

DESTRUCTIVE FEDERAL DECENTRALIZATION

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ABSTRACT

This Article—written for a symposium hosted by the *William & Mary Bill of Rights Journal*—focuses on the efforts by the Trump administration to relocate federal officials outside of Washington to reduce the capacity of the federal government. Federalism and the separation of powers are usually the twin pillars of structural constitutional law.¹ Locating federal officials outside of Washington—federal decentralization—has been an additional tool of diffusing power that has started to gain some scholarly attention.² These debates largely focus on structural constitutional law as *constructive*—as improving the capacity and operation of the federal and state governments.³ The power to diffuse becomes the power to democratize because more types of officials subject to more types of forces are empowered. There is another means of viewing these principles: as *destructive* rather than constructive.⁴ The power to diffuse becomes the power to destroy.

The Trump administration used federal decentralization in this destructive way. It attempted to reduce the number of officials who know how the federal government operates, with only minimal benefits in return.⁵ In the shorter term, these destructive efforts will be costly to reverse, thereby disabling important federal offices. In the longer term, it means that federal decentralization will not be associated with the Federal Reserve Bank or the lower federal courts, but with “drain the swamp.”⁶

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¹ See David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 729 (2018).

² See *infra* note 17 and accompanying text.

³ See, e.g., Fontana, *supra* note 1, at 729–35.

⁴ See Dave Owen, *Regional Federal Administration*, 63 UCLAL. REV. 58, 91–92 (2016) (discussing a study of the U.S. Army Corps of Engineers’ decentralized regulatory program and the effectiveness of its implementation).

⁵ See David Fontana, *Trump Administration Drains the Swamp the Wrong Way*, CNN (June 24, 2019, 8:18 AM), <https://www.cnn.com/2019/06/24/opinions/trump-decentralizing-government-wrong-way-fontana/index.html> [<https://perma.cc/PW39-LW2L>].

⁶ See *id.* (highlighting the association between “drain the swamp” and “decentralizing the operations of the federal government by spreading its officials more widely around the country”).

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INTRODUCTION

Constitutional law is often divided, broadly speaking, into two big categories: rights and structure.⁷ The constitutional law of rights addresses the relationship between individuals and their federal or state governments, while structural constitutional law addresses the relationship between federal and state institutions of government.⁸ Federalism and the separation of powers are the twin pillars of structural constitutional law.⁹ James Madison described these principles as combining together to provide “double security” safeguarding the American constitutional experiment.¹⁰ Scholars have responded to Madison’s view and debated the various forms of security these two principles provide and which forms matter more or less.¹¹

Locating federal officials outside of Washington has been an additional tool of diffusing power for several hundred years.¹² The President and the Congress were purposefully located in separate parts of Washington when the capital was moved there so that they would “eye each other with Constitutionally ordained respect and

⁷ This bifurcation goes at least as far back as the debate at the Founding regarding the necessity for a bill of rights given a Constitution identifying the basic structure of government. *See, e.g.*, THE FEDERALIST NO. 84, at 513–15 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions . . .”).

⁸ For a discussion of how the American republic’s federal system divides power and provides checks between the state and the federal government, see THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

⁹ *See id.*; *see also* Fontana, *supra* note 1, at 735.

¹⁰ *See* THE FEDERALIST NO. 51, *supra* note 8, at 323 (James Madison).

¹¹ For a discussion of the current literature and what the author considered an additional, largely neglected security consideration, see Fontana, *supra* note 1, at 729.

¹² *See id.* at 730–31.

suspicion.”¹³ More than two hundred years later, regional banks of the Federal Reserve Bank,¹⁴ lower federal courts,¹⁵ and even the Centers for Disease Control count as important parts of the federal government located outside of Washington.¹⁶ Scholars in the past few years have started to focus on this federal decentralization as an important dimension of structural constitutional law.¹⁷

These debates largely focus on structural constitutional law as *constructive*—as improving the capacity and operation of the federal and state governments.¹⁸ The power to diffuse becomes the power to democratize because more types of officials, subject to more types of forces, are empowered.¹⁹ There is another means of viewing these principles: as *destructive* rather than constructive. The power to diffuse becomes the power to destroy.

Destructive structural constitutional law has shorter- and longer-term effects. In the shorter term, destructive efforts are costly to reverse. Reallocating power among federal and state governments is difficult to achieve because of the many procedural and political barriers characterizing the American system.²⁰ The bad policy will be the harm that keeps on giving, because it is difficult to undo the harm.

In the longer term, destructive efforts constitute a form of unilateral constitutional (mis)appropriation. These efforts are usually highly salient, and therefore widely known.²¹ Their destructive nature makes them provocative and polarizing.²²

¹³ FERGUS M. BORDEWICH, *WASHINGTON: THE MAKING OF THE AMERICAN CAPITAL* 226 (2008).

¹⁴ See, e.g., Sarah Binder & Mark Spindel, *Monetary Politics: Origins of the Federal Reserve*, 27 *STUD. AM. POL. DEV.* 1, 1–2 (2013) (discussing the creation of regional banks); see also H.R. REP. NO. 63-69, at 12 (1913) (“In the United States, with its immense area, numerous natural divisions, still more numerous competing divisions, and abundant outlets to foreign countries, there is no argument either of banking theory or of expediency which dictates the creation of a single central banking institution, no matter how skillfully managed, how carefully controlled, or how patriotically conducted.”).

¹⁵ See Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (creating geographically defined lower federal courts).

¹⁶ See *Our History—Our Story*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/history/ourstory.html> [<https://perma.cc/D6F5-N6EA>] (last visited Mar. 15, 2021).

¹⁷ For some examples, see generally Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 *STAN. L. REV.* 1895 (2018); Jessica Bulman-Pozen, *Our Regionalism*, 166 *U. PA. L. REV.* 377 (2018); Fontana, *supra* note 1; David Fontana, *The Narrowing of Federal Power by the American Political Capital*, 23 *WM. & MARY BILL RTS. J.* 733 (2015) [hereinafter Fontana, *The Narrowing of Federal Power*]; David Fontana, *Placing the Government in Fragile Democracies*, 50 *WAKE FOREST L. REV.* 985 (2015); Owen, *supra* note 4.

¹⁸ See sources cited *supra* note 17.

¹⁹ See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 729.

²⁰ See Fontana, *supra* note 1, at 743–45 (discussing early debates to decentralize the federal government).

²¹ See *id.* at 731.

²² See J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 *CONN. L. REV.*

The end result is that one political party is widely known as the supporter of the structural principle that was used for destructive ends, and the other political party becomes excessively opposed to the principle.²³ The debate about these principles becomes unduly political and pointless.²⁴ The party opposed to the principle fails to leverage the principle for their own desired ends.²⁵

It is a separate question *why* officials might pursue policies that are less constructive and more destructive. Sometimes it might be accidental. Other times it might be more in bad faith.²⁶ These efforts are often done for reasons other than a concern for structural constitutional law, so such efforts usually feature a lack of candor.²⁷

While there has been substantial focus on how the administration of President Donald J. Trump (mis)handled federalism and separation of powers, there has been little meaningful discussion of how it handled federal decentralization.²⁸ Its allies in Congress proposed relocating ninety percent of Washington officials in the next few years.²⁹ Its leaders in the executive branch successfully relocated important officials to Grand Junction, Colorado and Kansas City, Missouri.³⁰

These efforts were broad in their nature but singular in their focus: they were an attempt to undermine existing federal officials in Washington, without any reason to believe they would provide the benefits that follow from successful efforts at

869, 870–71 (1993) (discussing how the two prominent American political parties tend to take opposite views on important issues).

²³ See *id.* at 871 (“[L]egal ideas and symbols will change their political valence as they are used over and over again in new contexts. This description envisions an idea or symbol changing its political significance over time while its content is held constant. Nevertheless, we know that meaning is equally dependent on context.”).

²⁴ See *id.* at 872–73.

²⁵ See, e.g., *id.* at 874.

²⁶ For a landmark treatment of these issues, see generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 886 (2016). Bad faith can have an objective component focused “on the fairness or reasonableness” of the conduct. *Id.* at 893. It can also have a subjective component focused on “the use of deception to conceal or obscure a material fact, a malicious purpose, or an improper motive or belief.” *Id.* at 892.

²⁷ For a brilliant discussion of these concepts, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 992 (2008) (“Sincerity, on this view, requires correspondence between what people say, what they intend to say, and what they believe.”). This author further asserts that “[e]ven a speaker who means what she says may not say everything necessary for her to be considered candid.” *Id.* at 994.

²⁸ See, e.g., Ross K. Baker, *Donald Trump’s Laissez Faire Federalism Is as Toxic as Covid-19*, USA TODAY, <https://www.usatoday.com/story/opinion/2020/07/14/donald-trump-federalism-coronavirus-covid-19-response-column/5424862002/> [<https://perma.cc/5WBF-RASM>] (July 14, 2020, 7:00 AM); Terry Carter, *The Executive Branch Pushes the Boundaries of the Separation of Powers*, ABA J. (Apr. 1, 2018, 12:01 AM), https://www.abajournal.com/magazine/article/imbalance_of_power_executive_branch [<https://perma.cc/U3CM-PB45>].

²⁹ See H.R. 826, 115th Cong. (2017).

