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ABSTRACT

This article examines the U.S. Supreme Court's impact on centralizing and decentralizing power in the American federal system. Through an original database of nearly 700 landmark constitutional decisions, we show that the Court has contributed to the centralization of political power, defined in the traditional sense of expanding federal government authority relative to that of states and localities. But it has also promoted decentralization by protecting individual rights against state and local governments. The impact of the Court also tends much more toward decentralization if we classify decisions upholding federal laws against challenge, as neutral, rather than centralizing. These two crucial methodological points have been largely neglected in previous analyses of the Court's impact on federalism and centralization. We also present multiple models for understanding how the Court affects federalism. Our analysis calls into question the traditional picture of the Court as a consistent force for centralization. It also raises serious questions about the conventional wisdom on the impact of the Court on centralization during specific periods in American history.

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INTRODUCTION

"No question of government has been more vigorously debated than…centralization versus states' rights," opined future U.S. Senator Paul H. Douglas in 1920.[1] Scholars of American federalism have suggested that the U.S. Supreme Court is a "principal instrument" of centralization.[2] Because the Court has the power of judicial review, its constitutional rulings regularly police the boundaries between national and state governments.

Conventional wisdom holds that this authority has been a centralizing force throughout all or most of American history. That conventional wisdom is partly right. But it also has significant limitations. Any assessment of the Court's impact on American federalism depends crucially on how we understand the concepts of centralization and decentralization, and from which baseline we start. In some crucial respects, the Court has been a decentralizing force, even though it has constrained the power of state and local governments far more than the federal government.

In this article, we empirically catalogue the Court's role in centralization and thus contribute to the literature on the role of judicial review in fostering centralization and

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[1] John Kincaid, *Dynamic De/Centralization in the United States*, 1790–2010, 49 PUBLIUS 166, 167 (2019).
[2] See, *e.g.*, *id.*

decentralization in federations.[3] We show that Supreme Court has contributed to the centralization of political power, defined in the traditional sense of strengthening federal government authority relative to that of states and localities. But it has also promoted decentralization by protecting individual rights against state and local governments. Recognizing the extent and significance of this trend is a significant challenge to the conventional wisdom on the subject of centralization and the Supreme Court's relationship to federalism.

The extent to which the Court promotes centralization or decentralization also depends crucially on how we classify decisions upholding policies established by other branches and levels of government. In some situations, it is more appropriate to classify such rulings as "neutral," because they merely leave in place a status quo established by other political actors. In that respect, they do not contribute to the marginal impact of judicial review, relative to a baseline in which that institution is absent.

Our findings are based on an expanded version of a U.S. Supreme Court centralization database, first created by one of us, that describes how decisions have affected the restriction or expansion of federal state power.[4] This data contains nearly 700 cases decided by the Supreme Court spanning from the early years of the republic through 2018. The data base is more nuanced and comprehensive than previous efforts to assess the Supreme Court's impact on centralization.

Our analysis of the data shows that, in crucial ways, the Supreme Court has indeed contributed to the centralization of power in American federalism. However, a more nuanced picture emerges when we consider two issues that have largely been ignored in the previous literature. First, decisions that merely affirm expansions of federal power by other branches of

[3] Paolo Dardanelli et al., *Dynamic De/Centralization in Federations: Comparative Conclusions*, 49 PUBLIUS 194 (2019).
[4] MICHAEL A. DICHIO, THE US SUPREME COURT AND THE CENTRALIZATION OF FEDERAL AUTHORITY (2018).

government (the executive and the legislature) do not lead to a net increase in federal power relative to a baseline in which there was no Supreme Court or it lacked the power of judicial review. Thus, it is important to consider what happens when such cases are excluded from the analysis.

Second, decisions striking down state or local laws on individual rights grounds are examples of centralization, in the sense that they weaken state and local authority. But they are also examples of decentralization, in so far as they push decision-making authority to an even lower level than subnational governments: individual citizens, the private sector, and civil society.

If we make these two adjustments to the data, the picture that emerges is one where the Supreme Court's net effect on centralization is much more ambiguous than conventionally believed. The Court may well even have had a net decentralizing impact. Whether these adjustments are preferable to the more traditional framing of the Court's impact depends in large part on the question at hand. We do not claim they are appropriate for all conceivable situations and research questions. But our findings represent a significant qualification to conventional wisdom, in so far as analysts seek to assess the marginal impact of the Court as an institution, and its effect on the overall level of centralization in the American political system, as opposed to just the balance of power between the federal government on the one hand, and states and localities on the other.

Part I of this article provides an overview of the existing literature on the Supreme Court and federalism, which largely endorses the conventional wisdom that the Court is a force for centralization. Part II explains our data base of cases and methodology. In Part III, we outline our results on the impact of the Supreme Court on decentralization, with particular emphasis on the

challenges to conventional wisdom that arise from reevaluating the traditional understanding of decisions that restrict state and local government power in order to protect individual rights. Part IV presents findings on variation over time in the Supreme Court's impact on centralization and decentralization. Some eras that are traditionally seen as periods where the Court was a centralizing force look different from the perspective of our revisionist methodology.

I. PREVIOUS LITERATURE ON THE SUPREME COURT AND CENTRALIZATION

The long-dominant view in the literature is that the Supreme Court, on balance, promotes centralization. That view, which, in modern scholarship dates at least to Robert Dahl's path breaking article,[5] rests on the reality that the Supreme Court only rarely strikes down federal laws, upholding them far more often than it rules against them.[6] By contrast it is far more common for it to impose significant constraints on state and local governments, by striking down *their* laws and regulations.

Scholars have long noted that centralization rests "at the heart" of the federalism subfield within political science.[7] It is also of obvious importance to legal scholars.[8] To examine the historical development of centralization patterns, federalism scholars have recently built a sweeping and systemic dataset examining the de/centralization dynamic in federations around

[5] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

[6] *E.g.*, DICHIO, *supra* note 4; Kincaid, *supra* note 1; KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019).

[7] Dardanelli et al.,

[8] For a few of many examples of legal scholars' analyses of the Supreme Court's role in promoting centralization or decentralization, see, e.g., ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY, (2008): RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION (2016); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6 (2010); and Ilya Somin, *The Supreme Court of the United States: Promoting Centralization More than State Autonomy*, *in* COURTS IN FEDERAL COUNTRIES: FEDERALIST OR UNITARISTS? 440-82 (Nicholas Aroney & John Kincaid eds., 2017).

the world—the "De/Centralisation Dataset" (hereafter "DcD").[9] The DcD has uncovered five properties of dynamic de/centralization—direction, magnitude, tempo, form, and instruments.[10] From these data, Dardanelli and his coauthors argued that the Supreme Court and court rulings, more broadly, are key "nonconstitutional instrument[s]" in our efforts to understand dynamic centralization and decentralization. As they note, "judicial decisions can have major implications" for the allocation of power between central and subnational governments when the judicial branch has substantial authority to resolve disputes.[11] Using the DcD, John Kincaid concludes that in the U.S. case: "federal judicial rulings occupied first place for more than a century after 1789" in driving centralization.[12]

The limited existing empirical literature focusing on the Supreme Court's impact on federalism, is largely consistent in concluding that it promotes centralization. In *Exploring Federalism*,[13] for example, Daniel Elazar argued that the U.S. Supreme Court was responsible for an "overwhelming majority" of centralization within the American federal system during the two decades before his publication. Nearly a century before Elazar, Fred Powers,[14] L.H. Pool,[15] and Robert Scott[16] contended that the Supreme Court played a major role in promoting centralization at the turn of the twentieth century both in the judiciary itself[17] and with respect to the broader powers of the national government.[18] Building on these findings and expanding

[9] Dardanelli, et al. *supra* note 3, at 196.
[10] *Id.* at 204-06.
[11] *Id.* at 206.
[12] Kincaid, *supra* note 1, at 178.
[13] DANIEL J. ELAZAR, EXPLORING FEDERALISM (1987).
[14] Fred Perry Powers, *Recent Centralizing Tendencies in the Supreme Court*, 5 POL. SCI. Q. 389 (1890).
[15] L. H. Pool, *Judicial Centralization*, 11 YALE L.J. 246 (1902).
[16] Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 AM. POL. SCI. REV. 347 (1909).
[17] Pool, *supra* note 14.
[18] Powers, *supra* note 13; Scott, *supra* note 15.

globally, Aroney and Kincaid's *Courts in Federal Countries* documented judicial institutions' tendency toward centralization in many federal systems.[19]

