



ARTICLE

Reviving Federal Regions

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Abstract. More than one hundred executive departments and agencies operate through systems of regional offices strategically located around the country. Currently, these regions are misguidedly viewed as mere enforcers and implementers of central policies. We propose two alternative visions of federal regions—regions as mediators and regions as coordinators. These two visions have deep roots in the rich but forgotten history of U.S. public administration. In the New Deal era, federal regions were understood as mediating entities between the central government’s centralizing efforts and regional needs and conditions. With the expansion of federal programs and agencies in the 1950s and 1960s, federal regions were gradually reconceived as vehicles for coordination among the different branches of the administration as well as between the federal government and the states. Since the 1980s, however, federal regions have been seen as part of the oversized federal government and have thus been mistrusted, their role confined to that of mere enforcers.

This Article calls for a revival of viewing federal regions as mediators and coordinators. It argues that when regions live up to their potential, they inject a much-needed dose of democracy into the bureaucracy, improve the coordination among federal departments and agencies, and serve as a powerful check on presidential overreach. Federal regions

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mediate between central headquarters and state and local governments. Their proximity to the states and to regulated populations and industries enables regional offices to counter the democratic deficit that plagues U.S. bureaucracy. Relatively insulated from Washington, D.C. and state partisan politics, regional officials fuse their expertise with principled politics and can avoid capitulating to the will of the President or presidential appointees. Our model of federal regions as coordinators envisions them as entities that coordinate among the different departments, agencies, states, and localities that operate within given regions.

Our innovative understanding of federal regions gives rise to a promising alternative to both the centralizing, national vision and the state-centered vision of American federalism. We then propose a set of legal doctrines and principles that modify administrative law to suit the unique characteristics of federal regions. Included among these doctrines are broad subdelegation of powers to regions; greater judicial deference to regional policies and decisionmaking; and intergovernmental consultation and redelegation at the regional level.

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Introduction

More than one hundred federal departments, agencies, offices, and bureaus, some old and some new, some executive and some independent, operate through a system of regional offices strategically located across the country. Among the departments and agencies that have administrative regions are the U.S. Environmental Protection Agency (EPA), the U.S. Social Security Administration (SSA), the Consumer Financial Protection Bureau (CFPB), the Federal Emergency Management Agency (FEMA), the Federal Reserve System, the U.S. Department of Housing and Urban Development (HUD), the Bureau of Land Management (BLM), and the National Labor Relations Board (NLRB), to name a few.¹ The regional offices of these and other federal entities serve as a governmental layer sitting in between the Washington-based headquarters and the field offices of the agency. Each regional office typically reigns over a broad geographic region encompassing several states and is in charge of its department's or agency's operations within its jurisdiction.² Regional offices

1. See *EPA Organization Chart*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/H5BX-KTSL> (last updated Mar. 7, 2018); *Organizational Structure of the Social Security Administration*, SOC. SECURITY ADMIN., <https://perma.cc/F7LG-H23R> (archived Apr. 21, 2018); *Meet Our Regional Directors*, CONSUMER FIN. PROTECTION BUREAU (Mar. 12, 2013), <https://perma.cc/KP87-KYV8>; *FEMA Regional Contacts*, FEMA, <https://perma.cc/XP3F-XKU9> (last updated Jan. 3, 2018); *About the Federal Reserve System*, BOARD GOVERNORS FED. RES. SYS., <https://perma.cc/VE5Y-RPV8> (last updated Mar. 3, 2017); *HUD's Regions*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/FY3U-JC8X> (archived Apr. 21, 2018); *Organization Chart*, BUREAU LAND MGMT., <https://perma.cc/P3KH-CP6P> (archived Apr. 21, 2018); *Regional Offices*, NAT'L LAB. REL. BOARD, <https://perma.cc/J6L5-WYAH> (archived Apr. 21, 2018).

Some regions, such as those of the EPA or of HUD, are a top administrative level serving directly under the agency's administrator or the department's secretary; other regional schemes, however, are subunits within departments or agencies—for example, the Bureau of Land Management within the U.S. Department of the Interior. See *Bureaus*, U.S. DEP'T INTERIOR, <https://perma.cc/56CS-YJGZ> (archived May 18, 2018). In some cases, a department or agency may have a regional structure both at the top and at the subunit level, such as the Office of Multifamily Housing within HUD. See *Multifamily Regional Centers and Satellite Offices*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/RHG3-DXNB> (archived Apr. 21, 2018).

2. The federal regions discussed in this Article are different from three other types of regional entities that currently exist in the United States: regional special purpose governments (SPGs) (for example, in metropolitan settings), interstate compacts, and congressionally created special federal regional administrations (such as the Tennessee Valley Authority and the Appalachian Regional Commission). What distinguishes this Article's federal regions from the other types of regional schemes is that while the former are part of an overall federal scheme that maps the entire national territory and divides it into regions, the latter are smaller in scale, ad hoc, and sporadic. Indeed, the federal regions we deal with are subdivisions of federal agencies whose geographical reach and mandate span the entire national territory. Furthermore, interstate compacts and regional SPGs are often voluntary; their creation depends on the agreement of the component states and localities. Jessica Bulman-Pozen recently provided an account of

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normally implement central policies, oversee the department's or agency's field operations, make determinations regarding states' applications for grants and permits, and form regional policies—all within their region.

Currently these federal regions are regarded chiefly as mere enforcers and implementers of central policies—the long arms of a wholly centralized bureaucracy. Such an intuitive, yet impoverished, understanding of federal regions has led in turn to their weakening through deficient legal authorization by Congress and misguided interpretations of their powers by administrators and courts. The history of federal regions suggests that there are better alternatives to this understanding; regions could serve as mediators between state and federal interests and as coordinators among scattered federal and state agencies. Designing administrative regions according to these alternative visions, and reframing and amending various administrative law doctrines in accordance, could make the federal administration more responsive, effective, democratically accountable, and capable of responding to the vexing challenges it currently faces: a severe democratic deficit,³ acute problems of intergovernmental coordination,⁴ and increased political control by the President over the administration.⁵

the various forms of regionalism in the United States. *See generally* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377 (2018) [hereinafter Bulman-Pozen, *Our Regionalism*]. For a detailed discussion of regional SPGs, see Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1781-88 (2002) (describing SPGs as the “most common mechanism in the United States for dealing with regional problems” while emphasizing the need for other metropolitan solutions). For a recent study of interstate compacts, see Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016) [hereinafter Bulman-Pozen, *Executive Federalism*]. For more on the Tennessee Valley Authority, see Gordon R. Clapp, *The Tennessee Valley Authority*, in REGIONALISM IN AMERICA 317 (Merrill Jensen ed., 1965); and Roscoe C. Martin, *The Tennessee Valley Authority: A Study of Federal Control*, 22 LAW & CONTEMP. PROBS. 351 (1957).

3. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (demonstrating how a decentralized structure enables democratic experimentalism and alleviates the democratic deficit).
4. *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (discussing the challenges of interagency coordination and the relative strengths and weaknesses of different coordination tools); Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886 (2012) (demonstrating how decentralized power enables democratic experimentalism by allowing regulatory agencies to adjust circumstances-based solutions while using local knowledge); Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421 (2015) (illustrating how regulatory agencies act strategically while facing presidential review, which can lead to resistance and self-insulation); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (describing how executive agencies augment their capacities by mixing and matching resources allocated to different agencies).
5. *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (describing the President's primary control over administrative agencies as inconsistent with separation of powers principles); Abner S. Greene, *Checks and Balances in an*
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The first potent alternative vision of federal regions we distill from the historical record is the conception of regions as *mediators*. This conception views them as mediating between central headquarters on the one hand and state and local governments on the other. Each governmental level represents a different set of interests and values; these sets of interests are often in conflict. Thus, regional offices, which are tasked with implementing agency policies in the region, are required to mediate between these competing sets of interests. Regional offices can navigate between the pull from below and push from above, applying agency policies in ways that are more attuned to both central demands and the people who reside in the region. Regional offices also mediate between politics and expertise, serving as buffers between political pressures and professional commitments. Relatively insulated from both Washington and state partisan politics,⁶ regional officials can infuse their expert points of view with principled politics without simply capitulating to the will of the President or presidential appointees. They can thereby serve as much more than passive agents of Washington; they can be policymakers in their own right. Accordingly, authorizing the regions to serve as normative mediators could, counterintuitively (given the tendency to view the administration as democratically inferior to the political branches), ameliorate the democratic deficit that currently afflicts the administration.

The second conception—regions as *coordinators*—sees them as the primary coordinating agents of the federal government within a particular region. Many contemporary accounts view centralization as the best remedy for interagency coordination problems.⁷ In contrast, we propose decentralization within the federal government as the better solution. Our approach rests on the fact that regional offices oversee a large number of federal programs and policies that are administered by different departments and agencies in the

Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123 (1994) (calling to restrain the delegation of substantial lawmaking power to the President in order to sustain checks and balances); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (illustrating the Clinton Administration's tight presidential control over regulatory activities and arguing for the merits of such control).

6. Contrary to received wisdom, it is no longer clear that states' elected bodies pay more attention to or better represent distinctly local issues and preferences; to the contrary, states are often subsumed by national partisan politics. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 767 (2017) (“[T]o the extent that they are second order, the outcomes of many state and local elections have little to do with anything that *ought* to matter—like the past performance of state government, or candidates' positions on issues in front of the state or local governments.”); *id.* at 782 (“[G]iving authority to state governments may not produce policies that are particularly representative of local preferences or for which state officials are held accountable.”).
7. For a summary and critique of some of these accounts, see Jennifer Nou, *Agency Coordinators Outside of the Executive Branch*, 128 HARV. L. REV. F. 64 (2015) (discussing the costs and benefits of centralized executive control of agency adjudication).

region. This makes regional offices ideally situated to coordinate between the departments and agencies, whose jurisdictions often overlap and even conflict, and to forge an intergovernmental regional perspective and agenda. Moreover, regional offices can coordinate not only among the large number of federal agencies but also between the agencies and the state and local governments within the region.

These two alternative conceptions of federal regions have significant potential to alter our understanding of the U.S. system of federal government. Many accounts of federalism imagine that only states (and sometimes localities) can achieve federalist goals⁸: being responsive to democratic preferences and interests; preventing the concentration of excessive power in one governmental entity; promoting experimental democracy; constructing qualified and well-regulated jurisdictional competition; enhancing diversity; and protecting disadvantaged minorities. The federal government, in this common view, serves as a corrective for the various problems associated with decentralization, such as problems of coordination, inequality, negative externalities, myopia, and fragmentation. Even when central bodies such as Congress and the President promote federalism, they do so by transferring powers from the federal government to the states. But hardly anyone seems to suggest that the federal government itself can advance federalist ideals.⁹ Our novel claim is that this is precisely what the federal government does by administering authority through its territorial subdivisions—the regional offices of its departments and agencies. Thus, the regions of the various departments and agencies should be seen as sometimes complementary and sometimes supplementary to states in achieving the main goals of federalism.

By focusing on regional offices and their interactions with other federal, regional, state, and local entities, this Article contributes to the growing body

8. For a critique of the notion that federalism achieves various values, which should properly be attributed to decentralization in general, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). Other scholars have argued that various bodies, including local governments or even juries, can promote federalist values. See generally, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006) (describing the role of local governments in enforcing the Constitution); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (identifying the role of political bodies beneath the state, including local governments, school boards, and even juries, in promoting federalist values).

9. For some rare recent exceptions, see Bulman-Pozen, *Our Regionalism*, *supra* note 2 (describing the federalist ideals implicated in various federal regional schemes); David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727 (2018) (arguing that federal decentralization is important in promoting federalist ideals); and Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (using the field structure of the U.S. Army Corps of Engineers as an example of how federal decentralization advances federalist values).

of literature dedicated to “crack[ing] open the black box of agencies,”¹⁰ which emphasizes the internally complex and decentralized nature of administrative agencies. While previous scholarship considered federal regions only cursorily, treating them merely as an example of the hierarchical structure of federal agencies that includes both bureaucrats in Washington and a host of line, branch, and field offices,¹¹ this Article highlights the distinctive character of regional offices within the administration by revealing their unique history and potential. Furthermore, the identification of federal regions as meaningful policymakers enables us to shift attention from agencies’ central headquarters, and from the centralized rulemaking through which they operate, to the many “internal administrative law” measures such as “measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel.”¹² This shift calls for a more complicated analysis of inter- and intra-agency dynamics and a more nuanced application of existing administrative law doctrines.

Our model of regions as mediators and coordinators is deeply rooted in the history of U.S. public administration. During the New Deal, political theorists, politicians, and bureaucrats designed and implemented a regionalized structure for the federal government. This structure was intended to counter both an excessively powerful central government and the fragmentation produced by handing powers over to the states while taking into serious consideration the

10. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011).

11. For example, in discussing how administrative law doctrines allocate power within agencies, Elizabeth Magill and Adrian Vermeule group territorial subdivisions of the federal government—regional, district, and field offices—together as purely functional hierarchical subdivisions of the federal government. *See id.* (“[A]dministrative law directly and indirectly determines the relative influence within agencies of appointed agency heads, lower-level bureaucrats, and line personnel.”). Similarly, David Barron and Elena Kagan distinguish between top-tier and lower-level bureaucrats, thereby merging various “branch offices” and “line actors” regardless whether they are located in Washington, in major regional centers, or in remote and peripheral field units. *See* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203, 244. Likewise, Dave Owen’s recent study of the U.S. Army Corps of Engineers, while shedding light on the importance of the territorial structure of the agency, lumps together its entire field apparatus; he does not distinguish the regional level from other line branches such as “division offices, district offices, and field offices.” *See* Owen, *supra* note 9, at 62 & n.21. Additionally, when Jennifer Nou “assess[es] controls internal to the agency: how these mechanisms arise, what explains their design, and how agency heads can shape and implement them,” she disregards the entire field structure of agencies and refers only to the agencies’ functional units as “divisions,” “bureaus,” “centers,” and “offices.” *See* Nou, *supra* note 4, at 423-24 (emphasis omitted).

12. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1251 (2017) (discussing the importance of recognizing “internal administrative law” as a distinct and important ingredient of administrative practice, as opposed to the common emphasis on “external” administrative law—primarily judicial review).

variations (natural, social, political, and economic) among the different regions of the United States.¹³ These new regional offices were touted as having the potential to mediate among Washington, the states, and local communities. Although the focus on the mediating qualities of regions gradually gave way to an emphasis on their coordinating role, the appreciation of regional power persisted through the 1960s and 1970s. The staggering increase in federal agencies and the programs they administered¹⁴ gave rise to an urgent need to address intergovernmental coordination and to reinforce democratic representativeness and public participation in the bureaucracy.¹⁵ Regions thus

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13. See generally JAMES W. FESLER, AREA AND ADMINISTRATION (1949) [hereinafter FESLER, AREA AND ADMINISTRATION] (illustrating the different interests of different local areas and the merits of the regional layer as a middle ground between the national and local); EARL LATHAM, THE FEDERAL FIELD SERVICE: AN ANALYSIS WITH SUGGESTIONS FOR RESEARCH 22-23 (1947) [hereinafter LATHAM, THE FEDERAL FIELD SERVICE] (describing the need to adjust special administrative supervision to different geographical circumstances); DAVID BICKNELL TRUMAN, ADMINISTRATIVE DECENTRALIZATION: A STUDY OF THE CHICAGO FIELD OFFICES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 3-5 (1940) (describing regional decentralization as contributing to the “proper equilibrium between centrifugal and centripetal political forces”); Herbert Emmerich, *Distinguishing Administrative Aspects of the Farm Credit Administration*, 30 AM. POL. SCI. REV. 1117 (1936) (describing the regional administrative structure of the Farm Credit Administration and emphasizing its democratic responsiveness to local communities); James W. Fesler, *Federal Administrative Regions*, 30 AM. POL. SCI. REV. 257 (1936) [hereinafter Fesler, *Federal Administrative Regions*] (describing regional organization as a necessary structure for addressing various regional problems); James W. Fesler, *Standardization of Federal Administrative Regions*, 15 SOC. FORCES 12 (1936) (discussing the advantages of a regional division while considering regional differences) [hereinafter Fesler, *Standardization*]; Earl Latham, *Executive Management and the Federal Field Service*, 5 PUB. ADMIN. REV. 16 (1945) [hereinafter Latham, *Executive Management*] (focusing on federal bureaus that were established during the 1930s and early 1940s and their advantages as mediatory links to Washington); James William Fesler, *Federal Administrative Regions with Special Reference to War Department Procurement Planning Activities* (Apr. 1935) (unpublished Ph.D. dissertation, Harvard University) (on file with authors) [hereinafter Fesler Dissertation] (describing the need for a regional level to oversee field operations in the War Department); Carroll Kingsley Shaw, *Administrative Control of Field Services in the United States Treasury Department* (1933) (unpublished Ph.D. dissertation, University of Illinois) (on file with authors) (emphasizing the importance of a middle-ground mechanism to supervise the various field services of the treasury bureaus).
14. See ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-95, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 63-64 (1984) (charting the twentieth century growth in regulatory agencies and the number of major regulatory adoptions). The Advisory Commission on Intergovernmental Relations (ACIR) was established in 1959 to address the growing problem of a lack of coordination between the various government departments and agencies. For a comprehensive account, see Bruce D. McDowell, *Advisory Commission on Intergovernmental Relations in 1996: The End of an Era*, 27 PUBLIUS: J. FEDERALISM 111 (1997).
15. See Herbert Kaufman, *Administrative Decentralization and Political Power*, 29 PUB. ADMIN. REV. 3, 4-9 (1969).

became a central pillar of Nixon's experimental New Federalism, which sought to transfer power away from Washington to strong and standardized federal regions, reconceiving and transforming them into regional semi-general-purpose governments.¹⁶

In the 1980s, these regionalist models were replaced with a vision of regions as enforcers of central policies. Reagan rejected the Nixonian vision, instead advancing what has since become the dominant version of federalism: strong states' rights and a small federal government.¹⁷ Reagan and subsequent presidents backtracked from the attempt to standardize regions and to empower them as coordinating and mediating entities, instead reconfiguring regions as mere enforcers of central policies.¹⁸ This reconfiguration continued until recently and gave rise to concerns regarding uniformity, consistency, and economic efficiency.¹⁹

Since the beginning of the twenty-first century, there has been a revival of interest in using federal regions as more than enforcers and implementers of central policies. The 9/11 attacks, the devastation of Hurricane Katrina, and the Great Recession brought the importance of regions as both coordinators and mediators to the forefront.²⁰ Nonetheless, federal regions still tend to be seen simply as enforcers of central policies; the renewed attention has not been accompanied by any ideological shift or overarching legal reform.

The promise of regions stems not only from their situation outside Washington and closer to their constituencies but also from their institutional design as nodal points that connect headquarters to the agencies' field offices. Their proximity to regulated industries, to social groups they serve, and to state and local political institutions enables regional offices—indeed, forces them—to develop distinctive territorial expertise regarding the specific conditions, needs, and interests of their regions. Although not democratically accountable in the strictest sense, regional offices can inject principled politics and democratic accountability into the federal bureaucracy. A regional structure also encourages experimentalism and innovation, values lauded in

16. *See infra* Part II.B.

17. *See infra* Part II.C.

18. *See infra* text accompanying notes 188-91.

19. *See infra* note 193 and accompanying text.

20. Soon after 9/11, Congress enacted the Homeland Security Act of 2002, establishing the Department of Homeland Security and prescribing the consolidation of the various regional offices. *See* Pub. L. No. 107-296, § 706, 116 Stat. 2135, 2220 (codified at 6 U.S.C. § 346 (2016)) (requiring a plan for “consolidating and co-locating . . . any regional offices or field offices of agencies that are transferred to the Department under this Act”).

contemporary scholarship.²¹ Regions can serve as buffers against excessive political influence by the President, the Cabinet, and other presidential appointees.²² Additionally, they can gather information from the various public and private actors operating in their regions at lower cost and develop a holistic and coordinated regional outlook. Lastly, regions can enable inter- and intra-agency coordination and collaboration in devising and implementing federal program policies.

Reconceptualizing federal regions as mediators and coordinators has two significant ramifications for legal doctrine and policy. First, it enables us to identify what we term “the law of federal regions.” This is the thick legal environment—constantly being reshaped by Congress, the President, the administration, and the courts—that regulates the creation and functioning of federal regions: how they are organized and structured territorially and institutionally; how and for what purposes they are authorized; how power is delegated to them from Washington; and how doctrines of judicial review apply to them. Understanding this legal structure as a unified legal field brings to light the crucial role regions already play within the federal administration.

Second, understanding federal regions as an integral part of U.S. administrative governance allows us to critically assess the existing law of federal regions. We can then offer novel legal doctrines, principles, and institutions that would enable regional offices to act as mediators and coordinators and to address the challenges currently faced by the administration. One of these innovative doctrinal and policy suggestions is to apply the *Skidmore/Mead* standard of judicial review—which defers to agencies’ informal interpretations of their authorizing laws to the extent those interpretations have the “power to persuade”²³—to regional interpretations as well. This deference should be given even where there is inconsistent application among different regions of the same agency, at least in certain cases.²⁴ Another proposal is that when an agency headquarters rejects regional policy after a long period of inaction, courts should require the headquarters to provide reasoned justification for the change of position.²⁵ We also call for a strengthening of the federal executive boards, the already-existing coordinating bodies within the regional structure.²⁶

21. See generally Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Dorf & Sabel, *supra* note 3; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

22. See *infra* Part III.A.2.

23. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

24. See *infra* Part IV.C.1.

25. See *infra* Part IV.C.2.

26. See *infra* Part IV.D.2.

This Article proceeds as follows. Part I analyzes the nature and roles of federal regions, explaining the distinct traits of regions and presenting our three conceptions of federal regions: enforcers, mediators, and coordinators. Part II details the history of federal regions, arguing that until the 1980s, regional offices were understood as mediators and coordinators and were structured accordingly. This (forgotten) history explains the current institutional design of many regionalized federal departments and agencies and opens the door to future legal and policy proposals. Part III analyzes the merits and drawbacks of a regionalized structure of the federal administration. And Part IV discusses the law of federal regions. We analyze and evaluate the legal framework that organizes federal regions and propose various doctrinal changes that could enhance regions' capacity to address the problems of contemporary administration.

I. The Nature and Roles of Federal Regions

Federal regions are Janus-faced: They simultaneously decentralize and centralize power. With respect to Washington, federal regions represent a decentralization of power, shifting execution and even decisionmaking power to regional offices. With respect to the states, in contrast, federal regions centralize power in that they manage federal activities in areas encompassing several states. As such, they can be conceptualized—and consequently, legally empowered—in three distinct manners. The first ideal type is the region as *enforcer*: a region mainly executes central policies and mandates. The second ideal type is the region as *mediator*. Under this conception, federal regions do much more than simply enforce central policies. Rather, they are active institutions that generate policy by bridging gaps and conflicts between Washington and the regions over which they are responsible. The third ideal type is the region as *coordinator*. This task is of great importance given the wide array of governmental departments and agencies that operate within each region—whether agents of federal, state, or local government—and that are often delegated similar or at least overlapping powers.

In this Part, we first examine the distinct traits of federal regions as compared to other elements of “national administrative governance”²⁷: the complicated web of federal agencies, states, and localities that perform administrative and executive tasks. We then present the three conceptions of federal regions—as enforcers, mediators, and coordinators—and consider the inherent tension between these different conceptions.

27. Cf. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 4 (2011).

A. Why Federal Regions?

Our conception of a regional office relates only to the top tier of the field structure within a department, agency, bureau, or other administrative entity. There are usually between three and ten such offices within a given agency. Regional offices serve as a governmental layer between Washington-based headquarters and the field apparatus of the agency. Each regional office typically has control over a region encompassing several states and is in charge of its department's or agency's operations within its jurisdiction. Some regions are a top administrative level serving directly under the agency's administrator or the department's secretary; other regional schemes belong to subunits within departments or agencies. Regional offices normally implement central policies, oversee the department's or agency's field operations, make determinations regarding states' applications for grants and permits, and form regional policies. Different executive and administrative entities create different regional schemes based on the particular function of the entity, the nature of the regulated resource or service it delivers, and other considerations, as we explain below.²⁸ Furthermore, even within the same agency or department, different regional offices are structured differently in order to respond to different regional demands and needs.

Take, for example, the EPA. From its inception in 1970, the EPA has included ten regional offices,²⁹ each of which comprises six to eleven subdivisions³⁰ and operates field offices, functional offices, and local laboratories across its jurisdiction.³¹ Each regional office addresses different

28. See *infra* text accompanying notes 67-71.

29. See *The Origins of EPA*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/EC7E-E6ZW> (last updated Apr. 16, 2018); see also EPA Order No. 1110.2, Initial Organization of the EPA § 13 (1970) ("There shall be ten regional offices of the Agency, which shall have regional boundaries and headquarters locations prescribed by the Administrator.").

30. For example, Region 1 includes six subdivisions; Region 9 includes eight subdivisions; and Region 4 includes eleven subdivisions. See *Organization Chart for EPA's Region 1 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/Q97J-BKS5> (last updated Jan. 5, 2018) [hereinafter *EPA Region 1 Org Chart*]; *Region 9 (Pacific Southwest) Organization*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/6FE5-R8WW> (last updated Dec. 20, 2017) [hereinafter *EPA Region 9 Org Chart*]; *Organization Chart for EPA's Region 4 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/UJH4-JJ9H> (last updated Mar. 21, 2018) [hereinafter *EPA Region 4 Org Chart*].

31. For example, Region 1 operates a laboratory in addition to its headquarters in Boston; Region 2 has six subdivisions, two of which are called field offices; and Region 9 includes four subdivisions (a main San Francisco office, a field office, a border office, and a Pacific Islands office). See *EPA Region 1 (New England)*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/5AYX-4R6Y> (last updated Apr. 16, 2018); *EPA Region 2*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/YP6E-8MJ8> (last updated Dec. 21, 2017); *Visiting the Pacific Southwest (Region 9) Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/6CD5-NKZB> (last updated Mar. 15, 2018).

key issues;³² thus, some subdivisions vary between different regions. For example, only Region 5 and Region 9 operate a land division,³³ and only four regions include an office of environmental justice or another similarly named office.³⁴ Other subdivisions, like a water protection division, are common and can be found in most of the regional offices.³⁵ Some regions also operate a geographically focused program office, like Region 5's Great Lakes National Program Office³⁶ or Region 3's Chesapeake Bay Program Office.³⁷

HUD is also divided into ten regional offices, each of which operates between three and eleven regional field offices.³⁸ Most of HUD's regional

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32. For example, Region 2 (covering New Jersey, New York, Puerto Rico, and the U.S. Virgin Islands) focuses on lake cleanups and river restoration programs, whereas the key issues in Region 6 (covering Arkansas, Louisiana, New Mexico, Oklahoma, and Texas) include hurricane response and mosquito control. See *EPA Region 2*, *supra* note 31; *EPA Region 6 (South Central)*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/5JLT-GUHY> (last updated Mar. 22, 2018).
33. See *Organization Chart for EPA's Region 5 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/B7CP-CZZB> (last updated Feb. 8, 2018) [hereinafter *EPA Region 5 Org Chart*] (Land and Chemicals Division); *EPA Region 9 Org Chart*, *supra* note 30 (Land Division).
34. See *Organization Chart for EPA's Region 3 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/E4AP-5LHB> (last updated Mar. 20, 2018) [hereinafter *EPA Region 3 Org Chart*] (Office of Enforcement, Compliance and Environmental Justice); *EPA Region 4 Org Chart*, *supra* note 30 (Office of Environmental Justice and Sustainability); *Organization Chart for EPA's Region 6 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/Z2CW-EUVR> (last updated Jan. 2, 2018) [hereinafter *EPA Region 6 Org Chart*] (Office of Environmental Justice, Tribal, and International Affairs); *Organization Chart for EPA's Region 8 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/HL6M-6966> (last updated Oct. 18, 2017) [hereinafter *EPA Region 8 Org Chart*] (Enforcement, Compliance and Environmental Justice).
35. A water division exists in each EPA regional office other than Region 1. See *Organization Chart for EPA's Region 2 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/HYU8-Z43V> (last updated Feb. 2, 2018) (Clean Water Division); *EPA Region 3 Org Chart*, *supra* note 34 (Water Protection Division); *EPA Region 4 Org Chart*, *supra* note 30 (Water Protection Division); *EPA Region 5 Org Chart*, *supra* note 33 (Water Division); *EPA Region 6 Org Chart*, *supra* note 34 (Water Division); *Organization Chart for EPA's Region 7 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/358E-38Z6> (last updated Jan. 22, 2018) (Water, Wetlands, and Pesticides Division); *EPA Region 8 Org Chart*, *supra* note 34 (Office of Water Protection); *EPA Region 9 Org Chart*, *supra* note 30 (Water Division); *Organization Chart for EPA's Region 10 Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/K4N4-WPXE> (last updated Jan. 9, 2018) (Office of Water & Watersheds).
36. See *About the Great Lakes National Program Office (GLNPO)*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/LAQZ-7HWA> (last updated Apr. 9, 2018).
37. See *About the Chesapeake Bay Program Office*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/3H28-KZBE> (last updated Jan 23, 2018).
38. See *HUD Office Locations*, HUD USER, <https://perma.cc/HT54-ZQ2J> (archived Apr. 22, 2018).

offices consist of similar general subdivisions,³⁹ but there are some unique positions in different offices, such as Region VIII's Sustainability Officer and Healthy Homes Representative⁴⁰ and Region IX's Homeless Liaison.⁴¹ Some regions include certain divisions as part of their main headquarters office while others operate them as a part of their field offices.⁴²

The Food and Drug Administration (FDA), an independent agency within the Department of Health and Human Services (HHS), has a different regional structure including only five regional offices, which are a part of the FDA's Office of Regulatory Affairs and operate under the supervision of regional directors.⁴³ Each region consists of two to seven district offices, with twenty district offices overall.⁴⁴ Each district office typically comprises three to four branches;⁴⁵ in most districts, the main branches are a compliance branch and

39. For example, many regions operate a management analyst division and a public affairs division. *See, e.g., Office of the Regional Administrator: Serving Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/DG5S-FBSJ> (archived Apr. 23, 2018) (Region I); *Office of the Regional Administrator: Serving Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/XC32-NMN4> (archived Apr. 23, 2018) (Region III); *Office of the Regional Administrator: Serving Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/3LUT-RWCV> (archived Apr. 23, 2018) [hereinafter *HUD Region V*] (Region V); *Office of the Regional Administrator: Serving Arkansas, Louisiana, New Mexico, Oklahoma and Texas*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/9PY5-7XL4> (archived Apr. 23, 2018) (Region VI).