³⁰ See generally *infra* Part III (discussing decentralization by the Trump administration).

federal decentralization.³¹ In the near future, this means that important offices of the federal government have lost talented people that even a later, sympathetic administration will have a difficult time rehiring. In the longer term, it means that federal decentralization will not be associated with the Federal Reserve Bank or the lower federal courts, but with “drain the swamp.”³²

I. CONSTRUCTIVE AND DESTRUCTIVE STRUCTURAL CONSTITUTIONAL LAW

Passions about constitutional rights often run deep and motivate public officials to take action to protect or limit these rights.³³ Structural constitutional law is different. Structural constitutional law is more often a means to another end. Even controversial constitutional disputes surrounding structural issues are controversial because they ultimately appear to be about rights and not structure.³⁴ This means that evaluating efforts to diffuse power often involves assessing incidental or side effects rather than main effects.³⁵ And an incidental or side effect can sometimes make the federal government worse off, rather than better off.

A. *The Categories*

Federalism and the separation of powers are broad principles encompassing many discrete textual rules and doctrinal trajectories.³⁶ Each principle has been presented

³¹ For a description of some national systems that have used decentralization successfully in their countries, see Fontana, *supra* note 1, at 758–59.

³² See Fontana, *supra* note 5.

³³ For instance, by deciding in *Planned Parenthood v. Casey* to reaffirm the “essential holding” of *Roe v. Wade*, the Supreme Court made it clear that problematic future regulations would be those that had “the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877, 880 (1992) (minority and majority opinions) (emphasis added).

³⁴ For an example of this phenomenon, see generally *NFIB v. Sebellius*, 567 U.S. 519 (2012), which was nominally about the Commerce Clause but really seemed to be more of a case about rights. See also Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U.L. REV. 1723, 1725 (2011) (explaining how Affordable Care Act litigation was more about the claim “that the government lacks authority to regulate certain personal decisions or actions, because those decisions or actions are for the individual, and only the individual, to make or take”).

³⁵ See, e.g., *Casey*, 505 U.S. at 877 (minority opinion) (stating that the side effect of the statute in *Planned Parenthood v. Casey* needed to be analyzed in addition to the primary focus on unborn life because of the obstacle created “in the path of a woman’s choice”).

³⁶ For helpful criticisms of the breadth of these areas of doctrine, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (discussing “a freestanding separation of powers doctrine” as a problem for judicial discretion); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2037–45 (2009) (arguing that federalism is also a broad concept that generates judicial discretion in deciding cases). It is worth noting that

as improving the capacity of the federal and state governments not in a single way, but in multiple different ways.³⁷ Some of the goals that these principles are meant to further can be more desirable than others, or more achievable than others.³⁸ For instance, some promoting federalism focus more on its potential to empower local minorities.³⁹ Others focus more on its ability to encourage experimentation.⁴⁰ One could be a skeptic of federalism's capacity to incentivize experimentation,⁴¹ but a believer in federalism's capacity to incentivize broad participation in government, or vice versa.⁴² If one had to trade off among these ambitions of federalism, perhaps they would prioritize experimentation and sacrifice some participation, or vice versa. These are disagreements that arise within the concept and the community of those using structural principles to create and generate governmental capacity to do good and to do well.⁴³

But structural principles can also be destructive, and destructive enough that some countries have entirely rejected them.⁴⁴ Neither federalism nor the separation of powers

even the narrower, clause-bound *examples* of federalism and the separation of powers are still presented as furthering broad—but not entirely identical—principles. *See* *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944–46 (1983) (mentioning “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government” as relevant considerations, but not determinative ones, in interpreting bicameralism and presentment). This is not just about the level of generality at which these principles are understood, although it is true that a higher level of generality might make disagreements broader and deeper.

³⁷ *See, e.g., The Constitution's Basic Principles: Federalism*, CONGRESS.GOV: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro-2-2-3/ALDE_00000032/ [<https://perma.cc/JH24-RWKM>] (last visited Mar. 15, 2021).

³⁸ *See infra* notes 41–44 and accompanying text.

³⁹ *See, e.g.,* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) (“[T]he conventional image of federal-state relations . . . is a model built on the notion that the best way to protect minorities is to give them an exit option—the chance to make policy in accord with their own preferences, separate and apart from the center.”).

⁴⁰ *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[O]ne of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁴¹ For great studies in this direction, see Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1346–61 (2009); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 603–05 (1980).

⁴² *See* *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes . . .”).

⁴³ *See* Galle & Leahy, *supra* note 41, at 1335 (stating federalism's purpose is to “better mankind”).

⁴⁴ *See, e.g.,* Steven G. Calabresi, *Does Institutional Design Make a Difference?*, 109 NW.

always achieves positive results.⁴⁵ Federalism is a controversial feature of constitutional design, one not accepted by every major constitutional democracy.⁴⁶ A presidential system like that featured in the American separation of powers has been rejected by most countries in favor of a parliamentary or semi-presidential system.⁴⁷

However, these structural principles are core to the American constitutional system, rather than rejected by it.⁴⁸ These principles have been legitimated over many hundred years in the American system.⁴⁹ That leaves an opening: federal officials can use these principles to destroy the federal government. The same concerns that led countries like the United Kingdom and France to reject these principles entirely can be used by actors in the American system to harm the capacity of the federal government rather than to help it.⁵⁰

These destructive situations are to be distinguished from situations in which officials disagree about the desirability of different magnitudes of the good results that structural principles are meant to provide.⁵¹ Some might think that a little state or local participation is good, others that a lot of state and local participation is good. But there is still a shared goal to use the structural principle to build rather than to destroy.

Consider, for instance, the Patient Protection and Affordable Care Act,⁵² and the many debates about how much of that landmark statute should be implemented by the federal government and/or state governments.⁵³ There were disagreements about how much the federal government should do by itself, how much it should do with the state governments, and how much it should just fund the state governments to do directly.⁵⁴

U. L. REV. 577, 583 (2015) (describing how the U.S. has a more decentralized system than countries such as Brazil, Argentina, and Mexico).

⁴⁵ See *id.* at 578–79.

⁴⁶ See *id.* at 583 (“The U.S. federal government is also enormously more powerful than the centralized, national governments of France, Japan, Italy, Turkey, Indonesia, and South Korea.”).

⁴⁷ See generally Giovanni Sartori, *Neither Presidentialism nor Parliamentarism*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* 106 (Juan J. Linz & Arturo Valenzuela eds., 1994).

⁴⁸ See *id.* at 108.

⁴⁹ See Calabresi, *supra* note 44, at 599.

⁵⁰ See *id.* at 582–83, 588, 591 (highlighting the different issues that arise given the number of units into which a federal system is divided).

⁵¹ This is usually how the situation manifests in the United States. Political figures engage in constant switches in their positions on federalism and separation of powers. See generally Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485 (2016). But that means they are disagreeing about how much and when to employ these principles, not because they are using these principles to destroy the federal government.

⁵² See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁵³ See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 969 (2016); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1772, 1779–83 (2015); Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1686–87 (2014).

⁵⁴ See Metzger, *supra* note 53, at 1765–67.

These disagreements, though, are centered on the best way to make federalism work, not on the surest way to make federalism fail.⁵⁵

The constructive and destructive potential of these principles are often mirror images of one another. Karl Llewellyn wrote “one of the most celebrated law review articles of all time”⁵⁶ about how the canons of statutory construction canceled each other out, with one principle often being contradicted by another.⁵⁷ Likewise, structural constitutional principles such as federalism or the separation of powers often generate dynamics that can either be really good or—for the exact same reasons—really bad.

B. Double Security or Double Insecurity?

The diffusions of power that have made federalism and separation of powers so central to the American experience are also why they can be used to destroy the best parts of the American experience. Consider, first of all, the arguments surrounding federalism. Federalism can facilitate policy experimentation.⁵⁸ Because there are more jurisdictions creating rules, there are more opportunities to create new and different rules.⁵⁹ The frequency of experimentation might be less than is often assumed,⁶⁰ but it is still meaningful.⁶¹

But experimentation can be another word for chaos. The more different rules that jurisdictions are employing, the more different rules that individuals and firms have to learn about and follow.⁶² Consider how much that complicates efforts like creating a single national market.⁶³

Federalism can ensure access to power for a broader range of political communities.⁶⁴ More levels of government mean more institutions and individuals to try to

⁵⁵ See, e.g., *supra* note 53 and accompanying text (discussing the elements of federalism and the Patient Protection and Affordable Care Act).

⁵⁶ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992).

⁵⁷ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

⁵⁸ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[T]he happy incident[] of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory . . .”).

⁵⁹ See *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (encouraging the view taken by Justice Brandeis in *Liebmann*).

⁶⁰ See Galle & Leahy, *supra* note 41, at 1346–61; Rose-Ackerman, *supra* note 41, at 603–05.

⁶¹ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1277–78 (2009) (discussing examples of state innovations).

⁶² See Wiseman, *supra* note 53, at 1723–24.

⁶³ See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (discussing a “fundamental objective” of part of the Constitution as “preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors”).