Other scholarship has also highlighted similar tendencies of the U.S. Supreme Court across much of American constitutional history.[20] Scholars have noted divergent patterns in the Court's impact on federalism during different periods in history. Charles Wise focuses on the Court's use of the "institutional" and "process" theories of federalism.[21] The institutional school stresses the value of decentralization, understanding the theory of dual sovereignty and "the central role that judicial review plays in safeguarding state sovereignty".[22] By contrast, process theorists embrace a centralized model of federal power, with Congress enjoying near plenary authority over the states, limited only by procedural constraints.[23] Like Aroney and Kincaid[24] and Kincaid (writing separately),[25] Wise finds the Court tends toward embracing the process theory of federalism, viewing Congress's power as plenary, in most cases. But he sees these theories as being of different prevalence during different eras. He concludes, for example, that the period from 1819 to 1932 embodied the process school theory because of its broad "deference to Congress" in an effort to "establish an effective National Government".[26] Since

[19] COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? (Nicholas Theodore Aroney & John Kincaid eds., 2017).
[20] Ilya Somin, *The Supreme Court of the United States: Promoting Centralization More than State Autonomy*, *in* COURTS IN FEDERAL COUNTRIES: FEDERALIST OR UNITARISTS? 440-82 (Nicholas Aroney & John Kincaid eds., 2017); DICHIO, *supra* note 4.
[21] Charles Wise, *Federalism Theories and Principles of the US Supreme Court Implications for National and State Powers and Public Policy and Administration*, 20 PERSP. ON PUB. MGMT. & GOVERN. 1 (2020).
[22] *Id.* at 2 (2020); MICHAEL GREVE, THE UPSIDE-DOWN CONSTITUTION (2012); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).
[23] Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Jesse Choper, *The Scope of National Power vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 543 (1954).
[24] COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?, *supra* note 18.
[25] Kincaid, *supra* note 1.
[26] Wise, *supra* note 20, at 3.

1991, he contends, the Court has embraced the institutional school, and its penchant for states' rights.[27] By contrast, others argue that the Supreme Court did significantly constrain federal power during the nineteenth and early twentieth centuries, albeit often in alliance with various political forces.[28]

In a comprehensive historical survey of judicial review of acts of Congress from the Founding to the late-twentieth century, Keith Whittington[29] finds that the Supreme Court was relatively deferential to Congress during most periods, but also that its willingness to strike down federal laws has increased since the Rehnquist Court era, beginning in 1986. A 2016 article by one of us (Somin) highlights several important recent decisions limiting federal power, but does not make anything approaching a comprehensive case for the proposition that the Court limits federal power more than it expands it.[30]

Wise's and others' exclusive focus on federalism cases overlooks the larger impact the Court has had on federal-state relations across a variety of constitutional issue areas. The literature on centralization relies on a macro-level view of the factors behind centralization, and, in this article, we present a more specific and robust Supreme Court dataset that goes beyond the findings of the Dardanelli et al. database.[31] As more fully described below, our database, covers a wider range of cases and allows a closer look at the different periods in the Court's history. Therefore, this article adds significant texture and detail to the important findings Dardanelli et al.,[32] Kincaid,[33] Whittington,[34] and others have produced. Our data and findings also develop

[27] *See* Wise's table on p. 13. *Id.* at 13.
[28] *E.g.*, GREVE, *supra* note 21; SOMIN, *supra* note 19.
[29] WHITTINGTON, *supra* note 6.
[30] Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS 441 (2016).
[31] Dardanelli et al., *supra* note 3.
[32] *Id.*
[33] Kincaid, *supra* note 1.
[34] WHITTINGTON, *supra* note 6.

some key qualifications and challenges to the conventional wisdom on the impact of the Supreme Court. [35]

II. THE SUPREME COURT CENTRALIZATION DATABASE

This study uses Dichio's[36] Supreme Court centralization database, which already includes a variable on the "Effect on Federal Authority" for a collection of landmark constitutional decisions. This database collected a list of landmark rulings through analyzing 58 constitutional law casebooks and treatises[37] published between 1822 and 2012. The decisions that appeared most frequently across these treatises were included for analysis.[38] Our article extends this existing Supreme Court centralization dataset from 1997 to 2016; we followed the case selection process and included nine more constitutional casebooks published up through 2019. In doing so,

[35] See discussion in Parts III and IV, infra.

[36] Dichio, *supra,* note 4.

[37] We have used canonical and widely-used contemporary casebooks. Historic treatises in our database include JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray & Company, 1833); JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halstead, 1826); GEORGE TICKNOR CURTIS, COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES (1854); THOMAS COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS (Boston, Little, Brown & Co., 1868); JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW Vol. 1-2 (1895). From the modern day, the database draws from some of the most widely read casebooks used in law schools today— GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (8th ed. 2018); NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (20th ed. 2019); JESSE CHOPER ET AL., CONSTITUTIONAL LAW: CASE, COMMENTS, AND QUESTIONS (13th ed. 2019); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (6th ed. 2020); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW, CASES AND NOTES (unabridged. 11th ed. 2015); RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT (3d ed. 2017); MICHAEL PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES (3d ed. 2017); and PAUL BREST ET AL., PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (7th ed. 2018).

[38] To validate our case selection, we used the "authority scores" generated by James Fowler and Sangick Jeon's (2008) study. In that article, Fowler and Jeon create an "authority" score for every single Supreme Court majority opinion from 1754-2002. According to them, "The authority score of a case depends on the number of times it is cited and the quality of the cases that cite it". James Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 17 (2008). The mean authority score for the cases in my data is 0.01468, and the mean authority score for the universe of all Court cases is 0.00130. A one-sample t-test, with the population mean set at 0.00130, reveals my sample cases have a p-value of .000. Thus, they are significantly different from the population. The cases in my data can be considered as important and salient to both the Supreme Court and lower-level courts.

the database (and this article) includes cases decided during the late Rehnquist and Roberts Courts, totaling 687 constitutional decisions in all.

While the casebook selection methodology seeks to uncover landmark decisions, it also has the limitation of treating cases in the database as equal in salience. Despite their landmark status and above-average "authority scores," cases in the database vary in their impact on government policy. Such landmark rulings as *Brown v. Board of Education*[39] might be far more significant than the average or median case in our sample. This is a tradeoff inherent in any broad large-N analysis of the Court's impact on federalism. Future research can supplement our analysis with more qualitative assessments of specific cases and periods, and the ways they shape centralization and decentralization. In the meantime, our selection at least focuses attention on cases recognized as unusually significant by experts in the field. That at least ensures that the cases in our sample are likely to be more significant than those left out, even though we do attempt to rank the relative importance of cases *within* the sample.

The database includes a variety of variables that examine many dimensions of the decisions. These include majority/minority vote counts, constitutional issue area, and ideological direction of each decision, variables taken from Harold Spaeth's Supreme Court Database.[40] Even though the data set includes a range of information on the cases, the key variable of interest for the present article is the "Effect on Federal Authority." While the Dichio database codes for this variable, it only has three categories: expand, restrict, and neutral. But in this article, we differentiated the variable further by coding all decisions along five categories relating to federal

[39] 347 U.S. 483 (1954).
[40] Harold J. Spaeth, et al.. *2020 Supreme Court Database*, WASH. U. L. (Version 2020 Release 01), http://Supremecourtdatabase.org.

authority: restricting (striking down a federal law), neutral, expanding (striking down *state* laws), affirming federal laws and policies, and upholding state-level laws and policies.[41]

It is important to distinguish between *expanding* federal authority versus *affirming* it. While both are, potentially, types of centralization, they differ with respect to the mechanism by which centralization occurs. In the former situation, the Court centralizes federal power by striking down a lower-level government statute or policy. In such cases, the Court has diminished the sphere of state autonomy and forced states to conform to a uniform standard applied by federal courts. Consequently, the Court expanded federal authority through judicial supervision in these cases. By contrast, when upholding a federal law or action, the Court is not the actor that is expanding federal power; rather, it is merely endorsing an expansion of power by one of the other branches of government. In such a situation, it is far less clear that the Court has actually increased federal power, as opposed to merely chosen to refrain from blocking such an increase.

III. ASSESSING THE COURT'S IMPACT ON FEDERAL POWER

We assess the Supreme Court's impact on federal power in two different ways. The first is the traditional model, what we call Model One, under which decisions affirming exercises of federal power, and striking down state or local policies all count as expansions of federal authority. On the other hand, decisions striking down federal policies or upholding state or local policies count as decisions promoting decentralization.

[41] Generally speaking, when a Court decision invalidates a state/local action the decision was coded as an expansion of federal authority. Conversely, if a Supreme Court decision invalidates a federal action, then this decision was coded as a restriction. The coding in this article takes a more nuanced approach to understanding federal authority and its operation. DICHIO, *supra* note 4.

By contrast, in our revised models, enumerated and defined further below, decisions striking down state and local laws on the basis that the latter violate constitutional rights of individuals or private sector organizations qualify as decentralizing. Decisions upholding federal or state laws against constitutional challenge can be deemed as simply maintaining the status quo that would have existed in the absence of judicial review, or retain their original coding. Under the traditional coding, by contrast, decisions upholding state and local laws against individual-rights challenges are interpreted as promoting centralization.

Under any of these non-traditional specifications, it turns out that the Supreme Court's impact is much more decentralizing than previously believed.

