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## **Alienation and Reconciliation in Social-Ecological Systems**

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# ALIENATION AND RECONCILIATION IN SOCIAL-ECOLOGICAL SYSTEMS

BY

ANN M. EISENBERG\*

*After rancher Ammon Bundy's forceful occupation of the Malheur National Wildlife Refuge to protest federal "tyranny" in 2016, mainstream commentary dismissed Bundy and his supporters as crackpots. But the dismissal of the occupation as errant overlooked this event's significance. This conflict: 1) involved a clash over scarce natural resources, of the type that will likely gain more frequency and intensity in the face of climate change; and 2) highlighted the popular idea that the federal government and federal environmental regulations are the enemy of the (white, rural, male) worker. This thread of anti-environmental, anti-federal alienation among many working people has been given light consideration in climate scholarship and policy. Yet, this alienation goes beyond Bundy. Altogether, these are social issues within social-ecological systems (SESs) of various scales, which the law must evolve to address.*

*Using the Malheur occupation as a focal point, I suggest that adaptive governance, also known as adaptive comanagement, is not only appropriate for operationalizing resilience theory in SES regulation, but is also likely a pathway to steer climate governance more toward reconciliation over alienation, reducing the risks conflicts pose to effective outcomes. Scholars have recognized that a shift from environmental advocacy's traditional focus on adversarial approaches is necessary in the face of climate change, but few have focused specifically on how to achieve this shift. Two anti-federal, anti-environmental social movements—the Land Transfer Movement and the War on Coal Campaign—illustrate the impediment this particular form of alienation within SESs has posed to effective climate governance, while also highlighting the longstanding and inhibiting rift between labor and environmental interests.*

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\* Assistant Professor, University of South Carolina School of Law. The following people have my gratitude for their thoughtful comments on earlier drafts of this Article: Loka Ashwood, Robin Kundis Craig, Laura Griffin, Patrick McGinley, Lisa Pruitt, Jesse Richardson, J.B. Ruhl, Steven Selin, participants in the Sixth Annual Southern Clinical Conference Work-in-Progress Workshop at Charlotte School of Law, especially my discussant, Jason Huber, and classmates in Dr. Selin's spring 2016 course at West Virginia University, Human Dimensions of Natural Resource Management. All errors are my own.

*I examine one case study, the Malheur Comprehensive Conservation Plan planning process, as an illustration of adaptive governance successfully reconciling ranchers, environmentalists, tribes, and several agencies—mitigating anti-federal and anti-environmental alienation and the work–environment rift, to the benefit of federal SES climate adaptation mechanisms (and showing that Malheur was an ironic choice for Bundy’s protest). By contrast, a second case study, the administrative rulemaking process that created the federal Clean Power Plan, illustrates how process can fuel alienation and undermine the substance of federal climate policy. Adaptive governance receives more consideration for public lands and adaptation issues than for climate mitigation, but there is potential in the climate mitigation context for the United States Environmental Protection Agency to apply some of the adaptive governance and reconciliation principles illustrated at Malheur.*

*The research for this Article began prior to the 2016 presidential election and will be published in the weeks following the 2017 inauguration. Although the relevance of much of environmental law scholarship may have been called into question in the new political landscape, this discussion now seems more important than ever in light of the country’s ongoing political and cultural divides that continue to stymie efforts to address climate change.*

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## I. INTRODUCTION

When Ammon Bundy forcefully occupied the Malheur National Wildlife Refuge in Harney County, Oregon, in early 2016, he purported to protest federal “tyranny” and defend the trampled rights of ranchers.<sup>1</sup> The public commentary surrounding the occupation was dismissive; many characterized the occupiers as interlopers or crackpots.<sup>2</sup> However, the dismissal of the occupation as an errant act overlooked its significance.

First, the event highlighted a potent thread of anti-federal, anti-environmental sentiment among some white, working-class residents of rural areas. Indeed, both the occupation and the dismissive public discourse illustrated critical aspects of a deep, urban–rural cultural divide: the urban-rooted notion of wildlife as a place of purity to be set aside, the rural-rooted notion of land as a source of economic activity, and a sense of anti-urbanism that has been powerfully germinating in rural areas.<sup>3</sup> While Ammon Bundy and his father, Cliven—who had his own standoff with federal agents over grazing rights—are considered terrorists or extremists by many, they are folk heroes to many others.<sup>4</sup> The Bundys thus represent the idea that federal

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<sup>1</sup> Hal Bernton, *The Story Behind the Malheur National Wildlife Refuge, Ranchers and Armed Anti-Government Protestors*, SEATTLE TIMES (Jan. 9, 2016), <https://perma.cc/W3QZ-KEG6>; *Faces of the Malheur Occupation: Meet the Militants and Their Visitors*, OREGONIAN (Jan. 22, 2016) [hereinafter *Faces of the Malheur Occupation*], <https://perma.cc/QLA6-2VD2>; Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers’ Prison Terms*, N.Y. TIMES, Jan. 3, 2016, at A13.