⁶⁴ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint

access and to persuade.⁶⁵ They also mean more positions in government that are open for a range of people to serve in so that they can shape policy.⁶⁶

But this pluralism can also be a negative force rather than a positive one. A single level of government can encourage diverse forces to work together by providing a focal point for them to try to influence.⁶⁷ They have no insurance policy in government—everyone has to try to persuade that single level of government to do what they want. There is only voice, and not exit.⁶⁸ With a federal system, empowering a broader range of political communities pulls them farther apart rather than closer together. Without the need to interact, and to compromise, divergent political forces can become even more strongly opposed political forces.⁶⁹

The same is true for the separation of powers. There are multiple goals that the separation of powers tries to achieve.⁷⁰ The separation of powers can protect liberty by increasing the costs of taking governmental action.⁷¹ The primary threat to freedom, in this account, is an overbearing federal government.⁷² Making it harder for the federal government to act reduces the chances that it will act too often or too boldly.⁷³ Because at least two (and realistically three) branches of government usually have to concur with major federal actions, it is more difficult to take these actions.⁷⁴

sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes.”).

⁶⁵ See, e.g., Gerken, *supra* note 39, at 21–24 (discussing local institutions as places of decentralized authority with outsized influence).

⁶⁶ See *id.* at 43.

⁶⁷ See, e.g., Bulman-Pozen, *supra* note 17, at 434–35 (considering multistate opposition to a federal policy).

⁶⁸ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 37 (1970).

⁶⁹ See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 671 (2000) (“Time and again, federalism has proved to be a potent force for separationism throughout the world. The dynamic seems to recur whenever a group of smallish governments join together to form a federal union As far as the leaders of these states are concerned, *they* are the very creators of the new union.”).

⁷⁰ There is no single, canonical statement by the Supreme Court about the separation of powers goals comparable to what the Court said about federalism in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Aziz Z. Huq and Jon D. Michaels do an excellent job bringing together the Court’s jurisprudence to identify these various goals. See Aziz A. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 380–87 (2016).

⁷¹ See Huq & Michaels, *supra* note 70, at 382–83.

⁷² See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

⁷³ See *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (“Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .”).

⁷⁴ See *Bond v. United States*, 564 U.S. 211, 222 (2011) (noting how this dynamic “protect[s] each branch of government from incursion by the others” and also serves to “protect the individual as well”—all from an overbearing government); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (stating that the separation of powers was meant to protect “liberty”).

These same transaction costs can generate the risk of an underwhelming federal government that fails to protect liberty enough rather than protect it too much. Decisive federal action is often needed to make things better in the world—say, for instance, to fight a global pandemic.⁷⁵ How can it be said that liberty is protected when one cannot safely go outside their house because of a federal failure to act? But decisive federal action is hard to obtain because there are so many individuals and institutions that must consent before action can be taken.⁷⁶ This has often destroyed constitutions that feature the separation of powers.⁷⁷

Democratic accountability is also a virtue mentioned as associated with the separation of powers.⁷⁸ Defining different powers and distributing them to different branches is a means of shining a light on federal action. If one does not like the initiation of a war, blame Congress.⁷⁹ If one does not like how the war is being fought, blame the President.⁸⁰ The two political branches are elected in three different ways (House, Senate, President) and on three different timetables, increasing even more the potential for democratic accountability.⁸¹

In reality, though, the complexity of the separation of powers can also obscure more than it can clarify.⁸² So many institutions taking so many actions are hard to follow.⁸³ It is hard to separate out who did what, and therefore who should be praised for triumphs and punished for failures.⁸⁴ In a parliamentary system, the single party that controls the government can be blamed for a bad economy or a bad pandemic.⁸⁵ In a system with separated powers, who is to blame?

⁷⁵ See generally David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608 (2020).

⁷⁶ See, e.g., Huq & Michaels, *supra* note 70, at 385.

⁷⁷ See Sartori, *supra* note 47, at 106–08.

⁷⁸ See Huq & Michaels, *supra* note 70, at 385 (“The separation of powers is thought to promote one quite specific form of ex post democratic accountability by preserving clear lines of responsibility for distinct policy decisions. The clarity of responsibility enabled by crisp institutional separation facilitates voters’ retrospective assignment of liability at the ballot box.”).

⁷⁹ See U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o declare War . . .”).

⁸⁰ See *id.* art. II, § 2 (“The President shall be the Commander in Chief of the Army and Navy . . .”).

⁸¹ See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42, 45–46 (1995); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 516–25 (2003) (discussing political accountability in different models of representation).

⁸² See generally Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 309–19 (2010) (discussing the literature regarding the failures of elections to hold institutions accountable for their particular actions).

⁸³ See, e.g., G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 50–52 (2000).

⁸⁴ See, e.g., Margit Tavits, *Clarity of Responsibility and Corruption*, 51 AM. J. POL. SCI. 218, 219–20 (2007).

⁸⁵ See POWELL, *supra* note 83, at 57–58.

In the shorter term, using these structural principles to activate their negative features is very difficult to reverse. The diffusion of powers in the American system makes it incredibly costly to change the actions of the federal government.⁸⁶ There is the procedural cost of overcoming the barriers to action across the branches (Bicameralism and Presentment) or within a branch (administrative law for the executive branch).⁸⁷ There is also the political cost that “[n]ew policies create a new politics.”⁸⁸ Once a state is empowered, or a part of the federal government is empowered, it is difficult to remove its power.⁸⁹

In the longer term, destructive invocation of these structural principles effectively and unilaterally appropriate these principles. The invocation of these principles is likely to be highly salient, and therefore known to those within the political party invoking these principles—and known to those in the other political party. The wider public will also become vaguely aware of where the two political parties stand, and what the issue that is dividing them is about. Because these efforts will seem in bad faith—not really about federalism, for instance, but about destroying government—these efforts will be very provocative, triggering heated and partisan reactions. The result is that one party will own that principle and the other party will have a hard time ever using it.

II. DESTRUCTIVE FEDERAL DECENTRALIZATION

Locating federal officials outside of Washington has been an idea and a practice for several hundred years, but it has only started to enter the scholarly discussion in the past few years.⁹⁰ This Part briefly identifies the competing ambitions of federal decentralization. Federal decentralization is no different than the twin pillars usually defining structural constitutional law in its constructive and destructive potential. Every one of the constructive elements of federal decentralization has a matching destructive element of federal decentralization.⁹¹ Enlisting federal decentralization for destructive goals is particularly costly to reverse.⁹²

⁸⁶ See *infra* notes 87–89 and accompanying text.

⁸⁷ See, e.g., *Immigr. Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

⁸⁸ E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929–1930 REVISION OF THE TARIFF* 288 (1935).

⁸⁹ See Ackerman, *supra* note 69, at 650–51 (discussing the entrenchment of policy decisions once power has been granted).

⁹⁰ See sources cited *supra* note 17 and accompanying text.

⁹¹ See, e.g., Fontana, *supra* note 1, at 785–87 (explaining that relocating for beneficial expert relationships can harm beneficial government relationships).

⁹² See, e.g., Jessie Bur, *Most Employees Don't Want to Move with USDA Research Agencies*, FED. TIMES (July 18, 2019), <https://www.federaltimes.com/management/2019/07/18/most-employees-don't-want-to-move-with-usda-research-agencies/> [<https://perma.cc/JT58-MPC5>] (describing a “brain drain” of highly skilled researchers due to relocation orders).

A. Forms of Federal Decentralization

First, federal decentralization can increase the expertise that the federal government can bring to resolve complicated policy issues by increasing the number of labor markets that staff the federal government. The federal government employs roughly two million full-time officials performing a range of official tasks.⁹³ Metropolitan areas tend to have labor supplies that specialize in particular tasks.⁹⁴ New York City has been dominated by the finance industry,⁹⁵ and Detroit by the automobile industry.⁹⁶ A federal government trying to regulate finance and stimulate automobile production benefits from employing some of the labor force in *different* metropolitan areas, all while that labor force is still benefiting from its presence in that industry *in* those metropolitan areas.⁹⁷ For instance, regional banks of the Federal Reserve featuring officials with regional experience have been more attuned to local economies and therefore more effective in regulating them.⁹⁸

While diversifying labor markets can bring more diverse skills to a range of federal tasks, it can also undermine government-specific expertise because of the presence of other forms of skill diversity.⁹⁹ Federal officials across the branches and levels of government perform better when they have many relationships within the federal government and much experience with and in the federal government.¹⁰⁰

⁹³ See generally JULIE JENNINGS & JARED C. NAGEL, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2019), <https://fas.org/sgp/crs/misc/R43590.pdf> [<https://perma.cc/6PE5-PHNB>].

⁹⁴ See generally, e.g., Sukkoo Kim, *Regions, Resources, and Economic Geography: Sources of U.S. Regional Comparative Advantage, 1880–1987*, 29 REG'L SCI. & URB. ECON. 1 (1999); Christopher H. Wheeler, *Cities and the Growth of Wages Among Young Workers: Evidence from the NLSY*, 60 J. URB. ECON. 162 (2006).

⁹⁵ See James Orr & Giorgio Topa, *Challenges Facing the New York Metropolitan Area Economy*, 12 CURRENT ISSUES ECON. & FIN. 1, 5–6 (2006).

⁹⁶ See generally John F. McDonald, *What Happened to and in Detroit*, 51 URB. STUD. 3309 (2014); Thomas J. Hannigan, Marcelo Cano-Kollmann & Ram Mudambi, *Thriving Innovation Amidst Manufacturing Decline: The Detroit Auto Cluster and the Resilience of Local Knowledge Production*, 24 INDUS. & CORP. CHANGE 613 (2015).

