucrats outside Washington.

### III. THE IMPLICATIONS OF FEDERAL DECENTRALIZATION

So why, then, does that understanding matter? The basic reason is straightforward: Assumptions about federal centralization often lead to policy prescriptions and recommendations for institutional design. And if those premises are wrong, or even just exaggerated, the recommendations may falter as well. More

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290. See *Organization, Mission and Functions Manual*, U.S. DEPT JUST., <http://www.justice.gov/jmd/organization-mission-and-functions-manual> [<http://perma.cc/6EB5-A2TY>] (last visited Nov. 5, 2015) (linking to organization charts); *Local FBI Offices*, FBI, <http://www.fbi.gov/contact-us/field> [<http://perma.cc/8VAT-DWKW>] (last visited Nov. 5, 2015).

291. See *The Structure of the Federal Reserve System: Federal Reserve Banks*, FED. RESERVE BOARD, <http://www.federalreserve.gov/pubs/frseries/frseri3.htm> [<http://perma.cc/6U5P-KJYP>] (last visited Nov. 5, 2015).

292. See, e.g., U.S. DEPT OF VETERANS' AFFAIRS, 2014 FUNCTIONAL ORGANIZATION MANUAL-V2.0A at 46–47 (2014) (describing field operations).

293. See, e.g., *infra* notes 318–20 and accompanying text (discussing the Office of Management and Budget and OMB's Office of Information and Regulatory Affairs).

broadly, the reality of federal decentralization offers a new dimension to our understanding of federalism. This Part discusses each set of implications in turn.

### A. Adjusting the Prescriptions

Legal scholars, jurists, and legislators have developed a series of recommendations from the premise that federal agencies represent centralized governance. One is that we should prefer state or local governments because of their greater sensitivity to local conditions.<sup>294</sup> Similarly, the arguments go, we ought to favor state and local governments because they are more likely to innovate.<sup>295</sup> Both arguments overlap with, and draw additional strength from, a broader claim that state and local governments are more democratically legitimate than the federal government.<sup>296</sup> And, interestingly, this same stereotype can lead to calls for increased presidential oversight over the executive branch, which, the argument goes, will restore some accountability and political sensitivity to an otherwise headless monster.<sup>297</sup> A more realistic portrait of federal governance complicates each of those claims.

#### 1. Sensitivity

The most questionable notion is the oft-repeated claim that federal “staff and civil service employees . . . may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible,” and thus will be less sensitive to local conditions than their state or local counterparts.<sup>298</sup> It overlooks the reality that many federal agency staff live in the areas where they work, and have often done so for decades, if not their entire lives. The Army Corps staff I spoke with, for example, had worked in their present offices for an average of 20 years, and almost two-thirds of my interview subjects were working in the same geographic region where they had grown up. They readily affirmed the notion that a longstanding connection with their work areas helped them do their jobs better.<sup>299</sup> And they thought they had that local connection.<sup>300</sup>

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294. See *supra* notes 77–84 and accompanying text.

295. See *supra* notes 85–98 and accompanying text.

296. See *supra* notes 112–18 and accompanying text.

297. See *supra* notes 106–11 and accompanying text.

298. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 576 (1985) (Powell, J., dissenting).

299. See *supra* notes 167–74 and accompanying text.

300. *Id.*

Their answers comport with common sense. Other than knee-jerk anti-federal bias, there is little reason to suppose that a person will have a lesser understanding of the place she lives and works because her paycheck comes from the federal government. This is particularly true if, as was the case for most Corps staffers I talked to, communication with state agency staff and members of the public constitutes a key part, if not the majority, of each day's work.<sup>301</sup> Sensitivity to local conditions clearly matters. But judges, politicians, and commentators should not assume—as, unfortunately, they often have done—that federal agencies lack that sensitivity, or that achieving sensitivity necessarily requires devolving power to state or local governments.