A. The Traditional Model

Viewed from the standpoint of the traditional model, the Court's decisions have tended to centralize federal authority. As shown in Figure 1, 397 (57 percent) of the 687 decisions fall into the categories either expanding or affirming federal power, while 111 (16 percent) restricted it by striking down federal law, and another 162 (24 percent) upheld state/local-level laws, in that sense rejecting calls to expand the scope of federal power. The two largest categories deal with the Court's relationship with lower-level governments: striking down state/local laws or upholding them. The overall direction of change was towards centralizing federal authority by striking down state and local laws down. The three largest constitutional issue areas in the data are civil rights and liberties (17 percent of the total), First Amendment (17 percent),[42] and

[42] The database classifies First Amendment cases separately from other civil liberties decisions, because there are so many of the former.

regulation of economic activity (23 percent); and each of these areas serve as equally significant drivers of centralization.[43]

[Insert Figure 1 about here]

[Insert Figure 2 about here]

B. Revisionist Models

Under any of several different revisionist approaches to the data, however, we get radically different results from the traditional view. We label the "traditional model" described above as Model One. There are three different revisionist models.

The relevant options are Model Two, which follows the traditional model in every respect, except coding decisions striking down state and local laws and policies on individual rights grounds as *decentralizing* rather than as centralizing, Model Three, which includes the adjustment made in Model Two, but also classifies decisions upholding federal policies as *neutral* rather than centralizing, and Model Four, which follows Model Three, but also classifies individual rights decisions upholding state and local laws against constitutional challenge as *neutral* rather than as *de*centralizing.

For many purposes, there is a strong case for treating some decisions striking down state and local laws as decentralizing, rather than centralizing. When they vindicate individual constitutional rights, such rulings devolve power to individuals and private-sector organizations.

[43] *See infra* Figures 1 and 2.

As one of us has emphasized in previous publications,[44] that generally involves *greater* decentralization than leaving authority in the hands of state and local governments. This aspect of the relationship between decentralization and the power of subnational governments in federal systems is extremely important, but has largely been ignored in previous work on the impact of judicial review on federalism.

Several types of judicial review striking down state and local laws can promote decentralization. For example, federal-court decisions protecting constitutional property rights enable individual owners to have greater freedom to decide for themselves how their land will be used.[45] That leads to more decentralized and diverse decision-making than if state and local governments are in control.[46] The latter can and do impose one-size-fits-all land use policies on large areas. The same point applies to decisions protecting civil liberties, such as freedom of speech and freedom of religion.[47] If judicial review empowers individuals and private-sector entities to have greater autonomy in deciding what views they can express or how they wish to worship (if at all), that leads to greater decentralization than if a state government is able to suppress all speech or worship of a given type throughout its domain.

Such devolutions of power to individuals and private-sector organizations have important implications for federal systems. Among other things, they can expand citizens' opportunities to

[44] ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION AND POLITICAL FREEDOM, chs. 4, 7 (rev. ed. 2021) (hereinafter SOMIN, FREE TO MOVE); ILYA SOMIN, FOOT VOTING, FEDERALISM, AND POLITICAL FREEDOM, *in* NOMOS LV: FEDERALISM AND SUBSIDIARITY (James Fleming & Jacob Levy eds., 2014) [hereinafter *SOMIN*, FOOT VOTING, FEDERALISM, AND POLITICAL FREEDOM]; Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEG. FORUM 53 (2011) [hereinafter Somin, *Federalism and Property Rights*]; SOMIN, *supra* note 19.
[45] Somin, *Federalism and Property Rights*, *supra* note 41.
[46] Id.
[47] For more detailed discussion of the types of civil liberties decisions that promote decentralization, see Ilya Somin, *How Judicial Review Can Help Empower People to Vote with their Feet***,** GEO. MASON L. REV., forthcoming, (symposium on "Does the Will of the People Exist") [hereinafter Somin, *How Judicial Review Can Empower People*], available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4008386.

"vote with their feet" by choosing where to live, what private-sector organizations to join, and which goods and services to purchase in the market.[48]

When people can vote with their feet between state and local governments, that decentralizes authority over the key question of which laws and regulations they have to obey, allowing individual citizens and families to make decisions on a question that would otherwise be under the control of more centralized government authorities.[49]

Supreme Court decisions barring states and localities from restricting the entry and exit of citizens are the most obvious way in which this kind of decentralization can be promoted by judicial review. For example, *Williams v. Fears*, a 1900 Supreme Court decision struck down state laws barring emigration agents from assisting workers in moving to other states, ruling that "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment."[50] In 1941, the Court struck down a California law making it a crime to bring into the state any "indigent" person who was not already a resident.[51] Such decisions obviously limit state and local government autonomy, but also just as obviously decentralize political choices.

[48] For an overview, see SOMIN, FREE TO MOVE, chs. 4, 7.
[49] For an extensive recent discussion, see id. at ch. 2. The classic analysis is Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 JOURNAL OF POLITICAL ECONOMY 516 (1956).
[50] Williams v. Fears, 179 U.S. 270, 274 (1900).
[51] Edwards v. California, 314 U.S. 160 (1941).

Students of federalism increasingly recognize the importance of interjurisdictional mobility and competition to the effective functioning of federal systems,[52] and also how state and local laws impede it.[53]

By striking down a state or local law, the Court also effectively devolves more autonomy to private individuals and organizations and thus expands the range of potential foot-voting options. This is significant because – among other things – moving costs are often lower than with foot-voting between political jurisdictions.[54] For example, some 74 million Americans currently reside in private planned communities, such as homeowners' associations and condominiums, many of which offer services similar to those provided by state and local governments.[55] Within a given area, there are likely to be far more private communities than local government authorities, and thus potentially a much wider range of options for potential foot voters.[56]

We do not, for present purposes, claim that such foot-voting opportunities are necessarily desirable or that expanding them always trumps opposing considerations.[57] We do, however, emphasize that empowering this type of choice is a way in which federal judicial review—by striking down limits state and local government laws—can actually increase decentralization,

[52] The classic analysis is Tiebout, *supra* note 46. For a particularly influential more modern statement, see Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 1 (1995).
[53] For recent overviews of such barriers, see, e.g., Edward Glaeser, *Reforming Land Use Regulations*, Brookings Institution, Apr. 24, 2017, available at https://www.brookings.edu/research/reforming-land-use-regulations/amp/; and David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 Yale L.J. 78 (2017),
[54] SOMIN, FREE TO MOVE, ch. 4.
[55] Id. at 85-86,
[56] Id. at 85-88.
[57] For detailed discussion of various objections to private-sector foot voting, see Id. at ch. 4.

rather than produce centralization, as is the traditional way of understanding federal judicial review of state autonomy.[58]

The relationship between cases involving antidiscrimination rights and decentralization is, perhaps, more complicated. But if a state is restricted in discriminating on the basis of such characteristics as race, sex, religion, or sexual orientation, that constrains an important traditional source of power for controlling private behavior.

In theory, the state can still impose the same restrictions in a non-discriminatory manner. For example, it could potentially comply with the Supreme Court's decisions forbidding bans on interracial and same-sex marriages[59] by denying marriage rights to *all* couples. But, in practice, the elimination or restriction of discriminatory state policies usually increases the overall autonomy of private-sector actors. It thus qualifies as decentralization, relative to a situation where the state has broad discretion to discriminate as it sees fit.

In addition, many restrictions on state and local-government discrimination can help empower people to vote with their feet between jurisdictions, by eliminating barriers to the in-migration of traditionally disfavored ethnic, racial, religious, and other minorities.[60] This, too, enhances decentralization of decision-making power. For example, the Supreme Court's 1917 decision in *Buchanan v. Warley* struck down local laws barring African-Americans from moving to majority-white neighborhoods.[61] While the ruling by no means ended residential segregation

[58] For a more extensive overview of ways in which judicial review can empower foot voting, including in the private sector, see id. at ch. 7, and Ilya Somin, *How Judicial Review Can Help Empower People to Vote with their Feet*, GEO. MASON L. REV.,forthcoming, (symposium on "Does the Will of the People Exist") [hereinafter Somin, *How Judicial Review Can Empower People*].
[59] *See* Loving v. Virginia, 388 U.S. 1 (1967) and Obergefell v. Hodges, 576 U.S. 644 (2015), respectively.
[60] See Somin, *How Judicial Review Can Empower People*.
[61] Buchanan v. Warley, 245 U.S. 60 (1917).

in the United States, it did help enable large numbers of African-Americans to move to areas from which state and local governments would otherwise have excluded them.[62]

Prominent federalism scholar Heather Gerken usefully distinguishes between devolution of power to state governments and that to local governments, on the grounds that empowering the latter is a more extensive form of decentralization, taking federalism "all the way down".[63] Empowering individual citizens and private organizations is an even greater degree of devolution, thus taking federalism even *further* down.[64]

Recoding individual-rights cases striking down state and local laws as a form of decentralizing makes excellent sense if the goal of our analysis is to determine the overall impact of Supreme Court rulings on the degree of centralization in a federal system. It is also useful for analyses that focus on the extent to which judicial review in a federal system facilitates foot voting and interjurisdictional competition, a key feature of some influential modern theories of federalism.[65] It further recognizes that federalism is not always a zero-sum game between states and federal governments. As Emily Zackin concludes in a review essay, "we should remember that the governing capacities of both state and federal government may increase at the same time."[66] Similarly, we argue that these governing capacities can diminish and decentralize at the same time. Judicial review can, in some instances, limit state and local government power in

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[62] On the effects of *Buchanan* a see, e.g., David Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE LAW JOURNAL 591 (2004), 626–39; David E. Bernstein, *Philip Sober Controlling Philip Drunk*: Buchanan v. Warley *in Historical Perspective"* 51 VANDERBILT L. REV. 797 (1998).