⁹⁷ Cf. Gerken, *supra* note 39, at 39 (discussing state and local officials as “insiders to the system . . . [that] can set policy rather than merely complain about it”).

⁹⁸ See Binder & Spindel, *supra* note 14, at 1–2 (discussing the regional design of the Federal Reserve). See generally Gary Richardson & William Troost, *Monetary Intervention Mitigated Banking Panics During the Great Depression: Quasi-Experimental Evidence from a Federal Reserve District Border, 1929–1933*, 117 J. POL. ECON. 1031 (2009) (providing a specific example of the better outcomes generated by the better knowledge of the southern economy by southern officials at the regional bank in Atlanta).

⁹⁹ Fontana, *supra* note 1, at 786–87.

¹⁰⁰ See generally DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 15 (2001) (discussing related literature and general mechanisms explaining this finding).

Federal centralization encourages expertise in the federal government.¹⁰¹ When federal positions are centralized in Washington, the market depth in those positions encourages ambitious people to specialize in matters related to the federal government.¹⁰² These people know that their institution-specific investments in learning about the federal government are more likely to be rewarded in the future—without major disruption to their lives—because there are so many employment opportunities in Washington for those with expertise in the federal government.¹⁰³ The more federal positions outside of Washington, the greater the risk that any investment in expertise in the federal government will be pointless.¹⁰⁴ Federal decentralization, in other words, prioritizes subject-matter expertise at the expense of federal governmental expertise.¹⁰⁵

Second of all, federal decentralization can also increase the independence of officials by locating them outside of Washington. It is difficult for institutions to be separated from one another if they are across the street from another. Because different places have different types of individuals working there, locating institutions in different places will tend to attract different types of people to work for them in the first place.¹⁰⁶ Political actors are influenced by those they are closest with, and even in this century people are closest with those they live closest to at any time.¹⁰⁷

Institutions that are co-located will therefore influence one another, and be influenced by the same forces, undermining their independence.¹⁰⁸ When the capital was relocated to Washington, the legislative and executive branches were purposefully placed far away from each other on Pennsylvania Avenue, N.W.¹⁰⁹ The West German system that was designed after World War II to avoid another excessive concentration of powers purposefully placed the executive and legislative branches in a separate location from the Federal Constitutional Court.¹¹⁰

¹⁰¹ Fontana, *supra* note 1, at 786–87.

¹⁰² See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1521 (discussing how market depth operates).

¹⁰³ See *id.* (noting that deep labor markets provide insurance against disruption by providing ample alternative employment).

¹⁰⁴ For a discussion of the risk pooling that comes from market depth, see, for example, James R. Baumgardner, *The Division of Labor, Local Markets, and Worker Organization*, 96 J. POL. ECON. 509, 510 (1988), and Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSP. 139, 146 (1998).

¹⁰⁵ Fontana, *supra* note 1, at 784–85, 787–88.

¹⁰⁶ See generally Jae Hong Kim, *Residential and Job Mobility: Interregional Variation and Their Interplay in U.S. Metropolitan Areas*, 51 URB. STUD. 2863 (2014).

¹⁰⁷ Cf. Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, 83 PAPERS REG'L SCI. 197, 208–10 (2004).

¹⁰⁸ See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 747–50.

¹⁰⁹ See BORDEWICH, *supra* note 13, at 225.

¹¹⁰ See generally Alan Cowell, *In Germany's Capitals, Cold War Memories and Imperial Ghosts*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/world/europe/24-berlin.html> [<https://perma.cc/4RHW-RPDR>] (describing the division of the German government between Bonn and Berlin).

However, federal decentralization can also facilitate independence translating into irrelevance. Both outcomes are generated by the same underlying mechanisms. The kinds of people that staff a part of the federal government far from the capital are more likely to be those with lesser experience in and with the federal government.¹¹¹ They are more likely to be local elites with knowledge about and experience with local matters.¹¹² Being isolated from those in power means they receive less information from and about them¹¹³ and have less capacity to influence them.¹¹⁴ Distance can hamper persuasion, and proximity can facilitate it.¹¹⁵

Consider, for instance, the difficulties of the Centers for Disease Control (CDC) during the coronavirus pandemic. The CDC is headquartered in Atlanta, and so is staffed with scientists unfamiliar with the federal government in Washington¹¹⁶—contrary to the scientists located in departments in Washington like the Department of Health and Human Services (HHS).¹¹⁷ Officials in Washington that have known each other for decades and were meeting (either in person or remotely) to plan the response to the pandemic were leaving out strangers located far away in Atlanta.¹¹⁸

Or consider the aftermath of the Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Court ordered President Harry Truman to return the steel mills that he seized to help him fight the Korean War.¹¹⁹ Justice Hugo Black invited the other Justices and President Truman to his house in Northern Virginia to ensure that they could find common ground moving forward and to ensure that the President would continue to comply with Court decisions.¹²⁰

¹¹¹ See Blank & Rosen-Zvi, *supra* note 17, at 1961.

¹¹² See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 560–62 (2004) (discussing theories at the Founding distinguishing between local political leaders and “continental characters”).

¹¹³ See, e.g., Meric S. Gertler, *Tacit Knowledge and the Economic Geography of Context, or the Undefinable Tacitness of Being (There)*, 3 J. ECON. GEOGRAPHY 75, 84 (2003) (identifying “language[,] common ‘codes’ of communication[,] shared conventions[,]” and “trust” as hard to transmit across distance and generating distrust across distance).

¹¹⁴ See generally Michael Bailey, Rachel Cao, Theresa Kuchler, Johannes Stroebel & Arlene Wong, *Social Connectedness: Measurement, Determinants, and Effects*, 32 J. ECON. PERSPS. 259 (2018) (discussing and documenting how places shape spheres of influence).

¹¹⁵ See, e.g., Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 747–50 (discussing the strength and depth of professional networks in the political capital).

¹¹⁶ See *Our History—Our Story*, *supra* note 16.

¹¹⁷ See *HHS Headquarters*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/about/hhs-headquarters/index.html> [<https://perma.cc/3F9U-XB2B>] (Jan. 21, 2021).

¹¹⁸ Apoorva Mandavilli, *C.D.C. Testing Guidance Was Published Against Scientists’ Objections*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/09/17/health/coronavirus-testing-cdc.html> [<https://perma.cc/5CLW-23X8>].

¹¹⁹ 343 U.S. 579, 583–84, 587, 589 (1952).

¹²⁰ See Steve Hendrix, *Truman Declared an Emergency When He Felt Thwarted. Trump Should Know: It Didn’t End Well*, WASH. POST (Jan. 11, 2019, 9:40 AM), <https://www.washingtonpost.com/history/2019/01/08/truman-declared-an-emergency-when-he-felt-thwarted-trump-should-know-it-didnt-end-well/> [<https://perma.cc/8X9C-Z4G6>].

Irrelevance can also be facilitated because of the greater transaction costs generated by working across greater distances. Interactions in person are more efficient because of the extent to which individuals rely on informal cues that do not work on a computer screen.¹²¹ Federal officials have a harder time working as efficiently with those inside of Washington because of the distance. If Washington still has the plurality of the most important federal officials, then, they could simply ignore those outside of Washington out of frustration—even if their intentions are benign.

Third of all, federal decentralization has democratic virtues. By placing more federal officials near more different kinds of people, the federal government would hear from and include more different kinds of people. It lowers the costs for a broader range of people to be in power or to be close to power—figuratively and literally.¹²² Playing an important role in the federal government would no longer require enduring the direct and opportunity costs of relocating to Washington.¹²³ An individual with generations of family in Maine can stay in Maine and still access important officials in the federal government. An individual with generations of family in Oklahoma can stay in Oklahoma and still access important officials in the federal government.

Proximity to power for more people also means they can influence power more easily. Federal officials are no longer strangers across the country, but instead neighbors across the street. It is no surprise, then, that empirical studies have found that federal officials already outside of Washington are not part of the same influence networks as those in Washington.¹²⁴

The flip side of all of this can be true: federal decentralization can undermine democracy because of the greater access it facilitates. Decentralizing federal power reduces the monopolistic access that those more likely to have a public mindset have over federal positions.¹²⁵ People move to metropolitan areas in particular because of the types of industries and identities that are most salient in that metropolitan area.¹²⁶ Having a singular capital that stands above all other places as the location for power means that people move to Washington with a strong desire to make a career in and around the federal government. The Founders wanted “[c]ontinental [c]haracters” to serve in federal office.¹²⁷ Making federal officeholders relocate to a city dedicated

¹²¹ See Gertler, *supra* note 113, at 84.

¹²² See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 752–53.

¹²³ See generally *id.* (explaining reasons why proximity to federal power changes who is in power). For a general discussion of forces that lead people to stay closer to home, see Raven Molloy, Christopher L. Smith & Abigail Wozniak, *Declining Migration Within the U.S.: The Role of the Labor Market* (Nat’l Bureau of Econ. Rsch., Working Paper No. 20065, 2014).

¹²⁴ See also David M. Hedge, *A Spatial Model of Regulation*, 21 AM. POL. Q. 387, 393 (1993); John T. Scholz, Jim Twombly & Barbara Headrick, *Street-Level Political Controls Over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829, 829 (1991). See generally Fontana, *The Narrowing of Federal Power*, *supra* note 17.