## 2. Innovation

Federal decentralization also complicates arguments that state or local governments must be the experimental centers of policy innovation. There is no question, of course, that state and local governments can and sometimes do play that role. But, as the Corps illustrates, federal agencies can too.<sup>302</sup> And each level of government brings its own advantages to the experimentation process. National laws do narrow the Corps's discretion, as does a political culture that emphasizes federal agency consistency. But states also have their own forces—national political parties, industries, and advocacy groups, for example—pushing them toward copycat policies; the forces of uniformity do not operate at the federal level alone.<sup>303</sup> Additionally, an agency like the Corps has built-in structures for disseminating innovation beyond its original location.<sup>304</sup> Replication and scaling up are key components of any successful program of policy experimentation, and an organization in which regional staff frequently talk to their counterparts elsewhere has clear advantages on those fronts.<sup>305</sup> There are, in short, reasons why we might favor the federal government, the states, or local

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301. See *supra* notes 165–68 and accompanying text.

302. See *supra* notes 257–83 and accompanying text.

303. See, e.g., Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC, Apr. 14, 2012.

304. See Telephone Interview with Regulatory Division Chief (Oct. 3, 2014) (describing communication techniques, and also noting that “when we do something that’s kind of cutting edge[,] we pool in headquarters-supported resources from . . . [the] Engineer Research and Development Center or [a] laboratory . . .”).

305. See David Albury, *Fostering Innovation in Public Service*, 25 PUB. MONEY & MGMT. 51, 54 (2005). Another significant federal advantage is its tendency to use common protocols and platforms for collecting and storing data, which then can be used to evaluate performance. See David Markell, “Slack” in the Administrative State and Its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 45 (2005).

governments as generators of innovation. But there is little reason for a categorical preference.

There is one important caveat to these assertions about sensitivity and innovation. Federalism theorists have often observed that a key consequence of federalism is to allow different voting blocs to prevail in different places.<sup>306</sup> We empower state or local governments, under this theory, partly to allow groups that are political minorities on the national scale to implement and test their policy ideas in smaller geographic units where they constitute a majority.<sup>307</sup> Those smaller geographic units also serve as consolation prizes; if liberals cannot have the Senate, for example, at least they can have San Francisco, and that accommodation will preserve some national unity amid national disagreement.<sup>308</sup> This study does not undercut that particular rationale for state or local authority (or, if one fears the influence of state or local-scale factions, that argument against state or local authority). But that has been just one of several common arguments for favoring state or local-scale governments in institutional choice debates.<sup>309</sup> If that argument is to prevail—and sometimes it should—it will often need to prevail on its own.

### 3. Centralized Accountability

In a widely cited 2001 law review article, then-professor Elena Kagan argued in favor of strong presidential control of bureaucratic structures.<sup>310</sup> A key premise of her argument was a claim that the bureaucracy was relatively isolated from and inaccessible to the broader public, while the president was much more visible and directly accountable.<sup>311</sup> That argument echoes claims often made by more right-leaning unitary executive theorists.<sup>312</sup> For some, the argument is largely textual, but for others, the basic foundation for unitary executive theory is the need for responsive, accountable governance.<sup>313</sup>

That argument begins to break down, however, if agency staff are not actually isolated and inaccessible. If, instead, federal regulators are tied to the communities they regulate and to the people who benefit from their regulatory efforts, then shifting power to the president may actually be a way of *reducing* sensitivity

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306. See, e.g., McGinnis & Somin, *supra* note 81, at 106.

307. Gerken, *supra* note 81, at 1354–55.

308. Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1960 (2014).

309. See *supra* Part I.

310. Kagan, *supra* note 106; see also Bressman, *supra* note 107, at 485–92 (summarizing this “presidential control model”).

311. Kagan, *supra* note 106, at 2332.

312. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (“The diffusion of power carries with it a diffusion of accountability.”).