[63] Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6 (2010); *see also* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente*, 59 ST. LOUIS U.L.J. 997 (2015); Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY (Spring 2012), http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page¼1.

[64] Somin, *Foot Voting, Federalism, and Political Freedom*, *supra* note 41.

[65] See, e.g., id. (discussing this significance), and Weingast, *supra* note 49.

[66] Zackin draws this conclusion in her review of four books on American federalism. Emily Zackin, *What's Happened to American Federalism,* 43 POLITY,388, 402 (2011).

ways that do not augment that of the federal government, but rather increase that of the private sector.

Such recoding of cases limiting state power is far less defensible if our purpose is instead to consider its impact on the autonomy of subnational governments. Individual-rights restrictions on state and local power clearly do restrict state and local government autonomy, even if they also promote decentralization.[67] Thus, this methodological shift is not justified for all conceivable purposes. But it is valid and useful if our focus is on the overall extent of centralization in the political system, rather than on the extent of state and local government power, specifically.

If we reclassify the 126 cases striking down state and local laws on individual rights grounds as a form of *decentralization* rather than as *centralization* through the judiciary, we see a major shift in the overall impact of the Court. Consider Figure 3, which looks only at only individual liberty issues. Here is the distribution of these individual rights issue and their effect on centralization when using the traditional coding—that the Court striking down a state or local regulation on individual liberties is a form of *centralization* in Figure 3. Figure 3 demonstrates that civil rights and First Amendment cases reviewing state and local laws, in particular, account for a large portion of centralization through striking down such laws under the traditional understanding

[Insert Figure 3 about here]

[67] SOMIN, *supra* note 19.

By contrast, Figure 4 applies the revisionist understanding of decentralization, revealing a major shift in civil rights and First Amendment cases, when we consider striking down state laws as a type of *decentralization*:

[Insert Figure 4 about here]

Simply changing the coding of the 126 cases striking down state and local laws based on individual rights radically revises the conventional wisdom, leading to the conclusion that a clear majority of Supreme Court cases in the entire data base (57.8 percent) have decentralizing effects, as compared with 39 percent that centralize—a near 20 percent drop in cases that centralize compared to the traditional interpretation discussed above. The latter include cases striking down state and local laws on grounds other than protecting individual rights, and cases upholding federal laws and policies.

The Court comes out as even more of a decentralizing force if we also make one or both of the other two possible revisionist adjustments: recoding decisions upholding exercises of state and federal power.

There is a strong case for classifying decisions upholding exercises of federal authority as neutral rather than "centralizing." In the absence of judicial review, those federal policies would still remain in place, and presumably would still trump state and local policies under the Supremacy Clause of the Constitution. Viewed in this light, Supreme Court decisions upholding federal laws and regulations against constitutional challenge do not lead to any net increase in federal power, and thus do not create any centralization that would not have existed otherwise.

This approach is subject to the criticism that court decisions upholding exercises of federal authority can potentially legitimize the latter, and thus create "slippery slope" effects

leading to enactment of additional policies of the same type.[68] The debate over this issue dates back to the Founding. In opposition to Madison's claim in *Federalist* 39 that decisions "relating to the boundaries of the two jurisdictions" will be "impartially made, according to the rules of the Constitution,"[69] the prominent Anti-Federalist writer "Brutus" argued that by affirming Congress's exercises of federal power, the Court will create precedents that gradually lead to the eventual "abolition" of states. Judges, he argued, "will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. …one adjudication will form a precedent to the next, and this to a following one."[70] Over 150 years later, Robert Dahl, like Brutus, highlighted the regime legitimizing function of the high Court. Dahl found that, "[b]y itself, the Court is almost powerless to affect the course of national policy," but the Court maintains public support by "confer[ring] legitimacy on the fundamental policies" of the dominant political coalition at the federal level.[71] Dahl's and subsequent work has become known as the "regime politics approach," which collectively argues that the Supreme Court typically promotes and legitimates the dominant political "regime" in the federal government.[72]

[68] WHITTINGTON, *supra* note 6; Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).
[69] Terence Ball, ed. *The Federalist with Letters of "Brutus,"* (2007), 186.
[70] Id. at 528.
[71] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 293-94 (1957).
[72] See, for example, KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY, (2007). BARRY FRIEDMAN. THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION. (2009). Cornell W. Clayton & David A. May. "A Political Regimes Approach to the Analysis of Legal Decisions." 32 POLITY 233 (1999); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*,87 VA. L. REV. 1045 (2001).

Despite Dahl's lasting impact on the regime politics literature,[73] there is much evidence to demonstrate that Court does not often serve the legitimating function Dahl and subsequent literature posits. Political scientist Matthew E.K. Hall, for example, finds significant evidence undermining this aspect of the regime politics theory in his study of 180 federal statutes invalidated by the Supreme Court between 1789 and 2008.[74] Of these 180 invalidations, Hall finds that few of them support the findings of the regime approach—either entrenching, fulfilling, or maintaining the existing dominant regime (each of these behaviors could also be considered some type of legitimation). In fact, 104 of 108 statutes in his dataset did not fall into any of these three categories.[75]

Why might the Court have only a modest effect, if any, on legitimating federal power? Part of the reason might be that most of the public pays little attention to the Court's decisions and its membership.[76] To be sure, some political scientists have found that the public "do attend to the [Court's] decisions;" but at the same time, this attentiveness is often filtered through an "educated and elitist subset of that population."[77] Yet even when the public does pay attention, Court rulings often do little to persuade the public. Polling has long demonstrated the public's ignorance of the Court and its members. In a 2012 study, 71 percent of respondents could not name any justice, and only two of 1,005 respondents could name all nine.[78] When respondents were asked their impressions of each justice the vast majority responded "haven't heard

[73] For an overview of this vast field of literature, see Thomas Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOCIAL INQUIRY 511 (2007).
[74] Matthew E.K. Hall, Rethinking Regime Politics, 37 Law & Social Inquiry 878 (2012).
[75] Hall, *supra* note 53, p. 889.
[76] Matthew P. Hitt, Kyle L. Saunders, and Kevin M. Scott, *Justice Speaks, but Who's Listening? Mass Public Awareness of US Supreme Court Cases*, 7 *Journal of Law and Courts* 29 (2019).
[77] Id. at 46.
[78] LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, THOMAS G. WALKER. SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS. 783 (5th. ed 2012).

enough."[79] Additionally, polling has shown the Court's ruling do not often shift the public's attitudes on issues. For example, polling in the years after *NFIB v. Sebelius* (2012)[80] largely upheld key provisions of the Affordable Care Act illustrate how the Court's opinion do not always lend legitimation to the federal government's statues and activities. In the aftermath of that case in 2012, public approval of the Affordable Care Act actually *decreased* according to Pew Research Center's polling. From 2012 to 2017, a larger percentage *disapproved* of the Affordable Care Act.[81] The Kaiser Family Health Foundation's polling revealed very similar findings in the wake of *NFIB.*[82]

The experience with *NFIB* is notable because it was probably the most high-profile Supreme Court decision largely upholding a prominent federal policy against claims that it went beyond the scope of federal authority. If even this decision failed to have much "legitimating" effect, it is doubtful that such effects occur to any great degree in other cases, where there is far less public awareness of the Court's rulings.

Ultimately, in a baseline with no Supreme Court and no judicial review, federal laws would likely already be presumptively valid and legitimate. Thus, it is not clear that the legitimizing effects of the upholding of laws by the Supreme Court really leads to greater federal power relative to a baseline with no judicial review.