¹²⁵ See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 752–53.

¹²⁶ See Yong Chen & Stuart S. Rosenthal, *Local Amenities and Life-Cycle Migration: Do People Move for Jobs or Fun?*, 64 J. URB. ECON. 519, 520 (2008).

¹²⁷ See Ackerman & Fontana, *supra* note 112, at 559–60.

to public service helps to attract those dedicated to serving the public far from and apart from local loyalties.¹²⁸ Decades spent in different parts of the federal government and around different parts of the federal government generate different loyalties.¹²⁹ For instance, federal judges with prior experience in the executive branch in Washington vote differently than federal judges who have not served in the executive branch in Washington.¹³⁰

B. Costs of Destructive Decentralization

In the shorter term, employing the destructive features of federal decentralization is problematic because federal decentralization is costly to reverse. Restoring the status quo of the official that was moved from Washington to their status as an effective official in Washington is exceedingly difficult.¹³¹ Scholars have studied other attempts to ensure that loyal federal officials remain in power for long periods of time, and disloyal federal officials remain out of power for long periods of time.¹³² Destructive federal decentralization can do precisely the same things—banishing officials one does not like and making their normal return difficult to accomplish.

Other forms of destructive structural efforts require overcoming the normal transaction costs that are present in taking federal action. If destructive federalism has resulted in too much power residing in state governments—or destructive separation of powers has resulted in too much power residing in one branch of the federal government—there are means to reverse these actions, but all are costly.¹³³ The federal government can enact a statute, thereby having to overcome many veto gates in both houses of Congress and obtaining a presidential signature.¹³⁴ That does not

¹²⁸ *See id.*

¹²⁹ *See* David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 71 (2018).

¹³⁰ *See* Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 LAW & SOC'Y REV. 889, 907–13 (2012).

¹³¹ *See* Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 737–38, 744.

¹³² For instance, consider the practice of “burrowing,” whereby temporary political appointees are converted into permanent civil servants. *See, e.g.*, PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 7–9 (1995); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 606–16 (2003).

¹³³ *See, e.g.*, Fontana, *supra* note 1, at 786–89.

¹³⁴ *See, e.g.*, Richard S. Conley & Amie Kreppel, *Toward a New Typology of Vetoes and Overrides*, 54 POL. RSCH. Q. 831, 850 (2001) (“Presidents are generally adept at marshaling enough partisan support to halt overrides.”); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1460 (2014) (discussing “the formidable veto gates that render legislation quite difficult”); *see also* *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (“Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”).

happen very often.¹³⁵ The executive branch could generate a federal regulation, but administrative law places procedural barriers in the way of that transpiring easily.¹³⁶ Or different federal officials at the highest levels with different priorities could be nominated and confirmed, but that is increasingly difficult as well.¹³⁷

Undoing acts of destructive federal decentralization requires overcoming those normal transaction costs, but also requires individual people to quickly uproot their personal and professional existence. Less than one percent of Americans move across state lines every year.¹³⁸ The difficulty of leaving behind a personal and professional network and starting a brand new one poses challenges even for those in relatively well-paying and high-status positions.¹³⁹ Federal officials are often much desired by the private sector.¹⁴⁰ They can accept a private-sector position in the place where they were relocated without having to return to Washington.

If a federal position is moved from Washington to someplace outside of Washington, and that action is to be undone, that official then has to be recalled to Washington. Relocation back to Washington requires abandoning the personal and professional relationships that were built in and tied to the new location.¹⁴¹ If the official does relocate back to Washington because their move out of Washington was deemed a

¹³⁵ See *Statistics and Historical Comparisons*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/UY98-RQRK>] (last visited Mar. 15, 2021).

¹³⁶ See, e.g., *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (noting that, in many contexts, before acting, an agency must “‘disclose the basis’ of its action” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962))); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (noting that an agency must consider “the relevant data” and present “a satisfactory explanation for its actions including ‘a rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines*, 371 U.S. at 168)).

¹³⁷ See, e.g., Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1652 (2015) (“[A]lmost a quarter of submitted nominations between 1981 and 2014 were not confirmed . . .”).

¹³⁸ See *2019 CPS-ASEC Geographical Mobility Data Release*, U.S. CENSUS BUREAU (Nov. 20, 2019), <https://www.census.gov/newsroom/press-releases/2019/cps-asec-geographic-mobility.html> [<https://perma.cc/9QB5-5T9C>].

¹³⁹ See, e.g., Dora L. Costa & Matthew E. Kahn, *Power Couples: Changes in the Locational Choice of the College Educated, 1940–1990*, 115 Q.J. ECON. 1287, 1287–88 (2000) (noting some unique relocating challenges faced by college educated people and dual career households).

¹⁴⁰ See CONG. BUDGET OFF., *COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES* 7 (2012).

¹⁴¹ See, e.g., Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOCIO. 1, 11 (1998) (“Leaving a community tends to destroy established bonds, thus depriving [the movers] of a major source of social capital.”); see also Noah E. Friedkin, *Informational Flow Through Strong and Weak Ties in Intraorganizational Social Networks*, 3 SOC. NETWORKS 273, 281 (1982); Nancy B. Kurland & Lisa Hope Pelled, Note, *Passing the Word: Toward a Model of Gossip and Power in the Workplace*, 25 ACAD. MGMT. REV. 428, 431–34 (2000).

mistake, it also means that their presence in Washington was deemed valuable. Yet all of the time they were away from Washington, their Washington-based skills were degrading because they were not in Washington.¹⁴² Their relationships with important actors in the federal government have withered, as has their knowledge about important actions in the federal government.¹⁴³ They are back in Washington, in other words, but not back at full capacity.

If the federal official refused to relocate from Washington in the first place, that means the actors responsible for the destructive federal decentralization were able to hire their preferred person for the job. They selected the location where the federal official would be sent, so they picked the labor market that would be supplying potential federal officials. Do they prefer the pool of people that Mesa, Arizona has to offer, or that San Francisco has to offer?¹⁴⁴ Then they are able to pick the particular official from that labor supply. If it is determined that the official should be returned to Washington, it will be very difficult to remove them from office and reinstate the official who refused to move from Washington.¹⁴⁵

The risks of constitutional misappropriation posed by destructive federal decentralization are also substantial. Federalism is already strongly identified with conservatives, since at least the mid-1960s, because of the role that federalism played in resisting the Civil Rights Movement.¹⁴⁶ The famous political scientist William H. Riker even remarked in 1964 that “if . . . one disapproves of racism, one should disapprove of federalism.”¹⁴⁷ Yet there is no necessary reason why moving power out of Washington has to be a conservative tool rather than also a progressive one. Empowering Albany and Sacramento—or New York City and San Francisco—relative to Washington can be a profoundly progressive tool.

Once controlled by the Republican Party,¹⁴⁸ federal decentralization suffers from the same pathologies presented by so many other issues in our polarized politics.

¹⁴² Cf. Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 651 (2012) (“A lobbyist talking to another lobbyist about congressional procedure is producing information spillovers that will improve the listener’s productivity at work.”).

¹⁴³ See *id.* at 651.

¹⁴⁴ Those two metropolitan areas are mentioned because they are the most ideologically distinct of the metropolitan areas in the country. See Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 608–09 (2014).

¹⁴⁵ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-215, RECENT TRENDS IN FEDERAL CIVILIAN EMPLOYMENT AND COMPENSATION 17 (2014) (discussing the stability of federal employment).

¹⁴⁶ See generally Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User’s Guide*, DEMOCRACY, Spring 2017, <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [<https://perma.cc/ACF3-5594>].

¹⁴⁷ WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964); see also Gerken & Revesz, *supra* note 146 (“Even today, many progressives think of federalism as a parochial anachronism, better suited for stymieing change than for effecting it.”).

¹⁴⁸ See Gerken & Revesz, *supra* note 146.

Republicans using federal decentralization can see no wrong in it, and Democrats can see no right in it. The conversation about its best and worst uses becomes more political rather than principled.

III. DESTRUCTIVE FEDERAL DECENTRALIZATION IN THE TRUMP ADMINISTRATION

The efforts by the Trump administration always appeared to be destructive because of the words preceding and accompanying them and because of the deeds that were part of them.¹⁴⁹ There was a serious conversation during the presidential and congressional campaign of 2016 about federal decentralization.¹⁵⁰ Former Florida Governor Jeb Bush launched his campaign for the Republican nomination for President (in Miami) in June of 2015 by declaring that Washington was a “static capital” in a “dynamic country.”¹⁵¹ He wanted to relocate the Department of the Interior to a city in the Western United States so that it could employ individuals with a different set of skills in managing federal lands and could hear more from those reliant on federal lands.¹⁵²

That serious conversation never involved the Trump campaign, which instead called for “draining the swamp.”¹⁵³ After the Trump administration came into office, the ambition of its officials and its supporters to use federal decentralization to destroy rather than to create became clearer.¹⁵⁴ Mick Mulvaney, the acting White House Chief of Staff, praised one effort to move federal officials as an effort to drain

¹⁴⁹ See, e.g., Ben Guarino, *USDA Science Agencies' Relocation May Have Violated Law, Inspector General Report Says*, WASH. POST (Aug. 6, 2019, 12:30 PM), <https://www.washingtonpost.com/science/2019/08/05/usda-science-agencies-relocation-may-have-violated-law-inspector-general-report-says/> [https://perma.cc/J46E-J83Q].