40. *See Office of Regional Administrator*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/5R47-SXKA> (archived Apr. 23, 2018).

41. *See Office of the Regional Administrator: Serving Arizona, California, Hawaii, Nevada, the Territory of Guam, Commonwealth of the Northern Mariana Islands, and American Samoa*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/F6JG-6LR2> (archived Apr. 23, 2018).

42. For example, Region IV has a Labor Relations division as part of its main headquarters office, whereas Region V operates its Labor Relations division through field offices in Indianapolis and Minneapolis-St. Paul. *See Atlanta Regional Office—Program Directory*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/5NA5-T55P> (archived Apr. 23, 2018) (Region IV); *HUD Region V*, *supra* note 39.

43. FDA, REGULATORY PROCEDURES MANUAL § 1-2-5(6) (2016), <https://perma.cc/3VD5-DPJG>.

44. *Id.*

45. *Id.*

an investigations branch,⁴⁶ whereas a few others also operate an import operations branch.⁴⁷

Before we describe the three models of federal regions, we wish to explain what distinguishes regions from other entities that make up the national administrative governance system and why we focus our analysis specifically on them. First, regional offices must be distinguished from the numerous branch offices scattered across the country. The field offices represent classic “street-level bureaucracy.”⁴⁸ They are located in smaller towns far removed from the seats of political power (both federal and state). They are delegated only the power to concretely apply and technically execute agency policies set by headquarters and the regional offices.⁴⁹ They are in charge of relatively small territories and therefore lack a comprehensive outlook. Moreover, because they have fewer employees, they are unable to develop functional specialization. Regional offices, in contrast, are located in large urban centers and are therefore closer to the political, industrial, and commercial centers of gravity.⁵⁰ In addition, regions are delegated policymaking powers far more

46. See, e.g., FDA, STAFF MANUAL GUIDE 1312.6, at 2-3 (2013), <https://perma.cc/33XN-MK4X> (district office in Philadelphia); FDA, STAFF MANUAL GUIDE 1312.8, at 2-3 (2013), <https://perma.cc/7BCR-6ATN> (district office in Detroit); FDA, STAFF MANUAL GUIDE 1312.9, at 3 (2012), <https://perma.cc/Z7AW-RXRP> (district office in Minneapolis).

47. See, e.g., FDA, STAFF MANUAL GUIDE 1311.2, at 5-7 (2012), <https://perma.cc/HK7Y-NFKT> (district office in New York City); FDA, STAFF MANUAL GUIDE 1316.3, at 4 (2012), <https://perma.cc/XTL8-L9PH> (district office in Los Angeles).

48. See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980). For a recent study of ways to counter the undesirable effects of scattered “street-level” bureaucrats, see Daniel E. Ho, *Does Peer Review Work?: An Experiment of Experimentalism*, 69 STAN. L. REV. 1 (2017) (suggesting ways to design an affirmative and effective intervention of experimentalist peer review in order to achieve accuracy and consistency in a decentralized bureaucracy).

49. Although even technical application involves discretion and therefore causes street-level bureaucrats to be of great significance, there is a difference in magnitude between the concrete, ad hoc application of policy at the field-office level and the large-scale policymaking performed in the regional office.

50. For example, more than twenty departments, agencies, and bureaus—including HUD, the U.S. Department of Education, the General Services Administration, FEMA, the HHS, and the SSA—comply with the standard ten-region scheme. Thus, their regional offices are located in central cities: Atlanta, Boston, Chicago, Dallas, Denver, Kansas City, New York, Philadelphia, San Francisco, and Seattle. For a discussion of the standard regions, see Part II.B.2 below. Our original research has found that regional offices of agencies and bureaus that do not conform to the standard ten-region scheme also tend to be located in central cities. For example, the seven regions of the Federal Trade Commission (FTC) are managed through eight regional offices located in Atlanta, Chicago, Cleveland, Dallas, Los Angeles, New York, San Francisco, and Seattle. See *East Central Region*, FED. TRADE COMMISSION, <https://perma.cc/8FEZ-3QQY> (archived May 9, 2018); *Midwest Region*, FED. TRADE COMMISSION, <https://perma.cc/W4DD-49GF> (archived May 9, 2018); *Northeast Region*, FED. TRADE COMMISSION,

footnote continued on next page

extensive than merely concrete and individualized applications of central policies.⁵¹ Further, regional offices are responsible for larger territories, usually encompassing several states; due to this larger size, they tend to develop functional—rather than purely territorial—specialization and expertise.⁵²

Second, regional offices' close proximity to state and local actors and the field offices they oversee leads to significant differences between them and

<https://perma.cc/RE6C-THZY> (archived May 9, 2018); *Northwest Region*, FED. TRADE COMMISSION, <https://perma.cc/E2TT-54WB> (archived May 9, 2018); *Southeast Region*, FED. TRADE COMMISSION, <https://perma.cc/KLJ8-F5LJ> (archived May 9, 2018); *Southwest Region*, FED. TRADE COMMISSION, <https://perma.cc/F7MW-4VUP> (archived May 9, 2018); *Western Region*, FED. TRADE COMMISSION, <https://perma.cc/4FGQ-DDUM> (archived May 9, 2018). The eight regional offices of the Merit Systems Protection Board (MSPB) are located in Atlanta, Chicago, Dallas, the Denver area, New York, Oakland, Philadelphia, and Washington, D.C. See *MSPB Jurisdiction*, U.S. MERIT SYS. PROTECTION BOARD, <https://perma.cc/DAC6-AT9K> (archived Apr. 23, 2018).

51. *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473 (2002), demonstrates the discretion often given to regional offices in their daily operations. Pursuant to the Medicare Catastrophic Coverage Act of 1988, states began adopting two divergent methods for determining Medicaid eligibility for institutionalized spouses. See *id.* at 483-84; see also Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (codified as amended in scattered sections of 42 U.S.C.). Upon reviewing Wisconsin's standard, the regional office of the Health Care Financing Administration (HCFA)—the agency within the HHS responsible for Medicare—issued an opinion letter notifying the states within its jurisdiction that the Wisconsin eligibility standard was not only legitimate but also in fact mandated by the language of the Act. See *Blumer*, 534 U.S. at 479 & n.1, 484-85. The region then issued an inconsistent letter providing that “until regulations are promulgated, a state Medicaid plan [would] not be considered out of compliance with federal standards whether the state uses an income-first or a resource-first approach.” See Brief of Respondent at 40, *Blumer*, 534 U.S. 473 (No. 00-952), 2001 WL 1424474; see also *Blumer*, 534 U.S. at 485. At the time, the HCFA had not promulgated any binding nationwide regulations as to the appropriate interpretation of the Act. Following this opinion letter, the agency endorsed the region's ultimate interpretation. See Brief for Petitioner, *Blumer*, 534 U.S. 473 (No. 00-952), 2001 WL 1025887, at *41-43.

Reno v. Flores, 507 U.S. 292 (1993), raised the issue of regional decisionmaking in the context of immigration policy. During the 1980s, the matter of alien juvenile detainees was dealt with “on a regional and ad hoc basis, with some [Immigration and Naturalization Service (INS)] offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations.” *Id.* at 294-95. In 1984, the INS's Western Regional Office “adopted a policy of limiting the release of detained minors to ‘a parent or lawful guardian,’ except in ‘unusual and extraordinary cases.’” *Id.* at 296 (quoting the court of appeals's panel's opinion). Pursuant to a district court injunction, the INS adopted a nationwide policy that differed only slightly from the region's policy. See *id.* at 296-97. At no point did the Court raise the issue of the region's authority to adopt such a policy. The entire discussion centered on the constitutionality of the policy and on whether the INS regulation was within the attorney general's authority, implicitly suggesting that the region's power to make such significant and discretionary policies was a given. See *id.* at 299-300.

52. The specialization of the EPA's regional offices provides one example. See *supra* notes 32-34 and accompanying text.

central agency headquarters, which are usually located inside the Beltway. This proximity is both territorial and legal; our research reveals that regional offices are physically located in different states and localities throughout the nation, and they are legally charged with directly engaging the states, localities, communities, and industries they regulate. Regional offices' territorial closeness to states and localities enables them to interact and engage with local stakeholders better than can central headquarters. They can more readily hold public meetings and hearings and initiate public involvement in government decisionmaking.⁵³ As proponents of decentralization have long argued, proximity to the field apparatus increases regional offices' local knowledge and familiarity with the unique conditions of the region for which they are responsible.⁵⁴

Additionally, regional offices' legal responsibilities—what we term “legal proximity” to local actors—mandate that they routinely interact with governors, state representatives, mayors, and local communities and industries. This legal proximity means that regional offices are exposed to and are required to consider the interests, views, and values of the different stakeholders within the regions. Consequently, state and local actors take great interest in the identity of regional office heads and, in some cases, have a formal role in their appointment.⁵⁵ The flip side is that regional offices are territorially and legally detached from the President, Congress, and Washington bureaucracy—at least relative to the agency or department headquarters. Regional heads are not appointed by the President, and regional personnel tend to be career employees,⁵⁶ rendering regional offices more independent from the President, and less susceptible to Washington-based partisan politics and lobbying groups, than are agency headquarters.

Thus, regions are able to represent local interests better than Washington can. This ability stems not only from their territorial locations but also from their legal and institutional design and capabilities; from the appointment of regional personnel; from the local knowledge and expertise they accrue; from their duty to take regional specificity into consideration when executing their authority; and from the close working relationships regions establish with state and local governments.⁵⁷

Third, regions are radically different from states. Unlike states, which are the result of historical happenstance and whose borders do not necessarily

53. *See infra* Part III.A.1.

54. *See, e.g.,* FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 63-64.

55. *See infra* notes 210-14 and accompanying text.

56. *See infra* Parts III.B.5, IV.D.1.

57. Indeed, as we discuss below, these close working relationships might deteriorate, in some cases, into capture of the regional office by local actors. *See infra* Part III.B.3.

represent cohesive social or economic units,⁵⁸ federal regions were more often purposefully created and designed to balance between a certain function and a particular territory in a more flexible and contextual manner, despite the fact that their boundaries also reflect power struggles, political compromises, shifting ideologies, and path dependence.⁵⁹ Regions go beyond state lines and are structured to foster interstate dialogue and cooperation. They can thus overcome coordination problems and manage resources more rationally than can states. Furthermore, it is not clear that states' elected bodies pay attention to or better represent local issues and preferences. Especially in an era of increasingly polarized partisanship during which state and local democracies are becoming nationalized,⁶⁰ the comparative advantage of electoral decentralization seems to be waning.

Our historical analysis suggests that these unique traits of regional offices have made them susceptible to competing conceptions as to their main role within the administrative state.⁶¹ Different eras emphasized different roles, resulting in institutional and legal reforms. We now discuss the three paradigmatic conceptions of federal regions.

B. The Three Conceptions of Federal Regions

Out of the historical record emerge three central conceptions of the proper function of federal regions. Although these conceptions are not defined in the exact terms we use in this Article, they nonetheless capture the various attitudes and positions taken by the participants in the debates over agencies' institutional design. The first focuses on regions' role as enforcers; the second on their role as coordinators between federal agencies within a region; and the third on their role as mediators between central agency headquarters and states, localities, and local communities. These three conceptions are ideal types in that no region functions *only* as enforcer, coordinator, or mediator; in reality, regions fulfill all three functions. The ideological foundations of each of these functions are quite distinct, however, reflecting different political views regarding federalism and the role of government in general. Over time, various political actors, each with different views concerning the essence of federal

58. See Fesler, *Federal Administrative Regions*, *supra* note 13, at 258 (“[S]tates do not represent geographical, social, or (in a special sense) political unities.”).

59. See *infra* Part II.

60. See Michael Greve, *Our Polarized, Presidential Federalism* 11 (George Mason Univ. Legal Studies Research Paper Series, No. LS 16-37, 2016), <https://perma.cc/JXZ8-65H3>. See generally Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama’s “New Nationalism,”* 46 PUBLIUS: J. FEDERALISM 281 (2016) (demonstrating the increased nationalization of state politics and the adherence of state politicians to national party lines).

61. See *infra* Part II.

regions, have pushed for different political and legal reforms regarding regions. Consequently, the role regions play in the structure of government has shifted in line with the dominant contemporary political vision.

1. Regions as enforcers

The most obvious and prevalent justification for the existence of regions in federal departments and agencies is that they serve as frontline enforcers and implementers of policies set by central headquarters. This sets regions as the long arm of the agency in a particular area, as technical organs of the administrative apparatus. Under this view, regions should not make the rules, but rather should simply implement them or ensure that they are properly implemented by others. They should not formulate policies, but rather should apply them in their region by translating them into concrete measures.⁶²

Moreover, in many cases, states and localities are the main executors of federal laws and policies. Be it through grants-in-aid, block grants, or other modes of financing, states and local governments are often responsible for the implementation of federal programs. Here, the role of regions is confined to reviewing, approving, and monitoring the implementation of federal laws and programs by other governmental entities.⁶³ In 2006, for example, approximately 75% of all federal environmental programs were operated by the states, with EPA regions' role limited to approving and overseeing state actions and implementation plans.⁶⁴

62. This is apparent in political debates surrounding the need to ensure that regions conform with central policies or the need to reduce the number of regions due to their redundancy, as well as in contemporary scholarship that measures variations or inconsistencies among regions. See, e.g., *EPA Regional Inconsistencies: Hearing Before the S. Comm. on Env't & Pub. Works*, 109th Cong. 3-4 (2006) [hereinafter *EPA Regional Inconsistencies Hearing*] (statement of Sen. James M. Inhofe, Chairman, S. Comm. on Environment and Public Works) (demanding more regional consistency in enforcement of environmental laws); *id.* at 29 (statement of David Paylor, Executive Director, Virginia Department of Environmental Quality; Officer, Environmental Council of States) (stating that "there are opportunities to reduce redundancy" and that "some things that EPA regional offices are doing . . . are duplicative of the State rules"); Andrew B. Whitford, *Decentralized Policy Implementation*, 60 POL. RES. Q. 17, 23-26 (2007) (finding variations in the implementation of eight statutes by the EPA's regional offices). See generally Gwen Arnold, *Street-Level Policy Entrepreneurship*, 17 PUB. MGMT. REV. 307, 321-23 (2015) (examining degrees of innovation in field offices, including regional ones).

63. Beginning in the 1950s, federal involvement in a variety of activities shifted from providing direct services to funding states and local governments so they can provide the services themselves. Many of these programs are executed through partial preemption, requiring the preapproval of state plans by the federal government, often through federal regional offices. See *infra* Part II.B.

64. See *EPA Regional Inconsistencies Hearing*, *supra* note 62, at 63-66 (statement of David Paylor, Executive Director, Virginia Department of Environmental Quality; Officer,
footnote continued on next page

2. Regions as mediators

A second conception of federal regions is that of mediators. In this conception, federal regions are political entities that mediate between regional and national preferences, values, and norms. Rather than mere administrative subdivisions that enforce nationwide policies and oversee states' activities, federal regional offices are regarded as another tier of government resting between the federal government and the states. They strike a balance between the regional and the national polities, a balance that by definition varies across regions. Although regions are unelected administrative entities, they are much closer to their constituencies than are central agency headquarters and can therefore serve as intermediaries between the state and federal levels. They connect nationwide thinking with regional particularity by infusing national policies with regional values and preferences, and vice versa.⁶⁵

The novelty of the mediator conception of federal regions is in its view of regional interests and values. While the enforcer conception of regions treats regional particularity as a challenge to uniformity and consistency, the mediator conception considers such particularity to be no less valuable or important than central interests and values. Under the mediator conception, regional officers are not just the representatives of the central agency in the region; they also speak for the region. Regions are where the federal and regional merge. Regional decisionmaking is the art of mediating between two distinct normative worlds: that of the region and that of the federation as a whole.

3. Regions as coordinators

The third conception of federal regions is as coordinators among the various states that make up the region and among and within different federal agencies and departments. Given the multitude of federal departments and agencies, along with the many policies and programs they administer and execute, regions are ideally situated to solve the inevitable problems of interstate and intergovernmental coordination and cooperation. The proximity between regional offices of different departments and agencies, whose jurisdictions often overlap and sometimes even conflict, allows for easier and less costly cooperation and coordination.

When each agency, however, has its own regional structure, it becomes extremely difficult for regional offices to serve as coordinators and harmonize

Environmental Council of States); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-108, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT (2000).

65. As we demonstrate below, this conception was developed during the New Deal era. *See infra* Part II.A.

the programs and agendas of the various agencies. Therefore, a robust coordinating model entails some degree of standardization of regional boundaries and the collocation of offices in the same cities. In the maximalist formulation of this model, a miniature general purpose government, comprising the various departments and agencies operating in the region, should be established. This regional governing body would be able to coordinate and formulate regional policies and even impose them on its component agencies.⁶⁶

4. Tensions among the three conceptions

There are two important tensions among the three conceptions of federal regions. First, the enforcer conception pushes for consistency in policymaking and application, while the mediator and coordinator conceptions tolerate or sometimes even welcome regional variation. Because under the enforcer conception regions are faithful servants of Washington, any variation among regions can be seen only as a threat to the equal application of the law and as hindering its efficient administration. According to the mediator and the coordinator conceptions, however, regions are meaningful agents that should be given at least some leeway and discretion in how they apply agency policies in order to be democratically responsive and to fulfill their role as laboratories of experimentation. Thus, variations are in fact encouraged, or at least tolerated, depending on the specific function of the department or agency and on the concrete circumstances.

Second, the three conceptions conflict over the way regional boundaries should be drawn. Historically, policy proposals adhering to the mediator conception often entailed a multitude of ad hoc regional schemes, each tailored to its specific function.⁶⁷ For regions to respond to specific local demands and be suited to the relevant natural resources, economic activity, or social phenomena, there is a need for many different regional schemes, each delineated according to the particular function and subfunction the agency (or its subunits) is designed to fulfill. As James Fesler noted in 1949, “[T]he nature, multiplicity, and grouping of tobacco farms is different from the nature, multiplicity, and grouping of banks or oil wells or meat-packing plants”⁶⁸ Furthermore, the activities each region performs are dynamic: They change

66. For discussion of an ambitious plan for standardizing regional boundaries, see Part II.B.2 below.

67. See NAT'L RES. COMM., REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT app. at 206-23 (1935) (detailing 108 different regional schemes for dealing with planning and administration of conservation programs). For a discussion of the historical era when such diverse regional schemes evolved, see Part II.A below.

68. FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 51.

over time, as natural traits of the region evolve into manmade functions. As Rupert Vance noted in 1935, “Natural areas change into culture-made areas, drainage basins become hydro-electric power zones, biotic areas become types of farming areas, harbor indentations become the zones of port authorities[,] and the list continues *ad infinitum*.”⁶⁹

The coordinator conception pushes for a fundamentally distinct approach to regional boundary demarcation, and calls for the congregation of as many agencies and departments as possible in the same area and in the same cities. If regions are to realize the ideals of coordination—collective action, resource pooling, and formation of a coherent and effective agenda—standardizing the regional structures of the various agencies and departments is advisable so that they operate in roughly the same area rather than through distinct regional schemes.⁷⁰

The enforcer conception, contrary to the other two conceptions, recommends neither full standardization of geography nor a multitude of ad hoc regional schemes. Due to the overriding importance it gives to economic efficiency and to faithful obedience to central command, the enforcer conception foregrounds cost-saving schemes, taking into account the specific function of the agency, ever-changing technological means, and the structure of the agency’s field operation.⁷¹

Thus, pursuing the maximalist versions of enforcement, mediation, and coordination could prove to be difficult or even impossible. But more moderate understandings of regions under any of the three conceptions can coexist. Balancing the need for tailored regions with the desire to standardize the regional boundaries of federal agencies and the imperative to cut expenses might have an outcome that does not entirely comply with the edicts of any one conception but could improve the functioning of federal agencies in each of the enforcing, mediating, and coordinating senses. We will return to this point in Part IV below, where we consider the policy ramifications of our conceptualization of federal regions.

69. Rupert B. Vance, *Implications of the Concepts “Region” and “Regional Planning,”* in HUMAN SIDE OF SOCIAL PLANNING: SELECTED PAPERS FROM THE PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 85, 92 (E.W. Burgess & Herbert Blumer eds., 1935).

70. See Mini-symposium, *President Nixon’s Proposals for Executive Reorganization*, 34 PUB. ADMIN. REV. 487, 494 (1974) (describing the Nixon Administration’s “effort to standardize regions” and emphasizing the need to “bring[] order into the tortuous process of field coordination made unavoidable by the present weaknesses of departmental structure”).

71. See, e.g., Rescission of OMB Circulars, 60 Fed. Reg. 15,171, 15,171 (Mar. 22, 1995) (rescinding the Nixon-era circular that mandated the standardization of federal regions); *infra* notes 160-62 and accompanying text; see also Exec. Order No. 11,647, §§ 1-2, 3 C.F.R. 371, 372-73 (1973) (establishing a “federal regional council for each of the ten standard federal regions” (capitalization altered)).

In the next Part, we describe the history of the evolution of federal regions in the U.S. administrative state. What emerges from this history is that each of the conceptions we have just discussed has had significant expression in different historical periods and that different presidential administrations pursued their agendas by reforming the regional structure.

II. A History of Federal Regionalism

In this Part, we outline the untold historical evolution of the regionalized structure of the U.S. federal administration. When we reread the history of the administration through our theoretical lens, focusing on its regional structure, we see that the three conceptions of federal regions have been envisioned and even applied by various presidential administrations. Since the New Deal, presidents have tried to push federal regions in their preferred ideological directions. Thus, throughout the past century, there have been clearly discernible trends in how regions have been conceived and constructed by policymakers.

With the remaking of the republic in the late nineteenth and early twentieth centuries came a fundamental restructuring of the relationship between the traditional components of government. As transportation, economy, labor, and communication became national or regional in their scope at the turn of the twentieth century,⁷² it became clear that states—despite their ongoing efforts to control their territories and populations⁷³—were limited in their ability to deal with such nationwide and regional challenges.⁷⁴ At the same time, the federal government, which was growing steadily,⁷⁵ was faced

72. See Stephen Leacock, *The Limitations of Federal Government*, 5 PROC. AM. POL. SCI. ASS'N 37, 41-43 (1908).

73. See generally MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005) (describing the increased regulatory power of states in the late eighteenth and nineteenth century United States); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (analyzing various governmental schemes planned and executed by states during the nineteenth century aimed at better controlling population and territories).

74. See Bulman-Pozen, *Our Regionalism*, *supra* note 2, at 409-14 (describing the emerging realization that states, even when cooperating with each other, are limited in their ability to address national challenges). See generally PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (2016) (describing the emergence of the Federal Reserve System as a response to the changing needs of a competitive national economy); Vernon Carstensen, *The Development and Application of Regional-Sectional Concepts, 1900-1950*, in *REGIONALISM IN AMERICA*, *supra* note 2, at 99 (illustrating the importance of regional division due to geographical differences).

75. See Randall G. Holcombe, *The Growth of the Federal Government in the 1920s*, 16 CATO J. 175, 175-77, 176 fig.1 (1996) (detailing the growth of federal expenditures, agencies, and departments in the early twentieth century); see also TRUMAN, *supra* note 13, at 41 tbl.1

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with a host of problems associated with centralization: the difficulty in overseeing the operations of the field offices;⁷⁶ the lack of democratic checks on the increasingly powerful central government; and fears that it would deteriorate into a totalitarian regime.⁷⁷ These concerns resulted in the need to develop regional governance solutions.

At the beginning of the twentieth century, *regionalism*, or *sectionalism*, referred to a host of different measures aimed at contending with interstate, regional, and nationwide challenges.⁷⁸ These included interstate metropolitan planning, as in Chicago, New York City, Philadelphia, and Washington, D.C.; the establishment of planning regions comprising groups of states, including the Pacific Northwest Regional Commission and the New England Regional Planning Commission; and compacts signed between states.⁷⁹ Although these measures transcended state boundaries, they were, by definition, limited in both size and scope: Some depended on states' voluntary agreement; others were confined to a small segment of the national territory; and in general, they dealt with a narrow scope of issues. The establishment of regional offices, which served as intermediary entities between Washington and the growing field services of the different departments and agencies, thus complemented the aforementioned more limited regional experiments. Given the nationwide spread and the breadth of the issues with which the departments and agencies dealt, this form of regionalism was far more ambitious, as it encompassed the entirety of the national territory and a large portion of federal areas of operation and was not contingent on the consent of the states.⁸⁰

(documenting the steady growth in field and headquarters personnel within the U.S. Department of Agriculture from 1887 until 1939); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1368-73 (2010) (describing the development of the U.S. administrative state in the postbellum era).

76. See Shaw, *supra* note 13, at 7-8.

77. See HOWARD W. ODUM & HARRY ESTILL MOORE, AMERICAN REGIONALISM: A CULTURAL-HISTORICAL APPROACH TO NATIONAL INTEGRATION 3-4 (1938).

78. See generally, e.g., Carstensen, *supra* note 74 (describing numerous regional concepts and schemes initiated by governmental and business organizations during the first half of the twentieth century due to rapid national changes); Fulmer Mood, *The Origin, Evolution and Application of the Sectional Concept, 1750-1900*, in REGIONALISM IN AMERICA, *supra* note 2, at 5, 81-98 (exploring the development of forms of regionalism since the eighteenth century). Note that while Carstensen indicates that regionalism and sectionalism "have been used interchangeably," "the section embraces the regions rather than the reverse." Carstensen, *supra* note 74, at 112.

79. See NAT'L RES. COMM., *supra* note 67, at v-vi (referring to all three modes of regional cooperation).

80. The various sources that deal with particular departments and agencies describe a somewhat similar process by which the growth of the administrative apparatus that took place during the 1900s and 1910s resulted in a need for a regional or district government layer that would oversee field operations and mediate between Washington and line branches. Carroll Shaw, for example, describes the emergence of the

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Over the years, the structure of the federal administration changed significantly, yet the basic idea has remained unchanged: Much of the federal bureaucracy operates through a regional structure, manifesting not only administrative convenience but also deeply rooted regional ideology. We divide the history of federal regions into three major periods, each reflecting one of the three ideal conceptions of federal regions we developed in Part I above. Although all three conceptions—the region as enforcer, mediator, and coordinator—were present in policymaking and in theoretical discourse throughout the past century, we argue that in each period one conception was dominant. During the first period, lasting from the 1920s through the 1940s, the mediator conception was most prevalent. The second period, beginning in the early 1950s and ending in the late 1970s, was centered around the coordinator conception. And in the third period, from the early 1980s until the early 2000s, regions have primarily been conceived of as mere enforcers of central policies. We also speculate that since the early 2000s, a fourth era might have begun, one in which legislators and policymakers show a renewed interest in regions as mediators and coordinators.