<sup>2</sup> *E.g.*, Bill Chappell, *Oregon Occupier Countersues for \$666 Billion, Citing ‘Works Of The Devil’*, NAT’L PUB. RADIO: TWO-WAY (Feb. 18, 2016), <https://perma.cc/YDX9-CPHJ>; Timothy Egan, Opinion, *Crackpots in Cowboy Hats, and in Congress*, N.Y. TIMES (Jan. 8, 2016), <https://perma.cc/AK34-JZ6E>; Hal Herring, *Can We Make Sense of the Malheur Mess?*, HIGH COUNTRY NEWS (Feb. 12, 2016), <https://perma.cc/CT7D-QT9F>; Janell Ross, *Why Aren’t We Calling the Oregon Occupiers ‘Terrorists’?*, WASH. POST: THE FIX (Jan. 3, 2016), <https://perma.cc/323R-DBTQ>; Alan Pyke, *The Crackpot Alternative Legal System that Threatens to Escalate the Oregon Standoff*, THINKPROGRESS (Jan. 15, 2016), <https://perma.cc/7KWE-LCCD>; *see also* Sam Levin, *Oregon Militia Standoff: The 23 Men and Two Women Facing Felony Charges*, GUARDIAN (London) (Feb. 15, 2016), <https://perma.cc/JYL8-PTWK> (pointing out that, of the twenty-five occupants, only three were residents of Oregon).

<sup>3</sup> Lisa R. Pruitt & Linda T. Sobczynski, *Protecting People, Protecting Places: What Environmental Litigation Conceals and Reveals about Rurality*, 47 J. RURAL STUD. 326, 330–31 (2016).

<sup>4</sup> *See, e.g.*, Press Release, Ctr. for Biological Diversity, “Bundy Militia” Pocket Constitution Tops Amazon Charts Amidst Trump-Khan Feud: NCCS Constitution Cloaked in Recruitment Materials for Sagebrush Rebel Movement Steeped in Racism, Anti-Federal Domestic Terrorism (Aug. 4, 2016), <https://perma.cc/L9QJ-Q3UA> (discussing popularity of particular version of pocket constitution brandished by Malheur occupiers). The Bundy Ranch has almost than 200,000 followers on Facebook. Bundy Ranch, FACEBOOK, <https://perma.cc/WWSS-D8J7> (last visited Feb. 25, 2017). National elected officials have also expressed support for the family. Jack Jenkins, *As The Bundy Brothers Occupy A Federal Building, Here Are The GOP Candidates Who Supported Their Dad*, THINKPROGRESS (Jan. 3, 2016), <https://perma.cc/UY3R-GS3Q> (listing then Presidential-candidate Donald J. Trump, Senators Rand Paul (R-Ky.) and Ted Cruz (R-Tex.), and others); *see also* Joel Dyer, Opinion, *The New Era of Conspiracy Thinking: Why People Die When We Talk About Gun Control*, BOULDER WKLY. (Feb. 7, 2013), <https://perma.cc/CE3Z-YNPK> (discussing how the antigovernment movement involves

natural resources law is an illegitimate encroachment on the rights and way of life of rural, blue-collar (mostly white, male) workers.<sup>5</sup>

Second, the occupation needs to be contextualized as a violent conflict over scarce natural resources resulting in a human casualty, in addition to economic, ecological, and cultural losses.<sup>6</sup> We should therefore consider it through the lens of climate change. Namely, a group of angry ranchers occupying a wildlife refuge and demanding use of its resources is precisely what a conflict over natural resources will look like in the era of climate change. Although there is a long history of western “wrangling” over natural resources and public lands ownership,<sup>7</sup> most notably manifested in the so-

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frustration over issues such as unemployment and farm failures that “funnel” into violent radicalism and a perceived war with the government).