¹⁵⁰ See, e.g., Michael D. Shear & Gardiner Harris, *Trump Wants to 'Drain the Swamp,' But Change Will Be Complex and Costly*, N.Y. TIMES (Nov. 10, 2016), <https://www.nytimes.com/2016/11/11/us/politics/trump-government.html> [https://perma.cc/3YZE-5S6Y].

¹⁵¹ See Michael Barbaro & Jonathan Martin, *Jeb Bush Announces White House Bid, Saying "America Deserves Better,"* N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/16/us/politics/jeb-bush-presidential-campaign.html> [https://perma.cc/82JR-XREU].

¹⁵² See Jeb Bush, *Western Land and Resource Management*, MEDIUM (Oct. 21, 2015), <https://medium.com/@JebBush/western-land-and-resource-management-e21ae5bce5f> [https://perma.cc/2N2N-7YRT]; Sean Sullivan, *Jeb Bush Moves Against Washington Again with Call to Relocate Interior Department to the West*, WASH. POST (Oct. 21, 2015, 6:30 AM), <https://www.washingtonpost.com/news/post-politics/wp/2015/10/21/jeb-bushs-moves-against-washington-again-with-call-to-relocate-interior-department-in-the-west/> [https://perma.cc/Q8CZ-NPE4].

¹⁵³ See Kenneth P. Vogel & Eric Lipton, *Recording Shows that the Swamp Has Not Been Drained*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/01/26/us/politics/trump-recording-donors.html> [https://perma.cc/76ZK-NLUB] (“It became such a central slogan of Donald J. Trump’s 2016 campaign that at rallies his supporters would chant the three words representing his pledge to take on big donors and special interests: ‘Drain the swamp.’”).

¹⁵⁴ See, e.g., Guarino, *supra* note 149.

the swamp by targeting people in the “liberal haven of Washington, D.C.” who did not care for “the real part of the country.”¹⁵⁵

A. Statutory

The various efforts led by President Trump’s supporters in the House of Representatives suggested this was an example of destructive federal decentralization. Republican members of the House of Representatives introduced the “Drain the Swamp Act of 2017.”¹⁵⁶ It would have required “the head of *each* executive agency” to relocate “outside of the Washington, D.C., metropolitan area” within six years.¹⁵⁷ In six years, “no more than 10 percent of the employees of the agency [should be] based in the Washington metropolitan area.”¹⁵⁸

From the perspective of constructing (rather than destroying) expertise, the statute did far too much to far too many people. It would have substantially undermined the governmental expertise that existing officials have by requiring the relocations of hundreds of thousands of them,¹⁵⁹ including the most important executive branch officials. It also gave no clear indications that it would have replaced that expertise or supplement it with issue-based expertise.¹⁶⁰

There are many officials within the executive branch who should remain in Washington. These officials have expertise related to their social networks in Washington.¹⁶¹ Their relationships in Washington provide them with information

¹⁵⁵ *Id.*

¹⁵⁶ H.R. 826, 115th Cong. (2017).

¹⁵⁷ *Id.* § 2 (emphasis added).

¹⁵⁸ *Id.*

¹⁵⁹ There are nearly 600,000 employees—broadly construing the term employees—in the Washington metropolitan area. See *Policy, Data, Oversight: Data, Analysis & Documentation: Federal Civilian Employment*, U.S. OFF. PERS. MGMT. (Sept. 2017) [hereinafter *Federal Civilian Employment*], <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/> [<https://perma.cc/JK3R-BQPM>] (listing 589,426 annuitants and employees). It is worth noting that this statute would have affected all federal officials in the Washington metropolitan area, not just in the District of Columbia:

(A) the District of Columbia

(B) Montgomery and Prince George’s Counties in the State of Maryland; and

(C) Arlington, Fairfax, Loudon, and Prince William Counties and the City of Alexandria in the Commonwealth of Virginia.

See H.R. 826 § (2)(c)(2).

¹⁶⁰ See generally *id.*

¹⁶¹ For a powerful and important study about how being part of the network of decision-makers in Washington empowers officials, see CARPENTER, *supra* note 100, at 14–15. The quality and quantity of information that a network provides is crucially important. See Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOCIO. THEORY 201,

about policies enacted or being considered and the politics related to these policies.¹⁶² If these officials are relocated outside of Washington, these networks will wither away,¹⁶³ as will the quality of information they receive from the networks.¹⁶⁴

The proposed statute, though, would have mandated the relocation of precisely those officials whose greatest comparative advantage is their Washington expertise.¹⁶⁵ It mandated that “the head of *each* executive agency” be out of Washington within six years.¹⁶⁶ That even meant all of those who directed an “[e]xecutive agency,” except for the President.¹⁶⁷ Cabinet secretaries—like other high-level political appointees—usually have expertise related to how Washington operates rather than how a particular policy issue should be handled.¹⁶⁸ The Secretary of State does not spend hours each day reading academic papers or country reports. The Secretary knows the range of private actors and officials in the federal government that need to be united in order to take meaningful foreign policy action.¹⁶⁹ Whether it would have been Hillary Clinton or Mike Pompeo, relocating them from Washington would have meant that the network necessary to take action dissipates eventually to the point of disappearance.

More than ten percent of the officials in the executive branch have an expertise derived from their work in Washington.¹⁷⁰ Many of these officials are the thousands of other political appointees that each President places in important positions in his administration.¹⁷¹ But others also occupy positions that rely on Washington knowledge. For instance, there are thousands working as civil servants in the Office of Legislative Affairs of their executive agency or department and navigating the complicated appropriations process on Capitol Hill.¹⁷²

204 (1983); Gabriel Weimann, *The Strength of Weak Conversational Ties in the Flow of Information and Influence*, 5 SOC. NETWORKS 245, 260–63 (1983).

¹⁶² See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 746–50.

¹⁶³ See Luis M.A. Bettencourt, *The Origins of Scaling in Cities*, 340 SCIENCE 1438, 1439 (2013) (finding that “the average number of local interactions” between people depends on how physically proximate they are).

¹⁶⁴ See Gertler, *supra* note 113, at 84 (noting that better quality information is provided more proximately).

¹⁶⁵ See H.R. 826; see also Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 740, 745.

¹⁶⁶ H.R. 826 § 2(b)(1) (emphasis added).

¹⁶⁷ *Id.* § 2(c)(1) (drawing the phrase’s definition from the U.S. Code).

¹⁶⁸ See Fontana, *supra* note 1, at 762, 786–87.

¹⁶⁹ See LIGHT, *supra* note 132, at 106.

¹⁷⁰ See *Federal Civilian Employment*, *supra* note 159 (noting that 15.12% of federal civil employees are in the Washington, DC-MD-VA-WV area).

¹⁷¹ See David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 NW. U. L. REV. 1993, 1997 (2009) (identifying the thousands of officials that Presidents must select to staff the executive branch); David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 35 (2012) (discussing the many lawyers in the executive branch who occupy positions partially shaped by the President’s preferences).

¹⁷² See, e.g., Fontana, *Executive Branch Legalisms*, *supra* note 171, at 42.

For both the heads of important parts of the executive branch and the many who work beneath them, the statute also has no sense of where to relocate these officials in order to help them work with more technical sophistication. It only mentions the goal to “maximize any potential cost savings associated with the relocation.”¹⁷³ If the goal is to maximize cost savings, then federal officials could be placed in locations without the labor supply to handle complicated governmental tasks. There are other metropolitan areas that have a deep bench of federal officials with governmental expertise, not just (or not even) issue expertise.¹⁷⁴ For instance, relocating the Secretary of Defense to Virginia Beach—a notable military town—would surround the Secretary with thousands of others who have some knowledge of the federal government.¹⁷⁵

Because of this, it is hard to evaluate the Drain the Swamp Act as anything other than an attempt to destroy existing federal officials. Requiring that hundreds of thousands of federal officials be forced to leave Washington within six years or lose their positions would result in thousands (or hundreds of thousands) of departures from the federal government.¹⁷⁶ Those with the most experience in the federal government—including those who would be heads of agencies or departments—will have the deepest personal and professional connections in Washington and therefore be the least likely to leave it.

B. Regulatory

While this statute never had a serious chance of being enacted, there were efforts within the executive branch that were actually implemented. The Trump administration relocated many officials from the Bureau of Land Management (BLM) in Washington to Grand Junction, Colorado.¹⁷⁷ BLM employs “10,000 [officials]—97 percent of whom are located in the western United States—[and] manage[s] a portfolio of public lands and resources encompassing more than 245 million surface acres, primarily located in 12 western states.”¹⁷⁸

¹⁷³ H.R. 826, 115th Cong. § 2(b)(2)(B) (2017).

¹⁷⁴ See Richard Florida, *America’s Federal Employment Belt*, BLOOMBERG: CITYLAB (Nov. 15, 2013, 8:00 AM), <https://www.bloomberg.com/news/articles/2013-11-15/america-s-federal-employment-belt> [<https://perma.cc/TG4B-B336>].