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[79] EPSTEIN et al., *supra,* note 55, p. 784.
[80] 567 U.S. 519 (2012). The Court upheld the ACA individual health insurance mandate by reinterpreting it as a "tax," but partly struck down the requirement that states must expand Medicaid or face loss of all federal Medicaid funding. Id.
[81] Pew Research's poll measured "public approval of Affordable Care Act"—approve versus disapprove. *Public approval of Affordable Care Act at highest level since it became law*, Pew Research Center, December 11, 2017, available at https://www.pewresearch.org/fact-tank/2017/12/11/for-the-first-time-more-americans-say-2010-health-care-law-has-had-a-positive-than-negative-impact-on-u-s/ft_17-12-08_aca_public-approval/
[82] Kaiser's poll asked**, "**As you may know, a health reform bill was signed into law in 2010. Given what you know about the health reform law, do you have a generally favorable or generally unfavorable opinion of it?" "Unfavorable" was the larger group until January 2017. *KFF Health Tracking Poll: The Public's Views on the ACA,* Kaiser Family Foundation, October 15, 2021, available at https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable--Unfavorable&aRange=twoYear

If cases upholding federal laws and regulations are treated as "neutral," while those striking down state laws on individual rights grounds are classified as decentralizing, we get 57.8 percent of cases in our sample promoting decentralization, compared with only 17 percent that promote centralization (those striking down state and local laws on non-individual rights grounds). The preponderance of decentralizing decisions becomes even greater than under Model Two.

On the other hand, for some purposes the appropriate baseline might be a world with strong judicial review in at least some areas. Relative to that baseline, upholding of federal law could indeed potentially give "extra" legitimacy to federal laws upheld against structural challenges, though it would be desirable to have hard evidence that such legitimation actually occurs, as opposed to merely assuming its existence. As with the treatment of rulings striking down state laws on individual rights grounds, much depends on the question researchers focus on.

It is also possible to make adjustments to the traditional classification of cases upholding state and local laws against individual-rights challenges. If decisions in this field that go against state governments are decentralizing, perhaps those that go in their favor (11.4 percent of the total in our sample, 78 of 687 cases) should be considered either "neutral" or centralizing. As with the analysis of decisions upholding all types of federal laws (21.8 percent of the total sample, 150 of 687 cases), they could be classified as neutral if we assume that the default baseline is allowing state laws and regulations to remain in effect, except where they conflict with federal law. On the other hand, if decisions upholding state and local laws are seen as giving them extra "legitimacy" and thereby actually increasing the power of subnational governments, such decisions qualify as promoting centralization.

Our Model Four adopts former approach (classifying these rulings affirming state and federal laws as neutral). We nonetheless end up with a large preponderance of decisions promoting decentralization. Specifically, 46.3 percent (319 of 687) of cases are now classified as decentralizing, and 36.4 percent as neutral (250 of 687), with only 128 (about 20 percent) qualifying as centralizing. Under the specification classifying these rulings as centralizing, the percentage of decentralizing rulings remains the same (46.3 percent), but neutral cases fall to 3.2 percent, while centralization rises from 17.2 to 50.4 percent. Here, too, the appropriate framing depends on the issues researchers are focusing on, which are likely to determine the appropriate baseline to use.

IV. VARIATION OVER TIME

Breaking down the Court's behavior across time reveals more details about trends towards and away from greater centralization of federal authority. Following conventional divisions of American historical development, we divide up the cases in the database into eras: the Early Republic (1789-1828), The Jacksonian Era (1829-1860), Civil War and Reconstruction (1861-1876), The Gilded Age (1877-1896), the Progressive Era (1897-1932), the New Deal/Great Society period (1933-1969), the post-Great Society period (1969-2005), and the current era (2006-2016). Under the traditional classification of decisions, virtually all eras end up being classified as periods where the Court promoted centralization, on net. Things are very different from the standpoint of our revisionist models.

A. The Traditional Model

Figure 5 presents the Court's role in centralization, under the traditional model, across the historical eras typically used to indicate periods of constitutional development. During most historical periods, expanding federal authority by reviewing and striking down state/local-level decisions is the most frequent effect of the Court. This, rather than affirming federal authority, is the most common process through which, under the traditional model, the Court has consolidated federal authority at the expense of states.

In only two periods is expanding federal authority not the largest category: during the Gilded Age, when upholding state authority was the plurality (and affirming federal authority was more common than expanding federal authority), and in the present day, with the Roberts Court's spike in affirming federal authority and the lowest historical proportion of cases that expanded federal authority.

[Insert Figure 5 about here]

Figure 5 also shows that the overall proportion of cases that centralize federal authority remains relatively stable across historical eras, except for the Gilded Age. Notably, however, the Roberts Court has centralized in an atypical way: much more often through affirming federal laws and actions than by striking down state laws. While the interpretation of the federal government's specific powers has changed immensely, the *overall* effect on growth of centralization has not. This consistent rate of centralization has implications for the standard interpretation of the New Deal as a critical juncture, which, it is held, witnessed an abrupt shift in

federal government authority.[83] On the contrary, the traditional model coding of the data suggests that the process of change was far steadier than typically posited. While John Kincaid has argued that "the pace of [American] centralization was slow until picking up speed in the twentieth century,"[84] the Supreme Court's contribution to this process was relatively steady and consistent. .

American political development scholars have highlighted periods that contributed more significantly to centralization than others. This contrasts with the data presented here: centralization has been a steady process. For example, the so-called "*Lochner* Era" of the early 20th century is often criticized for the Court's tendency to strike down state-level laws regulating labor and workplace safety. At the time in the early twentieth-century, this led progressives to castigate "court-imposed restrictions on organized labor and limitations on social welfare legislation."[85] Louis Brandeis, argued that courts were "largely deaf and blind" to the challenges facing an industrializing nation."[86]

In contrast to this Progressive narrative, the Supreme Court's landmark cases demonstrated quite a bit of deference to both states and the federal government rather than actively striking down state laws. Taken together, the Court more frequently upheld democratically elected legislatures rather than striking them down laws—53 percent of the Court's decision affirmed either state or federal laws while 37 percent of cases struck down state laws, as illustrated earlier in Figure 5. In this sense, contrary to the narratives of many of these

[83] Barry Cushman's *Rethinking the New Deal* also pushes against the standard interpretation that the New Deal was an abrupt turning point in constitutional development. BARRY CUSHMAN, RETHINKING THE NEW DEAL: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).
[84] Kincaid, *supra* note 1, at 176.
[85] Brian Z. Tamanaha, *The Progressive Struggle with the Courts: A Problematic Asymmetry*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN STATES 65 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).
[86] *Id.* at 68.

Progressive reformers, the Court did not simply serve as an obstacle to the growth of federal power, nor did it come close to striking down all state-level economic regulations.[87]

B. Revisionist Models Over Time

A very different picture emerges if we consider variation over time from the standpoint of our revisionist models. The simplest of these, (Model Two) - classifying decisions striking down state and local laws as decentralizing - leads to a radical departure from conventional wisdom. Under this approach, all eras but the Early Republic come off either as periods of roughly equal centralization and decentralization, or as periods where decentralization heavily predominates.

The Model Two approach identifies particularly robust decentralizing tendencies in the Gilded Age, New Deal/Great Society, and Post-Great Society periods.[88] While the latter two are conventionally seen as periods where the Supreme Court was a centralizing force, they also both featured numerous decisions where it struck down state and local laws on individual rights grounds. Decisions of this type predominate over cases where the Court promoted centralization by upholding federal laws against challenges. On this approach, the Jacksonian era and Civil War/Reconstruction come off as periods with a slight predominance of centralizing decisions (50 percent and 50.9 percent centralizing, respectively), while the current era (2005-present) has a modest predominance of centralization (48 percent centralizing decisions, compared with 40 percent decentralizing) . The Progressive Era yields an exactly equal split.

[87] *See also* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).
[88] *See infra* Table 1.

An even more decentralization-oriented picture emerges if we also make the adjustment of treating rulings upholding federal laws and regulations as neutral, rather than centralizing,[89] while also classifying decisions striking down state laws on individual-rights grounds as decentralizing—what we call Model Three. With this model, every era shows up as decentralizing, except for the Early Republic (which is roughly evenly split). Most of the other eras end up having a lopsidedly decentralizing effect, particularly the New Deal/Great Society and Post-Great Society eras.

The net tilt towards decentralization is diminished, but still strong, if we treat decisions upholding state laws against challenge as "neutral," rather than decentralizing, thereby making them symmetrical with the revisionist treatment of decisions upholding federal laws—what we call Model Four.[90] On this approach, the Early Republic and Jacksonian eras are roughly evenly split. But all other periods tilt strongly towards decentralization.

It is important to emphasize that none of this indicates that periods such as the Progressive and New Deal/Great Society eras were not periods of centralization in American government, overall. Given the vast increases in federal spending and regulation that occurred during these time-frames, it would be absurd to claim that they somehow resulted in an overall weakening of federal power relative to the states and the private sector.

Rather, the revisionist models suggest that the marginal impact of the Supreme Court, specifically, may have been different than usually portrayed. While in some respects it facilitated centralization, these may be outweighed by the decentralization promoted by its increasing willingness to protect various types of individual rights against states and localities. This effect is

[89] *See infra* Table 2 and Figure 7.
[90] *See infra* Table 3 and Figure 8.

accentuated when we exclude from consideration (by treating as "neutral") judicial rulings that merely leave in place the policies of other branches or levels of government (whether they be the "political" branches of the federal government, or state and local governments).