Despite the fact that each historical period reflects a different dominant conception of federal regions—resulting in differences in their institutional and legal design—up until the early 1980s, policymakers and scholars consistently understood regions as mediators and coordinators. From the early 1920s through the late 1970s, public administration discourse and policy were occupied by intense debates concerning the proper function of regions as averting tyrannical central government, promoting diversity, enhancing democratic accountability, and improving cooperation—*within* the federal government. With the rise of President Reagan’s New Federalism, which vested all federal values solely in the states, the discourse surrounding regions’ unique role within the federal government dissipated, and they were reconceived as the long arm of Washington. Despite the modern dominance of

districts of the Public Health Service (a division of the U.S. Department of Health, Education and Welfare (HEW), the predecessor to the HHS). From 1870 until 1920, the Public Health Service worked a large field operation that was directly supervised by Washington. See Shaw, *supra* note 13, at 199. However,

[t]he post-War expansion of the operations of the service in all fields of work had made it increasingly difficult for [an assigned officer] to supervise and keep in touch with its enlarged field establishment. As a result . . . [t]he seven directors in the Inspection Service were assigned to seven inspection districts Under the new practice, . . . these field inspectors, formerly attached to the departmental service in Washington, were transferred to the field, making their headquarters in a principal city of their inspection district.

Id. at 200. David Truman describes the expansion of the Department of Agriculture’s field organization in the beginning of the twentieth century, which necessitated reorganization and improved supervision. See TRUMAN, *supra* note 13, at 36-40. Fesler analyzes a similar process in the War Department. See Fesler Dissertation, *supra* note 13, at 2, 15-16.

the enforcer conception, however, federal regions still play a significant role in the federal administration.

A. The Mediation Era: 1920s-1940s

By the 1920s, regional thinking was in vogue in the practice and theory of public administration.⁸¹ Years of centralization of power in Washington resulted in an immense burden on the central government, pushing one 1922 commentator to conclude that “the machinery of national government has failed to cope adequately with the increased burden centralization has imposed upon it.”⁸² In this process of decentralization, the commentator argued, “It is quite probable that changes in national administration will result in centering in local *districts* many matters now controlled in Washington”⁸³ In 1925, Felix Frankfurter and James Landis, two of the most prominent figures in the field at the time, discussed this shift toward regionalism in government and in law. Regionalism, to them, was a necessary accompanying feature of the unifying and centralizing processes that characterized the emergence of the American federation.⁸⁴ It was both a natural outcome and a desirable political and theoretical response to the many new issues government had to deal with.

In light of the growth of the national government and of national economy and industry, scholars of varying disciplines pointed to the existence of organic and distinct regions within the United States. Historians, linguists, sociologists, planners, and geographers claimed that “the region”—rather than the state or the entire nation—was the proper unit of scientific analysis,⁸⁵ and

81. See Bulman-Pozen, *Our Regionalism*, *supra* note 2, at 394-401 (describing the widespread belief in the “promise of regionalism” that arose in the 1920s among scholars as well as the new interest in state compacts as a regional form (quoting LEWIS MUMFORD, *THE GOLDEN DAY: A STUDY IN AMERICAN EXPERIENCE AND CULTURE* 158 (1926))).

82. S. Gale Lowrie, *Centralization Versus Decentralization*, 16 AM. POL. SCI. REV. 379, 384 (1922).

83. *Id.* at 386 (emphasis added).

84. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 708 (1925) (“As to these regional problems Congress could not legislate effectively. Regional interests, regional wisdom and regional pride must be looked to for solutions.”). Although the authors did not discuss federal regions within central agencies and departments, their discussion reflects the way in which regionalism was generally understood.

85. See generally DONALD DAVIDSON, *THE ATTACK ON LEVIATHAN: REGIONALISM AND NATIONALISM IN THE UNITED STATES* (1938) (emphasizing the merits of cultural regional identity); ODUM & MOORE, *supra* note 77 (describing the popular cultural interest in regionalism and its practical implications); FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY* (1932) (arguing that sectionalism based on geographic regions has been shaping the politics of American society since the early colonial period); Lewis Mumford, *Toward a New Regionalism*, NEW REPUBLIC, Mar. 25, 1931, at 157 (analyzing different trends of regionalism in American culture). For a
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political scientists relied on these findings to argue that government should heed regional variations in different ways. Thus, during the 1930s, a number of public administration scholars wrote on the need to decentralize governmental functions and delegate to regional entities.⁸⁶ As Howard Odum explained:

[I]t is not possible to understand or to plan for the next period of American development without a vivid sensing of great regional differences. . . .

....

... There is everywhere new evidence for the reemphasis upon the new geographical and demographical points of view in interpretation and research. More and more regional analysis becomes the first essential for public administration.⁸⁷

Indeed, argued Frankfurter and Landis, because “the United States by virtue of its size reveals distinct regions with differences of climate, geography, economic specialization, and social habits,” “[r]egional interests, regional wisdom and regional pride must be looked to for solutions.”⁸⁸

Regionalism was viewed as an effective mechanism to achieve better control over the growing administrative apparatus,⁸⁹ to provide flexible solutions to “rigid federalism,”⁹⁰ to pacify possible violent upheavals by those who are governed by detached and remote central powers,⁹¹ to allow greater popular control over “the newer functions of the national government,”⁹² and to counter the excessive powers of the federal government.⁹³ Thus, for

comprehensive analysis of the regionalist movement in the United States, see ROBERT L. DORMAN, *REVOLT OF THE PROVINCES: THE REGIONALIST MOVEMENT IN AMERICA, 1920-1945*, at 81-104 (1993) (describing regionalist expressions in culture and art as a revolt against postwar mass culture and industrial society).

86. See Fesler, *Federal Administrative Regions*, *supra* note 13, at 259-60 (explaining the need for a regional organization in order to address regional problems); Fesler, *Standardization*, *supra* note 13 (describing different functions of administrative regions and arguing that uniformity should and can be achieved even in a decentralized scheme); John M. Gaus, Book Review, 32 AM. POL. SCI. REV. 1180 (1938) (reviewing DAVIDSON, *supra* note 85; and ODUM & MOORE, *supra* note 77). John Gaus was a professor of public administration at the University of Wisconsin and served as the chairman of the National Resources Committee’s technical subcommittee on regional planning. See NAT’L RES. COMM., *supra* note 67, at iv-v.

87. Howard W. Odum, *The Case for Regional-National Social Planning*, 13 SOC. FORCES 6, 15-16 (1934).

88. Frankfurter & Landis, *supra* note 84, at 708, 717.

89. See TRUMAN, *supra* note 13, at 3-8.

90. See *id.* at 8-9.

91. See *id.* at 3-4 (noting that “overconcentration of effective authority in the central offices at Washington will be increasingly hazardous,” creating difficulties in maintaining stability); Odum, *supra* note 87, at 7-8.

92. TRUMAN, *supra* note 13, at 5.

93. See ODUM & MOORE, *supra* note 77, at 3-4.

Frankfurter and Landis, regionalism was a middle ground between intrusive centrism and loose federalism:

The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths “States-Rights” and “National Supremacy.” . . . Our regions are realities. Political thinking must respond to these realities. Instead of leading to parochialism, it will bring a fresh ferment of political thought whereby national aims may be achieved through various forms of political adjustments.⁹⁴

By the 1930s, federal regions had proliferated throughout the administrative apparatus. A survey commissioned by President Franklin Delano Roosevelt and conducted by the newly appointed National Resources Committee identified over one hundred distinct regional schemes applied by departmental units and by independent agencies.⁹⁵ The survey found nine federal departments whose subunits (bureaus, divisions, services, corps, and so on) had each adopted their own regional schemes: Treasury (14 schemes), War (11 schemes), Justice (3 schemes), Post Office (4 schemes), Navy (5 schemes), Interior (14 schemes), Agriculture (19 schemes), Commerce (7 schemes), and Labor (1 scheme).⁹⁶ In addition, the survey enumerated twenty-one independent agencies operating through one or more regional schemes, including the Interstate Commerce Commission, the Public Works Administration, and the Federal Communications Commission, for a total of thirty different schemes.⁹⁷

Given the disparate functions governmental units sought to fulfill, it is no surprise that so many different regional schemes were developed over such a relatively short period. As the National Resources Committee report suggested, there are many alternative ways to divide the national territory, depending on the relevant agency’s functions.⁹⁸ The Committee, for instance, examined various natural, social, political, and economic factors, each of which could serve as the basis for dividing the nation into regions. These factors included climate, soil, minerals, geography and topography, density of population, agriculture, industry, political affiliations, retail and wholesale shopping, socioeconomic characteristics, and metropolitan areas.⁹⁹ The focus on a single

94. Frankfurter & Landis, *supra* note 84, at 729.

95. See NAT’L RES. COMM., *supra* note 67, at v-vi (summarizing the survey); *id.* app. at 206-23 (providing maps of the many regional schemes). For President Roosevelt’s executive order creating the Committee, see Exec. Order No. 7065 (June 7, 1935) (on file with authors).

96. See NAT’L RES. COMM., *supra* note 67, app. at 206-18.

97. See *id.* app. at 219-23.

98. See *id.* at 167.

99. The report shows the alternative regional maps that could be drawn based on these different factors. *Id.* at 171-77.

factor can result in regional maps that look radically different from one another. While some maps divide the nation into dozens of regions (for example, into retail shopping areas or farm income regions),¹⁰⁰ others include only a handful of regions (based, for example, on socioeconomic homogeneity, climate, and physical traits).¹⁰¹ And whereas some have almost no correlation with state lines, others follow them at least in part.¹⁰²

The National Resources Committee report reflects the considerable academic interest in federal administrative regions at the time and the involvement of leading political scientists in the construction of federal regions. In a series of articles, books, and reports, almost every aspect of the problem of “area and administration” (as it was called at that time) was discussed, analyzed, and debated.¹⁰³ The division of federal departments and agencies into regions was seen as part and parcel of the New Deal state, and it took center stage in debates over public administration. There was consensus that regionalism was a valuable counterweight to federal power on the one hand and state power on the other.¹⁰⁴ It was thus seen to bolster the republic against “over-centralization, urbanism, and totalitarianism”¹⁰⁵ without immediately resorting to the sometimes inefficient and often problematic states’ rights idea.

Dividing the fledgling bureaucracy into federal regions was an appealing compromise, as these regions facilitated the growth of a federal apparatus

100. *See id.* at 175 fig.26.

101. *Cf. id.* app. at 217 fig.41; *id.* app. at 219 fig.43; *id.* app. at 221 fig.45.

102. *Compare, e.g., id.* app. at 214 fig.38 (map labeled “Interior Dept.: U.S. Geological Survey: Water Resources Branch Areas for Reporting on Surface Water Supply”), *and id.* app. at 218 fig.42 (map labeled “Dept. of Commerce: Bureau of Navigation and Steamboat Inspection Supervising and Local Inspection Districts”), *with, e.g., id.* app. at 211 fig.35 (maps labeled “Post Office Dept.: Supply Offices” and “Post Office Dept. Railway Mail Service: Divisions”).

103. Two leading figures in the debate were Fesler and Earl Latham. Fesler, who received his Ph.D. in political science from Harvard, began his teaching career at the University of North Carolina and later on went to teach at Yale. His research focused on the territorial distribution of the U.S. administration. *See In Memoriam: James Fesler*, YALE BULL. & CALENDAR (May 6, 2005), <https://perma.cc/MT8S-PAG9>. Latham worked at the Bureau of the Budget and was later a professor at the University of Minnesota and Amherst College. *See* Richard E. Ashcraft, *A New England Professor*, HARV. CRIMSON (Oct. 17, 1959), <https://perma.cc/UX9C-8F8U>.

104. *See* TRUMAN, *supra* note 13, at 7-9 (presenting decentralized administration as a solution to the fear of increasing federal power); *see also* FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 126 (describing the importance of a regional level as a middle-ground layer between the national and local); Latham, *Executive Management*, *supra* note 13, at 19, 25-26 (arguing that agencies’ field officials can promote better relations between state and local officials and federal agencies).

105. ODUM & MOORE, *supra* note 77, at 3-4.

while partially neutralizing its totalitarian and centralizing potential.¹⁰⁶ The link between centralization and totalitarianism was especially salient during the 1930s with the rise of fascist and communist regimes in Europe. Against this background, political scientists and public administrators in the United States were wary of the causal connection between central state power and autocratic regimes. Historians, sociologists, and legal scholars hailed the United States's decentralized structure and emphasized the importance of regions within it, which addressed fears of a too-powerful centralized state.¹⁰⁷

Consequently, in the 1930s and 1940s, administrative regions were conceived of as mediators between the federal government's centralizing efforts and regional and local needs and conditions. In this context, Fesler noted:

We need not choose between a strong Federal government and a strong state government, between absolute centralization and absolute decentralization, between bureaucratic regimentation and local self-government. . . . The either-or approach precludes recognition of the fact that in the United States at least three magnitudes of governmental areas are needed—national, sub-national, and local—and that the people have a stake in the efficiency and popular control of the governments at each of these three levels. In a field service the either-or approach neglects the need for finding a middle ground between central responsibility for results and for equitable treatment of all persons on the one hand, and on the other, adjustment of administration to distinct regional and local conditions.¹⁰⁸

The idea that administrative regions should enforce and implement federal policies in a way that mediates between central mandates and regional and local needs and conditions was especially dominant in these decades and was a conception held by many academics as well as senior officials in the administration of Franklin Delano Roosevelt.¹⁰⁹ The National Resources Committee's 1935 report praised the importance of regions for public administration, emphasizing the value of incorporating regionalism into national planning and federal programs.¹¹⁰ In the report, regions appear as social and natural realities requiring the adaptation of central policies, as well

106. See NAT'L RES. COMM., *supra* note 67, at vii-ix.

107. See Bulman-Pozen, *Our Regionalism*, *supra* note 2, at 396-401.

108. FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 126-27.

109. The National Resources Committee was a governmental committee established in 1935 by President Roosevelt to serve as the federal planning authority. See *supra* note 95 and accompanying text. The Committee was chaired by the Secretary of the Interior; its other members included the Secretary of War, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, and the Federal Emergency Relief Administrator. See NAT'L RES. COMM., *supra* note 67, at iv-v. Top political scientists and experts in administration and geography were counted among its advisors and assistants, including James Fesler, Charles E. Merriam, Marshall Dimock, Wesley C. Mitchell, John Gaus, and Frederick A. Delano. See *id.*

110. See NAT'L RES. COMM., *supra* note 67, at 138-40.

as administrative tools that are created in order to more efficiently manage the vast and diverse national territory.¹¹¹ The unique potential of administrative regions as mediators between a uniform central outlook and regional perspectives is apparent:

Throughout our history the role of the States in the Federal system, and the interplay of forces between them and the National Government, have been fundamental factors. This is true not only of the States, but of groups of States. From this fact has arisen a recognition of "sectionalism" . . . There have sometimes been efforts to suppress sectionalism by ignoring it; it has been viewed as a policy of selfishness and intransigence. Recently, however, it has been recognized as a factor of value and importance in the encouragement of a more varied and a richer life for the Nation, whereby the peculiar characteristics, resources, and contributions of the major sections of the country, and within each of its constituent parts, could be protected from invasion and suppression by ill-considered and hasty national policies. The very stimulation of the self-consciousness of the section may recruit a wider leadership for civic affairs, and a richer culture. Thus within the past two decades a regional approach to American life and its problems and opportunities can be found in the social studies, geography, literature, the drama, painting, architecture, history, and civic education.¹¹²

In a special report from 1947 entitled *The Federal Field Service*,¹¹³ a host of administrators and bureaucrats led by Earl Latham applauded the federal region and its importance for public administration. The report emphasized the democratic advantages of powerful federal regions, noting that "[t]he federal government, in brief, is no longer distant, but local"; that "[a]gencies are conveyors of political, economic, and social ideas, and in turn are affected by the corresponding ideas in the areas where they work"; and that "[d]emocracy is an expression of political ethics, and participation by the field in the formulation of agency policy is not only consonant with democratic belief but produces conditions favorable to increased efficiency."¹¹⁴ The report continued:

Each clerk bears in his person some small measure of the power that the people have vested in their agents to act for them. His behavior is conditioned by the small polity represented by his agency and by the larger polity whose collective purposes he has been employed to advance. To the extent that he merges his private interest with the public interest, as Rousseau said, to that extent does big government become more tolerable and viable.¹¹⁵

111. *See id.* at 139-40.

112. *Id.* at 8.

113. LATHAM, *THE FEDERAL FIELD SERVICE*, *supra* note 13.

114. *Id.* at 2-3.

115. *Id.*

Moreover, the report defied the conception of regions as mere enforcers. Unlike the dominant view today, which sees the agency center as superior to the regions and regions as mere implementers of central policies,¹¹⁶ the view in the 1930s and 1940s saw the two as equal partners, complementing each other:

[C]entral-field relationships may be thought of as an organic unity, not unlike a wheel, in which the hub helps to keep the rim and spokes in relation to each other while the entire object moves from one point in space and time to another. Each assists the other; no part is dispensable, or better, or superior to any other.¹¹⁷

Indeed, this conception meant that federal regions should take part in agency policymaking, not just in execution. As stated by the National Resources Committee report, “[S]ubnational units of area are needed in order to accomplish actual decentralization of powers and activities of the Federal agencies, particularly where planning and policymaking are involved.”¹¹⁸

B. The Coordination Era: 1950s-1970s

In the late 1940s, the Truman Administration engaged in a comprehensive investigation of the federal government, including an analysis of its regional structure. The need to reevaluate and restructure the government was a result of its extensive, rapid, and often-uncoordinated growth during the 1930s and 1940s. The expansion of the federal government and its powers during this period was a product of the New Deal, as well as wartime necessities and the emerging role of the United States in world affairs.¹¹⁹ Many of the emergency measures required the establishment of new departments and agencies and the broadening of existing authority. These uncoordinated and hasty measures led to duplications, waste, and conflicts within and between governmental entities, hindering the efficacy and efficiency of the federal government.¹²⁰

In 1947, President Truman appointed a commission to examine the organizational structure of the executive branch and to propose ways to improve its functioning. This commission, named the U.S. Commission on Organization of the Executive Branch of the Government and chaired by

116. For a full discussion of the conception of regions as enforcers, see Part II.C below.

117. LATHAM, *THE FEDERAL FIELD SERVICE*, *supra* note 13, at 1.

118. NAT’L RES. COMM., *supra* note 67, at 31.

119. See U.S. COMM’N ON ORG. OF THE EXEC. BRANCH OF THE GOV’T, *THE HOOVER COMMISSION REPORT*, at xiv (1949) [hereinafter *HOOVER COMMISSION REPORT*] (“As a result of depression, war, new needs for defense, and our greater responsibilities in the foreign field, the Federal Government has become the most gigantic business on earth.”). Between 1933 and 1944, federal employment grew from about 600,000 to over 3.3 million workers. See DAVID E. LEWIS & JENNIFER L. SELIN, *ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 22* (2012), <https://perma.cc/2S85-ABHW>.

120. See *HOOVER COMMISSION REPORT*, *supra* note 119, at xiv.

former President Herbert Hoover, submitted its report on February 5, 1949.¹²¹ Although the Hoover Commission's mandate was not centered on the issue of federal regional offices, the Commission found it necessary to delve into the regional structure of the federal government, and one of its task forces was dedicated to the investigation of the federal field offices.¹²² The Commission recognized the importance of regional offices, noting that "[t]he business of the Federal Government is primarily transacted by field offices" and that "[n]early 90 percent of all Federal employees work outside of Washington."¹²³ The report's findings laid the foundations for the subsequent two decades, when federal regions were theoretically reconfigured and structurally reorganized into coordinating entities.¹²⁴

Given the importance of federal regions, the Commission took it upon itself to identify the malfunctions in their structure and operation and to propose solutions. The Commission's first finding was that there were "[t]oo many separately organized, highly specialized field offices."¹²⁵ The functionalist approach to the regional division of agencies yielded a chaotic array of regional boundaries that in the Commission's view resembled "an unbelievable spider-web pattern."¹²⁶ The Commission also found that agency headquarters failed to adequately delegate authority to their regions and to effectively monitor their field operations.¹²⁷ The report added that there was a "[l]ack of coordination of effort among the various Federal field offices, both within the same agency and between different agencies."¹²⁸ This lack of coordination existed both in policy implementation, rendering central policies less effective, and in resource management, causing unnecessary waste.¹²⁹ The report's final finding was that there was insufficient cooperation between regional offices on the one hand and states, local governments, and private organizations on the other.¹³⁰

121. *Id.* at xi.

122. *See id.* at 28-29. For contemporaneous discussions of the Hoover Commission Report, see Ferrel Heady, *The Reports of the Hoover Commission*, 11 REV. POL. 355 (1949); and John W. Lederle, *The Hoover Commission Reports on Federal Reorganization*, 33 MARQ. L. REV. 89 (1949).

123. HOOVER COMMISSION REPORT, *supra* note 119, at 28-29.

124. *See id.* at 28-30 (summarizing the Commission's recommendations for better coordination between central and regional levels of government).

125. *Id.* at 29.

126. *Id.*

127. *See id.* at 23, 29.

128. *Id.* at 29.

129. *See id.* ("Now agencies separately provide their own supply, motor transport, space, and other services. Substantial savings in overhead cost are possible.")

130. *Id.*

The Commission concluded that more coordination was needed at all levels of government, including the regional level. It recommended that federal agencies streamline their regions and improve their coordinating capacities. It accordingly advised that “[a]dministrative regions and regional headquarters should be more nearly comparable geographically.”¹³¹ The Commission also suggested reconstructing the relationship between agency headquarters and regions by delegating more powers to the regions but at the same time subjecting them to more inspection and reviews.¹³² Thus, it suggested that manuals of instructions, through which headquarters control regions’ conformity, “should be revised and simplified and their self-defeating degree of detail eliminated.”¹³³ Further, the Commission called on agencies to pool their resources within their regions in order to avoid duplication and waste.¹³⁴

The Commission’s report had a significant impact on the reorganization of the administration and of the executive, especially in making the bureaucracy more accountable to the President and in emphasizing economy and efficiency.¹³⁵ Although there is no evidence that the Commission’s recommendations regarding the structure of regional offices and their role within the federal bureaucracy were implemented at the time, we believe that the recommendations’ spirit has had an impact on the ambitious reforms initiated by subsequent administrations—chief among them the Nixon Administration—relating to the standardization and roles of federal regions.

Under President Eisenhower in the 1950s, the countermovement against the New Deal expansion of the federal government gained momentum. High on the new presidential agenda was the reintroduction of state and local governments as important partners in the execution of federal programs.¹³⁶ The new Administration regarded subnational political units—primarily the states—as vital for achieving federal goals. Against the “dark background of Eastern Europe” and “the results of extreme and dictatorial concentration of power,” warned President Eisenhower, it was important to reverse the centralizing trend of his predecessors and ensure that the states did not “degenerate into powerless satellites of the national government in

131. *Id.*

132. *See id.* at 23 (“Some department heads fail to delegate authority adequately to field officials.”); *id.* at 30 (“Reporting and inspection practices should be strengthened.”).

133. *Id.* at 30.

134. *Id.* at 29.

135. *See* Peri E. Arnold, *The First Hoover Commission and the Managerial Presidency*, 38 J. POL. 46, 48-49 (1976). *See generally* Ralph Purcell, *The Hoover Commission*, 4 GA. REV. 3 (1950) (reviewing the legislative measures taken in light of the Commission’s recommendations).

136. *See* McDowell, *supra* note 14, at 111-12 (describing President Eisenhower’s desire to return some of the “less traditional” federal functions to the states).

Washington.”¹³⁷ Under this vision, federal regions were obliquely depicted as markers of centralization, and regional coordination was to be achieved mainly through state-based regional compacts.¹³⁸ Thus, federal regions were rather marginal in Eisenhower’s reorganizational initiatives, reorienting their role toward coordinating between Washington and states and localities.¹³⁹ Once the Eisenhower Administration identified insufficient intergovernmental coordination within and among departments and agencies, both in Washington and the regions, as a main problem and cause of governmental malfunction, strengthening intergovernmental coordination became a high priority.¹⁴⁰

In a report submitted to President Eisenhower in 1955 by the Commission on Intergovernmental Relations (Kestnbaum Commission), later known as the Advisory Commission on Intergovernmental Relations (ACIR),¹⁴¹ various measures were proposed to combat the problems plaguing the fragmented federal government. The proposals highlighted the need to develop and strengthen intergovernmental relations and coordination and called for devolving authority currently held by the federal government to the states.¹⁴² Despite sparse discussion, the Kestnbaum Commission advised department headquarters to delegate more authority to their regions, finding that the latter are better situated to coordinate between the various departments of the federal government as well as between those departments and state and local governments.¹⁴³ Indeed, the report saw the regions as coordinating vehicles, through which the federal government could “keep in touch with localities and their problems.”¹⁴⁴

The coordinating function of federal regions continued to be bolstered through the next decade by both the Kennedy and Johnson Administrations.

137. Address to the 1957 Governors’ Conference, Williamsburg, Virginia, PUB. PAPERS 486, 488-89 (June 24, 1957).

138. See THE COMM’N ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 45-47 (1955) [hereinafter KESTNBAUM REPORT].

139. See *id.* at 80.

140. See Wm. G. Colman & Delphis C. Goldberg, *The Eisenhower Years and the Creation of ACIR*, INTERGOVERNMENTAL PERSP., Summer 1990, at 19, 20; Tim Conlan, *From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations*, 66 PUB. ADMIN. REV. 663, 665 (2006) (reviewing the Kestnbaum Commission’s recommendations for enhancing and sharpening federal intergovernmental relations).

141. The Commission was headed by Meyer Kestnbaum, see KESTNBAUM REPORT, *supra* note 138, at ii—hence its more widely known name. In 1959, the Kestnbaum Commission was replaced by the more permanent ACIR. See generally McDowell, *supra* note 14.

142. See KESTNBAUM REPORT, *supra* note 138, at 56-58, 86-89.

143. See *id.* at 230.

144. *Id.*

Because many, albeit not all, regional offices of many departments and agencies were located in the same cities, an attempt was made by President Kennedy to concentrate various administrative services in order to “pool experience and resources, and to accomplish savings.”¹⁴⁵ Immediately after his election, President Kennedy established in each administrative region of the Civil Service Commission a federal executive board whose function was to foster “closer coordination of Federal activities at the regional level.”¹⁴⁶ Much of President Johnson’s Great Society program was based on the understanding that poverty—rural and urban—is a multifaceted problem that requires regional, intergovernmental, and coordinated solutions. Federal regions were therefore reframed as important governmental coordinating units, especially in the field of social and economic development.¹⁴⁷ As a result the Johnson Administration began experimenting with the standardization of federal regions and the establishment of regional councils.¹⁴⁸

However, these miniature-scale regional experiments were not sufficient to contend with the far-reaching social, economic, and political changes of the 1960s, and more profound and comprehensive restructuring was required. It was the Nixon Administration and its New Federalist ideology that gave life to this new understanding of the coordinating functions of federal regions, based on their standardization and the institutionalization of their governing capacities.

1. Nixon’s New Federalism

Although the term New Federalism is commonly attributed to President Reagan,¹⁴⁹ it was in fact coined more than a decade earlier by President

145. See Memorandum on the Need for Greater Coordination of Regional and Field Activities of the Government, PUB. PAPERS 717, 717 (Nov. 14, 1961) [hereinafter Kennedy Memorandum].

146. *Id.* at 718. Federal executive boards are currently located in twenty-eight cities across the country: Albuquerque; Atlanta; Baltimore; Boston; Buffalo; Chicago; Cincinnati; Cleveland; Dallas-Fort Worth; Denver; Detroit; Honolulu; Houston; Kansas City; Los Angeles; Miami; Minneapolis; New Orleans; New York; Newark; Oklahoma City; Philadelphia; Pittsburgh; Portland, Oregon; San Antonio; San Francisco; Seattle; and St. Louis. See *Locations*, FED. EXECUTIVE BOARDS, <https://perma.cc/EPE6-UB23> (archived Apr. 29, 2018). Interestingly, only 5 of the 28 boards are located in state capitals (Atlanta, Boston, Denver, Honolulu, and Oklahoma City).

147. See Exec. Order No. 11,386, § 1(d)-(e), 3 C.F.R. 85, 86 (1968).

148. See Melvin B. Mogulof, *The Federal Regional Councils: A Potential Instrument for Planning and Joint Action*, 44 SOC. SERV. REV. 132, 133 (1970); The Urban Inst., *Research, 1968-1971*, 20 OPERATIONS RES. 516, 527 (1972).