¹⁷⁵ See *id.*

¹⁷⁶ See, e.g., Nathalie Baptiste, *The Trump Administration Has Figured out How to Get Rid of Federal Workers Without Firing Them*, MOTHER JONES (Oct. 7, 2019), <https://www.motherjones.com/politics/2019/10/the-trump-administration-has-figured-out-how-to-get-rid-of-federal-workers-without-firing-them/> [<https://perma.cc/8YZ2-X2QM>]. After moving the USDA Economic Research Service to Kansas City, 78% of the employees at the ERS left the agency all together. *Id.*

¹⁷⁷ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-397R, BUREAU OF LAND MANAGEMENT: AGENCY’S REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS (2020), <https://www.gao.gov/assets/710/705175.pdf> [<https://perma.cc/2WQ9-J9YR>].

¹⁷⁸ *Id.*

BLM was an unusual target for decentralization. While roughly 85% of all federal officials are located outside of Washington,¹⁷⁹ 97% of BLM offices are located outside of Washington.¹⁸⁰ Some of the best information we have about the BLM relocation suggests that 311 career BLM officials were relocated outside of Washington and sixty remained in Washington.¹⁸¹ This means that less than 1% of BLM officials remain in Washington.¹⁸²

Of these 311 relocated outside of Washington, fifty-nine were deprived of their abilities to perform significant functions like they did in Washington.¹⁸³ That means 252 of them would still be performing significant duties akin to those that they were in Washington.¹⁸⁴ Of those 252 still performing significant responsibilities, thirty-nine would be in Grand Junction, while 213 would be in other state and field offices.¹⁸⁵ Functionally, this means that Washington remains as one of many headquarters, rather than Grand Junction replacing Washington as the only one.

There are potentially statutory¹⁸⁶ and/or constitutional difficulties¹⁸⁷ with placing the “headquarters” of higher-ranking offices outside of Washington. BLM is located within the Department of the Interior.¹⁸⁸ It is therefore unlikely to be considered to have its own headquarters in the way that phrase has usually been understood, thereby mitigating these constitutional and statutory concerns.¹⁸⁹

¹⁷⁹ See Carl Abbott, *Dimensions of Regional Change in Washington, D.C.*, 95 AM. HIST. REV. 1367, 1370 n.11 (1990).

¹⁸⁰ See Darryl Fears, *Trump’s Bid to Move Hundreds of Jobs from D.C., Possibly Separating Families, Was Based on Unsupported Assumptions, Report Says*, WASH. POST (Mar. 6, 2020, 5:32 PM), <https://www.washingtonpost.com/climate-environment/2020/03/06/trumps-bid-move-hundreds-jobs-dc-possibly-tearing-families-apart-was-based-unsupported-assumptions-report-says/> [<https://perma.cc/BK4R-TEMF>].

¹⁸¹ See *id.*

¹⁸² See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 177.

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, Pub. L. No. 1-28, 1 Stat. 130 (1790). This statute refers to “the permanent seat of the government” as being the District of Columbia. *Id.* § 1. It states that “all offices attached to the said seat of government . . . shall be removed” to the District, and their powers “shall . . . cease to be exercised elsewhere.” *Id.* § 6. Yet at the time that statute was enacted, there were already many important officials operating outside of the District. See Fontana, *supra* note 1, at 742–43.

¹⁸⁷ See U.S. CONST. art. I, § 8, cl. 17 (mentioning “such District . . . as may . . . become the Seat of the Government of the United States” (emphasis added)). Earlier objections to relocating federal officials outside of Washington were based on this constitutional clause. See Fontana, *supra* note 1, at 751. *But see* U.S. CONST., art. I, § 8, cl. 17 (mentioning officials outside of Washington by referring to “all Places [needed] . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings” (emphasis added)).

¹⁸⁸ See *Bureaus & Offices*, U.S. DEP’T INTERIOR, <https://www.doi.gov/bureaus> [<https://perma.cc/NGV7-R49K>] (last visited Mar. 15, 2021).

¹⁸⁹ See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 737–38. It is worth

BLM leaders placed in charge by the Trump administration identified only sixty officials in all of BLM who benefitted substantially from being in Washington.¹⁹⁰ There are certainly more officials than that benefitting from learning what other agencies and departments are doing related to public lands, learning what is politically possible to do from those on Capitol Hill and in the White House, learning what is desirable from think tanks, and learning about the private sector effects of this from lobbyists. It is worth noting that over two billion dollars were spent lobbying in some areas of environmental law between 2000 and 2016, most of it presumably spent in Washington.¹⁹¹

The means by which Washington officials were relocated suggest that the goal was not to mix their Washington expertise with subject-matter expertise, but simply to remove them from BLM altogether.¹⁹² BLM officials were given thirty days to decide whether to accept or reject their reassignment.¹⁹³ Unless they accepted the reassignment, they would be terminated.¹⁹⁴ Deciding whether to relocate one's entire personal and professional lives—particularly when those lives usually involve decades in Washington—takes more than thirty days. At first, in return for agreeing to relocate, officials were promised 25% of their base salaries and free temporary housing, but those offers were subsequently rescinded.¹⁹⁵ The result was that 87% of the affected individuals in BLM opted to resign or retire than relocate outside of Washington.¹⁹⁶

The cost of minimizing the influence of these officials is not matched by any of the benefits that federal decentralization can provide. There are major metropolitan areas in the Western United States that have public and private sectors with expertise

noting that the head of BLM is confirmed by the Senate, suggesting they are a “principal officer.” See U.S. CONST. art. II, § 2. There is an open constitutional question whether that is probative of BLM's status for location purposes.

¹⁹⁰ See *Headquarters Move West*, BUREAU LAND MGMT., <https://www.blm.gov/office/national-office/hq-move-west> [<https://perma.cc/8NZA-ZB5K>] (last visited Mar. 15, 2021) (noting “[a]bout 60 positions from programs with inherently DC-based responsibilities” would stay in Washington including those who worked on issues related to “legislative, regulatory and public affairs, budget, and Freedom of Information Act compliance”).

¹⁹¹ See Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 CLIMATIC CHANGE 289, 295 (2018).

¹⁹² The leading officials involved in this effort essentially confirmed this was the general impetus for reforms like this. See Guarino, *supra* note 149.

¹⁹³ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 177.

¹⁹⁴ *Id.*

¹⁹⁵ See Eric Katz, *Interior Threatens to Relocate Employees Without Incentive Payments If Congress Withholds Funding*, GOV'T EXEC. (Sept. 24, 2019), <https://www.govexec.com/workforce/2019/09/interior-threatens-relocate-employees-without-incentive-payments-if-congress-withholds-funding/160120/> [<https://perma.cc/HE9E-BB9B>].

¹⁹⁶ Juliet Eilperin, *Trump Officials Moved Most Bureau of Land Management Positions out of D.C. More Than 87 Percent Quit Instead.*, WASH. POST (Jan. 28, 2021, 6:24 PM), <https://www.washingtonpost.com/climate-environment/2021/01/28/trump-blm-reorganization/> [<https://perma.cc/83J4-CPKY>].

in public lands management, but Grand Junction does not appear to be one of them.¹⁹⁷ BLM was also already a part of the federal government with uniquely broad and deep ties to communities outside of Washington.¹⁹⁸ It did not just have offices outside of Washington, but twelve state offices, thirty-eight district offices, and 127 field offices.¹⁹⁹ Because only 3% of its officials were in Washington,²⁰⁰ it did not have a substantial presence in Washington at the top to ignore or overrule those located outside of Washington.

A second effort at decentralization that was destructive was the relocation of two different offices from the Department of Agriculture.²⁰¹ The Trump administration decided to relocate the Economic Research Service office (ERS) and the National Institute of Food and Agriculture (NIFA) within the Department of Agriculture to the Kansas City metropolitan area.²⁰²

Like the BLM relocation, these efforts seemed to be targeted at eliminating existing staff, rather than improving their performance or supplementing their performance with a different type of environment. On June 13, 2019, officials in ERS were told they had less than three months not only to agree to move to Kansas City, but to actually move there—or else these officials would lose their jobs.²⁰³ As one official put it, that meant she had “about two-and-a-half months to pull up [her] roots, get [her] spouse a job, get [her] kids in school.”²⁰⁴ While that deadline was eventually slightly extended,²⁰⁵ it did not matter. Only sixteen of the 181 officials that were told to relocate stayed with ERS.²⁰⁶

These officials seemed particularly suited for Washington work. These offices featured highly educated officials with substantial amounts of technical expertise in analyzing the policy effects of different federal actions.²⁰⁷ That is a clear specialty of

¹⁹⁷ See Jason Plautz, *Can Grand Junction Save Itself by Becoming the Next Home for the Bureau of Land Management*, PAC. STANDARD (July 11, 2019), <https://psmag.com/environment/can-grand-junction-save-itself-by-becoming-the-next-home-for-the-bureau-of-land-management> [<https://perma.cc/U3XB-UKAN>] (providing an overview of the economic and political situation in Grand Junction).

¹⁹⁸ See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 177.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Merrit Kennedy, *Scientists Desert USDA as Agency Relocates to Kansas City Area*, NPR (July 17, 2019, 6:35 AM), <https://www.npr.org/sections/thesalt/2019/07/17/742519999/future-of-key-farming-research-uncertain-as-2-3-of-usda-staff-say-they-wont-move> [<https://perma.cc/85JR-LKC9>].