The revisionist models provide a useful corrective to standard, often oversimplified, accounts of the role of the Supreme Court in American political development. A focus on the Court's marginal impact (excluding decisions ratifying the status quo created by other branches) makes its distinctive effect clearer. Treating decisions striking down state laws as decentralizing shows how the Court has, increasingly over time, helped diffuse power to individual citizens and private organizations, even as it has often constrained the authority of state and local governments.

We do not suggest that the revisionist models should completely displace more conventional accounts of the role of the Supreme Court. Whether individual-rights decisions striking down state laws should be treated as centralizing or decentralizing depends on whether the analysis in question is focused on the relative power of state, local, and federal governments, or on the overall degree of decentralization in American society. If the latter is the focus, it makes sense to treat judicial intervention to protect in individual rights as decentralizing; otherwise not. Similarly, whether we treat decisions upholding status quo state or federal policies as "neutral" or as promoting centralization or decentralization, may depend on the extent to which we believe that a judicial ruling upholding a law legitimizes or entrenches it.

But while we should not completely ignore the traditional approach to classifying the impact of Supreme Court rulings on centralization, it is important to recognize its limitations. In some situations, it must be supplemented or even displaced by other models.

CONCLUSION

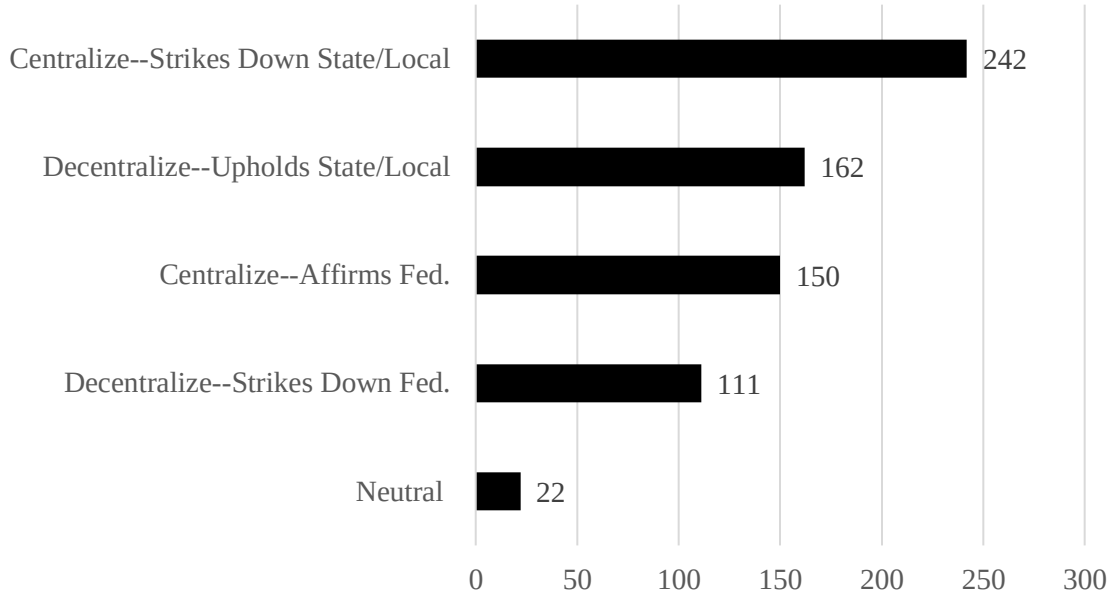
Our analysis of a data set of major Supreme Court decisions from the Founding to the present sheds new light on the role of the Court in facilitating centralization and decentralization in the American political system. Most notably, we show how alternative ways of classifying particular types of decisions indicate that the Supreme Court may be a much less centralizing force than traditionally thought. That is true of both its overall impact, and its effect in particular key historical eras. Our analysis also casts doubt on the utility of viewing centralization and decentralization as a simple tug-of-war between the states and federal government. Centralization is not always a zero-sum game.

Perhaps the most significant issue overlooked by many previous analyses is the possibility that decisions protecting individual rights against state and local governments might have a net effect of promoting decentralization, despite – and in part because – they constrain the powers of state and local governments. Similarly, unconventional conclusions follow if we classify decisions upholding federal laws against challenge, as neutral, rather than centralizing.

Future research can build on our analysis in a variety of ways. For example, it would be useful to take a more nuanced view of the impact of decisions in specific issue-areas, and to develop a better understanding of how some decisions in our sample might promote centralization (or decentralization) to a greater extent than others.

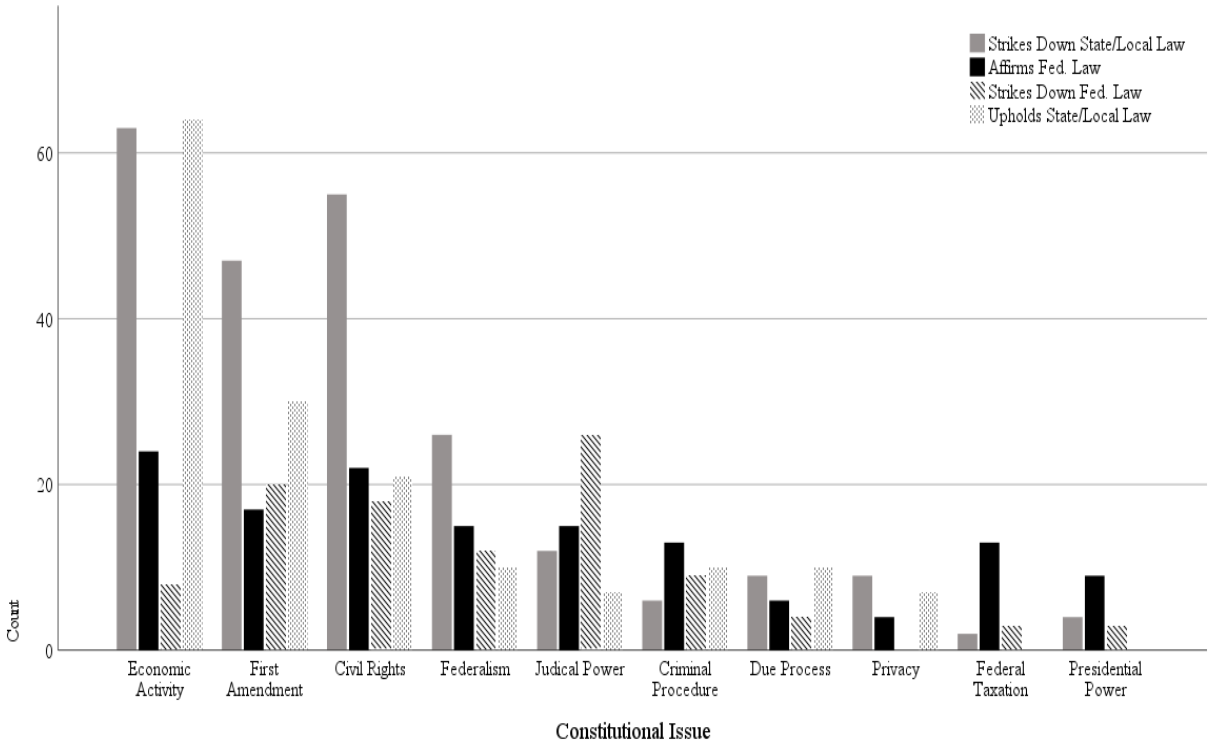
Whether the Supreme Court promotes centralization, decentralization, or some combination of both, is a far more equivocal issue than is usually thought. The answer often depends on the assumptions behind the question.

Figure 1: Distribution of Effect on Federal Authority, 1793-2016



Note: N= 687

Figure 2: Distribution of Effect on Authority across Constitutional Issues, 1793-2016



Note: N=633. Issue areas with fewer than 15 cases were excluded from Figure 2—attorney, unions, private action, interstate relations, and miscellaneous cases. Neutral cases were also excluded.