<sup>5</sup> See Carol M. Rose, Response, *Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case?*, 104 Geo. L.J. Online 95, 95–96 (2015) (“In the spring of 2014, rancher Cliven Bundy, together with a group of self-appointed armed ‘militiamen,’ placed himself in a standoff with the federal Bureau of Land Management (BLM) in southern Nevada. The BLM insisted that Bundy owed over \$1 million in delinquent and current fees for grazing his livestock on federally owned land, but Bundy insisted that grazing on this land should be costless to him and refused to pay. Bundy’s group effectively chased off the federal officials and, in doing so, garnered considerable conservative media support—at least until Bundy himself made some extemporaneous and intemperate remarks about the state’s African-American population. Not surprisingly, his reference to alleged welfare freeloading invited comparison to his own considerable outstanding bill for the use of federal property.” (footnote omitted)); see also *id.* at 111 (“Sagebrush westerners sniff something like the odor of a royal domain in the special status of the federal public lands, a domain controlled by dictatorial bureaucrats who hold their region in a subordinate status.”). See generally Jaime Fuller, *The Long Fight Between the Bundys and the Federal Government, From 1989 to Today*, WASH. POST: THE FIX (Jan. 4, 2016), <https://perma.cc/P49D-WVX9> (giving a timeline of the Bundys’ relationship with the federal government); Tay Wiles, *New Data Released on Violent Threats to Federal Employees*, HIGH COUNTRY NEWS (June 29, 2015), <https://perma.cc/CBL2-24Y4> (discussing connections between the Bundys’ antigovernment conduct and longstanding regional history of violence toward federal public lands officers). In prosecution pending as of this writing, Cliven is charged with conspiracy to commit an offense against the United States, 18 U.S.C. § 371 (2012), and assault on a federal law enforcement officer, *id.* § 111(a)(1)(b), along with many other charges. See Superseding Criminal Indictment at 37–53, *United States v. Bundy*, No. 2:16-cr-00046-GMN-PAL (D. Nev. Mar. 2, 2016), ECF No. 27.

<sup>6</sup> Economic losses were estimated at \$6 million. Diantha Parker, *A Mess Left by Occupiers at the Malheur Wildlife Refuge in Oregon*, N.Y. TIMES (Mar. 25, 2016), <https://perma.cc/F6YQ-6SAC>.

<sup>7</sup> Hillary Hoffmann, *Demand Management, Climate Change, and the Livestock Grazing Crisis in the Great Basin*, GEO. WASH. J. ENERGY & ENVTL. L., Winter 2016, at 14, 15; Donald J. Kochan, *Public Lands and the Federal Government’s Compact-Based “Duty to Dispose”*. A Case Study of Utah’s H.B. 148—The Transfer of Public Lands Act, 2013 BYU L. REV. 1133, 1336 (2013); see also Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982) (“Land use fights are an old tradition in the West, and it is tempting to regard the Sagebrush Rebellion as nothing more than another episode in a long history of conflict. But it would be a mistake to dismiss the Rebellion as a regional curiosity. Behind the simple proposal of the sagebrush rebels lie complex intergovernmental issues relating to ownership and management of the West’s natural resources. While the rebels’ motives are suspect, the movement has been fueled by genuine uneasiness and increasing conflict between the states and the federal government over management of the public domain. . . . As the open spaces disappear, competition for energy

called Sagebrush Rebellion,<sup>8</sup> one should anticipate that these tensions will worsen with the increased stresses of climate change.

This thread of anti-federal, anti-environmental sentiment among white, rural, working people and its relevance to managing scarce natural resources has been given light consideration in climate law and policy scholarship.<sup>9</sup> However, it has been a meaningful obstacle to a more unified and effective national approach to climate change. It is a social element in the national social-ecological system (SES)—a thorny, people-centric issue closely linked to land use. It is also an issue that land use regulations have traditionally treated as outside their purview, but which the law must evolve to account for as a “factor[] in the law-and-society system that threaten[s] dynamical system sustainability,” as well as the rule of law.<sup>10</sup>

Using the Malheur occupation as a focal point, this Article examines two anti-federal, anti-environmental social movements, to the extent those movements have involved populist sentiments expressed by working residents of mostly rural areas: 1) the movement to transfer public lands in the west to the states (the “Land Transfer Movement”) and 2) the movement to counteract regulation of the coal industry (“the War on Coal Campaign”). While these movements tend to be treated as distinct, their commonalities illustrate how the alienation of interest here is a phenomenon of national scale. This analysis sets aside for now the heavy involvement of political and industry actors in these movements, with the reasoning that addressing a broken political system is a different conversation than one focused on rural alienation, labor, and land use. The specific objectives of this inquiry are threefold: 1) to better understand this segment of society that environmentalism appears to have left behind and the related alienation manifested in these movements; 2) to better understand how these movements and related themes may impede formulation and implementation of effective federal climate policy; and 3) to consider how federal climate law and policy and effective SES management can address

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resources intensifies, and water resources dry up, the problems caused by our focused land management structure will become more acute.”)

<sup>8</sup> See generally GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 72–73 (7th ed. 2014).