313. See, e.g., *id.* (emphasizing both textual and functional arguments).

and political accountability.<sup>314</sup> After all, a sense of accountability doesn't just come from the possibility of future votes. On a low-salience issue like wetlands permitting, being required to explain and answer for a decision in a public forum, in a meeting, or on the phone may be a far more effective mechanism of accountability than a general election. And the president, or even a governor, is much less likely to have those alternative accountability moments than a Corps field officer or district chief. Indeed, there is some evidence that when executives receive heightened authority over day-to-day governance functions like permitting, they will use that authority primarily to favor a select few people with political connections, not to respond to the nuances of local conditions or to promote any broader conception of public benefit.<sup>315</sup>

The potential problems seem even greater when one considers that consolidating executive power often just means shifting power elsewhere within the executive branch. The President, after all, is usually busy, and implementing his increased control will necessarily require redelegating some authority.<sup>316</sup> Some advocates of strong executive oversight envision achieving that control through cost-benefit analysis, which would probably mean delegating more authority to experts within the Office of Management and Budget (OMB).<sup>317</sup> But with OMB, the bureaucrat-in-Washington stereotype really is accurate; the agency has no staff in most of the places directly impacted by the regulatory programs it reviews.<sup>318</sup> Its analysts probably will never sit through a public meeting at which community members speak out about a proposed permit, talk with a permit applicant, or participate on coordinating committees with state agency staff.<sup>319</sup> If past practices are any preview of the future, OMB may not even be particularly transparent to D.C. insiders, unless they represent regulated industries.<sup>320</sup> Taking federal agency decentralization into account, in other

314. A sympathetic connection also can spawn cronyism. *E.g.*, *N. Cal. River Watch v. City of Healdsburg*, 2004 WL 201502, at \*15–16 (N.D. Cal. 2004) (describing an egregious example).

315. *See, e.g.*, Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View Into the Trustee's World*, 39 *ECOLOGICAL L.Q.* 123, 179–86 (2012) (documenting connections between executive control and political favoritism).

316. *See* Freeman & Rossi, *supra* note 13, at 1175–81 (describing mechanisms of presidential control).

317. *See, e.g.*, Eric A. Posner, *Controlling Agencies With Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 *U. CHI. L. REV.* 1137, 1141 (2001).

318. EXEC. OFF. PRES., OFFICE OF MANAGEMENT AND CONTROL, [http://www.whitehouse.gov/sites/default/files/omb/assets/about\\_omb/omb\\_org\\_chart\\_0.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/about_omb/omb_org_chart_0.pdf) [<https://perma.cc/8P5W-RK49>]. Every division has a 202 area code.

319. *See* Robin Bravender & Emily Yehle, *Wonks in Embattled Regulatory Office Are Mysterious—But 'Not Nefarious'*, *ENV'T & ENERGY PUBL'G*, (Feb. 18, 2014), <http://www.eenews.net/stories/1059994711> [<http://perma.cc/479Q-JX2Q>] (describing long hours, noninteractive public meetings, and a total absence of travel).

320. *See* Farber & O'Connell, *supra* note 28, at 1165–67, 1175 (describing OIRA's insulation).

words, means acknowledging that further centralizing executive oversight may mean losing important mechanisms of public sensitivity and accountability.

#### 4. Legitimacy

Related to both of these points is a broader claim: The reality of regional administration complicates arguments about the relative legitimacy of federal, state, and local governments.

Responding to those arguments is difficult because the very concept of legitimacy is as contested as it is important. To some people, legitimacy derives from accountability.<sup>321</sup> To still others, it derives from grounding decisions in sound scientific, technical, or policy analyses, or from observing good procedures.<sup>322</sup> That grounding may require insulation from local or regional political preferences, if undue political influence is a concern. Or it may require awareness of those preferences as a precondition to informed decision making. For many people, legitimacy arises from longtime connections to the places affected by decisions; they are reluctant to vote for, or take direction from, someone they perceive as a geographic outsider. The tension among those views can be substantial.

Nevertheless, whatever view one holds, regional administration complicates its application to governance. If sensitivity to local conditions is a hallmark of legitimacy, then the geographic distribution of federal agencies undercuts arguments that state or local governments are more legitimate. Similarly, if accountability is key, the fact that regional federal administrators have repeat contact with the people they regulate, and the people for whom they regulate, surely should influence our perceptions of the legitimacy of their actions.<sup>323</sup> If legitimate governance means a New-Deal-like ideal of politically-insulated technical expertise, then decentralization might actually lessen the federal government's legitimacy—except that being closer to the regulated resources also means being closer to some of the information that would inform a technical analysis.<sup>324</sup> Finally, if consistency is important, then a key question is the extent to which the regional dispersion of federal governance results in treating like situations in unlike ways. And if all of these factors matter, then any discussion of legitimacy will require a nuanced comparative analysis of the ways federal agencies (and their state counterparts, which also may be more or less decen-

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321. See generally Bressman, *supra* note 107 (critiquing this view).