Figure 3: Effect on Federal Authority for Only Individual Rights Issue with Traditional Coding (Model One)

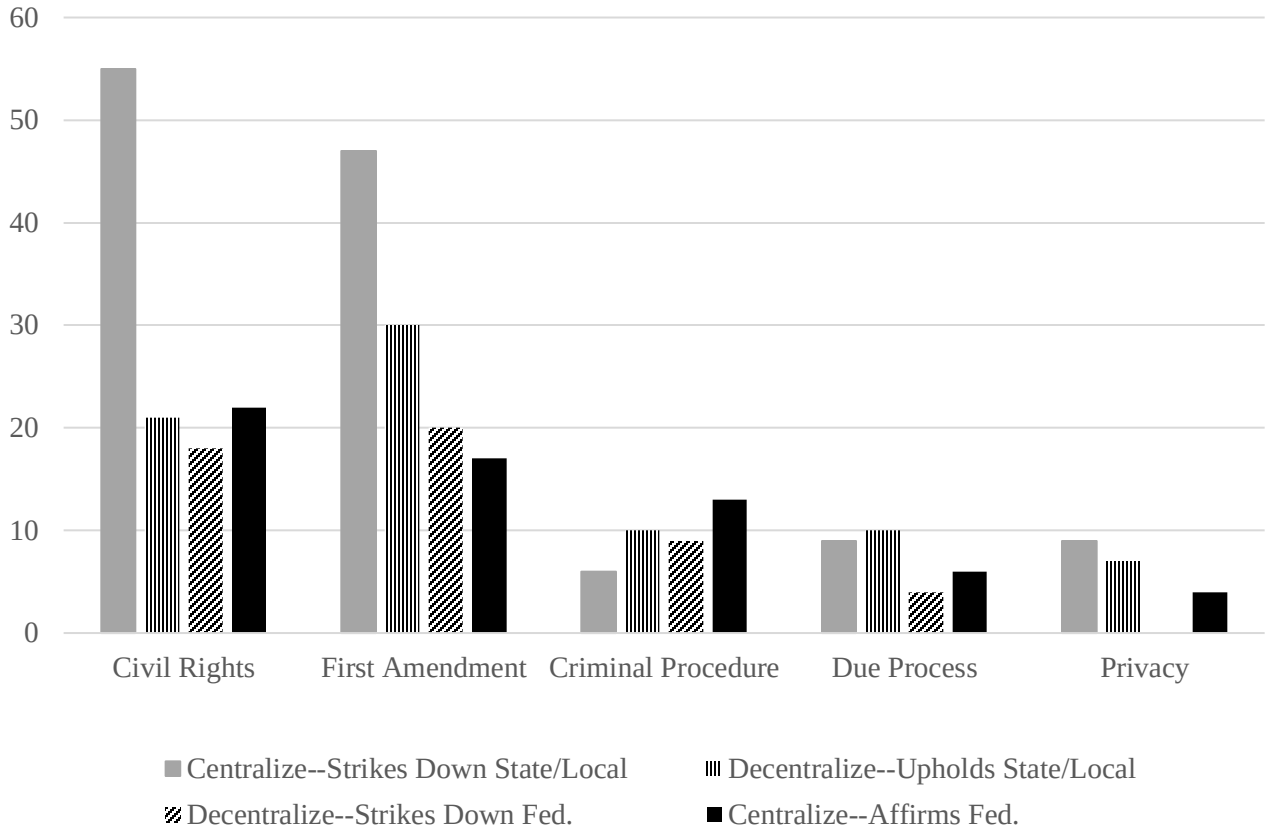


Figure 4: Effect on Federal Authority for Only Individual Rights Issue with Revised Coding (Model Two)

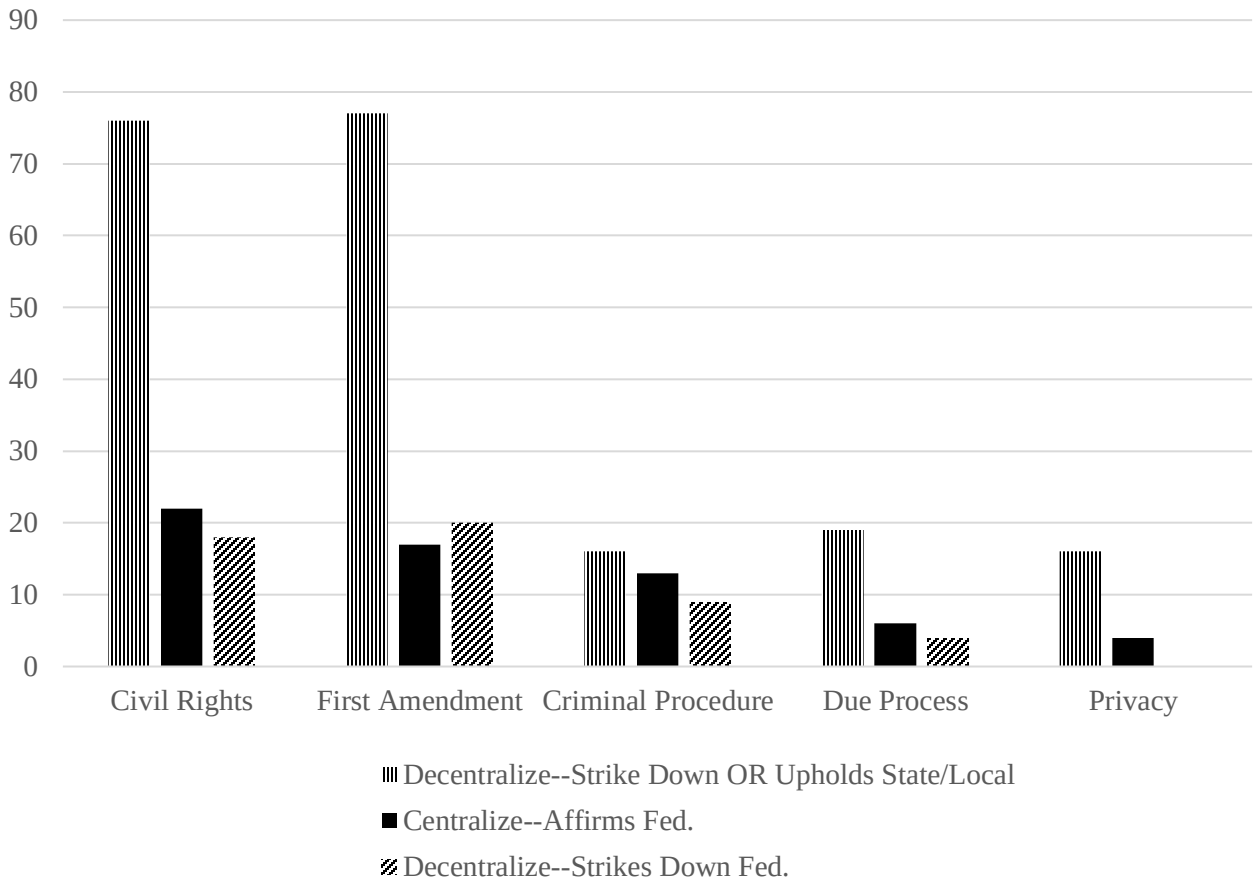
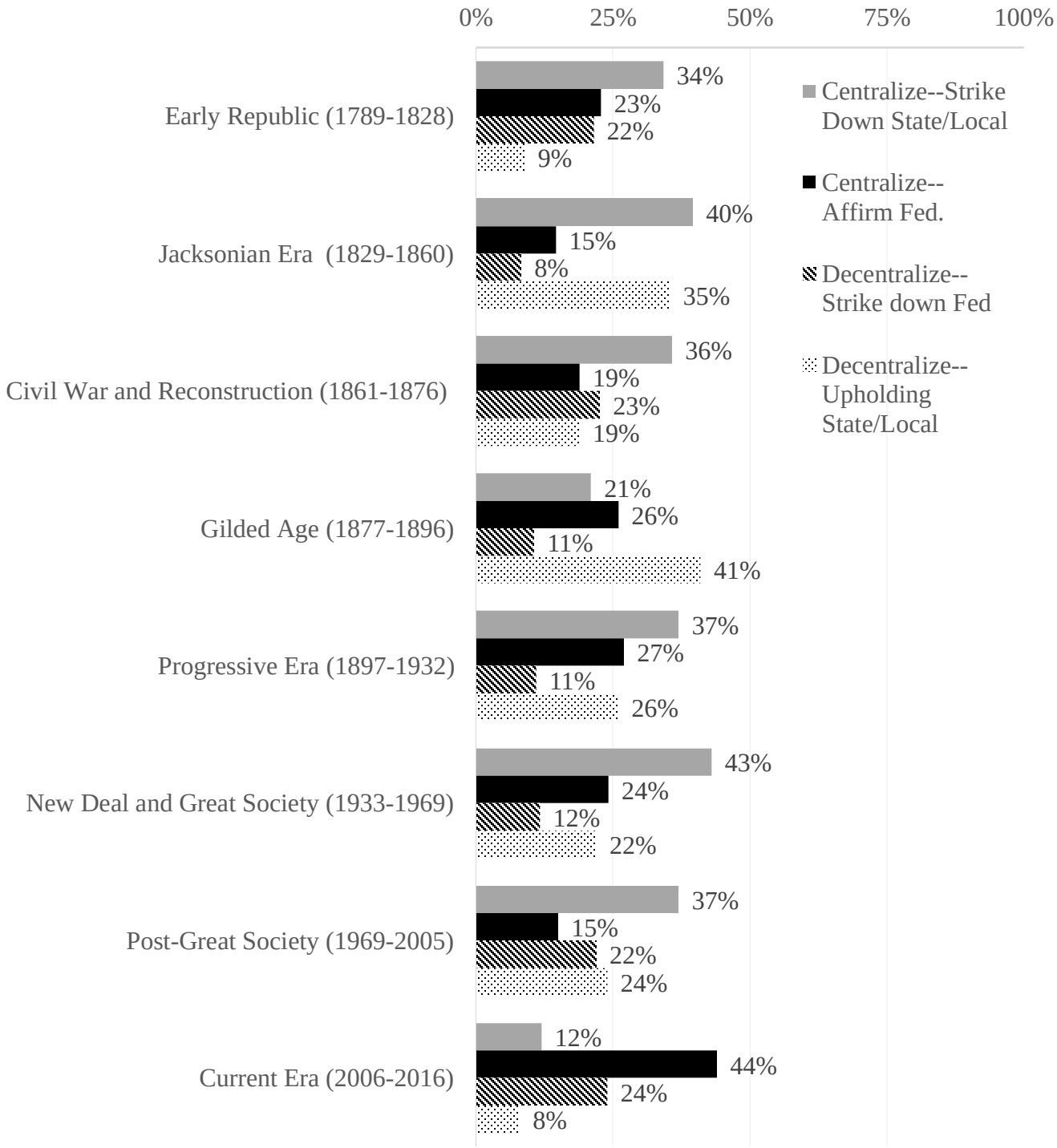