149. See, e.g., Joseph F. Zimmerman, *Federal Preemption Under Reagan’s New Federalism*, 21 PUBLIUS: J. FEDERALISM 7, 7 (1991).

Nixon.¹⁵⁰ Contrary to Reagan's New Federalism, which viewed government as "the problem" rather than the solution and thus focused on radically downsizing it,¹⁵¹ Nixon's New Federalism put less emphasis on states' rights and deregulation at the federal level. In fact, during the Nixon Administration, the amount of federal regulation increased dramatically.¹⁵² Nixon's New Federalism was a profound ideological shift directed at reforming the entire federal government by rationalizing, coordinating, and decentralizing it while retaining or even expanding the role of the government in social and economic affairs.¹⁵³ The aim of Nixon's New Federalism was to place greater reliance on state and local governments, moving federal decisionmaking out of Washington and closer to the people.¹⁵⁴ No less important was the emphasis on representativeness and on the need to decentralize the administration as a way to create greater "local clientele domination of the decentralized organizations."¹⁵⁵ In this new governmental scheme, federal regions were to play a central and unique role. Nixon's New Federalism sought to move federal decisionmaking from agency headquarters to the regions, a mode of decentralized administration designed to advance the federalist ideals of representativeness and proximity of the government to the people.¹⁵⁶

Thus, the 1960s and 1970s were characterized by exponential growth of the federal government and the introduction of new legal and administrative measures through which it operated and that increased the power of federal regions.¹⁵⁷ This era was marked by the appearance of more federal standards and programs with which the states either had to comply or were induced to comply through various sanctions and incentives. This new governance scheme significantly bolstered the power of federal regions because, in most cases, the regional offices were in charge of the grant-giving process and

150. See Address to the Nation on Domestic Programs, PUB. PAPERS 637, 638, 642-43 (Aug. 8, 1969).

151. See Inaugural Address, PUB. PAPERS 1, 1 (Jan. 20, 1981).

152. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 14, at 5; TIMOTHY CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 20-21, 76-91 (1988).

153. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A-39, MULTISTATE REGIONALISM 172 (1972).

154. See Address to the Nation on Domestic Programs, *supra* note 150, at 638 ("After a third of a century of power flowing from the people and the States to Washington it is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the States and to the people.").

155. Kaufman, *supra* note 15, at 6.

156. Herbert Kaufman argued contemporaneously that what motivated the reform was "the growing demand for extreme administrative decentralization, frequently coupled with insistence on local clientele domination of the decentralized organizations." *Id.*

157. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 14, at 61-63.

monitoring state and local compliance with federal policies, standards, and goals.¹⁵⁸

2. Federal regions as semi-general-purpose governments

In order to deliver on its promise for a New Federalism, the Nixon Administration launched two main reforms: the standardization of federal regions and the establishment of a regional council to coordinate and steer federal government activities in each region.¹⁵⁹

Standardization of federal regions. Soon after taking office, Nixon announced his plan to establish ten standard federal regions for most federal departments and agencies.¹⁶⁰ In line with this plan, the entire national territory was divided into ten regions that were to gradually replace the multitude of distinct regional schemes the departments had used until then.¹⁶¹ In 1974, the standardization effort was taken a step further when Nixon issued an order directing all federal agencies, save for a few exceptions, to conform to the ten standard regions.¹⁶² Figure 1 below displays a map of this ten-part division.

158. *See id.* at 1-17, 103-47 (describing the growth of federal intergovernmental regulations and various problems with implementing such regulations).

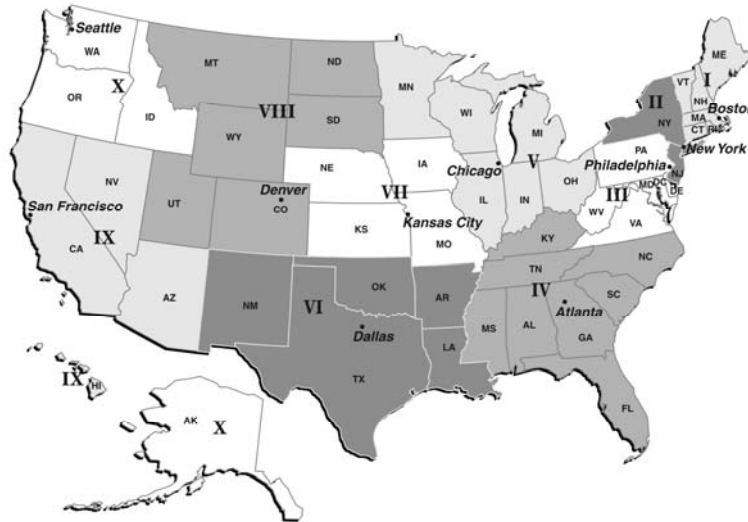
159. Although both ideas continued experiments initiated by President Johnson, *see* Exec. Order No. 11,386, 3 C.F.R. 85 (1968), it was the Nixon Administration that adopted them as nationwide formal policies.

160. Statement on the Realignment of Regional Boundaries of Certain Federal Agencies, PUB. PAPERS 387, 388 (May 21, 1969) [hereinafter Nixon May 21, 1969 Statement]. Two months earlier, Nixon had announced that there would be only eight regions. *See* Statement on Establishing Common Regional Boundaries for Agencies Providing Social and Economic Services, PUB. PAPERS 255, 256-57 (Mar. 27, 1969) [hereinafter Nixon March 27, 1969 Statement].

161. *See* Office of Mgmt. & Budget, Exec. Office of the President, Circular A-105, Standard Federal Regions (1974) [hereinafter Circular A-105], in U.S. GEN. ACCOUNTING OFFICE, FPCD-77-39, STANDARDIZED FEDERAL REGIONS—LITTLE EFFECT ON AGENCY MANAGEMENT OF PERSONNEL app. I at 25 (1977). At the beginning, only four federal departments and one agency were required to conform to the newly established regions: the Department of Labor (DOL); HUD; HEW; the Office of Economic Opportunity; and the Small Business Administration (SBA). Others were merely encouraged to adopt them as well. *See* Nixon March 27, 1969 Statement, *supra* note 160, at 256. For a roundtable discussion of the reform, *see* Mini-symposium, *supra* note 70.

162. *See* Circular A-105, *supra* note 161, § 3, at 25.

Figure 1
The Ten Standard Federal Regions



Each federal region comprises several states, and each region's external boundaries adhere completely to state lines. Regional offices were to be located in ten large cities, referred to as "standard regional headquarter cities": Boston (Region I), New York (Region II), Philadelphia (Region III), Atlanta (Region IV), Chicago (Region V), Dallas (Region VI), Kansas City (Region VII), Denver (Region VIII), San Francisco (Region IX), and Seattle (Region X).¹⁶³ Only three of the ten cities—Atlanta, Boston, and Denver—are state capitals.

Federal regional councils. The radical nature of the Nixon Administration's federal regional policy is apparent in a complementary component of the reform: the establishment of a federal regional council (FRC) for each of the ten newly formed standard regions.¹⁶⁴ The FRCs were intended to constitute a meaningful governmental tier at the regional level that would coordinate the activities of the agencies and departments operating in the region and eventually become a decisionmaking body regarding various governmental activities within the region.¹⁶⁵ Nixon's New Federalism was suspicious of, even

163. *Id.* § 7(a)-(b), at 27-28.

164. *See* Exec. Order No. 11,647, 3 C.F.R. 371 (1973); *see also* Mogulof, *supra* note 148, at 133-34.

165. *See* Robert W. Gage, *Federal Regional Councils: Networking Organizations for Policy Management in the Intergovernmental System*, 44 PUB. ADMIN. REV. 134, 135 (1984); Mogulof, *supra* note 148, at 136-37; *see also* ADVISORY COMM'N ON INTERGOVERNMENTAL
footnote continued on next page

hostile toward, Washington and thus sought to shift the power balance within the federal government from the center to the regions.¹⁶⁶ In this regard, Nixon's plan diverged significantly from dominant decentralization efforts, which commonly aim to empower the states and diminish the federal government's role.

The FRCs were primarily geared toward ensuring that the grantmaking activities of the various departments and agencies would be conducted "in concert."¹⁶⁷ To this end, they had four main functions: (i) developing short- and long-term "regional interagency strategies" and "funding plans"; (ii) resolving "interagency conflicts and coordination problems" within the regions; (iii) coordinating grant applications and grant allocation with state and local executives; and (iv) conducting regionally coordinated plan supervision.¹⁶⁸ Each FRC comprised the regional heads of the most important federal departments and agencies in the region.¹⁶⁹ FRC chairpersons were selected by the President from among the regional heads.¹⁷⁰

When asked in Congress whether the Nixon Administration's decentralization policies might produce an extra layer of bureaucracy, Secretary of Health, Education and Welfare Caspar Weinberger replied:

[T]he purpose of decentralization is to *remove a layer*. Right now in most programs, . . . the final decision has to be made in Washington. We are talking about putting authority, final authority, for whatever function it may be—whether audit, technical assistance, or approval for a grant—in the regional office . . .¹⁷¹

Though originally initiated by Nixon, standardization efforts continued uninterrupted throughout the 1970s—by both the Ford¹⁷² and Carter¹⁷³ Administrations—with more and more departments and agencies adapting their administrative structures to the model. The number of federal programs

RELATIONS, A-43, REGIONAL DECISION MAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS 212, 215 (1973).

166. See CONLAN, *supra* note 152, at 89-90.

167. See Exec. Order No. 11,647, § 2, 3 C.F.R. at 373.

168. See *id.*

169. Member departments and agencies included the DOL, HEW, HUD, the Department of Transportation, the Department of Agriculture, the Department of the Interior, the Office of Economic Opportunity, the EPA, and the Law Enforcement Assistance Administration. See U.S. GEN. ACCOUNTING OFFICE, B-178319, ASSESSMENT OF FEDERAL REGIONAL COUNCILS 7-8 (1974).

170. Exec. Order No. 11,647, § 1(a), 3 C.F.R. at 372.

171. *Departments of Labor and Health, Education, and Welfare Appropriations for 1975: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 93d Cong. 51, 70-72 (1974) (statement of Caspar W. Weinberger, Secretary, U.S. Department of Health, Education, and Welfare) (emphasis added).

172. See Exec. Order No. 11,892, 3 C.F.R. 238 (1976).

173. See Exec. Order No. 12,149, 3 C.F.R. 420 (1980).

that were managed by FRCs also grew significantly during the 1970s: In just the first four years of the existence of FRCs, the number grew from 99 to 187 programs.¹⁷⁴

Despite the concerted effort by three consecutive Administrations, the FRCs made only a “very modest degree of improvement” in coordinating various regional functions¹⁷⁵ and were officially abolished by President Reagan in 1983.¹⁷⁶ At the heart of this failure, we demonstrate below, was no mere political or ideological opposition: The lack of legal mechanisms to support the new organizational structure left FRCs unequipped to realize their goals. FRCs suffered from a set of structural weaknesses as a result of political opposition from Congress and the Washington bureaucracy, both of which objected to the idea of a new and powerful regional governmental tier.¹⁷⁷

Various contemporaneous reports dedicated to evaluating the regional reform have pointed to a set of factors that led to its failure and eventual demise. First, there was a low compliance rate with the Nixon Administration’s 1974 mandate to conform to the standard regional scheme.¹⁷⁸ This lack of compliance resulted in FRCs’ experiencing difficulty fulfilling their coordinating function, as many agencies remained outside of their purview and beyond their influence. Second, due to the strong congressional opposition, FRCs were not given sufficient legal authority. Thus, an FRC had no legal power to instruct its member departments and agencies to take coordinated actions, nor was it authorized to commit grant funds to states and localities.¹⁷⁹ Moreover, while the council chairpersons were in charge of resolving interagency conflicts and coordinating the activities of the federal administration in their regions, they did not have any authority over the various regional entities or over the regional heads who served as council members,¹⁸⁰ and

174. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 169, at 21-22.

175. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-54, THE INTERGOVERNMENTAL GRANT SYSTEM AS SEEN BY LOCAL, STATE, AND FEDERAL OFFICIALS 210-12 (1977). The ACIR report found that in most cases the grant application and award processes were not substantially improved as a result of the standardization of federal regions and the establishment of FRCs. See *id.* at 212 & tbl.V-19.

176. See Exec. Order No. 12,407, 3 C.F.R. 154 (1984).

177. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 161, at 20-21 (discussing the lack of congressional appropriation of funds for the FRCs and Congress’s explicit restrictions against “using public monies ‘to finance interdepartmental boards, commissions, councils, [committees,] or similar groups . . . which do not have prior and specific congressional approval of such method of [financial support]’” (quoting Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 92-49, § 609, 85 Stat. 108, 124 (1971))); see also *id.* at 15 (citing the lack of commitment by top-level executives as one of the reasons for the failure of FRCs).

178. See *id.* at 16.

179. See *id.* at 17.

180. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 169, at 25.

consequently they could not carry out the FRCs' functions effectively. These authorization problems were greatly exacerbated by actions taken by the Washington-based heads of departments and agencies, who resisted Nixon's plan to strip them of their powers. In order to thwart the shifting of power from Washington to the regional councils, they either kept the authority to make final decisions on grant approvals in Washington or bypassed the regional council heads by delegating decisionmaking powers directly to agency regional officials.¹⁸¹ This meant that even if the regional heads agreed on a coordinated regional action, they could not force it upon their subordinates, who enjoyed direct authorization from the Washington headquarters.

Third, Congress did not appropriate separate funds for FRCs.¹⁸² They were therefore left without an independent budget they could use to maintain a functional apparatus of their own and allocate at their discretion. Hence, they had to depend financially on the member agencies for any plan they wished to advance. Because not all member agencies were committed to supporting FRCs, in some cases they were left without proper administrative assistance and financial means.¹⁸³ Relatedly, the FRCs' chairpersons, members, and staff had to divide their time and efforts between FRC and agency affairs, and consequently they often did not have enough time or resources to work on issues pertaining to the FRC.¹⁸⁴

Due to these structural weaknesses and constant opposition from Washington—both from Congress and the bureaucracy—it was easy for the opponents of regional power to declare the reform a failure and to abolish it in the 1980s. States and localities that could have supported the regional reform were at best unenthusiastic about it, both because it only complicated the grant application and award processes and arguably also because their political

181. *See id.* at 20-21 (“For 12 of the 17 programs, decisionmaking authority was decentralized. However, for 10 of the 12 programs (1) decisionmaking authority was vested in regional officials other than the regional heads serving on Councils or (2) grant award levels were set by a formula which gave regional heads little or no discretion over funding allocations. Therefore, full decisionmaking authority, including approvals of program content, funding period, and funding level, was vested in the regional head who served on the Council for only 2 of the 17 programs.” (footnote omitted)).

182. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 161, at 19.

183. *See id.* at 20-21 (noting that there are “serious questions regarding the present method of funding FEBs and FRCs,” that there are “no direct appropriations for these interdepartmental organizations,” and that this issue should be brought to the attention of the Congress).

184. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 169, at 29-31. In the early 1970s, there was a pilot program to allocate \$250,000 to each FRC in order to advance independent, regionally-agreed-upon programs. This program was discontinued within two years because FRCs dedicated too much time and energy to their independent programs. *See id.* at 15-16.

power was threatened by the emerging regional tier.¹⁸⁵ Those who were worried about intergovernmental cooperation were therefore able to declare that the regional level only made matters worse in that it had become just another governmental entity increasing coordination problems instead of decreasing them.

C. The Enforcement Era: 1980s-2000s

From the 1980s through the early twenty-first century, federal regions' role as mediating and coordinating entities gradually faded, and they were reconfigured as predominately enforcing bodies. With the emergence of President Reagan's New Federalism, the focus shifted to states' rights and downsizing government.¹⁸⁶ Federal regions were now seen as part of the mistrusted and oversized federal bureaucratic apparatus. Consequently, over this period, the intense debate over the role of federal regions withered away, with attention limited to ensuring that regions enforce and execute central policy in a consistent and efficient manner.¹⁸⁷ Regional variance, the need to mediate between local constituencies and federal policies, and the necessity of coordinating federal and state actions within distinct territories took a back seat; consistency in enforcement became the overriding principle to which federal regions were expected to adhere.

Immediately after he took office, President Reagan seemingly adopted his predecessors' policies toward regional reform.¹⁸⁸ Yet it was an adoption that substantially altered the constitution and function of the FRCs. Declaring a "restructur[ing]" of the FRCs, he removed almost all independent agencies, leaving only eight federal departments and the EPA as members, thus strengthening the hold of the President.¹⁸⁹ In terms of their function, the coordinating role of the FRCs was almost abolished; instead, they became a vehicle to "assist in explaining" the "federalism initiatives" of the new administration.¹⁹⁰ These new initiatives included the "[r]eform of the Federal

185. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 175, at 210-15 (reporting on a survey concerning states' and localities' discontent with the role of the FRCs in the grantmaking process).

186. See CONLAN, *supra* note 152, at 97.

187. In recent years, when federal regions have been mentioned at all by academics and policymakers, the main concern has been with consistency among regions and efficiency. See *supra* note 62 and accompanying text; *infra* note 267.

188. See Exec. Order No. 12,314, pmbl., 3 C.F.R. 161, 161-62 (1982) (restructuring the FRCs and noting the commitment "to establish interagency coordinating groups structured to respond to opportunities for promoting Federal policies and to support interagency and intergovernmental cooperation").

189. See *id.* § 1(a), 3 C.F.R. at 161.

190. See *id.* § 2(c), 3 C.F.R. at 162.

aid system through block grants” (instead of the former grant-in-aid programs), “[d]evolution of Federal programs and functions,” “[r]eduction in the number and impact of federal regulations,” and identification of “significant problems with Federal regulations.”¹⁹¹

Less than two years after he took office, President Reagan abolished the FRCs “in order to eliminate a mechanism for interagency and intergovernmental coordination which [was] no longer needed.”¹⁹² Under President Reagan’s New Federalism scheme, there was a need not for more intergovernmental coordination but for less federal government, federal regions included. During the 1980s, as states were reconceived as the sole bearers of federalist values, federal regions were accordingly reconceived as the long arm of the central, federal government and nothing more. Following this reconceptualization, federal regions’ ability to promote mediation and coordination was severely curtailed.

Although subsequent administrations had different visions of the roles of the federal government and the states, they did not dispute the conception of federal regions as mere enforcers of central policies, and they continued to focus only on the regions’ consistency and efficiency in doing so. A recurring theme in the Clinton Administration, for instance, was whether federal regions are desirable given the inefficiency and inconsistency they seem to create; accordingly, federal regions’ functions were sometimes transferred to either field offices below or to agency or department headquarters above.¹⁹³ In a series of National Performance Review reports, prepared as part of President Clinton’s initiative to reform the federal government, regional offices were depicted mainly as redundant bureaucratic entities, and serious doubt was cast on their contribution to the executive branch.¹⁹⁴ As is apparent from National

191. *See id.* § 2(c), (e), 3 C.F.R. at 162.

192. Exec. Order No. 12,407, 3 C.F.R. 154 (1984).

193. In 1998, for example, the Federal Highway Administration’s regional offices lost their “programmatically decision-making responsibility” over the federal highway aid program. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1220, 112 Stat. 107, 221 (1998). Soon after, the regional offices were altogether abolished, leaving their fifty state division offices under the direct control of the Washington headquarters. *See* U.S. Dep’t of Transp., DOT 1100.63a, Chg. 2, Department of Transportation Organization Manual: Federal Highway Administration—Change, at 1 (1998) (“abolish[ing]” the Federal Highway Administration’s “existing nine regions and regional offices” and updating the “organization chart and narrative”).

194. *See* NAT’L PERFORMANCE REVIEW, OFFICE OF THE VICE PRESIDENT, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 28 (1993) [hereinafter NPR HUD REPORT] (“Regional offices should continue to provide certain necessary functions such as coordination between the field offices and headquarters. However, most functions and staff should be shifted to the field offices.”); NAT’L PERFORMANCE REVIEW, OFFICE OF THE VICE PRESIDENT, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT
footnote continued on next page

Performance Review reports that were prepared for the various departments and agencies, regions seemed to have little to contribute to the management of federal activities in any area, especially given the tremendous technological advancement in the 1990s enabling distant reporting, monitoring, and storing enormous amounts of data and information. The reports suggested that while the day-to-day operations of federal departments still required the existence of low-level field offices, regions' role within the administration was less pivotal because control over field offices could be performed directly from Washington.¹⁹⁵

Despite the economically induced hostility toward regional offices and the questioning of their necessity, the enforcement era was not marked by massive administrative centralization and elimination of regions. For example, although governmental reports from the 1990s recommended that regions in both the Department of Labor (DOL) and HUD be abolished and their responsibilities be performed directly by Washington, the regional structure of each remained intact.¹⁹⁶ Indeed, throughout this period, the number of agencies and departments that operated through regions did not significantly change. At the same time, the last vestiges of Nixon's reforms were formally abandoned

WORKS BETTER & COSTS LESS; DEPARTMENT OF LABOR 80 (1993) [hereinafter NPR DOL REPORT] ("The job of the regional staff . . . could be handled at the national office level . . . Costs could be reduced (and communications streamlined) by transferring the regional functions to the national office."); U.S. DEP'T OF HOUS. & URBAN DEV., REINVENTING HUD 2 (1994) ("HUD is changing the way it does business, both at headquarters and in the field. HUD program offices are streamlining their procedures. The filter of HUD's regional bureaucracy is being eliminated. Program assistant secretaries are overseeing field operations, and field offices are assuming new responsibilities."); see also John Kamensky, *A Brief History of Vice President Al Gore's National Partnership for Reinventing Government During the Administration of President Bill Clinton, 1993-2001*, UNT LIBR. (Jan. 12, 2001), <https://perma.cc/J8AJ-7UA7>.

195. See NAT'L PERFORMANCE REVIEW, OFFICE OF THE VICE PRESIDENT, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; DEPARTMENT OF AGRICULTURE 13 (1993) (recommending that the Department of Agriculture "review its regional, state, and area office structure" and "eliminate those elements no longer appropriate"); see also NAT'L PERFORMANCE REVIEW, OFFICE OF THE VICE PRESIDENT, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; DEPARTMENT OF VETERANS AFFAIRS 19-21 (1993) [hereinafter NPR VA REPORT]; NAT'L PERFORMANCE REVIEW, OFFICE OF THE VICE PRESIDENT, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS; REINVENTING ENVIRONMENTAL MANAGEMENT 13 (1993).

196. In the case of the DOL, the National Performance Review report found:

The job of the regional staff is to prepare personnel actions, execute and allocate grants to states, and determine whether to recommend litigation of veterans' reemployment rights cases. All of these responsibilities could be handled at the national office level, but the statute does not grant DOL the flexibility to pursue such alternatives. Costs could be reduced (and communications streamlined) by transferring the regional functions to the national office.

NPR DOL REPORT, *supra* note 194, at 80.

with the rescinding of the requirement to establish and adhere to the standard regional scheme.¹⁹⁷

D. The Revival of Regions in the Twenty-First Century?

A new wave of regionalism seems to be on the rise. New regional schemes have been introduced in a variety of areas, particularly where rapid and coordinated governmental response is needed. Crises such as the 9/11 attacks, Hurricane Katrina, and the Great Recession led to renewed appreciation of federal regions' potential as mediators and coordinators when an orchestrated yet locally sensitive approach is required. An example of a renewed interest in regions as coordinators is the radical reorganization of FEMA that took place in the aftermath of Hurricane Katrina. Following a harsh report that identified the major failings of the governmental response to Hurricane Katrina, especially in the lack of coordination at the regional level,¹⁹⁸ Congress empowered FEMA's ten regional offices and remade them into the primary governmental entities responsible for coordinating the agency's preparedness for future disasters.¹⁹⁹ FEMA was ordered to "develop and maintain robust Regional Offices that will work with State, local, and tribal governments . . . to identify and address regional priorities."²⁰⁰ In order to do so, FEMA's regional administrators were required by law to develop deep familiarity with their regions; maintain strong ties with state, local, and other entities within their regions; and sustain an apparatus capable of coordinating all disaster relief responses in the regions.²⁰¹

The 2007-2008 financial crisis and the ensuing Great Recession led to a renewed interest in the mediating role of federal regions. The crisis was seen as resulting from agency capture by Wall Street and Washington and from an inattention to regional economic trends and needs. Politicians and policymakers, therefore, turned to the regional branches of federal agencies overseeing the banking and financial industry—the regional banks of the Federal Reserve System and the newly created CFPB—for solutions. Defending an amendment

197. See Rescission of OMB Circulars, 60 Fed. Reg. 15,171 (Mar. 22, 1995). The notice of rescission was described as reflecting a managerial, rather than political, agenda, stemming from technological innovations and "changes in the way the Federal Government manages resources." *See id.*

198. See OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-06-32, A PERFORMANCE REVIEW OF FEMA'S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA 22, 54-56, 95-97 (2006).

199. See Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, tit. VI, sec. 611, § 507, 120 Stat. 1355, 1401-03 (codified as amended at 6 U.S.C. § 317 (2016)).

200. *See id.* § 503(b)(2)(E), 120 Stat. at 1397 (codified at 6 U.S.C. § 313(b)(2)(E)).

201. *See id.* § 507, 120 Stat. at 1401-03.

to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)²⁰² aimed at protecting and strengthening the Federal Reserve's regional banks, Senator Klobuchar argued from the Senate floor that regional banks were especially needed due to their mediating role between the central bank and local communities: "[T]he regional banks provide a presence across this country that gives the Fed grassroots connections . . . [and] insights into local economies."²⁰³

Despite these important initiatives, federal regions are often still seen as mere enforcers of central policies, and thus there is still strong emphasis on economic efficiency and the need to reduce costs and redundant governmental positions.²⁰⁴ Furthermore, the renewed interest in regions was not accompanied until very recently by a matching academic interest, by a comprehensive ideological shift, or by the development of adequate legal doctrines. In Part III below, we evaluate the various advantages and shortcomings that are implicated by a regionalized administration. In doing so, we also rely on lessons we derive from our study of the history of federal regions.

III. The Merits and Drawbacks of Federal Regions

Even under the minimalist enforcing conception of regions, creating federal regions in a department or agency and delegating some powers to them has several advantages over a more centralized structure on the one hand and delegating all powers to the states on the other. Conceiving regional offices as mediators and coordinators, and empowering them accordingly, has the potential to further enhance the existing benefits and add new ones, but it also

202. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

203. 156 CONG. REC. 7739 (2010) (statement of Sen. Klobuchar).

204. An example is the Obama Administration's Campaign to Cut Waste, as established in 2011 by Executive Order 13,576. See Exec. Order No. 13,576, 3 C.F.R. 250 (2012), *reprinted in* 31 U.S.C. § 501 app. at 53-54 (2016). The campaign's emphasis on economic efficiency resulted in consolidations of regional offices in several bureaus, among them HUD's Office of Multifamily Housing and the U.S. Census Bureau. See Notice of Intent to Change HUD-Wide the Operating Model of the Office of Multifamily Housing, 78 Fed. Reg. 25,293 (proposed Apr. 30, 2013); Jereon Brown, *HUD Announces Major Restructuring of Field Offices*, U.S. DEP'T HOUSING & URB. DEV. (Apr. 24, 2013), <https://perma.cc/N6LU-HE38> (noting that HUD is "reviewing every aspect of our operation to determine if we have the right people in the right places and we're determining where we can be even more efficient" (quoting Maurice Jones, deputy secretary of HUD)); Gary Locke, *Commerce Department's U.S. Census Bureau Announces Management and Structural Reforms That Will Improve Efficiency and Cut Costs*, WHITE HOUSE (June 29, 2011, 2:02 PM ET), <https://perma.cc/CQ8H-Z9NH>.

has the potential to create additional risks. In this Part, we explore the advantages and disadvantages of federal regionalism.

A. The Merits of Federal Regions

The advantages of federal regions stem from their relative territorial and legal proximity (as compared with Washington) to their constituencies—states and localities as well as regulated individuals, communities, and industries. Various traits of regional offices make them nodal points that connect—and at the same time serve as buffers between—central headquarters and the states. These features achieve seven crucial comparative advantages over both a fully centralized structure and a fully decentralized one.