<sup>9</sup> Carol Rose has touched upon this issue in a discussion of Cliven Bundy’s 2014 standoff. Rose, *supra* note 5, at 111. Michelle Bryan also argues that avenues for local input in federal lands management would mitigate local outrage and calls for a federal land transfer. Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers*, 76 MONT. L. REV. 147, 148 (2015).

<sup>10</sup> J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 860 (1996); see also Hoffmann, *supra* note 7, at 15, 27 (“[F]or decades, [] the rule of law had absolutely no impact on [Cliven] Bundy’s actions . . . Bundy prevailed over the federal government and the rule of law. And he is not alone.”); cf. Carl T. Bogus, *Heller and Insurrectionism*, 59 SYRACUSE L. REV. 253, 265 (2008) (criticizing the Supreme Court of the United States for ignoring insurrectionism); Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 78–95 (1986) (arguing that ethical and economic approaches to combatting pollution must be reconciled in order to achieve environmental goals).

this and comparable forms of alienation, and even funnel it into productive pathways.

The Article proceeds as follows. Part II reviews the current literature on climate governance and the evolving understanding of how law can accommodate SESs. After establishing some definitions in Part III.A, Part III.B turns to a substantial social tension that has always overshadowed environmental regulation: the longstanding rift between labor- or work-related advocacy and environmental advocacy, and the common perception that environmental regulation is the enemy of (certain) workers' well-being. Part III.C discusses the two social movements noted above, using the Great Basin and central Appalachia as regions to illustrate some of the movements' characteristics. This Part notes three important parallels between the movements, in addition to the work-environment rift: 1) the historical absenteeism of the federal government in the regions where these movements see support; 2) the rural cultural and economic underpinnings of both movements; and 3) the lack of autonomous land use decision making in both regions. The discussion addresses these issues' significance to climate governance and SESs. Part III.D then considers the curative potential of collaborative decision making for the work-environment rift.

Parts IV and V argue that adaptive governance, also known as adaptive comanagement, and its embrace of procedures to secure stakeholder buy-in are on the right path toward remedying these issues. Part IV presents a case study as a success story and Part V presents a case study as a cautionary tale, while observing the relevance of certain land use planning principles to both scenarios. Part IV revisits the Malheur refuge and examines the comprehensive conservation planning process executed at Malheur pursuant to the National Wildlife Refuge System Improvement Act of 1997,<sup>11</sup> concluding that Malheur as an SES in fact has lessons to offer as a case study in adaptive governance and reflexive law. This success is perhaps unsurprising, since the Malheur scenario matches well with Robin Kundis Craig and J.B. Ruhl's summation of conditions conducive to successful adaptive management.<sup>12</sup> However, the process also appeared to mitigate anti-environmental, anti-federal sentiment in one comprehensive initiative, while also mending a localized work-environment rift. Malheur stands out in its illustration of the unique sociocultural benefits of successful execution of adaptive governance.

Part V then contrasts the Malheur study with the plight of the hotly contested Clean Power Plan (CPP) promulgated by the United States Environmental Protection Agency (EPA) and considers whether the more elusive aims of federal climate mitigation could be informed by the principles illustrated at Malheur. This Part suggests that the process used to

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<sup>11</sup> Pub. L. No. 105-57, 111 Stat. 1252 (codified as amended at 16 U.S.C. §§ 668dd-668ee (2012)). The 1997 Improvement Act amended the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (2012), which provided guidelines and directives for the administration and management of the national refuge system.

<sup>12</sup> Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 18 (2014).

create the CPP did little to address the populist, cultural issues catalyzing movements like the War on Coal Campaign, but more likely exacerbated them. To better address the social issues discussed throughout this Article, administrative rulemaking would need to be reconsidered or restructured as the main avenue for pursuing climate mitigation. Although considered more rarely than in the public-lands adaptation context, there is potential in the climate mitigation context for EPA to apply some of the adaptive governance and reconciliation principles illustrated at Malheur.