²⁰² *See id.*

²⁰³ Baptiste, *supra* note 176.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See* Kennedy, *supra* note 201.

the labor market in Washington.²⁰⁸ Kansas City has no clear specialty in that domain that would make it a superior place in which to recruit and retain talented workers.²⁰⁹

These relocations provide no clear benefit from the perspective of democratic access. Instead of multiple new locations—like the BLM decentralization achieved—there is now just one metropolitan area (again) that has all of these officials.²¹⁰ And rather than improving the independence of these offices, the decentralizations had the opposite effect. One organization labeled these efforts a “back-door” attempt to eliminate these staff because of their disagreement with the Trump administration on many issues.²¹¹

C. Effects

In the shorter term, BLM, ERS, and NIFA will be substantially affected. Officials in those offices with decades of knowledge about how the federal government operates and how those offices operate within the federal government no longer work there.²¹² If a later presidential administration were to move these offices back to Washington, they would either have to terminate the new officials hired in Colorado and Missouri or secure funding to hire hundreds more officials so they could hire these old officials back. All of this is assuming, of course, that these officials want to return.

Over the medium- to longer-term, these efforts by the Trump administration unilaterally appropriated federal centralization by conservatives—or at least President Trump’s vision of conservatism. People inevitably evaluate messages by the messengers telling them about those messages.²¹³ There is no preexisting, broadly and strongly developed sense among the public of federal decentralization.²¹⁴ It is not a principle like judicial supremacy, which is featured in high school textbooks.²¹⁵ Draining the swamp was a highly salient message communicated by the President

²⁰⁸ See Fontana, *The Narrowing of Federal Power*, *supra* note 17, at 735.

²⁰⁹ See, e.g., *QuickFacts: Washington City, District of Columbia; Kansas City City [sic], Missouri*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/washingtoncitydistrictofcolumbia,kansascitycitymissouri/PST045219> [<https://perma.cc/EAZ8-PVTP>] (last visited Mar. 15, 2021) (noting that only 34% of people in Kansas City have a college degree or higher education, compared to 58% in Washington).

²¹⁰ See Kennedy, *supra* note 201.

²¹¹ *USDA’s Proposed Relocation of ERS, NIFA an Insult to World-Class Researchers*, INST. AGRIC. & TRADE POL’Y (May 3, 2019), <https://www.iatp.org/documents/usdas-proposed-relocation-ers-nifa-insult-world-class-researchers> [<https://perma.cc/7SJP-DY77>].

²¹² See generally Baptiste, *supra* note 176; Kennedy, *supra* note 201.

²¹³ See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 619–21 (2000).

²¹⁴ See Fontana, *supra* note 1, at 732–33, 736–37.

²¹⁵ See Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 982 (2009) (“Throughout our contemporary textbooks, a moderate form of judicial supremacy often masquerades as judicial review.”).

of the United States, affiliating a relatively unknown principle like federal decentralization with a relatively widely known figure like Trump.²¹⁶

Placing federal officials outside of Washington has a long and distinguished history across both parties.²¹⁷ The principle has been used by significant figures in the Democratic Party in earlier periods of history.²¹⁸ Democratic President Franklin Delano Roosevelt relocated 10,000 federal officials outside of Washington to other cities.²¹⁹ A Democratic President that wants a Department of Labor more sympathetic to organized labor might find the active labor community of Los Angeles a more sympathetic home for a progressive labor agenda than Washington.²²⁰ New York has been a leader in regulating climate change, so maybe Albany or New York City would be a sympathetic home for an Environmental Protection Agency to combat climate change in a Democratic administration.²²¹

However, because federal decentralization is now so strongly associated with the Trump administration, it increases the difficulties for a Democratic President to pursue it. It is common for administrations to make constitutional arguments that were opposed by their party—or themselves—in the previous administration.²²² It is just harder to do so if the previous President made provocative and public arguments utilizing this principle. The Obama administration moved significant operations from the Department of Defense to Silicon Valley.²²³ If the next Democratic administration tries to do something like that, will opponents of such actions parody them by saying they are trying to drain the swamp?

The Trump administration's efforts at federal decentralization not only unilaterally appropriated the idea, but also delegitimized it because of its crazed invocations of it. The rhetoric of "Drain the Swamp" is the provocative frame by which people were first informed of the idea.²²⁴ The idea of relocating ninety percent of federal

²¹⁶ See Vogel & Lipton, *supra* note 153.

²¹⁷ See Fontana, *supra* note 1, at 745–57 (discussing the constitutional history of this idea).

²¹⁸ See *id.* at 749–52.

²¹⁹ See *President Shifts 10,000 Employees [sic] out of Washington*, N.Y. TIMES (Dec. 20, 1941), <https://www.nytimes.com/1941/12/20/archives/president-shifts-10000-employees-out-of-washington-dozen-bureaus.html> [<https://perma.cc/2UAS-QW83>].

²²⁰ See Scott L. Cummings, *Litigation at Work: Defining Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1625 (2011); Curtis J. Simon & Clark Nardinelli, *Human Capital and the Rise of American Cities, 1900–1990*, 32 REG'L SCI. & URB. ECON. 59, 61 (2002).

²²¹ See David Roberts, *New York Just Passed the Most Ambitious Climate Target in the Country*, VOX, <https://www.vox.com/energy-and-environment/2019/6/20/18691058/new-york-green-new-deal-climate-change-cuomo> [<https://perma.cc/DG7C-3MT6>] (July 22, 2019, 8:56 AM).

²²² See Posner & Sunstein, *supra* note 51, at 485.

²²³ See Ash Carter, U.S. Sec'y of Def., Drell Lecture: "Rewiring the Pentagon: Charting a New Path on Innovation and Cybersecurity" (Apr. 23, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/606666/drell-lecturerewiring-the-pentagon-charting-a-new-path-on-innovation-and-cyber/> [<https://perma.cc/3MUY-NRZS>].

²²⁴ See Vogel & Lipton, *supra* note 153.

officials within six years is the provocative examples of what it would look like in practice.²²⁵ The very nature of this principle, then, is thought to be “off the wall”²²⁶ because of the context in which people come to learn of the principle.

The assumption that the Trump administration was engaged in destructive federal decentralization elicited a strongly partisan reaction by Democrats in Congress. Representatives Ro Khanna (D-CA) and Tim Ryan (D-OH) had earlier in the administration indicated support for placing more important federal officials outside of Washington.²²⁷ Once the Trump administration and its supporters started to act, a very different Democratic Party response was generated. During hearings in the House on the Drain the Swamp Act, Representative Gerald Connolly (D-VA) made the unreasonable claim that the primary reason to decentralize federal officials was to move them closer to cows.²²⁸

CONCLUSION

Even old constitutional ideas can have new meanings when new political figures leverage these ideas for their own purposes. Federalism has been publicly affiliated with the Republican Party for more than half a century, but federal decentralization has been affiliated with neither party for even longer.²²⁹ It was a principle crucial to understanding the Constitution, but little discussed by those leading the country. That has all changed because of what has happened with three relatively obscure offices within the executive branch.²³⁰ BLM, ERS, and NIFA are not acronyms that

²²⁵ See Benjamin Wofford, *Inside the Radical, Self-Destructive, and Probably Impossible Plan to Move the Government out of Washington*, WASHINGTONIAN (July 16, 2017), <https://www.washingtonian.com/2017/07/16/radical-probably-impossible-plan-move-government-out-washington/> [https://perma.cc/N2QP-LMQL].

²²⁶ See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005).

²²⁷ See Annie Lowrey, *Ro Khanna Wants to Give Working-Class Households \$1 Trillion*, ATLANTIC (Apr. 28, 2017), <https://www.theatlantic.com/business/archive/2017/04/ro-khanna-trillion-dollar-plan/524754/> [https://perma.cc/M6HA-2BZZ]; Press Release, Congressman Timothy Ryan (D-OH), Congressman Tim Ryan Introduces Legislation to Decentralize the Federal Government (Apr. 20, 2017), <https://timryan.house.gov/press-release/congressman-tim-ryan-introduces-legislation-decentralize-federal-government> [https://perma.cc/SJ7M-BVBL].

²²⁸ See Jenna Portnoy, *Drain the Swamp? No, Let's Just Move It, Rep. Chaffetz Suggests*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/local/dc-politics/drain-the-swamp-no-lets-just-move-it-rep-chaffetz-suggests/2017/03/08/384938ba-0426-11e7-ad5b-d22680e18d10_story.html [https://perma.cc/L4AF-9T8A].

²²⁹ See Fontana, *supra* note 1, at 745–57.

²³⁰ See Liz Crampton, *Inspector General: USDA May Have Broken Laws in Moving ERS, NIFA*, POLITICO (Aug. 5, 2019, 7:18 PM), <https://www.politico.com/story/2019/08/05/inspector-general-usda-may-have-broken-law-in-moving-ers-nifa-1636046> [https://perma.cc/XQ8K-ZYPA]; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 177.

have featured in constitutional conversations, but now they will be.²³¹ The Trump administration will be known for using the offices with these acronyms to decentralize federal officials outside of Washington, and for owning federal decentralization as a result. And our government—and our constitutional principles—are the worse for it.

²³¹ See Crampton, *supra* note 230; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 177.