1. Enhancing democracy

Regions can function as an antidote to the democratic deficit of the federal bureaucracy. This deficit is both formal and substantive. Formally, the large bureaucratic apparatus is mostly run by unelected officials. Although most departments and nonindependent agencies are headed by officials who are directly accountable to the President (herself accountable to the people), most administrative decisions are made by unelected career officers. Officers who are formally accountable to the President have little ability to review and change the decisions of their inferiors. Given the size of the administration and the multitude of decisions made by lower-level officers, even when top-level decisionmakers change the policy of a department, the vast majority of mundane decisions are inevitably made by unelected and unaccountable bureaucrats. Substantively, even democratically accountable officials suffer from a host of agency problems and information gaps that cast doubt on their ability to truly represent the will and interests of the population.²⁰⁵ Given the number of issues the President and each department head are in charge of, and the obscurity of the signals coming from the ballot, it is close to impossible to know what the population really wants. Additionally, elected officials or their direct appointees have their own interests to pursue—among which are the need to appease small but well-organized interest groups²⁰⁶ and to send signals to their principals in order to set themselves apart from “captured” officers,²⁰⁷

205. See ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 63-78 (2000).

206. See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-48 (Schocken Books rev. ed. 1971) (1965) (arguing that small but organized interest groups, or special interests, possess an outsize ability to influence politics).

207. See Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 203 (2014) (“[A]n accountable agent has an incentive to signal that she is loyal to the principal and is not ill-motivated or biased or captured. . . . [S]he might go out of her
footnote continued on next page”)

and which sometimes cause their decisions to diverge from the interests of their constituencies.

Many commentators who address these formal and substantive problems seem to believe that the main solutions are to devolve governmental functions to states and localities²⁰⁸ and to harness new technologies to increase public participation in the administration.²⁰⁹ Yet (we argue) regions can serve as another, superior way to contend with both the formal and substantive democratic deficit.

In order to enhance formal democracy, the appointment process for regional heads sometimes involves directly accountable officials such as the President, state governors, or other state representatives. Although appointments of regional administrators do not require the advice and consent of the Senate, many administrators are political appointees of the President, secretaries, or heads of agencies, making them both politically accountable and democratically legitimate.²¹⁰ In other cases, the democratic legitimacy of the bureaucracy is enhanced due to the involvement of state, local, and other regional elected officials in the appointment process of regional heads. For example, the law requires that FEMA regional administrators be appointed by the FEMA Administrator “after consulting with State, local, and tribal government officials in the region.”²¹¹ Similarly, EPA regional administrators are traditionally nominated by presidential administrations after consultation with the senators representing the states within a region.²¹² Another example is the regional fishery management councils, located within the National Marine Fishery Service (NMFS), which are responsible for fisheries that

way to harass, burden, or persecute unpopular groups in order to credibly signal that she has not been captured by ... those groups.”).

208. See Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 120-22 (2005) (contrasting bureaucratic democracy with a populist version and arguing that the former rests on federal institutions while the latter is embodied in state and local institutions).

209. See generally JOHN O. MCGINNIS, *ACCELERATING DEMOCRACY: TRANSFORMING GOVERNANCE THROUGH TECHNOLOGY* (2013) (explaining how to adapt democracy to new information technologies that can enhance political decisionmaking); Jennifer Shkabatur, *Cities @ Crossroads: Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413 (2011) (exploring the role of technology in improving participation in democracy).

210. See *infra* Part IV.D.1.

211. 6 U.S.C. § 317(b)(1) (2016).

212. See Joel Mintz, *Is It Time to Depoliticize EPA's Regional Administrators?*, CTR. FOR PROGRESSIVE REFORM: CPRBLOG (Nov. 20, 2009), <https://perma.cc/6PWM-XBNC>.

require conservation and management.²¹³ Regional stakeholders—governors of the states composing the region, for instance—appoint several members of these decisionmaking regional entities.²¹⁴

Regions can enhance substantive democracy by facilitating greater interaction between regulators and the regulated, thus ameliorating both agency problems and information gaps. Given regions' proximity to the public, they are exposed to public monitoring, review, and scrutiny, and even less salient activities can attract public attention and deliberation. In addition, it is easier and less costly for regional offices to gather information, plan, execute mechanisms of public participation, and engage with state officials and regional citizen groups.²¹⁵

EPA regions, for example, are the main vehicle through which the agency engages the public and affected communities and industries. EPA regions regularly hold formal and informal public meetings and hearings,²¹⁶ and many

213. See U.S. REGIONAL FISHERY MGMT. COUNCILS, <https://perma.cc/9CUD-LB7Z> (archived May 1, 2018); see also *About Us*, NOAA FISHERIES, <https://perma.cc/UF5B-W7ZN> (archived May 1, 2018).

214. See 16 U.S.C. § 1852(b) (2016). A testament to the importance of these councils to states and the states' involvement in the nomination of their members is the Governors' Guidance Kit issued by the NMFS. See NOAA Fisheries, *Governors' Guidance Kit: Nominations to Regional Fishery Management Councils 3-5* (n.d.), <https://perma.cc/2VZX-2KTV> (explaining to state governors the process and criteria for nominating candidates to the regional fishery management councils and the importance of the nominations). Governors are required, for example, to "[e]xplain, in [a] nomination letter, how each nominee, by reason of occupational or other experience, scientific expertise, or training, is knowledgeable regarding the conservation and management or the commercial or recreational harvest of the fishery resources of the Council's geographical area." See *id.* at 5.

215. See, e.g., HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* 76, 194 (spec. reprinted ed. 2006) (describing forest rangers' participation in local civic and community organizations); cf. LIPSKY, *supra* note 48, at 47-48 (describing street-level bureaucrats' interaction with the public, which exposes them to the public's opinions and perspectives even though they often resist such "client" input). The issue of public participation in administrative activities is controversial. Many have pointed to problems that accompany public involvement in government. See, e.g., CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 120-21 (2002) (arguing that cost-benefit analysis is more important in regulatory decisionmaking than public opinion because "it is far from clear that reasonable citizens want, or would want, their government to respond to their uninformed demands").

216. See OFFICE OF SOLID WASTE, U.S. EPA, *RCRA PUBLIC PARTICIPATION MANUAL* 5-123 to -126 (1996), <https://perma.cc/U4GZ-AC5S> (providing guidance for implementation of the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6987 (2016))). The EPA's *RCRA Public Participation Manual* stresses the importance of "involv[ing] the public early in the process, encourag[ing] feedback, and address[ing] public concerns before initial decisions," as well as "provid[ing] for early stakeholder participation and open access to information" and addressing environmental justice concerns. See *id.* at 2-7, 2-19.

of the regions have public or community involvement offices and coordinators that serve as “conduit[s] between communities and technical staff.”²¹⁷

The regions of the Federal Trade Commission (FTC) demonstrate another mode of participation and democratic accountability regional offices can foster. Each year, FTC regional offices hold “common ground” conferences in which regional staff, state officials from the states composing the region, and regional NGOs meet and discuss issues of common interest under the authority of the FTC.²¹⁸ Attesting to the importance of these conferences is the presence of high-ranking officials from both the FTC and the states.²¹⁹

2. Buffering political pressures from above and below

Regions serve as buffers between Washington and the states as well as between politics and expertise. Regional officers are exposed to pressures from the agency administrator, who is in many cases a political appointee of the President. But they are no less influenced by competing pressures from and commitments to (i) state politicians who put pressure on the region to accommodate their state’s special needs and interests;²²⁰ (ii) the many and often-conflicting positions of the different states that constitute the region;²²¹ (iii) pressures to internalize and prefer professional commitments over political ones stemming from regional officers’ role as career employees who

217. See *Community Involvement*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/7LJ8-NAXQ> (last updated Feb. 14, 2017).

218. See, e.g., FTC & Ill. Attorney Gen.’s Office, *Sharing a Common Ground: 2012 Common Ground Conference*; Chicago, Illinois (n.d.) (on file with authors) [hereinafter *Chicago 2012 Agenda*]; FTC & Ctr. for Social Justice, *Common Ground Conference Agenda* (n.d.), <https://perma.cc/AB7G-K53K> [hereinafter *Cleveland 2011 Agenda*].

219. For example, the opening address at the conference held in Cleveland in 2011 was made by FTC Commissioner Edith Ramirez. See *Cleveland 2011 Agenda*, *supra* note 218. The opening remarks at the conference held in Chicago in 2012 were made by FTC Chairman Jon Leibowitz, and the keynote address was delivered by Illinois Attorney General Lisa Madigan. See *Chicago 2012 Agenda*, *supra* note 218.

220. See, e.g., Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT’L MIGRATION REV. 1308, 1327-31 (2004) (demonstrating how local coalitions managed to influence INS policies in California by leveraging the influence of a local congressman).

221. For an example of conflicting states’ interests within a federal region, see *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 242 (D. Conn. 2005). Connecticut challenged the constitutionality of a provision of the Magnuson-Stevens Act granting the Secretary of Commerce discretion to designate regional fishery management councils. See *id.* at 240-42; see also *Magnuson-Stevens Fishery Conservation and Management Act*, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified as amended in scattered sections of 16 and 22 U.S.C.). The context of this challenge was Connecticut’s claim that it was sidelined vis-à-vis other states within the region with regard to the fishing quota system. See *Blumenthal*, 369 F. Supp. 2d at 243.

commonly grow within the agency;²²² and (iv) personal and sometimes familial ties to the local constituency.²²³ These tensions produce one of the most promising features of regions: the ability—almost by necessity—to resist political pressures from both above and below, to adapt central policies to local conditions, to fuse politics and expertise, and to reach effective compromises between the various competing parties and considerations.

Such regional compromises are further enabled by the fact that regions develop regional and geographic expertise alongside professional expertise, as every region has particular economic, social, and natural circumstances.²²⁴ In his study of the SSA, among whose regions variations in policy implementation have been consistently found,²²⁵ Jerry Mashaw beautifully equates regional offices to U.S. embassies abroad. “Ideally,” he writes, “regional offices might be viewed as necessary communication links between federal and state cultures, translating the former into a vernacular that is useful and effective in the latter.”²²⁶ Given the unique position of the regional office, Mashaw adds, “It seeks to mediate inevitable conflict and misunderstanding rather than to facilitate hierarchical supervision or control.”²²⁷

3. Bolstering the separation of powers

Ever since the advent of the administrative state in the 1930s, a prominent concern has been that the administrative branch is becoming too powerful, thus upsetting the Framers’ intent of structurally dividing powers among the three branches of government. This concern intensified with the continuous growth of the modern administrative state and with the reemergence of strong ideological opposition to it, propelling judges and academics to call for a radical

222. See generally, e.g., Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227 (2012) (describing the conflict between political and ethical norms and its effect on immigration policy).

223. See FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 63-64 (stressing the possible capture of field officers by local populations due to their profound integration in the community); KAUFMAN, *supra* note 215, at 75-80, 218 (same).

224. See FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 51-52 (describing how agency functions vary according to natural circumstances).

225. See HAROLD J. KRENT & SCOTT MORRIS, *ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS* 14-23 (2013), <https://perma.cc/ES9D-SXY7>.

226. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 146 (1983).

227. *Id.*

limiting of the federal administration's exercise of power.²²⁸ A common response to the problem of the accumulation of immense powers in the hands of the federal administration is to create mechanisms that mitigate its risks: strengthening the separation of functions within it and encouraging internal dissent and conflict.²²⁹ Vesting regions with significant power complements these suggestions because doing so can bolster the separation of powers within the administration, both by adding a territorial dimension to the functional separation and by creating more spaces where constructive conflicts can occur.

The growing realization that national administrative governance is achieved through constant interaction between different governmental tiers—federal, state, and local—has propelled often-contradictory responses; some call for greater intergovernmental cooperation while others praise the merits of “uncooperation.” Michael Dorf, Charles Sabel, and Erwin Chemerinsky, just to name a few, emphasize the importance of greater cooperation between different levels of government for the preservation of federalist values.²³⁰ Jessica Bulman-Pozen and Heather Gerken, by contrast, insist that as much as cooperation should be valued, it is actually intergovernmental “uncooperation”—disagreement, conflict, and critique—that promotes federalist goals, among them the separation of powers.²³¹ These important insights, we argue,

228. See generally Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux; The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (discussing contemporary judicial and academic attacks on the administrative state).

229. See Bulman-Pozen & Gerken, *supra* note 21, at 1284-94 (emphasizing the benefits of conflict within the administration); Gerken, *supra* note 8, at 33-35 (arguing that applying federalist structures to administrative bodies ensures the separation of powers through conflict and disagreement); Metzger, *supra* note 228, at 44 (encouraging the separation of functions within agencies). See generally Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (arguing that the fragmented nature of the administrative power that creates internal administrative rivals—political appointees, civil servants, and the public—serves the constitutional goal of the separation of powers as well as the traditional accounts of external control by Congress and the courts); David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171 (2015) (arguing that administrative federalism has the potential to enhance both federalism and the separation of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (emphasizing the importance of the separation of functions within the administration).

230. See Dorf & Sabel, *supra* note 3, at 433-34 (describing the benefits of cooperative federalism as reflected in federal air pollution law, in which the federal government establishes broadly defined emissions standards but leaves the states enough authority to experiment in implementation and enforcement); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 113-22 (2015) (illustrating the benefits of cooperative agreements between the federal government and the states in the context of marijuana policy).

231. See Bulman-Pozen & Gerken, *supra* note 21, at 1284-94; see also Gerken, *supra* note 21, at 1785-86.

should be extended to include the regional offices as levels of government that are crucial for such dynamics. Omitting the regional layer from the analysis, we argue, results in a failure to take advantage of regions' unique potential as coordinators and mediators. Delegating decisionmaking authority to various regions of federal agencies indeed takes away power from Washington. Such territorial redistribution of power creates a constant check on policymaking in central headquarters and, in the long run, creates new power centers in locations other than Washington.

4. Responding to regional challenges and forming regional knowledge and expertise

A regionalized structure enables agencies to develop regional and geographical expertise alongside their professional expertise, often relying on the regional—rather than national, state, or local—character of the problem at hand, the managed resource, or the regulated industry or population. Indeed, in many cases, the department or agency deals with issues that extend beyond state lines but that still possess regional attributes. Because every area has different economic, social, and natural circumstances, an intimate acquaintance with them is necessary in order to apply agency policies in a nuanced, efficient, and effective manner.²³² Regions are ideally situated to gather such regional knowledge through their constant, long-lasting relationships with the states they oversee, the communities they serve, and the industries they regulate. In this sense, regions can better represent particular local interests than can agency headquarters. In addition, local knowledge and expertise enable the regional offices to identify local and regional trends well before headquarters can and to formulate tailored responses. The regional offices of the Nuclear Regulatory Commission (NRC) exemplify this, as attested to by a report submitted to Congress.²³³ NRC regional staff, the report explained, “have unique expertise in the area of field inspections and are familiar with the licensee location, procedures, strengths and weaknesses. This knowledge has been obtained through years of inspections and interactions with the licensee.”²³⁴

Regional offices' familiarity with the particular conditions of the various states in their region, as well as with the region at large, often leads to headquarters' subdelegating them the authority to review and assess various

232. See FESLER, *AREA AND ADMINISTRATION*, *supra* note 13, at 24.

233. See Letter from Nils J. Diaz, Nuclear Regulatory Comm'n, to David L. Hobson, Chairman, Subcommittee on Energy & Water Dev., Comm. on Appropriations, U.S. House of Representatives (June 26, 2003), <https://perma.cc/KHD8-RCAE>.

234. Nuclear Regulatory Comm'n, *Assessment of Efficiencies to Be Gained by Consolidating or Eliminating Regional Offices 3* (n.d.), <https://perma.cc/VB2M-C244>.

state plans and requests. Contexts in which this occurs include environmental regulation,²³⁵ emergency preparedness,²³⁶ and employment training.²³⁷ As a result, regions further develop their local expertise as they engage more and more with the specific needs and interests of the states they oversee.

The EPA Administrator, for example, subdelegated to EPA regions the responsibility of working with each state within the region to prepare a state implementation plan (SIP) and then reviewing and approving it.²³⁸ The delegation was premised on the need for “regional flexibility to address local issues.”²³⁹ An SIP is a federally enforceable plan that identifies how a state will comply with the national ambient air quality standards set forth under federal law. Each state is required to develop its SIP through a public process and lay out the control measures and strategies that will be used to comply with the Clean Air Act.²⁴⁰ The SIP must then be approved by the relevant EPA region.²⁴¹ The process of preparing and approving SIPs lasts several years; requires constant back and forth between the state and the EPA region; and involves an in-depth knowledge of and familiarity with a huge number of local social, environmental, geographical, political, economic, and industrial factors. Indeed, it was, we believe, the realization that the SIP approval process requires such localized knowledge and experience that originally led to the delegation of more and more power from Washington to the regional offices.

The role of FEMA regions in federal disaster relief also reveals how regional offices’ role as a repository for local knowledge and expertise is well accepted. Among their many responsibilities, the ten FEMA regions are charged with evaluating states’ requests for federal disaster relief and moving them up the administrative ladder for approval. While it is the President who is authorized to make the declaration that a state is entitled to federal disaster relief—in response to the state governor’s request²⁴²—it is the regional administrator who “evaluates the damage and requirements for Federal

235. *See, e.g.*, 40 C.F.R. § 56.5 (2017) (requiring regional administrators to review and approve state implementation plans (SIPs)).

236. *See, e.g.*, 42 U.S.C. § 5191(a) (2016).

237. *See, e.g.*, 20 C.F.R. § 658.603 (2017) (delegating authority to review training plans made by state workforce agencies to regions of the DOL’s Employment and Training Administration).

238. *See* State Implementation Plan Processing Reform, 54 Fed. Reg. 2214 (Jan. 19, 1989).

239. Memorandum from Mary D. Nichols, Assistant Adm’r, Office of Air & Radiation, U.S. EPA, to Regional Administrators, Regions I-X, U.S. EPA 2 (July 10, 1995), <https://perma.cc/8SB7-4GRT>.

240. *See* 42 U.S.C. §§ 7409-7410; *see also* Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7671q).

241. *See* 42 U.S.C. § 7410.

242. *See id.* § 5191(a).

assistance and makes a recommendation to the FEMA Administrator.”²⁴³ Such crucial regional recommendations are based on the regional office’s intimate local knowledge of the conditions of the state and of the entire region, and they are indispensable to decisionmakers in Washington.

5. Promoting diversity and minority inclusion

Regional offices provide structural protections for minorities and enable marginalized ideas to influence regional policymaking. This greater diversity is a product of the fact that regional offices are located in, and recruit personnel from, different states and cities across the country.²⁴⁴ It thus provides minority groups—racial, ethnic, or ideological—the opportunity to “dissent by deciding”: not only to dissent by speaking truth to power but also to speak truth with power and to act radically.²⁴⁵ Gerken cites territorial units such as local governments and school boards as examples of institutions in which this phenomenon occurs.²⁴⁶ Adding regions to the list of institutions that are structured to promote diversity and include minorities in government brings to light another potential benefit of federal regions.

However, unlike Gerken’s exemplary institutions—the jury, the school board, the locality—that are relatively free to make their own decisions even if they are eventually overruled by courts or hierarchically superior bodies, regional offices are supposedly under a duty to obey edicts from central headquarters. Indeed, according to the enforcer conception, regions merely enforce central policies, and any suggestion that they could or should “dissent”

243. See U.S. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 42 (2008), <https://perma.cc/2LXA-NADE>; see also 44 C.F.R. § 206.37 (2017).

244. An example of how regional offices can promote minority interests is the appointment of Heather McTeer Toney, an African American woman, as the head of EPA Region 4—a “notoriously sticky” region, see Robin Bravander, *EPA: Still No Takers for “Notoriously Sticky” Regional Administrator Post*, E&E NEWS (Dec. 23, 2013), <https://perma.cc/DM98-S4TS> (quoting Charles Lee, director of advocacy at Audubon Florida). This appointment occurred amid heated conflicts in the region over environmental justice and racial inequality, conflicts that had particular salience given that the regional administrator is responsible for potentially contentious issues such as the siting of hazardous waste facilities and polluting industries, which are disproportionately located in black neighborhoods. See Brentin Mock, *Tough Love: Can a Local Leader Save the EPA’s Troubled Southeast Region?*, GRIST (Jan. 22, 2014), <https://perma.cc/4X33-VZLX> (discussing Toney’s appointment and the region’s challenges regarding racial inequality); see also Bravander, *supra* (describing the significant delay in appointing a new administrator for the region); Robert Bullard, *Opinion, Time for New Type of EPA Regional Administrators*, OPEDNEWS (Sept. 3, 2009, 8:52:57 AM), <https://perma.cc/8JAP-MZ7M> (criticizing the lack of diversity among the region’s administrators).

245. See generally Gerken, *supra* note 21.

246. See *id.* at 1748-49.

would be misguided. It is our contention, however, that in certain cases, regions should be able to dissent from Washington's position in order to act upon their own minority opinions. Minority groups also have a greater chance of influencing enforcement policies in regions where they form regional majorities, or at least where they have greater political clout through local and state representatives who exert influence on regional officers.²⁴⁷ Such regional dissent has the potential to energize, politicize, and democratize ossified and elite- or majority-captured governmental institutions.

6. Fostering innovation and experimentalism

Although considered by some to be bastions of centralization, federal regions could serve as local experimental laboratories, much as states do in the traditional rendition of federalism.²⁴⁸ Generally, there are a multiplicity of regional offices that deal with the same issues—monitoring and overseeing states' execution of federal programs or, where relevant, executing the programs themselves. This can create competitive pressure on the regions to be more efficient and innovative than their peers and, if the regions successfully gain a reputation within the bureaucracy, they may be able to obtain more resources and better personnel.²⁴⁹ Due to their proximity to the regulated industries and deep familiarity with social and political realities, regions are particularly suitable for conducting such experiments, identifying local and regional trends well before central headquarters can, and tailoring responses to the needs and conditions of the region.²⁵⁰ Experiments initiated by regional

247. See, e.g., Wells, *supra* note 220, at 1327-31 (describing the influence of Latino communities on INS enforcement policies).

248. See Dorf & Sabel, *supra* note 3, at 345-56 (describing federal agencies' distinctive organizational features that allow for local experimentalism); Owen, *supra* note 9, at 73-75 (describing literature that emphasizes regional and local offices' innovative potential).

249. This is a variation on the interjurisdictional competition argument made by Charles Tiebout in the context of local governments. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Although Tiebout focused on competition over residents, his theory has been extended to include competition over resources and prestige. See generally, e.g., George A. Boyne, *Competition and Local Government: A Public Choice Perspective*, 33 URB. STUD. 703 (1996). Moreover, although significant differences obviously exist between federal regions and state and local governments, recent scholarship describing the existence and dynamics of intergovernmental competition supports the conclusion that regions would develop such productive competition as well. For an example analyzing the costs and benefits of federal agencies' struggle for jurisdiction over financial markets, see John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447 (1995).

250. See, e.g., Nuclear Regulatory Comm'n, *supra* note 234, at 3; *supra* text accompanying note 234.

offices can later be adopted as nationwide policy.²⁵¹ Additionally, central headquarters use regions as laboratories for innovative ideas, testing pilot programs in one or several regions before adopting them nationwide.²⁵²

The result is that in many cases there are variations among regions in the ways they interpret, implement, and oversee federal policies.²⁵³ Numerous studies, for instance, have found variations in the EPA's regional offices' implementation of federal environmental laws.²⁵⁴ Researchers have documented significant regional variations in the administration of a number of other federal programs as well.²⁵⁵

251. See *supra* note 51 and accompanying text; *infra* text accompanying note 316.

252. The use of regions as trial fields for pilot programs is prevalent in the literature on federal administrative regions. See, e.g., Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1196-221 (2016) (describing policy innovation by "frontline officers" that was later adopted by officials in the "highest echelons of government"); see also *EPA Regional Inconsistencies Hearing*, *supra* note 62, at 49-55 (statement of Jean Payne, President, Illinois Fertilizer and Chemical Association) (describing a pilot program conducted by EPA Region 5 with the Illinois Department of Agriculture); Memorandum from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to All Employees, Office of the Gen. Counsel, NLRB 1-2 (Jan. 11, 2013) (on file with authors) (reporting on a pilot program of administrative restructuring within the NLRB). See generally Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771 (2017) (describing the possibilities of agencies' experimenting with new forms of regulations that can promote inclusion and civil rights).

253. See, e.g., JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 21-27 (1995) (discussing variations between EPA regions in the early days of the EPA).

254. See generally Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939 (2007) (assessing variations in hazardous waste administrative penalties among EPA regions); Susan Hunter & Richard W. Waterman, *Determining an Agency's Regulatory Style: How Does the EPA Water Office Enforce the Law?*, 45 W. POL. Q. 403 (1992) (finding regional variations in the EPA's Office of Water's implementation of federal law); Whitford, *supra* note 62 (explaining existing variations in the implementation of eight statutes by the EPA's regional offices).

255. See, e.g., Jianting Hu et al., *A Structural Model of Social Security's Disability Determination Process*, 83 REV. ECON. & STAT. 348, 359 (2001) (finding variations in disability determination outcomes among the SSA's regions). For studies documenting regional variations in other agencies, see, for example, Owen, *supra* note 9 (describing variations in the implementation of federal environmental law by regions and other field offices of the U.S. Army Corps of Engineers); and Andrew B. Whitford, *Decentralization and Political Control of the Bureaucracy*, 14 J. THEORETICAL POL. 167 (2002) (examining differences among the NRC's regional offices).

7. Improving cooperation and coordination

Interstate and intergovernmental coordination problems have vexed scholars of administrative law and public administration for decades.²⁵⁶ Given that almost all federal issues require administration by several governmental entities at each level, there is a growing need to resolve problems that arise from jurisdictional overlaps and gaps as well as from competing policies and priorities. A host of solutions geared at solving coordination problems in these shared regulatory spaces have been offered. Jodi Freeman and Jim Rossi, for example, suggest numerous ways of promoting stronger interagency coordination.²⁵⁷ Bulman-Pozen proposes encouraging cooperation between federal and state governments at the executive level as well as utilizing the trend toward interstate compacts (voluntary interstate agreements) in order to foster better coordination.²⁵⁸

In each of these solutions, the role of federal regions is missing.²⁵⁹ Federal regions, we argue, are ideally situated to confront the multifaceted problems that require coordinated intergovernmental responses utilizing the resources and expertise of many of the federal, state, and local departments and agencies in the region. For example, there is a need for a coordinated intergovernmental response in order to successfully confront natural disasters and economic crises. Moreover, most problems, even when national in scope, have diverging regional effects and implications. Thus, a regional rather than nationwide perspective, as well as regionally coordinated action, is required.

Take, for instance, the emergency communications coordination working groups established within each of FEMA's regional offices following Hurricane Katrina.²⁶⁰ Because natural disasters require urgent measures and "different

256. See generally Freeman & Rossi, *supra* note 4; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324-27 (2006) (arguing that coordination "problems" such as overlapping and duplications are in fact useful due to agencies' different perspectives and to the risks of relying on just one agency); Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773 (2013) (discussing the need for institutions that will prevent conflicting decisions in energy policy); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015) (emphasizing the importance of coordination among administrative agencies).

257. See Freeman & Rossi, *supra* note 4, at 1155-81.

258. See generally Bulman-Pozen, *Executive Federalism*, *supra* note 2.

259. Owen is a rare exception, although he does not discuss regionwide coordination, but rather smaller-scale interagency coordination in a particular field office within the U.S. Army Corps of Engineers. See generally Owen, *supra* note 9.

260. See 21st Century Emergency Communications Act of 2006, Pub. L. No. 109-295, tit. VI, sec. 671, § 1805, 120 Stat. 1355, 1439-40 (codified as amended at 6 U.S.C. § 317 (2016)); see also FEMA, Regional Emergency Communications Coordination Working Group (RECCWG): Status Update 3-4 (2009), <https://perma.cc/G5Y2-K85U>.

FEMA regions are prone to different disasters,²⁶¹ FEMA's regions were directed by Congress to form planning and coordinating bodies to "foster a comprehensive understanding of regional emergency communications challenges" and "facilitate interaction between Federal, State, and local agencies at the regional level."²⁶² In a similar vein, Dodd-Frank established regions within the newly formed CFPB²⁶³ to create a holistic and coordinated outlook on the regulation of financial products, the lack of which was responsible in part for the financial crisis. The significant weight attributed to regional input in the CFPB is manifested in the requirement that it establish a Consumer Advisory Board, consisting of financial experts as well as representatives from six regional federal banks, whose duty is to report on "regional trends."²⁶⁴

Environmental enforcement is another area that requires cooperation and coordination among many actors within a region. As recent guidelines published by the U.S. Department of Justice's Environmental and Natural Resources Division note, "[M]ost EPA regional offices and their state counterparts conduct regular conferences to keep one another apprised of violations and planned and potential enforcement actions. Increasingly, EPA encourages its regional offices to develop coordinated enforcement strategies with state environmental agencies."²⁶⁵ Yet larger-scale coordination is required in order to better orchestrate the activities of national as well as local actors, and EPA regions take center stage in facilitating that coordination.