322. See *id.* at 494 (focusing on avoiding “arbitrariness” as a key criterion of legitimacy).

323. See *supra* notes 165–68 and accompanying text (describing frequent public contacts).

324. For the classic statement of this model, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

tralized) manage the challenges and opportunities that decentralization creates. In short, acknowledging federal decentralization will not end the legitimacy debates. It just complicates them.

## B. The Regional Office and the State in a Federal System

Distilled down, a key point of the previous Part is that regional federal offices produce some of the benefits, and some of the problems, that federalism theory traditionally associates with state or local governments. On its own, that point has important implications for federalism debates; it weakens key functionalist arguments that judges, politicians, and academics have routinely deployed to support regulatory devolution. But the implications transcend traditional debates about divvying up power between the federal government and the states. Regional offices also have important implications for the many spheres in which regulatory roles overlap and power is shared. In these realms, regional federal offices play a key—albeit unappreciated—role in helping a federalist system succeed.

Understanding that assertion requires a brief review of current federalism theory. In recent years, most discussions of American legal federalism have played around a few key threads. The dual federalists focus on conflicts between state and federal authority and the concomitant need to protect distinct state spheres from federal overreach.<sup>325</sup> Dual federalism remains influential within the Supreme Court, but a wide variety of academic theories now provide counterpoints to it.<sup>326</sup> Common to most of these theories are assertions that preserving separate, distinct spheres of authority is neither practically possible nor desirable, and that the overlap is where the excitement lies.<sup>327</sup> While these theorists differ in their areas of emphasis, all agree that a complex, overlapping system of governance institutions is not just an inescapable reality but also a potential source of good policy.

All of these accounts have added richness to federalism theory, but they have also left something important out. The new schools of federalist thought have not explained how people from a variety of different federal, state, and local agencies will actually go about talking through their agreements and differences. Will they use phone calls, emails, or in-person meetings? If they will talk face to face, where will they meet, and who will be in the room? These may sound like mundane questions, but they are crucially important. Coordination within complex

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325. See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

326. See *supra* notes 56–66 and accompanying text.

327. See, e.g., Schapiro, *supra* note 59; Ryan, *supra* note 17; Freeman & Farber, *supra* note 20.



regulatory terrains can succeed or go very badly, and communication systems help determine when cooperation thrives, and whether conflicts produce constructive outcomes or spiral out of control.<sup>328</sup>

If the federal government were truly centralized, those communication challenges would be quite difficult. They would not be impossible, of course; emails and phone calls can reach Washington, D.C., just as quickly as the cubicle next door. But as nearly every study of collaboration emphasizes, face to face contact matters.<sup>329</sup> It builds trust and understanding, creates a sense of focus, and facilitates large group meetings in ways that remain quite difficult to replicate even through the best videoconferencing technology.<sup>330</sup> Without that face to face contact, the dynamic federalists' emphasis on constructive collaboration and successful conflict would be much less plausible.<sup>331</sup> With it, a governance system predicated on extensive intergovernmental interaction has much better odds of succeeding.<sup>332</sup>

Regional federal offices make that kind of communication possible. Sometimes, they provide a physical space where federalism can be sorted out, in person, across a conference table—or over a cubicle wall.<sup>333</sup> Sometimes they provide a base from which federal officials can reach their meeting locations or field sites with just a short drive.<sup>334</sup> They also let federal and state regulators get to know each other, and the resulting familiarity can build trust and social capital.<sup>335</sup> That won't always happen; Corps staff told me that tensions exist, and that in some cases their relationships with state staff are decidedly chilly.<sup>336</sup> But

328. See Freeman & Rossi, *supra* note 13, at 1147–48, 1150–51 (describing coordination problems).

329. See, e.g., COMM. ON FACILITATING INTERDISCIPLINARY RESEARCH ET AL., FACILITATING INTERDISCIPLINARY RESEARCH 91 (2004) (emphasizing how face-to-face contact helps interdisciplinary research succeed); Priyamvada Tripathi & Winslow Burleson, *Predicting Creativity in the Wild: Experience Sample and Sociometric Modeling of Teams*, Proceedings of the ACM 2012 Conference on Computer Supported Cooperative Work, February 11–15, 2012, Seattle, Washington.