Figure 5: Centralization Effects across Historical Eras using Traditional Coding (Model One)



Note: The 22 neutral decisions are not graphed, but are included in calculating the percentages per historical era. N=665

Table 1: Model Two, All Cases of Individual Rights Laws Struck Down as Decentralization

Era	Decentr (Strikes Down Federal)	Decentr (Uphold Sub-Nat'l)	Neutr	Centr (Strike Down Sub-Nat'l.)	Centr (Uphol Fed.)	Era Tot	Per. Centr	Per. Decentr	Per. Neutr
Early Republic	19	7	10	25	18	79	54.3 %	32.9%	12.7 %
Jackson	6	17	1	17	7	48	50%	47.9%	2.1%
Civil War & Reconstr.	14	10	2	17	10	53	50.9 %	45.3%	3.8%
Gilded Age	13	31	1	11	31	76	40.8 %	57.9%	1.3%
Progressive	23	24	0	22	24	94	50%	50%	0%
New Deal and Great Society	63	29	0	11	29	135	31.9 %	68.2%	0%
Post-Great Society	89	42	5	14	42	177	23.2 %	74%	2.8%
Current	8	2	3	1	2	25	48%	40%	12%
Total	235	162	22	118	150	687	39%	45.4%	3.2%

Table 2: Model Three, All Cases of Individual Rights Struck Down as Decentralization and Affirming Federal Law as Neutral

Era	Decentr (Strikes Down Federal)	Decentr (Uphold Sub-Nat'l)	Neutr	Central (Strikes Down Sub-Nat'l)	Era Tot	Per. Centr	Per. Decen	Per. Neutr
Early Republic	19	7	28	25	79	31.8%	32.9%	35.4%
Jacksonian	6	17	8	17	48	35.4%	47.9%	16.7%
Civil War & Reconstr.	14	10	12	17	53	32.1%	45.3%	22.64 %
Gilded Age	13	31	21	11	76	14.5%	57.9%	27.6%
Progressive	23	24	25	22	94	23.4%	50%	26.6%
New Deal and Great Society	63	29	32	11	135	8.15%	68.2%	23.7%
Post-Great Society	89	42	32	14	177	7.9%	74%	18.1%
Current	8	2	14	1	25	4%	40%	56.%
Total	235	162	172	118	687	17%	57.8%	25%

Figure 7: Bar Chart of Model Three, All Cases of Individual Rights Struck Down as Decentralization and Affirming Federal Law as Neutral

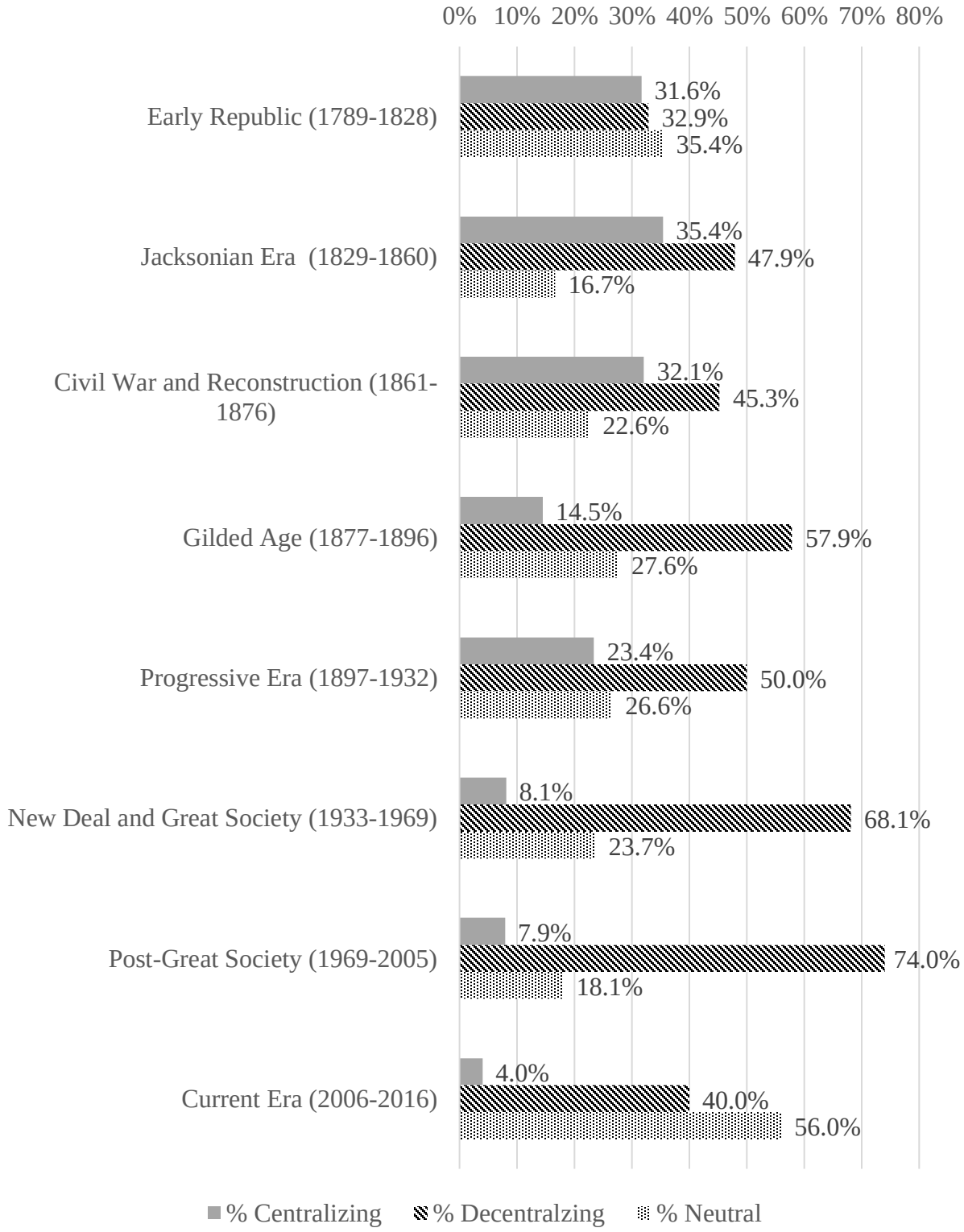


Table 3: Model Four, All Cases of Individual Rights Struck Down as Decentralization, Affirming Federal Law as Neutral, Affirming Individual Rights Challenges Against States/Local as Neutral

Era	Decentr (Strikes Down Federal)	Decentr (Uphold Sub-Nat'l)	Neutr	Central (Strikes Down Sub-Nat'l)	Era Tot	Per. Centr	Per. Decen	Per. Neutr
Early Republic	19	4	31	25	79	31.7%	29.1%	39.2%
Jacksonian	6	12	13	17	48	35.4%	37.5%	27.1%
Civil War & Reconstr.	14	8	14	17	53	32.1%	41.5%	26.4%
Gilded Age	13	27	25	11	76	14.5%	52.6%	32.9%
Progressive	23	16	33	22	94	23.4%	41.5%	35.1%
New Deal and Great Society	63	13	48	11	135	8.2%	56.3%	35.6%
Post-Great Society	89	4	70	14	177	7.9%	52.5%	39.6%
Current	8	0	16	1	25	4%	32%	64.%
Total	235	84	250	118	687	17.2%	46.4%	36.4%

Figure 8: Bar Chart of Model Four, All Cases of Individual Rights Struck Down as Decentralization, Affirming Federal Law as Neutral, Affirming Individual Rights Challenges Against States/Local as Neutral