B. The Drawbacks of Federal Regions

The common understanding assigns to the federal administration the responsibilities of checking and moderating the excesses of interstate competition, forcing some degree of coordination among the states, securing free movement of persons and goods throughout the country, and ensuring the

261. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-386, *HOMELAND DEFENSE: DOD CAN ENHANCE EFFORTS TO IDENTIFY CAPABILITIES TO SUPPORT CIVIL AUTHORITIES DURING DISASTERS* 7 (2010).

262. FEMA, *Regional Emergency Communications Coordination Working Groups (RECCWG) 1* (2008), <https://perma.cc/6Z6U-CJCK>.

263. The CFPB was established in Title X of Dodd-Frank following the financial crisis. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, § 1011, 124 Stat. 1376, 1964-65 (codified at 12 U.S.C. § 5491 (2016)).

264. *See* 12 U.S.C. § 5494(a)-(b); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-62, *CONSUMER FINANCIAL PROTECTION BUREAU: ADDITIONAL ACTIONS NEEDED TO SUPPORT A FAIR AND INCLUSIVE WORKPLACE* 6, 8 (2016) (describing the function of the Supervision, Enforcement, and Fair Lending division, which is carried out by the CFPB's Office of Supervision's four component regional offices).

265. U.S. DEP'T OF JUSTICE & NAT'L ATTORNEYS GEN. TRAINING & RESEARCH INST., *GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION* 2 (2017), <https://perma.cc/J2X6-35PQ>.

nationwide protection of basic rights. Our conception of federal regions as mediators and coordinators might seem anathema to this understanding: Instead of a unified and centralizing institution, we envision the federal administration as a territorially fragmented and internally divided entity, presumably less able to carry out the aforementioned responsibilities. Empowered regions could, under this view, hinder the equal distribution of federal services throughout the nation; infringe the equal protection of fundamental rights; obstruct nationwide coordination required by various federal programs; cause negative externalities and spillovers; and create inefficiencies, waste, and duplications. The conclusion might therefore be that federal agencies should either not have regional offices at all or, at the very least, should use them as mere enforcers of central policies.

Before we address these concerns in detail, it should be remembered that federal regions are a reality; they are not an academic proposal or a mere policy suggestion. The U.S. federal administration is currently—and has been for the past hundred years—operating through a system of regional offices that hold significant powers. This Article sheds light on this fundamental trait of the federal government in order to strike a better balance between the merits and drawbacks of federal regions. Furthermore, the continued discrediting of Washington’s ability to administer federal programs, which has led to the handing over of administration and execution to states and localities, means that federal regions now function as a centralizing force.²⁶⁶

Because we wish to further empower federal regions, it is necessary to analyze their drawbacks as compared to a fully centralized federal government.

1. Unequal and inconsistent application of federal laws and policies

Although in the previous section we hailed regional innovation and experimentalism, various critics condemn that idea as producing inconsistency in the application of federal laws and as causing inequality among citizens. The EPA’s ten regional offices, for instance, have been at the center of many congressional disputes; their diverse approaches to enforcement are sometimes seen as creating inequality among the regulated industries and as obstructing the agency’s nationwide goals.²⁶⁷ A similar critique has been launched against

266. See *supra* Parts II.B-.C.

267. See *EPA Regional Inconsistencies Hearing*, *supra* note 62, at 1 (statement of Sen. James M. Inhofe, Chairman, S. Comm. on Environment and Public Works) (noting that the EPA’s regions “are notoriously autonomous and have been known to advance their own priorities and agenda”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 64, at 4 (concluding that despite the need to take into consideration local conditions, “core enforcement requirements must nonetheless be consistently implemented”). Although consistency is a crucial consideration that should be taken seriously in designing administrative agencies, consistency is sometimes used by the political branches as a
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the unequal application of federal programs by the SSA's regions.²⁶⁸ This risk of inequality is heightened with respect to minorities: Indeed, the enforcement and provision of rights was vested in federal agencies rather than states and localities due to the very concern that the latter would not adequately protect minorities.²⁶⁹ The Madisonian fears of faction, the tyranny of local majorities, and the dysfunction of state political systems have bred suspicion about the ability of subnational entities to serve as protectors of rights.²⁷⁰

For example, in 1984 the western regional office of the U.S. Immigration and Naturalization Service (INS) adopted a policy limiting the release of detained minors to a parent or lawful guardian except in "unusual and extraordinary cases."²⁷¹ This regional policy was a retraction of the more child-protective policy of other INS offices that allowed "releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations."²⁷² This regionally inconsistent application of central policy demonstrates the possible dangers of allowing discretion at the regional level. Not only does such inconsistency lead to unequal protection of the core liberties of people living in different regions, but it can also lead to underprotection of the rights of disempowered minorities.

pretext to cripple an agency's operation for reasons unrelated to the role of its regions. A prominent example is the way in which Congress in the 1970s, as part of a larger plan to weaken the EPA, mandated that the agency promulgate "regional consistency" regulations. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(e), 91 Stat. 685, 776-77 (codified as amended at 42 U.S.C. § 7601(a)(2) (2016)); see also Regional Consistency, 45 Fed. Reg. 85,400 (Dec. 24, 1980) (codified as amended at 40 C.F.R. §§ 56.1-7 (2017)).

268. See Hu et al., *supra* note 255, at 359 (finding variations among SSA regions' disability determinations); *supra* text accompanying note 225.
269. For example, the Equal Employment Opportunity Commission was established in light of ongoing discrimination against black people in southern states. See *Pre 1965: Events Leading to the Creation of EEOC*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://perma.cc/3ZY7-CT7X> (archived May 18, 2018).
270. See THE FEDERALIST NO. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961) (expressing the fear that states and local governments are more prone than the national government to extreme factionalism that threatens minorities); see also Louis Wirth, *The Limitations of Regionalism*, in REGIONALISM IN AMERICA, *supra* note 2, at 381, 391-93 (illustrating the Madisonian fear of factions and warning that regionalism risks degenerating into a "cult"); Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 552-58 (2001) (arguing against devolution of immigration policymaking authority to the states in part because of their poor record in protecting the rights of immigrants).
271. See *Flores ex rel. Galvez-Maldonado v. Meese*, 934 F.2d 991, 994 (9th Cir. 1990) (quoting the policy), *rev'd*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).
272. See *Flores*, 507 U.S. at 295; see also *Flores ex rel. Galvez-Maldonado v. Meese*, 942 F.2d 1352, 1354-57 (9th Cir. 1991) (en banc).

Indeed, when core liberty interests are at stake and when vulnerable regional minorities are endangered, consistent application with very little regional variation should be the rule. Hence, we argue, in such contexts, regional offices' decisions should be strictly monitored by the central headquarters in order to prevent the discriminatory and unequal results that might accompany regional decentralization of power. Moreover, because the concern over unequal application should not be taken lightly even where no core liberty interests are at stake, regional variation in enforcement must be justified by an appeal either to particular local conditions or to a reasoned political process.

Yet regional offices often promote—rather than diminish—nationwide equality, once we move away from a formal conception of equality toward a substantive one. Whereas formal equality demands the strict application of a uniform standard, substantive equality calls for sensitivity to regional conditions; for a policy to be effective, attention must be given to regional specificities where it is applied. HUD's regional offices provide a case in point. Applying HUD's policies equally throughout the nation would result in substantive inequality and failure to realize the department's policy goals given the different housing and social conditions in different urban areas. Understanding the need for substantive equality and for a regionally sensitive application of national policy, some commentators have urged HUD's regional offices to adapt their policies to “local market conditions.”²⁷³

2. Undermining national policies, negative externalities, and problems with nationwide coordination

A centralized federal government is needed in order to overcome the many problems resulting from the fragmentation of sovereignty, among them the externalization of harms from one state or locality to another and the need to mitigate collective action problems associated with overlapping authority.²⁷⁴ Federal regions vested with significant powers might, according to the

273. See PAUL C. BROPHY & RACHEL D. GODSIL, PENN INST. FOR URBAN RESEARCH, UNIV. OF PA., *RETOOLING HUD FOR A CATALYTIC FEDERAL GOVERNMENT: A REPORT TO SECRETARY SHAUN DONOVAN* 8 (2009) (“HUD’s policies must allow for the flexibility necessary to develop neighborhood-appropriate stabilization strategies attuned to local market conditions This kind of market-savvy flexibility is important if HUD is going to succeed at partnering at the local, regional and state level . . .”).

274. See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368-69 (2006) (laying out the argument that strong federal government is required to prevent states from externalizing costs and harms on each other); Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-12, 1215-16 (1977) (pointing to externalities, lack of coordination, and race-to-the-bottom dynamics resulting from devolution of environmental regulatory authority to states).

underlying logic of this line of critique, undermine the benefits of the federal government and replicate, or perhaps even exacerbate, the problems inherent in handing over powers to states and localities. Because each region is responsible only for people and activities within its own jurisdiction, it has an incentive to internalize the benefits from its activities and to externalize its costs to other regions. Additionally, according to Elizabeth Magill and Adrian Vermeule, shifting authority down the agency hierarchy might hinder coordination because doing so creates many more decisionmakers.²⁷⁵

Indeed, where nationwide coordination is required, powerful regions are less apt to perform the task because they might develop different schemes and programs, thus disrupting a unified approach. Furthermore, where even a small deviation from central policy might seriously undermine the ends of the program, delegating any discretionary powers to the regions would be ill advised. Such is the case where negative externalities and spillovers might be caused by an agency's regionalization. The amount of leeway given to the regions in contexts that require greater coordination and that are more prone to create negative external effects should be smaller than in cases where the need for nationwide coordination is less pressing. National security and nuclear energy management are two examples of areas in which regions could be established in order to effectively and responsively execute central policies but in which regions should not be given discretionary policymaking authority because of the costly nationwide externalities involved.

We believe, however, that even in matters that require nationwide coordination, local knowledge and regional sensitivity are necessary for efficient and effective administration. As Cristina Rodríguez shows, even immigration—an area that is often understood to be the epitome of centralized federal power and to require a nationwide outlook and uniform execution—has distinct local and regional implications and therefore requires regional solutions, at least where the integration of existing immigrants into society is concerned.²⁷⁶ Furthermore, while regional offices might worsen interregional coordination problems, they could improve intraregional cooperation among agencies and departments. The collocation of the regional offices of different agencies and departments in the same cities creates more opportunities for interacting face to face, sharing information and best practices, pooling resources, and debating the desirable regional agenda.

275. See Magill & Vermeule, *supra* note 10, at 1078.

276. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 582-90, 600-05, 641 (2008) (pointing to state-level laws and initiatives regarding immigration and their likely impact on future immigration reforms). For accounts of the role of state and local governments in the regulation of immigration, see Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL'Y REV. 299 (2013); and Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013).

3. Capture by state and regional interest groups

Another concern is that regional offices might deteriorate into myopic, self-interested, and parochial advocates of regional and state interests. Regional officers—immersed in their regions by virtue of personal friendships, familial ties, work relationships, and political influence and pressures—might develop too strong an identification with either particular states within the region or with regionwide interest groups (such as regional industries, communities, or unions) and become state or regional advocates instead of mediators between the region and the agency. Indeed, even proponents of regionalism have expressed concern about the close proximity of regional officers and regulated entities, be they industries or communities.²⁷⁷ Such close ties threaten the required fidelity to central command and might in the long run create regional power centers that could even resist attempts by headquarters to rein in regional opposition to central policies.

Various mechanisms aimed at mitigating some of these concerns have been proposed and implemented by political theorists and policymakers, including rotating senior regional officers, centralizing training programs for regional employees, and distancing regional headquarters from the seats of state political power.²⁷⁸ Indeed, of the ten standard federal regions—to which many of the most important agencies and departments conform—only three are located in state capitals (in Atlanta, Boston, and Denver).²⁷⁹ Thus, while a regional headquarters remains physically close to the industries and populations it regulates, it is geographically distanced from the political centers of the states for which it is responsible.

Moreover, regions are institutionally designed to counter possible capture by state politics and regional interests. First, because each region comprises

277. See, e.g., FESLER, AREA AND ADMINISTRATION, *supra* note 13, at 63-64 (referring to the need to prevent the field official from becoming a “spokesman for local and provincial interests at the expense of the broader goals”); KAUFMAN, *supra* note 215, at 75-80; TRUMAN, *supra* note 13, at 14-16, 19 (“[W]here the outlook of officials becomes localized, it is not unlikely that their management policies will be shortsighted as far as the national welfare is concerned.”); Kaufman, *supra* note 15, at 12 (“As the regional officers get more and more involved in regional complexes, they will become more and more ambassadors from the regions to the chief executives instead of the executives’ men in the regions.”).

278. See KAUFMAN, *supra* note 215, at 170-75, 218-19 (advocating for implementation of various mechanisms such as central trainings and rotation); Kaufman, *supra* note 15, at 12 (arguing that “[r]apid rotation from area to area will help to reduce [regional] independence” but also predicting that “the rate of rotation will decline because each new assignment will necessitate a period of familiarization with the new territory . . . and because local interests, having established comparatively stable relationships with their regional officers, will protest and resist frequent transfers”); *id.* at 7-8 (describing bipartisan support for distancing the federal bureaucracy from Washington).

279. See *supra* Part II.B.2.

several states, it would be hard for any single state to fully capture the regional office, as its efforts would be counterbalanced by similar efforts made by competing states. While in some cases the states' interests might align, thus enabling easier capture of the regional office, in other instances states' interests would conflict with one another, preventing the regional office's decisionmaking from being dominated by the interests of just one state. And indeed, the abundance of conflicts and tensions that constantly arise between regional offices and the states they oversee suggests that states have not captured regional decisionmaking and that regions in fact serve as mediators, not only representing regional interests in Washington but also implementing and enforcing central headquarters' policies in the region. Examples of this can be seen in the frictions between states on the one hand and the EPA and FEMA on the other over decisions made by those agencies' regional offices.²⁸⁰ Second, although it could be argued that regions are more easily captured than Washington—because they are smaller and their decisionmaking processes less salient—regions (unlike field offices) are in fact large enough, and their actions sufficiently salient, to render them no more susceptible to capture. Third, the fact that most regional decisions are reviewed by the headquarters makes capture relatively more difficult because it adds another layer of oversight that does not exist for central headquarters' decisions.²⁸¹

280. See, e.g., Letter from Greg Abbott, Governor of Tex., to Guy Donaldson, Chief, Air Planning Section, EPA 1 (Apr. 20, 2015) (on file with authors) (objecting to the EPA's proposed decision to disapprove Texas's SIP regarding natural sites in the state); Letter from Kate Brown, Governor of Or., to W. Craig Fugate, Adm'r, U.S. DHS/FEMA 1 (June 17, 2016) (on file with authors) (criticizing FEMA for not providing clear information to local communities and for its generally insufficient communication with local governments); Letter from Dannel P. Malloy, Governor of Conn., to William Craig Fugate, Adm'r, FEMA 1 (Oct. 19, 2016) (on file with authors) (asking FEMA for assistance with housing damage in Connecticut caused by a natural disaster and criticizing its lack of involvement to that point); Letter from Matthew H. Mead, Governor of Wyo., to Bob Perciasepe, Acting Adm'r, U.S. EPA (June 13, 2013) (on file with authors) (objecting to the EPA's "rushed" public hearing on the state's SIP).

281. Additionally, capture cannot simply be assumed, and evidence of its existence is often scarce. As David Freeman Engstrom recently noted, "If you look really hard at the political science and related literatures, it is difficult to find any good, solid empirical evidence that materialist capture exists at all." David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31, 33 (2013). For an earlier and more theoretical critique of arguments concerning capture, see Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (emphasizing the ideological predispositions embedded in empirical descriptions of democratic decisionmaking). In fact, the empirical evidence often disproves the existence of capture. See generally, e.g., Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 54-84 (2000) (analyzing three regulatory initiatives that sought to advance the public benefit over the interests of organized and powerful groups); David A. Moss & Mary Oey, *The Paranoid Style in the Study of American Politics*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF

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4. Creating a more complicated and inefficient governmental structure

Too many regional offices could result in wasteful jurisdictional overlaps and gaps as well as unnecessary duplication of positions. The worry here is that establishing regional offices would not merely shift personnel downward from the headquarters and upward from end-of-the-line field offices but also add more employees; add more red tape; and duplicate costly overhead such as office space, machines, and purely administrative positions. Indeed, as we have earlier argued, reports from the 1970s, 1980s, and 1990s emphasize these concerns.²⁸² During the Clinton Administration, for example, attempts to downsize government zeroed in on regional offices as places of “duplicative and burdensome layers of review.”²⁸³ And in 2011 the U.S. Census Bureau decided to consolidate its twelve regional offices into six, in part because new technologies allowed census officers to do much of their work more efficiently using computers and through phone interviews.²⁸⁴

In addition, powerful regions might turn into a fourth governmental tier sitting between the federal government and the states, exacerbating intergovernmental coordination problems. Once regional directors not only control their own agencies but also collaborate with their counterparts in cross-governmental policymaking, budget allocation, and strategic planning, their regions might turn into political centers of gravity with the potential to alter the constitutional power balance between the states and the federal government.

Indeed, the lack of sufficient academic and political attention to federal administrative regions might have resulted in a failure to make federal regional structures more efficient and rational. In light of the risks of inefficiency and complication, the reliance on historical happenstance should give way to a more principled debate about the proper roles and functions of regions and the various associated costs—including complication, duplication, and overlap within the administrative branch.

Yet it is crucial that other important considerations not be set aside. This is particularly important because cost-benefit analyses of federal regions are complex and subject to several caveats. First, it is unclear whether merely

REGULATION (Edward J. Balleisen & David A. Moss eds., 2010) (illustrating the triumph of the general interest over special interests in three major case studies).

282. See *supra* Parts II.B.2, II.C.

283. See NPR HUD REPORT, *supra* note 194, at 28; see also NPR VA REPORT, *supra* note 195, at 6.

284. See Robert Groves, *A Restructuring of Census Bureau Regional Offices*, U.S. CENSUS BUREAU: DIRECTOR'S BLOG (June 29, 2011), <https://perma.cc/57XG-3WW8>; Locke, *supra* note 204.

eliminating the regional layer would indeed result in a significant net decrease in government employees. If, as some of the Clinton-era reports suggest, what is needed is to move regional functions upward to the headquarters and downward to the field offices, the cost savings achieved would be minimal and could perhaps be attainable without eliminating the regions but instead through cost-saving measures at the regional level itself. Furthermore, when measuring duplications and bureaucratic burdens, one should bear in mind the alternative administrative structure that was in place, itself extremely complicated and full of overlaps and duplications. As various ACIR reports have pointed out, many executive departments operated overlapping programs that themselves overlapped with state and local activities.²⁸⁵ Regional offices were conceived as a possible solution to these overlaps in that they could coordinate the operations of the various arms of the federal government—both within the federal bureaucracy and between it and the states and localities within the region. Especially because regions encompass several states, they serve primarily to reduce, rather than increase, the number of political spheres, thereby improving intergovernmental and interstate coordination. Lastly, the more that agencies are required to conform to standard regional schemes, and the more regional semi-general-purpose governments are formed in regions, the less likely it is that duplications and redundancies will be created.

5. Hindering democratic accountability

A final objection to regional power is that delegating administrative power reduces the political responsiveness and formal democratic accountability of the administration: Because the lower rungs of the bureaucracy are populated by nonaligned career officers, delegating authority to them means less political control and less democratic accountability over administrative policymaking. This, indeed, might be seen as a devastating critique against empowering federal regions and vesting them with decisionmaking authority rather than vesting that authority in the agency heads who answer to the President. This critique rings particularly true in the modern era, when the legitimacy of the administrative state is often called into question due to its lack of transparency

285. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A-53, IMPROVING FEDERAL GRANTS MANAGEMENT: THE INTERGOVERNMENTAL GRANT SYSTEM; AN ASSESSMENT AND PROPOSED POLICIES 6, 16, 20 (1977); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, B-1, IN BRIEF: THE INTERGOVERNMENTAL GRANT SYSTEM; AN ASSESSMENT & PROPOSED POLICIES 15-16 (n.d.) ("Many criticisms of the federal aid system center on its fragmentation and duplication. And, indeed, gross violations of tenets of order and coordination among categorical grants abound."); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 175, at 46-47.

and its insufficient democratic accountability and responsiveness.²⁸⁶ In this sense, strengthening regions by moving power to them from the President and his officers seems to conflict with Elena Kagan's argument that tighter presidential control over the administrative state promotes core democratic values such as transparency, responsiveness, and accountability.²⁸⁷

Undoubtedly, insulating regional offices from formal democratic institutions and enabling them to decide without having to answer to the President or political appointees would contravene our democratic values. This Article should therefore not be read as suggesting such far-reaching conclusions. Rather, the regional empowerment we discuss involves greater insulation from presidential politics and rests on the idea that regions are, in fact, more accountable to state and local politics than are central headquarters. Indeed, as we explained earlier, regional offices were designed to insulate policymaking from presidential *overreach* and Washington partisan politics—not from *all* presidential control or congressional authority.²⁸⁸

Moreover, a primary advantage of delegating power to regions—as opposed to headquarters—is that regions serve as buffers between the states and Washington and between crude political pressures and professional expertise.²⁸⁹ Regional heads answer to political appointees without being wholly subordinated to the increasingly polarized politics of Washington and of the states. This type of political responsiveness is precisely what makes them mediators with the ability to infuse democratic values into the bureaucracy. In the same vein, Catherine Powell highlights the potential for federal agencies to

286. See generally Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (describing and refuting the critique that the administrative state lacks democratic accountability).

287. See Kagan, *supra* note 5, at 2331-32.

288. See *supra* text accompanying notes 55-56. Additionally, some scholars doubt the superiority of Congress over the executive branch in terms of accountability. Mashaw, for example, claims that agencies are more accountable than Congress because they answer to the President, who is elected nationally. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-96 (1985). Other scholars point to the generally “troubled” nature of the concept of accountability and the need to refrain from assigning accountability only to elected officials. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1180-82 (2000); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1995).

289. Yet some argue that regional offices are not sufficiently insulated from political influence. A report prepared by the Union of Concerned Scientists in 2008 warned that the influence of politicians and political appointees on scientists within EPA regional offices was interfering with the agency's professional mandate. The solution, the report suggested, was further depoliticization of the regional offices. See SCI. INTEGRITY PROGRAM, UNION OF CONCERNED SCIENTISTS, INTERFERENCE AT THE EPA: SCIENCE AND POLITICS AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY 7-8, 23-37 (2008), <https://perma.cc/SZ8Z-DETS>.

strengthen democratic accountability through “participation of people in decision making that affects them.”²⁹⁰ Due to their greater proximity to regulated industries and populations, regions allow for more elaborate and widespread public participation.²⁹¹ As a result, regional offices are no less democratically accountable than their headquarters, though they are accountable in a different manner. Lastly, although regional answers do not answer directly to the President, the President is involved in the appointment of regional administrators of some agencies. Those administrators are often replaced when there is a presidential transition, so they are at least indirectly politically accountable.²⁹²

In Part IV below, we discuss the legal framework within which federal regions operate. This legal framework, we show, is a result of the history we have described and of competing ideas about the proper role of regions within the administration. We call this legal framework “the law of federal regions,” although in many cases regions are currently treated as indistinct from other administrative entities. We thus endeavor to gather various legal threads from distinct doctrines that pertain to regions and aim both to describe them and to make suggestions as to their reshaping in a way that accounts for federal regions’ unique potential. When making these doctrinal proposals, we take into account the merits and drawbacks of a regionalized structure, using various components we have developed from history.

IV. The Law of Federal Regions

Federal regions are creatures of the law. They are constantly being reshaped through acts of Congress, presidential executive orders, administrative rules, agency circulars and manuals, and court decisions. This process reflects evolving and competing normative visions of the various legal actors about the proper role and function of federal regions. The jurisprudence of federal regions, in turn, reflects the three main functions assigned to them: enforcement, mediation, and coordination. Through various rules and principles relating to their daily operation—authorization, delegation, reorganization, policymaking, judicial review and deference, and appointment—power is given to and taken away from regions, and their exact role within the administration is determined. Moreover, the law of regions is shaped no less by power struggles between Congress, the President, and the

290. See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 271 (2001).

291. See *supra* Part III.A.1.

292. Such is the case, for instance, with regional administrators in the EPA. See *infra* note 387.

administration, and it reflects the existing power relationship between the branches of government.

In this Part, we will distill some of the basic legal structures and principles that govern regional offices. We offer some modifications based on the unique potential of regions within the existing governmental scheme.

A. The Legal Status of Federal Regions

The first tenet of our law of regions is: Not only do regions lack any constitutional protection or status, but also the default rule is that the regional structure of any agency is a “nonjusticiable ‘political question.’”²⁹³ A decision to regionalize an agency, centralize an existing regional structure, consolidate regional offices, or alter the boundaries between regions is, therefore, an internal affair; it falls under the authority of the agency’s administrator or, in the case of a nonindependent agency, the department secretary.²⁹⁴ Crucially, however, the power to control regional structure is restricted by congressional and presidential intervention and constraints.²⁹⁵

1. Congressionally imposed constraints

At times, Congress controls regions directly through legislation, mandating their establishment in a particular case or recognizing them as existing vehicles through which a federal program will be executed. Exemplifying such a congressional mandate is the Maritime Administration, a bureau within the U.S. Department of Transportation.²⁹⁶ By directly legislating which regional offices are to be established, Congress constrains the discretion of the

293. See *Rysavy v. Harris*, 457 F. Supp. 796, 801 (D.S.D. 1978). Despite our efforts to trace more case law dealing with the general legal status of regional offices, this was the only case directly addressing the justiciability of disputes surrounding the internal structure of regions.

294. Although these powers inhere in the positions of secretary or agency administrator, Congress also sometimes expressly authorizes the head of the department or agency to carry them out. For example, the Secretary of Energy “is authorized to establish, alter, consolidate or discontinue and to maintain such State, regional, district, local or other field offices as he may deem to be necessary to carry out functions vested in him.” 42 U.S.C. § 7260 (2016). Similar provisions exist authorizing the Secretary of Education, *see* 20 U.S.C. § 3476 (2016), the Office of Personnel Management, *see* 5 U.S.C. § 1101 (2016), and the MSPB, *see id.* § 1201, to establish field offices.

295. *Cf. Nou*, *supra* note 4, at 452 (“[W]hile Congress and the President can write more specific dictates governing internal agency organization, agency heads remain otherwise unbound by detailed legislative or executive strictures.” (footnote omitted)).

296. *See* MAR. ADMIN., <https://perma.cc/TQ8H-T8C5> (archived May 11, 2018). The Maritime Administration’s charge is to “foster, promote, and develop the merchant maritime industry of the United States.” 49 U.S.C. § 109(a) (2016).

administrator regarding whether, and precisely where, to establish regional offices.²⁹⁷

More common, however, is Congress's use of regional offices to implement federal laws and programs. Throughout the twentieth century, Congress used federal regions to achieve some of its most ambitious goals, including, for example, regulating banks and financial institutions²⁹⁸ and managing national air quality.²⁹⁹ The explicit mention of regions in congressional legislation restricts the administration's ability to abolish or consolidate regions—even if the legislation did not intend to do so. For instance, when the Clinton Administration launched its initiative to reform the federal government, it eyed the regional offices of several departments, including the Veterans' Employment and Training Service (VETS) within the DOL, as potential targets for cuts.³⁰⁰ However, the National Performance Review reached the conclusion that the administration could not abolish VETS's ten regional offices. Even though "all of [their] responsibilities could be handled at the national office level," the authorizing legislation "does not grant DOL the flexibility to pursue such alternatives" because it specifically mentions the regions and their role in managing VETS.³⁰¹

Other times, however, Congress intentionally limits the administration's power to determine its own regional structure. For example, when it established the Department of Homeland Security, Congress forced the consolidation and collocation of regional offices of its component agencies.³⁰² The Internal Revenue Service (IRS) is another case in point. In 1998 Congress decided to abolish the IRS's regions altogether, stating that it needed to develop specialization based on taxpayers' needs and characteristics rather than their geography.³⁰³ In one case, Congress actually intervened to prevent the

297. See 49 U.S.C. § 109(e) ("The Maritime Administration shall have regional offices for the Atlantic, Gulf, Great Lakes, and Pacific port ranges, and may have other regional offices as necessary.").