330. See Greg Lindsay, *Engineering Serendipity*, N.Y. TIMES (Apr. 5, 2013), <http://www.nytimes.com/2013/04/07/opinion/sunday/engineering-serendipity.html> [<http://perma.cc/XG67-4VN2>].

331. See Ryan, *supra* note 327, at 82 (noting the importance of relationships to successful federal-state bargaining).

332. See generally Ronald S. Burt, *Structural Holes and Good Ideas*, 110 AM. J. SOC. 349 (2004) (arguing that better ideas emerge from the fringes of cohesive groups).

333. See *supra* notes 163–64 and accompanying text.

334. See Telephone Interview with Army Corps Field Office Staff Member (Sept. 23, 2014) (emphasizing the need to “get out in the field . . . face to face”).

335. See Telephone Interview with former FWS Staff Member (Aug. 26, 2014) (“We met frequently. . . . sometimes [we] met socially.”).

336. E.g., Telephone Interview with Project Manager (Aug. 22, 2014) (“[W]e don’t have a real great relationship . . . .”). Sometimes the differences arise from different regulatory priorities and sometimes from differences in pay. As one Corps staff member explained, “Unfortunately . . . you go into meetings with your partners and you’re both representing the [same] resources . . . and you may be making twenty-five to fifty percent more than they are. And so it’s stressful, there is resentment

for many Corps staff, talking with other state agencies, local governments, and regional offices from other federal agencies is a daily responsibility.<sup>337</sup> And the resulting relationships hold professional, and sometimes personal, value.<sup>338</sup>

Communication becomes much more important if it can lead people to actually do something, and here as well, regional offices matter. They provide geographically limited spaces within which states and local governments can tailor federal policy to their liking. State programmatic general permits are perhaps the best example of this phenomenon, for they allow state environmental officials, working with Corps district or field staff, to create state-specific permitting requirements and protocols.<sup>339</sup> But that is just one example. Corps district and field offices also work with states to develop compensatory mitigation approaches, to identify targeted areas for protection, and to resolve questions associated with major development projects.<sup>340</sup> The states cannot always have their way; a state—and there are many—that would prefer to do away with wetland or stream protection is limited by the basic dictates of federal law (though obtaining some measure of regulatory relief through increased permitting efficiency is a much more achievable goal).<sup>341</sup> But in many circumstances, the states do have real leverage, and they are constantly working with regional offices to put that leverage to effect.<sup>342</sup> The Corps takes those relationships seriously. As one division chief explained:

One . . . strength of the program . . . is that we can tailor the program, within sideboards, so that it fits as well as it could possibly be with the individual state program. . . . [W]e want to make sure that we're working hand-in-glove with the states. . . . Each state does its business a little differently, and (if) we have one-size-fits-all for fifty states across the nation . . . . I think it's going to compromise the effectiveness of the program. If we can work individually with each state and generally follow the rules and regulations but try to tailor the program to interact effectively with the state programs, I think it's a good thing. I think we've been very successful doing that.<sup>343</sup>

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from the state people about oversight or anything that they would perceive . . . eclipses them in any way.”). Telephone Interview with Regulatory District Chief (Sept. 16, 2014).

337. See *supra* notes 165–66 and accompanying text.

338. *E.g.*, Telephone Interview with Former FWS staff member (describing a recent retirement party, thrown by state agency staff, for a Corps district chief).

339. See *supra* note 235 and accompanying text.

340. See *supra* notes 242–83 and accompanying text.

341. See ENVTL. L. INST., *supra* note 249, at 13.

342. See *supra* Figure 3.

343. Telephone Interview with Army Corps Division Chief (Nov. 24, 2014).

Regional offices don't just help facilitate state innovation. They also help replicate it. Because many Corps districts are not coterminous with states (the boundaries instead were often drawn by watersheds), Corps offices work with multiple states.<sup>344</sup> That means those offices can export ideas from one state to another. Through conference calls, meetings, and trainings, the Corps also can transfer ideas across district boundaries. The states have their own mechanisms for communicating policy ideas, of course, but because contacts are more structured and repeated, the internal mechanisms within a federal agency are likely to be substantially more robust. That has real consequences. To provide just one example, when North Carolina developed particularly sophisticated methods for assessing the ecological value of streams, those ideas could be disseminated to Corps districts and other states across the nation.<sup>345</sup>

In his classic dissent in *New State Ice Co. v. Liebmann*, Justice Brandeis referred to the states as "laboratories of democracy." That description, though accurate, is underinclusive. Some of the most effective laboratories may be conference tables surrounded by staff from local and state governments and federal regional offices. By making those meetings possible and meaningful, regional federal offices can serve as the vectors of functional federalism.

#### IV. TAKING ADVANTAGE OF FEDERAL REGIONALISM

A key argument of this Article is that regional federal offices partially undercut many common assumptions about federal administration. But "partial" is an important word here. I make no claim that regional federal offices replicate all the benefits, or problems, associated with state or local governance. The reasons are partly cultural: We generally expect federal agencies to be nationally consistent in their regulatory approaches, and they strive to oblige.<sup>346</sup> But the emphasis on federal consistency also animates existing legal structures and doctrinal rules. Unlike federalism doctrines, many of which are designed to promote geographic variation, our system of federal administrative law is largely indifferent to the existence of regional offices,<sup>347</sup> and in some instances displays a pronounced preference for national consistency. That raises the final question addressed by

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344. See Figure 1, *supra* note 161 (showing Corps office locations).

345. See Telephone Interview with EPA Staff Member (Sept. 16, 2014) ("[T]he state of North Carolina did some of the strongest early work and [was] very influential in getting more attention paid to stream mitigation.").

346. See *supra* notes 188–89 and accompanying text (describing the emphasis Corps staff place upon consistency).

347. See Farber & O'Connell, *supra* note 28, at 1151 ("The Court also assumes the leaders of these agencies make the delegated decisions.").

this Article: What would administrative law look like if we sometimes accorded regional variation *within* federal administrative agencies some of the same value that we attribute to variation *outside* those agencies? In other words, what if we didn't just acknowledge the reality of regional federal administration, but also treated that reality as an opportunity, in appropriate circumstances, for experimentation and reform? The discussion that follows explains a few potential changes.

To put those changes in context, imagine that Congress has enacted a sweeping but imprecise statute, and the statute empowers an administrative agency to flesh its requirements out through rulemaking. Imagine, also, that despite widespread agreement that the statute responds to an important problem, reasonable people disagree about how that problem should be addressed. The statute itself, broadly worded as it is, leaves open several potential regulatory approaches, and no one is entirely sure which will work best. A sensible response to this situation would be to permit different parts of the country to experiment with different approaches.

In practice, Congress does often provide that permission. But it typically designates *state* governments as the loci of experimentation. Sometimes Congress uses cooperative federalism schemes to allow states to tinker with federal programs.<sup>348</sup> Indeed, those schemes pervade environmental law.<sup>349</sup> Sometimes it offers states opportunities to obtain waivers from the otherwise overarching requirements of federal law.<sup>350</sup> Welfare, education, and health care laws have all used this second approach.<sup>351</sup> But rarely does Congress specifically authorize federal agencies to craft markedly different legal schemes in different places.<sup>352</sup> And while, in practice, federal agencies do create some variation, they do so within a broader culture that emphasizes consistency as a paramount value. That places a ceiling on regional administrative experimentation within the hierarchy of federal administrative law: It can happen with permitting, guidance, or enforcement, but generally not with governing regulations or statutory law. One consequence is that federal agencies are probably not experimenting nearly as much as they could.