298. Upon its establishment in 1913, the Federal Reserve System was based on regional federal banks. See DONALD R. WELLS, *THE FEDERAL RESERVE SYSTEM: A HISTORY* 19 (2004); Gary Richardson & William Troost, *Monetary Intervention Mitigated Banking Panics During the Great Depression: Quasi-experimental Evidence from a Federal Reserve District Border, 1929-1933*, 117 J. POL. ECON. 1031, 1038-40 (2009).

299. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(e), 91 Stat. 685, 776-77 (codified as amended at 42 U.S.C. § 7601(a)(2)).

300. See NPR DOL REPORT, *supra* note 194, at 79-80.

301. *Id.* at 80. The authorizing legislation mandates that the Secretary of Labor assign to each region of the department "a representative of the Veterans' Employment and Training Service to serve as the Regional Administrator for Veterans' Employment and Training." 38 U.S.C. § 4102A(e)(1) (2016).

302. See 6 U.S.C. § 346 (2016).

303. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685, 689, *reprinted in* I.R.C. § 7801 app. at 3810 (2016); STAFF OF J. *footnote continued on next page*

abolishment of regional offices, prohibiting the Secretary of Agriculture from “clos[ing] or relocat[ing] a county or field office of the Farm Service Agency” for two years after the passage of the Agricultural Security Improvement Act of 2008.³⁰⁴

These examples of congressional mandates are the exception, however, and not the rule. Congress generally refrains from dictating to departments and agencies whether to regionalize, how to organize regions, and which programs regions should administer, instead allowing for administrative and executive discretion.

2. Presidentially imposed constraints

Throughout the past century, presidents have used their executive power to shape and orient the regional structure of federal departments and agencies. They have done so through executive orders, defunding decisions,³⁰⁵ and (when authorized by Congress) reorganization plans. Contrary to the congressional mode of intervention, presidential plans are often more ambitious and general, aiming for structural and cross-administrative reform.³⁰⁶ On occasion, however, presidents have pursued a concrete restructuring of particular agencies. A prominent example of the first type of executive intervention is President Nixon’s initiative to standardize federal regions and turn them into intergovernmental coordinating vehicles. In a series of presidential statements, directives, and executive orders,³⁰⁷ translated into an Office of Management and Budget circular,³⁰⁸ President Nixon imposed this vision on a variety of departments and agencies that had, in most cases until then, organized their regions according to their own wills. Exemplifying the second type of presidential intervention are President

COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1998, at 16-17 (Comm. Print 1998).

304. See Pub. L. No. 110-234, § 14212(a)(1), 122 Stat. 1453, 1465 (codified as amended at 7 U.S.C. § 6932a(a)(1) (2016)).

305. See, e.g., *Anderson v. Duncan*, 20 F. Supp. 3d 42, 44-50 (D.D.C. 2013) (examining President George W. Bush’s decision to defund all regional offices within the U.S. Department of Education’s Rehabilitation Services Administration).

306. See *supra* Parts II.B.-C.

307. See Exec. Order No. 11,647, 3 C.F.R. 371 (1973); Nixon May 21, 1969 Statement, *supra* note 160, at 387; Nixon March 27, 1969 Statement, *supra* note 160, at 256.

308. Circular A-105, *supra* note 161.

Truman's restructuring of the IRS³⁰⁹ and President Johnson's reorganization of the Bureau of Customs.³¹⁰

Executive directives and orders cannot, of course, contradict explicit congressional legislation regarding the specific role and functions of regions. However, as we have seen, Congress is generally silent on these issues.³¹¹

3. Indirect constraints imposed by adjudication

Decisions to establish, consolidate, abolish, or otherwise restructure regional offices—whether made by Congress, the President, or administrative authorities—have never been directly challenged in court, at least as far as we can tell. However, given that the consolidation or abolishment of regions often implicates workers' rights or gives rise to discrimination claims, there have been cases in which the affected regional offices' workers have contested the legality of such regional restructuring. For example, employees who were terminated or reassigned have filed claims that the decisions violated the agency's employment law and antidiscrimination obligations relating to race, age, or gender.³¹² Courts therefore have had occasion, albeit rarely, to

309. See Reorganization Plan No. 1 of 1952, 17 Fed. Reg. 2243 (Mar. 15, 1952), *reprinted in* 5 U.S.C. app. at 153 (2016) (announcing a plan to reorganize the IRS, including overhauling its field and district structures).

310. See Reorganization Plan No. 1 of 1965, 30 Fed. Reg. 7035 (May 26, 1965), *reprinted in* 5 U.S.C. app. at 181 (announcing a plan to reorganize the Bureau of Customs, including the establishment of six regional offices).

311. Presidential authority to issue instructions concerning regions—their establishment, reorganization, and functions—has never been contested in the courts. While such action is arguably within the President's power to give procedural and structural orders to the administrative branch, where such restructuring is fundamental and involves the establishment or abolition of the entire regional structure it might be considered a substantive intervention and thus beyond her powers (at least with respect to independent regulatory agencies). While the literature debates the scope of the President's ability to interfere with substantive policies of the federal administration—and in particular those of independent agencies—his procedural, structural, and managerial oversight power is undisputed. See, e.g., Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 486 (1979); Kagan, *supra* note 5, at 2324–27, 2327 n.318 (“Congress has left presidential procedural power in place with respect to at least the executive branch agencies. . . . [O]stensibly procedural power sometimes can determine the content of agency action.”).

312. See, e.g., *LaVecchia v. Occupational Safety & Health Review Comm'n*, No. 98-3256, 1998 WL 778920, at *1 (Fed. Cir. Nov. 9, 1998) (per curiam) (involving a challenge brought by a former administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (OSHRC) against “the *bona fides* of the [agency's staff reduction] as a mere pretext by the agency to remove him from his position as ALJ”); *DeNovellis v. Shalala*, 135 F.3d 58, 60 (1st Cir. 1998) (age discrimination); *Barry v. Dep't of Hous. & Urban Dev.*, No. 95-3564, 1996 WL 403271, at *1 (Fed. Cir. July 17, 1996) (involuntary retirement); *Anderson v. Duncan*, 20 F. Supp. 3d 42, 45 (D.D.C. 2013) (age discrimination); *Tietz v. Bowen*, 695 F. Supp. 441, 442 (N.D. Cal. 1987) (age discrimination), *aff'd*

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determine whether a decision to consolidate or abolish regional offices was legal. However, because this has usually occurred in the context of employment disputes, the rulings have been grounded in specific legal principles pertaining to employment and, accordingly, limited to the concrete questions at hand.³¹³

The various constraints the three branches of government impose on administrative discretion concerning regional structure, while strongly influenced by political contingencies, are no less affected by ideological approaches to the proper role of regions in government. As we demonstrate in the next Subpart, the way regions are viewed—as mediators, coordinators, or enforcers—affects their mode of authorization, appointment procedures, and the level of deference given to them by courts.

B. Authorization and Delegation

Although in some cases Congress expressly authorizes federal regions to perform specific duties, in the majority of cases regions' functions stem from a delegation of authority by the department secretary or agency head. This leaves ample leeway—subject to the constraints discussed below—for the department secretary or agency head to determine the role of regions within her department or agency and how much control over their activities she wishes to maintain. The delegation of authority to regions can vary dramatically from agency to agency and from case to case. It can include policy implementation, policymaking, and coordination between agencies or entities within the region. The EPA Administrator, for example, can delegate to regions the authority to perform technical, relatively nondiscretionary tasks such as measuring water emissions³¹⁴ or, alternatively, give them discretionary policymaking powers such as scrutinizing and approving or disapproving SIPs.³¹⁵ Similarly, the Secretary of Homeland Security can delegate to a region the authority to set policy regarding the release of detained alien minors during deportation proceedings.³¹⁶

mem., 892 F.2d 1046 (9th Cir. 1990); *King v. Bailar*, 444 F. Supp. 1093, 1094-95 (S.D.N.Y. 1978) (race and sex discrimination).

313. *See, e.g., LaVecchia*, 1998 WL 778920, at *1-2 (holding that a reduction in force by OSHRC's Dallas regional office was conducted for legitimate reasons); *Barry*, 1996 WL 403271, at *3 (reversing a decision by the MSPB and concluding that the plaintiff's retirement from HUD's New York regional office was involuntary).

314. *See, e.g., Am. Paper Inst., Inc. v. U.S. EPA*, 890 F.2d 869, 870-71, 876-77 (7th Cir. 1989) (discussing an EPA regional office's determination regarding "effluent limitations," which "dictate in specific and technical terms the amount of each pollutant that a point source may emit").

315. *See supra* text accompanying notes 239-41.

316. *See supra* notes 51, 271-72 and accompanying text.

As we describe below, as a matter of positive law, regions are merely administrative subordinates, governed by the general principles of subdelegation and redelegation. Yet a simple application of these general principles would limit regions' potential and might prevent them from serving meaningfully as mediators and coordinators. We therefore propose allowing greater delegation of discretionary powers to regions.

1. Subdelegation of powers to regions

Historically, courts tended to view delegation of discretionary powers from department secretaries and agency heads to their subordinate units with suspicion.³¹⁷ Yet with the growth of the administrative state, such delegation became indispensable to the operation of many departments and agencies.³¹⁸ In its groundbreaking 1947 decision in *Fleming v. Mohawk Wrecking & Lumber Co.*, the U.S. Supreme Court addressed the question whether the head of the Office of Price Administration could delegate his authority to sign and issue subpoenas to the agency's regional administrators.³¹⁹ The Court validated the delegation of authority even though the delegated power was discretionary in nature and no explicit authorization existed in the relevant legislation.³²⁰ The Court reasoned that the general rulemaking powers given to the administrator should be construed to include the authority to delegate some discretionary functions to his subordinates, at least in the absence of explicit or implicit negation in the law.³²¹

The *Fleming* Court grounded its conclusion in the institutional incapacity of the administrator to deal with the burden of personally deciding all matters. Given the "overwhelming nature of the price control program entrusted to the

317. See, e.g., *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 358-60, 366-67 (1942) (holding that a statute authorizing the administrator of the DOL's Wage and Hour Division to subdelegate investigatory functions did not authorize subdelegation of the power to issue subpoenas), *superseded by statute*, Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203.

318. For example, the Federal Circuit recently held:

The implicit power to delegate to *subordinates* by the head of an agency was firmly entrenched in *Fleming v. Mohawk Wrecking & Lumber Co.*, where the Supreme Court held the administrator of an agency could delegate the power to sign and issue subpoenas to *regional administrators* despite absence of an explicit authorization in the statute.

Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023, 1031 (Fed. Cir. 2016) (emphasis added) (citing *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122 (1947)).

319. See 331 U.S. at 119-20. For a critical appraisal of *Fleming*, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2177 (2004).

320. See *Fleming*, 331 U.S. at 120-21.

321. See *id.* at 121-22.

Administrator” and the fact that “administrative flexibility [was] necessary for prompt and expeditious action on a multitude of fronts,” the Court held that broad subdelegation was legitimate, even necessary.³²² A requirement for personal performance by the Administrator would cause a delay that “might do injury beyond repair. *The pyramiding in Washington of all decisions on law enforcement would be apt to end in paralysis.*”³²³ Although this paralysis might have been averted by delegating powers to subordinates in Washington or in branch offices, it can reasonably be inferred from the Court’s wording that regions—as opposed to overloaded and near-paralyzed central headquarters or the small, numerous branch offices—are more fit to perform not only technical but also discretionary activities; accordingly, broad subdelegation to them should be allowed, absent clear congressional intent to the contrary.

Subsequent case law has expanded *Fleming’s* scope, interpreting the decision as sanctioning agencies’ expansive delegation of discretionary powers to their regions, even where headquarters relinquish their supervisory powers and give regions final say. In *EEOC v. Raymond Metal Products Co.*, the Fourth Circuit affirmed the Equal Employment Opportunity Commission’s regulations delegating broad authority—including the power to make determinations about alleged unfair employment practices, dismiss charges, and make and approve conciliation agreements—to its district directors.³²⁴ Particularly contentious was the Commission’s relinquishment of its power to review some of these determinations, making district directors’ decisions final. The court ruled that the district directors were best situated to make the final rulings given “the magnitude of the task” and the amount of time it would require the headquarters to make such determinations itself.³²⁵ “Like the Court in *Fleming*,” the Fourth Circuit concluded, “we are unwilling, without evidence of congressional intent to the contrary, to read the rule-making regulation so narrowly as to render the agency ineffective.”³²⁶

The doctrine of subdelegation reflects, we believe, not only the necessity of allowing department heads to delegate discretionary powers to their subordinates, but also the special importance of allowing them to hand down such powers to regions. Considering the comparative advantages of regions—over local branch offices on the one hand and over headquarters in Washington on the other—we argue that it would be wise to embrace or even expand the doctrine formed in *Fleming* and *Raymond Metal Products*. Thus, even in the absence of express congressional delegation of general rulemaking

322. *See id.* at 122-23.

323. *Id.* at 123 (emphasis added).

324. *See* 530 F.2d 590, 592-94 (4th Cir. 1976).

325. *See id.* at 594.

326. *Id.*

powers, agency and department heads should be allowed to delegate discretionary powers to their regions.³²⁷

2. Redelegation

The constitutional doctrine of redelegation holds that absent statutory authorization, once Congress has delegated power to an agency, the agency cannot redelegate that power to another agency, nor can it transfer to other agencies funds not appropriated to them by Congress.³²⁸ Courts have extended this anti-redelegation principle to cases in which the authorizing statute is silent on redelegation (which is almost always the case), interpreting silence as implicitly barring redelegation.³²⁹ However, there exists an important exception to this general prohibition: Agencies have been permitted to use other agencies to perform nondiscretionary, secondary tasks so long as the authorized agency retains overall responsibility over those tasks.³³⁰

Given regional offices' valuable knowledge and expertise and their potential to expedite and coordinate administrative action within a region, it would be wise to use this exception to encourage interagency regional redelegation, provided the redelegating regions maintain their ultimate decisionmaking authority. An example of such a practice emerged in *Pistachio Group of the Ass'n of Food Industries v. United States*.³³¹ That case involved an antidumping regulation promulgated by the International Trade Administration (ITA) based on exchange rates set by the Federal Reserve Bank of New York.³³² The plaintiff argued that this rule was a prohibited redelegation of the

327. If a particular subdelegation is politically unpalatable to Congress, it can intervene through legislation that either prohibits the subdelegation or mandates that the regions take into account particular considerations. For instance, Congress expressly amended the National Labor Relations Act in order to confer certain powers on the NLRB's general counsel, thereby preventing the NLRB from subdelegating those powers to regional directors. *See* Labor Management Relations Act, Pub. L. No. 80-101, sec. 101, § 3(d), 61 Stat. 136, 139 (1947) (codified as amended at 29 U.S.C. § 153(d) (2016)); *see also* National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169). Another example is the congressional statute limiting the power of the Secretary of Health and Human Services to delegate her authority, including powers executed by the regional offices, "to any other officer not directly responsible to the Assistant Secretary [for Aging]." *See* 42 U.S.C. § 3011(a) (2016); *see also id.* § 3002(7).

328. *See* Marisam, *supra* note 4, at 887.

329. *See id.* at 893-94; *see also, e.g.*, U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004); Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 783-84 (D.C. Cir. 1998).

330. *See* Marisam, *supra* note 4, at 886-88, 900.

331. 11 Ct. Int'l Trade 668 (1987).

332. *See id.* at 669-71.

ITA's authority to select appropriate exchange rates to the Federal Reserve Bank of New York and was therefore invalid.³³³ But the U.S. Court of International Trade held that the ITA rule was reasonable and valid as long as the ITA made the final decision on the exchange rate, emphasizing that such redelegation "reduces the overall administrative burden."³³⁴

3. Consultation

Congress regularly mandates that officials from different agencies consult with one another in order to ensure that they benefit from each other's knowledge and expertise.³³⁵ At other times, such interagency consultation is not required by Congress but is merely authorized.³³⁶ In fact, absent an explicit or implicit statutory prohibition, there is generally no bar on discretionary consultation—although some agencies might nonetheless hesitate to consult without explicit congressional authorization.³³⁷ Generally, when an agency responsible for a particular decision engages in consultation, whether mandatory or voluntary, it retains considerable discretion over the final decision.³³⁸ Ignoring another agency's advice without articulating good reasons, however, might render the decision "arbitrary and capricious" and, therefore, unlawful.³³⁹ Given the physical proximity between regional offices of agencies with overlapping responsibilities, as well as that between regional offices and their states' administrations (at least compared to that between Washington and the states), consultation among these various parties is rather easily achieved and enables agencies to reach more informed decisions.³⁴⁰ To encourage more frequent voluntary consultation, we maintain, courts should relax the arbitrary and capricious test in this context and grant regional officers wide latitude in reaching final decisions, even if the reasons the region

333. *See id.* at 671-72.

334. *See id.* at 675-76.

335. *See Freeman & Rossi, supra* note 4, at 1157 ("It is quite common for Congress to create situations where an agency with the exclusive authority to regulate or manage a problem cannot proceed without first consulting, or taking comment from, another agency whose mission is implicated in the action agency's decisionmaking.")

336. *See id.*

337. *See id.*

338. *See id.* at 1158.

339. *See id.*; *see also* *Bennett v. Spear*, 520 U.S. 154, 169 (1997) ("[A] federal agency that chooses to deviate from the recommendations . . . bears the burden of 'articulat[ing] in its administrative record its reasons for disagreeing with the conclusions . . .'" (first and third alterations in original) (quoting Brief for the Respondents, *Bennett*, 520 U.S. 154 (No. 95-813), 1996 WL 396714, at *20-21)).

340. For a famous decision involving such a scheme, see *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659-60 (2007).

gives for ignoring the advice of other agencies (both federal and state) are insufficiently compelling to pass the test as typically applied.³⁴¹ Regional offices of various departments would be more willing to consult other entities—federal, state, and local—if they knew that declining to rely on those entities’ advice would normally not render their decisions arbitrary and capricious.

4. Interagency agreements

An interagency agreement, often called a memorandum of understanding (MOU), is another tool of interagency coordination that can be applied at the regional level. MOUs, argue Freeman and Rossi, are “[p]erhaps the most pervasive instrument” for interagency coordination³⁴²—and for “pooling” powers, to use Daphna Renan’s phrase.³⁴³ MOUs are typically voluntary agreements signed by federal agencies whose powers overlap or intersect.³⁴⁴ They are used to assign responsibilities, define jurisdictional boundary lines, share information, set procedures, or otherwise assist in furthering mutual commitments under the relevant authorizing legislation.³⁴⁵

In principle, regional administrators are legally authorized to enter into MOUs.³⁴⁶ One such example is the MOU signed by the EPA and the U.S. Fish and Wildlife Service, according to which disputes between the regional offices of the two agencies are to be referred to the agencies’ national offices for resolution pursuant to procedures set forth in the MOU.³⁴⁷ Although it is hard to evaluate the extent to which regional offices are involved in the process of negotiating and signing such MOUs, we propose encouraging the involvement of regional administrators of different departments and agencies who

341. Cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5, 8 (2009).

342. See Freeman & Rossi, *supra* note 4, at 1161.

343. See Renan, *supra* note 4, at 213.

344. See Freeman & Rossi, *supra* note 4, at 1161-62.

345. See *id.*

346. See, e.g., Environmental Resource Directory: Idaho exhibit 3 (2017), <https://perma.cc/3AWS-EA2S> (reproducing an MOU between the EPA’s Region 10 and the Idaho State Office of the Department of Agriculture); Letter from Se. Reg’l Office, Nat’l Park Serv., U.S. Dep’t of the Interior, to Scott C. Flanders, Dir., Div. of Site & Envtl. Reviews, U.S. Nuclear Regulatory Comm’n 1 (Apr. 22, 2011), <https://perma.cc/F5MD-UWDL> (accepting the NRC’s invitation “to act as a cooperating agency in the preparation of an Environmental Impact Statement . . . for new reactors” in Florida and pledging that the regional office of the National Park Service would work with the NRC to prepare an agreement).

347. See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 654 (2007) (describing the MOU).

administer joint programs in a region so as to better coordinate their activities. In order to make sure that these agreements do not deviate from central policies, national headquarters should review and approve the agreements before they go into effect.

C. Judicial Review

In performing their day-to-day duties, regions are regularly required to interpret laws and regulations. When authorized, either by Congress or by agency headquarters, to formulate regional policies (as in the case of the EPA's approval of SIPs), this can take the form of rulemaking.³⁴⁸ In other cases, regional constructions occur in a much less formal manner, through various means such as decisions on permit requests,³⁴⁹ ruling letters,³⁵⁰ guidance documents,³⁵¹ or

348. We were able to identify at least two examples of headquarters' expressly delegating rulemaking authority to regional offices. The first example is approval of SIPs. See Marcia Spink, EPA Region 3, SIP Law & Rulemaking on State Implementation Plans (2009), <https://perma.cc/M9LK-V8ML> (describing the role of the EPA's regions in the rulemaking process required for approving and amending SIPs); see also Memorandum from Gerald A. Emison, Dir., Office of Air Quality Planning & Standards (MD-10), U.S. EPA, to David P. Howekamp, Dir., Air Mgmt. Div., Region IX, U.S. EPA (Feb. 4, 1987) (on file with authors) (discussing the rulemaking backlog in EPA Region 9).

The second example is within the U.S. Forest Service. The authority to make rules regarding national forests is principally reserved to the Secretary of Agriculture, but regional foresters are authorized, to the extent such authority is redelegated to them by the Chief Forester, to "issue regulations prohibiting certain acts or omissions related to protection of National Forest resources, property, and public health and safety." See FOREST SERVICE MANUAL § 1013.01a(2), <https://perma.cc/XKZ8-TJ2L>.

349. See, e.g., Letter from Howard M. Cantor, Assistant Reg'l Adm'r, Office of P'ships & Regulatory Assistance, Region 8, U.S. EPA, to Joseph L. Uppercue, Deputy Operations Site Manager, BP Am. Prod. Co. (Sept. 20, 2012), <https://perma.cc/7W7N-DX96> (notifying BP America that its construction site no longer contained "stationary sources" or "major sources" emitting regulated pollutants as defined under federal law and thus that the company was not required to obtain a permit).

350. See, e.g., *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 219, 225-28 (4th Cir. 1997) (discussing letters sent by EPA Regions 4 and 6 to an industrial plant interpreting federal regulations governing benzene emissions); Letter from Donald Dossett, Manager, Stationary Source Unit, Region 10, EPA, to Claudia Davis, W. Region Air Quality Manager, Or. Dep't of Env'tl. Quality 1 (Sept. 26 2017), <https://perma.cc/5WLN-L7HE> (interpreting a term used in federal environmental regulations to exclude a liquefied natural gas facility).

351. See, e.g., *Ohio Valley Env'tl. Coal. v. Horinko*, 279 F. Supp. 2d 732, 752 (S.D. W. Va. 2003). In *Horinko*, EPA Region 4 had provided a guidance document interpreting federal water quality regulations. See *id.* at 751-52. The document referred not only to potential degradation following new discharges (as interpreted by the EPA) but also warned of preexisting permitted uses that might lower water quality. See *id.* This regional interpretation was later used by an environmental coalition while challenging an EPA decision. See *id.*

even oral instructions without any written material.³⁵² Regional interpretations may be adopted nationwide by headquarters, rejected by the agency center, or simply ignored. What degree of deference do courts owe to decisionmaking by regional offices? Is it the same as that given to decisions of the upper rungs of the administration? And how should courts view regional interpretations that diverge from interpretations by other regions or those by headquarters? After describing the answers to these questions provided by existing doctrine, we evaluate them and propose some modifications in light of our defense of regional power.

1. Deference to regional offices' interpretations

The traditional standard of review of an agency's interpretation of its enabling act in rulemaking was given in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which held that a reviewing court should defer to an agency's reasonable interpretation of an ambiguous statute the agency administers, even if the court might have interpreted the statute differently in the first instance.³⁵³ The standard for deference to agency interpretations that occur in more informal agency actions (such as guidance documents, manuals, circulars, and the like) was articulated in 1944 in *Skidmore v. Swift & Co.*³⁵⁴ and then modified and clarified in 2001 in *United States v. Mead Corp.*³⁵⁵ Under the *Skidmore/Mead* standard of review, the court assigns weight to an agency's challenged interpretation based on considerations including whether the interpretation requires particular agency expertise; whether the interpretation is consistent with earlier ones made by the agency; the level of the decisionmaker who made or approved the interpretation; the procedure by which the interpretation was adopted; and how carefully the agency considered the interpretation.³⁵⁶

352. See, e.g., *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030, 1031-32 (D.C. Cir. 1999) (discussing the Alaskan Region of the Federal Aviation Administration, which "consistently advised guide pilots" for approximately thirty years "that they were not governed by regulations dealing with commercial pilots" but which never set forth this interpretation in a written statement), *abrogated by* *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

353. See 467 U.S. 837, 842-45 (1984).

354. See 323 U.S. 134, 140 (1944).

355. See 533 U.S. 218, 221, 227-28 (2001).

356. See *id.*; *Skidmore*, 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); see also Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1281-91 (2007).

Thus, at least according to the *Skidmore/Mead* criteria, regional offices' interpretations might receive lesser deference than those made by central headquarters: Regional offices are situated lower in the administrative hierarchy; they possess less professional expertise; and their decisions sometimes seem to be inconsistent with nationwide policy. Over the years, regional interpretations have received a rather qualified degree of deference.³⁵⁷

We suggest instead that a more deferential attitude toward regional interpretation be adopted. The Second Circuit's 2002 decision in *Community Health Center v. Wilson-Coker*, according to which "even relatively informal . . . interpretations, such as letters from regional administrators, 'warrant[] respectful consideration,'"³⁵⁸ should be applied more broadly. Important policy considerations, as well as principled interpretations of *Skidmore* and *Mead*, support this promising decision and point to the conclusion that greater weight should be given to regional interpretations.

Four main arguments support our claim. First, regional offices can, and often do, fulfill *Mead's* requirement of "relative expertness."³⁵⁹ As discussed above, regions have indispensable regional (in addition to professional) expertise, unmatched by that of central headquarters or other agency professionals. During the course of their activities, regional offices develop in-depth regional knowledge; an understanding of regional complexities; and an ability to advance democratic responsiveness, regional diversity, and experimentalism. Being located in the region enables regional offices to forge crucial political ties and alliances with states and localities within the region and foster indispensable interstate cooperation.

Second, although sometimes depicted as low-level, bureaucratic, and unaccountable entities, regional offices—as opposed to lower-ranking field offices—are at the upper echelons of the administrative branch. Regions are in charge of operations throughout vast territories encompassing several states and are responsible for a large number of federal employees.³⁶⁰ Additionally,

357. Various degrees of deference to regional interpretation have been given by courts, albeit in a hesitant way. *See, e.g.*, *Troutman v. Cohen*, 588 F. Supp. 590, 598 (E.D. Pa.) ("Approval by a regional director . . . need not be given the same substantial weight as the official policy Approval by a regional office . . . is, however, entitled to some deference"), *aff'd mem. sub nom. Holland ex rel. Holland v. Cohen*, 755 F.2d 920 (3d Cir.), and *aff'd mem. sub nom. Troutman ex rel. Rowe v. Cohen*, 755 F.2d 924 (3d Cir. 1984); *see also* *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 803-04 (6th Cir. 1998) (giving some deference to an interpretation in a letter from an HHS regional office).

358. 311 F.3d 132, 133-35, 138 (2d Cir. 2002) (second alteration in original) (quoting *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002)).

359. *Mead*, 533 U.S. at 228.

360. Current estimates are that roughly 85% of federal employees are employed in the field services of the administration. *See* *Owen*, *supra* note 9, at 61.

many regional heads are appointed by the department secretary or agency head, sometimes with the involvement of the President.³⁶¹ Such appointees cannot be regarded as politically unaccountable, and therefore their interpretations should be given deference.

Third, the Supreme Court in *Mead* and various commentators have expressed concern about the risks of granting deference to the interpretations of a multitude of low-level federal officers all over the country.³⁶² This concern, we argue, does not apply to regional offices. Recall that our conception of a regional office relates only to the top tier of an agency's field structure, which controls and oversees the agency's activities in several states. Additionally, although at times regional offices set high-stakes general policies, they do not do so to the staggering degree that worried the *Mead* Court. We therefore agree with the Court's determination that deference should not extend to informal decisions made by one of the forty-six "regional offices" of the U.S. Customs Service, because (according to the Court) those offices functioned more like end-of-line field offices "placed around the country at the Nation's entryways."³⁶³ Rather, deference should be reserved for regional offices, which are responsible for a territory encompassing several states and are vested with significant power.