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348. See *New York v. United States*, 505 U.S. 144, 167–68 (1992) (listing examples).

349. See Erin Ryan, *The Spending Power and Environmental Law after Sebelius*, 85 U. COLO. L. REV. 1003, 1037 (2014) (listing many of environmental law's cooperative federalism programs).

350. See Barron & Rakoff, *supra* note 95, at 279–90 (describing “big waivers”).

351. See *id.*

352. For exceptions to this generalization, see 16 U.S.C. § 1533(d) (2012) (allowing FWS and NMFS to craft special rules for the management of individual threatened species) and 16 U.S.C. § 1539 (2012) (allowing FWS and NMFS to designate “experimental” populations subject to separate protection rules).

There are alternative possibilities.<sup>353</sup> First, agencies could use their regional offices to engage in regionally tailored but nationally inconsistent rulemakings. In other words, they could set up, through rulemaking, regulatory regimes that experiment with one policy approach in one part of the country and with other policy approaches elsewhere, even if those approaches embody incompatible interpretations of governing law. Second, and similarly, agencies could develop different bodies of adjudicatory precedent within different parts of the country, much as happens within the court systems of the fifty states. Third, Congress might extend the same waiver options it currently grants to states to regional offices within the federal government.<sup>354</sup> Congress might allow, for example, a regional federal office to set up an alternative to the Endangered Species Act or the Affordable Care Act if the alternative scheme meets some pre-specified set of criteria.

Would these approaches be legal? With waivers, the answer should be yes.<sup>355</sup> Waiver options for states are commonplace, and while federal waivers have seen less frequent use, courts have upheld them as lawful delegations of power.<sup>356</sup> For regionally inconsistent rulemakings or adjudicatory decisions, the analysis is more complicated. Consistency clearly is a basic goal of administrative law, and any experienced administrative litigator knows that highlighting inconsistencies in agency decisions is a powerful way to weaken the government's position. Existing deference doctrines also suggest favoritism toward nationally consistent, centrally endorsed legal interpretations.<sup>357</sup>

But that should not be the end of the matter. In other contexts, administrative law supports an agency's ability to diverge from its own past interpretation of

353. For discussion of research models for experimentation, see Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 933–34 (2011).

354. See Barron & Rakoff, *supra* note 95, at 279–90 (describing examples).

355. See generally *id.* (praising “big waivers”).

356. See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 119, 129 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008) (upholding a law that allowed the Department of Homeland Security to waive environmental laws that might impede construction of a border fence).

357. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the Court declined to accord *Chevron* deference to a tariff classification issued by the United States Customs Office. Explaining that holding, the Court wrote:

Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting. Although the circumstances are less startling here, with a Headquarters letter in issue, none of the relevant statutes recognizes this category of rulings as separate or different from others . . . .

*Id.* at 233. See also *Troutman v. Cohen*, 588 F. Supp. 590, 598 (E.D. Pa. 1984) (“Approval by a regional director of the HCFA need not be given the same substantial weight as the official policy of HCFA.”). But see *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (according “considerable deference” to a regional office’s legal interpretation).

statutory law, so long as it provides a reasonable explanation of the new interpretation.<sup>358</sup> The basic premise of that doctrine is that when Congress has drafted an ambiguous statute, it has implicitly given the agency some latitude to choose its approach.<sup>359</sup> That acceptance of *temporal* variation ought to extend to *regional* variation as well. If it is perfectly allowable for an agency to choose one approach at time A and another at time B, so long as it explains why each approach is reasonable at the time, it ought to be equally allowable for an agency to choose one approach at place A and another at place B, so long as it explains why each is suited to its place. Or the agency might just say, “we don’t know whether approach A or B will be better. The statute allows both, and trying each will be a good way to figure this out.”