Fourth, although inconsistency in agency interpretations is generally a reason to assign them lesser weight, variations between two or more regions should not render regional interpretations unworthy of deference. Variations among regions are not only inevitable; they are desirable. When we take into account the important role of regions as mediators and coordinators and their abilities to promote democratic responsiveness, experimentalism, and intergovernmental cooperation and coordination, such "inconsistencies" should actually be thought of as desirable variations.

Yoav Dotan has explained that courts value consistency because it protects parties' reliance interests, promotes the rule of law by ensuring that similarly situated parties are treated similarly, and guards against capricious or ill-intentioned agency action.³⁶⁴ But unlike inconsistency of interpretations within the same entity, variation among regions does not undermine reliance or the rule of law, nor does it signal capricious government behavior. It can

361. See *infra* note 387 and accompanying text.

362. See *Mead*, 533 U.S. at 238 n.19 ("[T]here would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways."); Barron & Kagan, *supra* note 11, at 201-02 (arguing that *Chevron* deference should be given only to interpretations made by top-level officials).

363. See *Mead*, 533 U.S. at 238 n.19.

364. See Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1000-01 (2005).

actually promote, in many instances, substantive equality—treating different cases differently—and can reflect careful, contextual, and nuanced decisionmaking. Therefore, the concern courts sometimes express—that inconsistency makes it less likely that the agency has settled on the “correct” interpretation of the language enacted by Congress³⁶⁵—is not justified when inconsistency stems from regional variation.

2. Headquarters’ diverging from regional interpretations

A major question facing courts is how to factor into their standards of review of agency action the fact that an agency changed its previous interpretation of the authorizing statute. Such change is often referred to by courts as an “inconsisten[t]” interpretation of the law, triggering a discussion of whether it should therefore be “‘entitled to considerably less deference’ than a consistently held agency view.”³⁶⁶ Furthermore, under existing doctrine, an agency that changed its position can be found to have acted in an arbitrary and capricious manner and risks having its decision set aside.³⁶⁷ And according to Gillian Metzger, the Supreme Court has recently become even more critical of inconsistent agency interpretations, more readily classifying them as arbitrary and capricious unless the agency provides adequate explanation for its change of heart.³⁶⁸

However, contradictory interpretations and disagreement between a regional office and headquarters at the policy formation stage are not considered arbitrary and capricious. This was the holding in *National Ass’n of Home Builders v. Defenders of Wildlife*.³⁶⁹ There, the Court overturned the court of appeals’s holding that the contradictory opinions given by the regional offices of the EPA and the Fish and Wildlife Service justified vacating the EPA’s final decision as arbitrary and capricious.³⁷⁰ The Court explained its holding by stating that “[t]he federal courts ordinarily are empowered to review only an agency’s *final* action, and the fact that a *preliminary determination by a local agency representative* is later overruled at a higher level within the agency does

365. See Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 87-90 (2011) (discussing cases in which the Supreme Court refused to grant *Chevron* deference to agency interpretations due to inconsistency).

366. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

367. See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

368. See Metzger, *supra* note 228, at 27.

369. See 551 U.S. 644, 659 (2007).

370. See *id.* at 655-57.

not render the decision-making process arbitrary and capricious.”³⁷¹ In other words, the Court refused to fault the agency for internal disagreements that regularly occur during the process of formulating policy.

Regional offices sometimes make decisions that are later overruled by headquarters. This is the unavoidable and natural course of agency action and reflects the desirable dynamics of regional offices. Furthermore, granting less deference to (or deeming arbitrary and capricious) agency interpretations that conflict with regional ones would suppress differences of opinion within the agency and cause headquarters to refrain from consulting with regional officers when making agency policy. But the contribution of regional offices to the formation of national policies cannot be overstated.³⁷² Alongside their regional knowledge and expertise, regional offices can give voice to the perspectives of marginalized communities, minorities, or ideologies. In this sense, our argument in support of conflictual dialogue between headquarters and regions is aligned with contemporary scholarship that lauds dissent, “uncooperative federalism,” and disagreement within government.³⁷³ Indeed, similarly to Daniel Farber and Anne O’Connell’s claim that intra-agency conflicts and disagreements over the interpretations of agencies’ delegated powers should be regarded favorably,³⁷⁴ we argue that the existence of disagreement among headquarters and regions should not result in reduced deference or heightened judicial skepticism.

3. Headquarters’ silence regarding regional interpretations

Regional offices are often compelled to make concrete decisions and form policies that address new and unforeseen situations long before central headquarters have to determine a definitive position. This is so because regions are nearer the front lines than are Washington headquarters. In some cases it might take years before headquarters take notice of regional proactivity. When headquarters reject long-held regional policies, there arise two questions: Does

371. *Id.* at 659 (emphasis added) (citation omitted).

372. Another example of a structured rulemaking process that includes the perspectives of regional offices and encourages the voicing of disagreements is the NRC’s directive on rulemaking. See U.S. NUCLEAR REGULATORY COMM’N, MANAGEMENT DIRECTIVE 6.3: THE RULEMAKING PROCESS, § XII(F)-(G), at 24-25 (2013), <https://perma.cc/HN9W-8UM8> (providing mechanisms for dissenters to choose not to concur on parts of documents or to obtain formal review of their “differing views on . . . mission-related issues considered by the highest level managers in their organizations”).

373. See Bulman-Pozen & Gerken, *supra* note 21, at 1284-91; see also Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 650 (2013).

374. See Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1385 (2017).

the headquarters's decision deserve *Skidmore/Mead* deference? And is such a decision likely to be arbitrary and capricious?

Drummond Coal Co. v. Hodel deals with such a scenario.³⁷⁵ For several years, the precise method for calculating reclamation fees under the Surface Mining Control and Reclamation Act (SMCRA) was left to regional offices of the Office of Surface Mining (OSM)—a bureau within the U.S. Department of the Interior.³⁷⁶ Given the ambiguity of how to calculate the fees in the governing regulations, the regional OSM office responsible for Alabama had calculated these fees in a manner that reflected the state's tax laws.³⁷⁷ When the Secretary of the Interior discovered that the regional office was applying a standard more lenient toward mining companies than his understanding of the original regulations, he amended the regulations to “clarify” the Department's position.³⁷⁸

Although there was no doubt that the Department could adopt a standard that differed from the region's, the plaintiff, Drummond Coal, argued that the new regulations represented a “departure from a prior administrative practice without a ‘reasoned justification’” and should thus be deemed arbitrary and capricious.³⁷⁹ At the core of this argument was the claim that the Department's silence in face of the region's interpretation, which lasted for five years, amounted to de facto adoption of the policy by the headquarters, and thus a divergence from that policy required reasoned justification.³⁸⁰ The Secretary, on the other hand, claimed that his position deserved “great deference” despite its divergence from longstanding regional practice because it was “consistent with the broad, remedial purposes of the SMCRA, and promoted the twin agency goals of uniformity in application and administrative efficiency.”³⁸¹

The district court granted deference to the Secretary and did not find his decision to be arbitrary and capricious. The court's decision expressed disdain toward regional interpretation of the SMCRA, characterizing regional officers as “insubordinates or misinformed government officials.”³⁸² These interpretations, concluded the court, should not bind the government because, “without knowledge or legal responsibility for [the] Region[s] activities[,] the Secretary

375. See 610 F. Supp. 1489, 1495 (D.D.C. 1985), *aff'd*, 796 F.2d 503 (D.C. Cir 1986).

376. See *id.* at 1491-92; see also Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of the U.S. Code).

377. See *Drummond Coal*, 610 F. Supp. at 1491-92, 1492 n.2.

378. See *id.* at 1500.

379. See *id.* at 1493 (quoting the plaintiff's motion for summary judgment).

380. *Id.*

381. *Id.*

382. See *id.* at 1504.

could not have authorized” them.³⁸³ In addition, the court blamed the plaintiff for not seeking advice from top-level officials at the OSM with regard to the proper interpretation of the regulations.³⁸⁴

Although we agree that an agency could legitimately decide to deviate from a regional interpretation, the *Drummond Coal* court’s reasoning is lacking, and the doctrine at its foundation is in need of modification. Contrary to what the court suggested, regional offices should not be seen as “insubordinate” or “misinformed.” The regional office of the OSM was likely responding to local needs and conditions and formed its policies based on its territorial expertise. When the headquarters was silent for a long period regarding the regional interpretation, the arbitrary and capricious standard should require that it give a “reasoned justification” for departing from that interpretation. Further, it does not follow from this position that one region’s interpretation becomes nationwide policy that binds other regions. In other words, despite the silence from headquarters, a region’s interpretation should remain regional: It should not be binding on other regions, which should remain at liberty to adopt their own interpretations.

These proposed doctrinal modifications are based on our conception of the appropriate relationship between central agency headquarters and regional offices. Once a region has been delegated decisionmaking powers by the agency, it should be legally and politically responsible for its regional actions and interpretations. Letting headquarters off the legal hook because they had no actual knowledge of regional actions would induce Washington to refrain from monitoring what regions do. Indeed, it is imperative for headquarters to develop routine oversight of regional operations. One way to motivate headquarters to do so is to adopt a principle assuming that headquarters assent to regional policies after a reasonable period of silence. Furthermore, imposing responsibility on headquarters for such regional interpretations would induce accountability, entrepreneurship, and experimentalism at the regional level because third parties would know that they can rely on regional decisionmaking. Such incentives are especially important when regional offices seek to realize their potential as mediators and coordinators.

D. Institutional Design: Appointment of Regional Heads and Regional Councils

The institutional design of regional offices affects their ability to perform their roles as mediators and coordinators. By “institutional design” we mean to refer to an array of arrangements that define structure rather than the specific

383. *Id.*

384. *See id.*

content of the regional office. The institutional design of an agency and its regional structure is a crucial factor in the institutional dynamics of a regional office and in setting each region's course. For example, a region in a departmental bureau headed by a political appointee of the department head—herself a political appointee—might be more inclined to accommodate political pressures than a region whose administrator was appointed by an independent commission or by a member of the administration who cannot be fired at will. Similarly, appointing a regional head in consultation with state senators might result in the office being more attuned to state interests and needs, thereby facilitating its role as a mediator.

Other institutional traits are also conducive to orienting regional operations in a particular ideological or political direction. Establishing regional councils in each region, for instance, comprising representatives of the different departments and agencies that operate in the region, could push the regional office to become a coordinator. Such structural characteristics do not determine the results or outputs of the institution, nor do they dictate which concrete actions or policy decisions it will take. Yet they do tilt the regional offices—sometimes heavily—in the direction desired by their designers.

1. Appointments

The ways regional heads are selected, approved, and appointed vary dramatically among the many agencies and departments that have regional offices. Yet some important generalizations can be made. First, the President does not *formally* appoint regional heads, even in executive departments and even for large and influential agencies like the EPA.³⁸⁵ None of the numerous presidential appointments—with or without Senate approval—is a regional head.³⁸⁶ Second, despite this lack of a *formal* presidential role in appointing regional heads, the President is *de facto* deeply involved in nominating them in

385. In 2012, an attempt was made by members of the Senate to limit the (informal) power of the President to affect the appointment of EPA regional administrators. Senator Inhofe of Oklahoma introduced a bill to require the “advice and consent” of the Senate in appointing EPA regional administrators. See EPA Regional Oversight Act, S. 3053, 112th Cong. § 2(a) (2012). The bill was introduced to the Senate Environment and Public Works Committee but never made it beyond that. See S.3053—EPA Regional Oversight Act of 2012, CONGRESS.GOV, <https://perma.cc/D2PR-MFH5> (archived May 5, 2018).

386. See CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 6-43 (2013) (listing all offices requiring Senate confirmation, none of which is a regional administrator); H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS, at iii, v, 1-195 (Comm. Print 2012) (specifying all the presidential appointees and listing no regional head or administrator).

a number of agencies and departments, either through the influence of the Office of Presidential Personnel or because the regional heads are directly appointed by department or agency heads who are themselves appointed by the President.³⁸⁷ Third, although Congress seldom legislates the appointment procedure for regional heads, in some cases it specifies which officer appoints regional heads, thus determining the degree of insulation of the region from the President and his appointees.³⁸⁸

Before discussing the actors involved in the appointment of regional heads and how they affect regions' ability to fulfill their potential as mediators and coordinators, we briefly discuss some of the constitutional constraints that could apply to the appointment process. The Appointments Clause requires that all principal officers of the United States be nominated by the President "with the Advice and Consent of the Senate."³⁸⁹ "[I]nferior" officers, however, can be appointed by the President alone, by "Courts of Law," or by "Heads of Departments," if Congress specifically allows it.³⁹⁰ The Appointments Clause does not apply to the hiring of regular employees of the executive branch.³⁹¹

According to the customary modes of their appointment as well as the tests developed by the Court in applying the Appointments Clause, it is rather clear that regional heads are not principal officers. First, regional heads have never been formally appointed by the President with the advice and consent of the

387. Press releases occasionally refer to EPA regional administrators as having been appointed by the President. For example, Lance R. LeFleur, director of the Alabama Department of Environmental Management, declared in a press release that "President Trump made a wise choice in selecting Trey [Glenn]," who became the administrator of EPA Region 4. See Press Release, Office of the Adm'r (AO), U.S. EPA, EPA Announces Appointment of Trey Glenn to Region 4 Administrator (Aug. 21, 2017), <https://perma.cc/RD7N-JRYK>.

388. See, e.g., 5 U.S.C. § 7105(d) (2016) (requiring that regional directors of the Federal Labor Relations Authority be appointed by the agency head); 6 U.S.C. § 317(b)(1) (2016) (requiring that regional administrators of FEMA be appointed by the FEMA Administrator); 42 U.S.C. § 7152(a)(2) (2016) (requiring that regional power administrators within the Department of Energy be appointed by the Secretary of Energy); 49 U.S.C. § 109(e) (2016) (requiring that regional directors of the Maritime Administration be appointed by the Secretary of Transportation).

389. U.S. CONST. art. II, § 2, cl. 2.

390. *Id.* ("Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."). For a detailed overview of recent developments in Appointments Clause jurisprudence, see *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2135-56 (2012) (describing recent legal battles over presidential nominations and Senate confirmations and noting that it has become more common for the Senate to reject candidates based on consideration of ideological beliefs).

391. The Appointments Clause is silent as to this type of employee. This silence has been interpreted to mean that the Clause does not apply to them. See Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 452, 459 (2018).

Senate, suggesting that there is wide and continuous consensus that they are not principal officers.³⁹² Second, although regional heads possess significant powers, these powers do not seem to rise to the level required by Appointments Clause jurisprudence—even taking into account that the Court “has yet to settle on an ‘exclusive criterion’ for drawing the line between principal and inferior officers.”³⁹³ As far as we can tell, no legal challenge has ever been made claiming that a regional administrator is a principal officer and that therefore she must be appointed by the President with the advice and consent of the Senate.

Whether regional heads should be considered inferior officers or mere employees, however, is another question, the answer to which, we argue, depends on various policy considerations and requires an ad hoc and nuanced examination of the type of agency and the region’s hierarchical level and specific functions within it. According to the Appointments Clause, Congress can mandate that inferior officers be appointed by the President alone—which has never happened in the case of regional heads—or by the officer’s “Head[] of Department[.]”³⁹⁴ What formally defines an inferior officer is he is directly subordinate to “some higher ranking officer” who is herself appointed by the President with the advice and consent of the Senate.³⁹⁵ Put differently, “[w]hether one is an ‘inferior’ officer depends on whether he has a superior.”³⁹⁶ Thus, an important (though by no means exclusive) parameter in determining

392. After each election, the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs alternate in publishing a book (known as the Plum Book) with all the appointees made by the President. No regional head or regional administrator appears on these lists. For recent Plum Books, see S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (Comm. Print 2016); and H.R. COMM. ON OVERSIGHT & GOV’T REFORM, *supra* note 386.

393. See Jennifer Nou, Essay, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 512 (2017) (footnote omitted) (quoting *Edmond v. United States*, 520 U.S. 651, 661 (1997)). The Supreme Court has stated that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear.” *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

394. U.S. CONST. art. II, § 2, cl. 2. If Congress does not specify a different mode of appointment for an inferior officer, the fallback position is presidential appointment with the advice and consent of the Senate. See *Edmond*, 520 U.S. at 660. Ample discussion also exists as to what counts as a “Department[.]” for purposes of the Appointments Clause, but in the interest of brevity we will not delve into it. For scholarship that does discuss this issue, see, for example, Kent Barnett, *The Consumer Financial Protection Bureau’s Appointment with Trouble*, 60 AM. U. L. REV. 1459 (2011) (describing the ambiguous criteria for defining a department and discussing whether the CFPB should be deemed as such).

395. See *Edmond*, 520 U.S. at 662-63.

396. *Id.* at 662; see also Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 512 (2009).

whether a regional head counts as an inferior officer—rather than a mere employee—is the location of the regional office within the administrative echelon. Regional heads who are directly subordinate to the agency’s administrator or department’s secretary, such as in FEMA and in the EPA, for example, would fit the bill of inferior officer.³⁹⁷ A regional head who is subordinate to lower-level officers within the department or agency, however, would seem to count as a mere employee.³⁹⁸

In addition to this formal test, however, the Court has developed substantive criteria to distinguish inferior officers from employees. An employee does not exercise “significant authority pursuant to the laws of the United States”³⁹⁹ and usually performs “ministerial tasks.”⁴⁰⁰ These criteria suggest that some regional heads could count as inferior officers while others would be mere employees. Those regional heads whose decisions are final and require no further adoption, approval, or promulgation by agency headquarters could be seen as inferior officers, while those who only recommend that headquarters adopt certain decisions would be classified as employees.

Surprisingly, scant litigation has dealt with these questions. In *Goethel v. Pritzker*, the plaintiffs argued that the appointment of members to various regional fishery management councils runs afoul of the Appointments Clause.⁴⁰¹ According to the plaintiffs, because members of these regional councils were inferior officers, Congress could have vested their appointment in the President or in their department head but could not let governors be so heavily influential in their appointment.⁴⁰² The court rejected this claim, holding that the councils “do not exercise ‘significant’ authority” given that they merely propose regulations that ultimately “only the Secretary of Commerce can promulgate.”⁴⁰³

397. See *EPA Organization Chart*, *supra* note 1; U.S. Dep’t of Homeland Security/FEMA (2018), <https://perma.cc/2JFH-97JW>.

398. The regional directors of DOL’s Office of Labor-Management Standards (OLMS) are an example of such lower-level regional heads, in that they are subordinate to the Director of the Office of Field Operations, who in turn answers to the Deputy Director of the OLMS. See *Office of Labor-Management Standards (OLMS): Organizational Chart*, U.S. DEP’T LAB., <https://perma.cc/D6WN-7HWN> (last updated Nov. 1, 2017).

399. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

400. See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

401. See No. 15-cv-497-JL, 2016 WL 4076831, at *1, *9 (D.N.H. July 29, 2016), *aff’d sub nom.* *Goethel v. U.S. Dep’t of Commerce*, 854 F.3d 106 (1st Cir. 2017). For more on the regional fishery management councils, see notes 213-14 and accompanying text above.

402. See *Goethel*, 2016 WL 4076831, at *10.

403. See *id.* (quoting *Nw. Envtl. Def. Ctr., Or., Inc. v. Evans*, No. 87-229-FR, 1988 WL 360476, at *8 (D. Or. Aug. 12, 1988)).

footnote continued on next page

An important policy consideration we argue should influence a regional head's classification as an inferior officer whose appointment is subject to the Appointments Clause is whether and to what extent it is desirable to insulate the region from presidential influence. Subjecting the appointment of regional heads to the Appointments Clause increases the probability that the President will be able to influence regional decisionmaking and actions. Classifying regional heads as employees, on the other hand, insulates them to a certain degree from the President and political appointees. (It would be difficult, however, to label a regional head who possesses significant authority as an employee rather than inferior officer, even if as a matter of policy it would be preferable to protect her from Washington-based political pressure.)

This last policy consideration is closely tied to three facets of the appointment process by which one can evaluate a region's degree of independence and ability to perform as mediator or as coordinator. First, as just discussed, how political is the appointment process (in the sense of being influenced by the President or by a presidential appointee)? Second, what is the degree of involvement of states' congressional delegations (in both the Senate and the House) in the appointment process? Third, what is the involvement of noncongressional regional stakeholders, such as state governors, in the appointment process? The more insulated the appointment process from state and regional forces, the more likely that the regional office will adhere to Washington's dictates. An appointment process that is more attuned to state and regional interests is more likely to produce a regional office that fulfills its mediating and coordinating missions.

FEMA exemplifies a model in which regional administrators are appointed by the agency head but through a process that is highly responsive to regional interests and needs. This is manifested in the requirement that the FEMA Administrator consult with "State, local, and tribal government officials in the region" and consider the candidate's "familiarity . . . with the geographical area and demographic characteristics of the population served by" the regional office.⁴⁰⁴

Other than *Goethel*, the only direct constitutional challenge to the appointment of a regional head we were able to find was resolved without a definitive judgment on the merits. In *Pennsylvania Department of Public Welfare v. United States*, 124 F. Supp. 2d 917 (W.D. Pa. 2000), Pennsylvania challenged the appointment of the regional administrator for the Administration of Children and Families, a bureau within HHS. *Id.* at 918. The state argued that the regional administrator is an inferior officer and thus should have been appointed according to the Appointments Clause rather than by an HHS personnel officer with the Assistant Secretary's approval. *See id.* at 918-19. Although the court refused to dismiss the case on standing grounds and found that the plaintiffs had "asserted a viable constitutional challenge under the Appointments Clause," *id.* at 926-28, the case was settled before a final judgment could be issued, *see Order, Pa. Dep't of Pub. Welfare*, No. 2:00-cv-00265-GLL-FXC (W.D. Pa. Oct. 3, 2001).

404. 6 U.S.C. § 317(b) (2016).

The regional fishery management councils have an even more exceptional institutional design, in which regional stakeholders have a significant impact on the appointment of regional entities. The Magnuson-Stevens Fishery Conservation and Management Act created eight such councils responsible for fisheries requiring conservation and management in the councils' respective regions.⁴⁰⁵ Governors of the states composing each region participate in the appointment of council members, as do regional directors of the NMFS in the relevant geographic area.⁴⁰⁶

Regional involvement in appointments can also be manifested in the participation or representation of the regional offices in the agency's central governing bodies. An example of such reverse influence can be found in the Federal Reserve System. Dodd-Frank established the Consumer Advisory Board to be in charge of various federal consumer financial laws and provide "information on emerging practices in the consumer financial products or services industry, including regional trends."⁴⁰⁷ As part of its reform, Dodd-Frank requires that at least six members of the Board be "appointed upon the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis."⁴⁰⁸ This requirement gives significant voice and influence to the regional banks in the central regulatory body.

2. Strengthening the federal executive boards

Despite the need to develop legal principles to facilitate intergovernmental coordination and cooperation, there is currently no institution that fosters such coordination in a thorough and systemic manner, and efforts to do so are reliant on ad hoc and sporadic collaboration and consultation between and among federal agencies, as well as between the federal government and the states. There is, we suggest, an institution that can be transformed into a regional coordinating platform: the federal executive boards.

Originally created in 1961 by President Kennedy, there are currently twenty-eight federal executive boards, all located in major cities in which the majority of regional offices of federal departments and agencies are also located.⁴⁰⁹ Although federal executive boards now function as a thin

405. See Pub. L. No. 94-265, § 302, 90 Stat. 331, 347-51 (1976) (codified as amended at 16 U.S.C. § 1852 (2016)); see also *id.* § 2(a)-(b), 90 Stat. at 331-33 (codified as amended at 16 U.S.C. § 1801(a)-(b)) (describing the findings and purposes motivating the Act); *Goethel*, 2016 WL 4076831, at *1.

406. See *supra* note 214 and accompanying text.

407. See Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, § 1014(a), 124 Stat. 1376, 1974 (codified at 12 U.S.C. § 5494(a) (2016)).

408. *Id.* § 1014(b), 124 Stat. at 1974 (codified at 12 U.S.C. § 5494(b)).

409. See *supra* note 146.

networking platform for the various agencies located in these central cities, their original mission, which is still in force, was much broader: to promote “greater coordination of regional and field activities of the government” and to achieve a “more closely coordinated approach in many activities, as on economic problems, natural resources development, protection of equal rights, and urban development efforts.”⁴¹⁰ Hence, we posit, they can serve as the institutional platform for regional coordination.

Moreover, despite the failure of President Nixon’s FRCs, we propose resurrecting them, albeit in a more careful and nuanced manner, through the existing structure of the federal executive boards. We suggest that in some cases it would be desirable to empower the boards to serve as regional councils in which representatives of nonstandardized federal departments and agencies (that is, those that do not conform to the standard ten-region structure) would sit together, set regional priorities and agendas, and articulate the ways in which inter- and intra-agency coordinated action can achieve these goals. These federal executive boards could serve as the institutional platform for interagency consultation, joint policymaking, interagency agreements, redelegation, and pooling of resources and powers. Federal executive boards can thereby become a space where regional administrators voluntarily meet, learn from one another’s experiences, exchange ideas, and engage in softer forms of coordination. Additionally, the boards can facilitate direct contact between regional offices and local constituencies that are not necessarily represented by traditional political institutions, thus combating partisan state politics.

Conclusion

During the past decade, scholars have described and analyzed the immense complexity of the federal administration and its impact on administrative law. Many have explored the role played by states⁴¹¹ and localities⁴¹² within the national administration. Others have turned their attention to the fragmented and internally divided nature of the federal administration—including its hierarchical structure,⁴¹³ internal functional divisions,⁴¹⁴ and elaborate field

410. See Kennedy Memorandum, *supra* note 145, at 717 (capitalization altered); see also *About, FED. EXECUTIVE BOARDS*, <https://perma.cc/FL3K-ESE3> (archived May 18, 2018).

411. See generally, e.g., Bulman-Pozen & Gerken, *supra* note 21; Chemerinsky et al., *supra* note 230; Metzger, *supra* note 27.

412. See generally, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

413. See, e.g., Barron & Kagan, *supra* note 11, at 204-05; Magill & Vermeule, *supra* note 10, at 1035.

414. See, e.g., Nou, *supra* note 4, at 423-30.

service⁴¹⁵—and analyzed the resulting implications for administrative law and theory. Yet administrative law scholarship by and large has overlooked regional offices as distinct entities operating within the federal administration.

As noted, a recent development in the scholarship has been the attempt to “crack[] open the black box of agencies”⁴¹⁶ and delve into the complexities of the decentralized and nonmonolithic nature of the administration. This Article joins that burgeoning literature by adding an additional important administrative layer, largely neglected: that of the region.

Indeed, the federal administration is already profoundly regionalized. In this Article we have argued that regional offices of federal departments and agencies can be used to cure many of the ills of the administrative state: democratic deficit, interagency coordination problems, and the concentration of too much power in the hands of the President. Currently, regional offices cannot fulfill their potential in a satisfactory manner because they are viewed chiefly as mere enforcers and implementers of central policies—that is, as the long arms of a wholly centralized bureaucracy. Contrary to conventional wisdom, regions do much more than uniformly enforce centrally mandated policies; they serve as regional policymakers that operate under (sometimes drastically) different conditions, resulting in significant variations even among different regions of the same agency. Looking back at the debates over federal regions that took place throughout the twentieth century, we have shown that regions were established for a number of important reasons that justify their persistence, preservation, and empowerment.

Given the novelty and breadth of the topic, this Article only begins to address some of the theoretical, normative, doctrinal, and constitutional questions that arise when trying to revive federal regions. Our goal is to pave the main roads into analysis of and thought about federal regions, but clearly there is much more to do. Federal agencies and departments deal with a large variety of issues, ranging from social security to environmental protection, from protecting rights to regulating trade and commerce, from defending the borders to combating natural and manmade disasters. Indeed, one of the main challenges facing a comprehensive attempt such as ours to rethink the system of federal regions is the huge array of functions and purposes federal agencies pursue. These specific administrative functions, we claim, could determine whether an agency should even be regionalized, which authorities its regional offices should be given, and how much discretion those offices should be allowed. For each agency or subunit, the weighing of the merits and drawbacks of regionalization—and the use of regions as mediators and coordinators—

415. See generally, e.g., Owen, *supra* note 9.

416. Magill & Vermeule, *supra* note 10, at 1035.

would have a different outcome, due to the often-complicated set of ends each agency is designed and authorized to achieve.

Balancing the competing considerations we discuss in this Article in a concrete setting would yield different results. This Article sets out, for the first time, a general framework for how we ought to think about and analyze the regional structure of the federal administration. It would require a more thorough, nuanced, and in-depth analysis of how precisely the various considerations weighing for and against empowered regions should be balanced in the context of a specific department or agency. This effort, we hope we have shown, is worthwhile.