A more difficult question is whether that sort of experimentation, even if legal, is desirable. Often, the answer will be no. In some areas of law, there is little justification for different rules in different places. It seems intuitively obvious, for example, that an importer should not be able to obtain a different tariff classification just by shipping its goods through New Orleans rather than Los Angeles. Regional variation also may create negative externalities for other regions. Giving the upper Midwest a regional waiver from air quality rules, for example, may lead to negative consequences in downwind northeastern states.<sup>360</sup> And regional variations can make the law more complex, leading to a confusing patchwork quilt of regulatory requirements.<sup>361</sup> These concerns probably sound rather familiar; allowing regional variations within federal governance could lead to many of the same problems that commentators commonly associate with state governance.<sup>362</sup> Nevertheless, that familiarity raises questions. If, in spite of those threats, we still prize states’ ability to create distinctive legal regimes, should we not endorse regional variation—at least sometimes—within the federal government itself?

Figuring out exactly when that endorsement would be appropriate is beyond the scope of a one-agency study. But a few criteria can at least be tested as hypotheses in future work. Regional federal variation seems most appropriate when experimentation and learning would advance some national goal—for example, controlling healthcare costs or compensating for wetland impacts—and when local conditions are likely to vary significantly across the country. Conversely,

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358. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

359. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843–45 (1984).

360. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2351 (1996) (explaining how prevailing winds create this threat).

361. See Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 340 (2010) (noting this argument).

362. See generally Esty, *supra* note 3, at 599–613 (reviewing arguments in favor of federal environmental law).

federal regional variation is likely to be least appropriate where regional differences in regulatory approaches would create significant externalities or collective action problems, or where national scale markets would thrive best under consistent regulatory conditions. Often, those criteria will point in opposite directions, but considering the balance among them would be a starting point for determining when regional federal governance offers an attractive option.

Lawmakers might also construct procedural mechanisms and power-sharing arrangements responsive to some of the potential objections. Congress or an agency could create extra layers of review for variations, perhaps even creating interagency teams to review proposals.<sup>363</sup> Similarly, if Congress worries that allowing federal agencies to independently seek waivers might freeze states out of the regulatory process, it might require that waiver proposals be crafted by partnerships between federal regional offices and state agencies. That kind of partnership is not new; as Part II discussed, the Corps already works with state agencies to craft state-specific permits. State-specific rules or waivers would just be more ambitious applications of that same basic concept.

Even with those protections in place, regionally tailored rules and statutory waivers are not likely to be appropriate for every regulatory problem. There are very good reasons why administrative law has emphasized consistency. But in some situations, federal regional offices offer another potential site for tailored, innovative legal responses, and an alternative to traditional binary choices between a centralized federal government and a decentralized set of states and localities.

## CONCLUSION

Legal commentators tend to focus on elite institutions. The Supreme Court, Congress, and the presidency receive far more attention than mid-tier courts or agencies, and within agencies, the actions of directors often enjoy far greater prominence than those of their subordinates. With that focus comes an often-unacknowledged geographic narrowing, because the top government officials that receive most of the attention generally work in Washington, D.C. There are, of course, perfectly good reasons for that focus. When the Supreme Court or Congress speaks clearly, agencies must follow those dictates, and most agencies do utilize hierarchical organizational structures. But that focus upon elites can go too far. Sometimes, it can obscure the discretion enjoyed by subordinate institutions. It also obscures the fact that within any institution, most decisions

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363. See *supra* notes 271–72 (describing interagency review teams).

never reach the elites. The day-to-day work of governance comes largely from mid- and lower-level decisionmakers.

This Article has argued for attention not just to what these mid- and lower-level decisionmakers do, but also to where they do it. In judicial, academic, and political circles, it is popular to portray federal administrative governance as emanating from Washington, D.C. Sometimes that portrayal is accurate. But quite often, it is not; important decisions are made every day in regional offices across the nation.

That reality has important implications. It weakens some of the key assumptions underlying traditional theories of federalism, and it offers new ways of understanding the relationships between the federal government and its state and local counterparts. It also opens up potential opportunities to reform, for there are many ways in which federal decentralization could facilitate better governance, as well as some ways in which it could make governance worse. Measuring those benefits, determining which modes of decentralization function best, and assessing whether those modes are transferrable to other regulatory programs all are potential questions for future research. And if the core thesis of this Article holds any merit, they are questions worth pursuing.