This Article contributes to the body of scholarship seeking to synthesize climate theory—including Resilience, New Governance, Dynamic Federalism, Transgovernmental Networks, Adaptive Management, and Adaptive Governance frameworks—while also identifying and assessing specific law and policy mechanisms that can best achieve those theoretical aims. Scholars have also recognized that a shift from environmental advocacy’s traditional focus on adversarial approaches is necessary in the face of climate change, but few have focused specifically on how to achieve this shift.<sup>13</sup> The Article has two goals in addition to adding to this dialogue: 1) to bring pressing social issues closer to the center of a discussion that has tended to skew more towards the ecological;<sup>14</sup> and 2) to embrace and contribute to a philosophical evolution that appears increasingly embedded in climate commentators’ outlooks. This shift reflects an attitude of searching for opportunity in crisis;<sup>15</sup> seeking to reconcile opposites and dissolve artificial conceptual divides;<sup>16</sup> and acknowledging that

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<sup>13</sup> See, e.g., J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 432–33 (2010) [hereinafter Ruhl, *Climate Change Adaptation*] (“Climate change adaptation thus presents an opportunity for environmental law to break free from its culture of litigation and contestation and build back what that culture has eroded most—trust. Trust generally does not come about through threats to sue. . . . But environmental law has a choice to make and the luxury of making it early in the formulation of climate change adaptation policy—is it going to be about conflict or conciliation?”); *id.* at 431–32 (discussing “threats to sue” as the environmental movement’s approach to disputes and also stating: “Environmental law is not omnipotent, though one would not gather so from the rhetoric of environmental law on climate change mitigation policy.”).

<sup>14</sup> Compare Vicky J. Meretsky et al., *Migration and Conservation: Frameworks, Gaps, and Synergies in Science, Law, and Management*, 41 ENVTL. L. 447, 454 (2011) (noting examples of how human actions increase species mortality), with Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575, 603–05 (2016) (discussing how environmental racism results from racial violence), and Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL’Y F. 23, 23–24, 64–66 (2012) (discussing how harms from natural disasters fall heaviest on those with the least power).

<sup>15</sup> E.g., Neal Donahue et al., *How to Transform Climate Change from Crisis to Opportunity*, DEVEX, (Nov. 30, 2015), <https://perma.cc/UGB9-9M77> (discussing ways in which agricultural practices have addressed crises).

<sup>16</sup> Cf. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000) (arguing that in administrative law, “[t]here is no purely private realm and no purely public one[—only a] set of negotiated relationships between public and private actors”); Alison Peck, *Sustainable Development and the Reconciliation of Opposites*, 57 ST. LOUIS U. L.J. 151, 182–83 (2012) (arguing that embracing anti-rationalist traditions such as Taoism could help reconceptualize seemingly irreconcilable tensions inherent in sustainable development theory); Nancy Perkins Spyke, *The Land Use - Environmental Law Distinction: A Geo-Feminist Critique*,



considerations of the ends of climate policy (i.e., mitigation and adaptation) cannot somehow be treated separately from the means of climate governance (i.e., process).<sup>17</sup> Drawing on these themes, this analysis of an under-discussed demographic and of the Malheur and CPP case studies provides a unique angle in the picture of effective, climate-era SES management.

## II. CLIMATE THEORY VERSUS CLIMATE LAW AND POLICY

Climate theory and practice have both evolved over the past several decades, although the former more swiftly than the latter.<sup>18</sup> Scholars and practitioners tend to conceptualize approaches to climate change under two discrete categories: mitigation and adaptation. Mitigation involves initiatives to reduce greenhouse gas emissions in the hopes of reducing the effects of climate change.<sup>19</sup> Corporate Average Fuel Economy Standards for vehicles, for instance, are recognized as serving mitigation aims.<sup>20</sup> Adaptation involves responses to either anticipated or actual changes in the environment with the aim of reducing harms borne from those changes.<sup>21</sup> For instance, many coastal communities are already adjusting their infrastructure in response to

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13 DUKE ENVTL. L. & POL'Y F. 55 (2002) (criticizing the land use–environmental law distinction as “an outgrowth of the male-female dualism that plagues western thought”); Christopher M. Kimrey, *Learning to See the Opportunities in Crisis and Catastrophe: A Decisions Maker's Guide to the Issue-Attention Cycle* 85–86 (Sept. 2015) (unpublished MA thesis, Naval Graduate School, Monterey, California), <https://perma.cc/33DM-WDGZ> (advocating “building a comprehensive landscape of . . . dissimilar crises” to determine the appropriate resilience for dealing with crisis, rather than simply relying on a legislation’s reactive decision making or a department’s prospective decision making). To resolve artificial divides, this Article takes a tone that may strike some as unusual. It gives the benefit of the doubt, or at least declines to condemn actors who we might normally be inclined to characterize as the root of the problem. The actions of Ammon and Cliven Bundy are, of course, condemnable. However, this Article’s aim is not to examine human culpability. It assumes instead, in what may or may not be an artificial mental exercise, that failures in the law alone are responsible for conflicts and alienation. Cf. Robert Pondiscio, Opinion, *The Miseducation of Donald Trump Voters*, U.S. NEWS (Dec. 31, 2015), <https://perma.cc/YFK3-W754> (“[W]e largely overlooked a crisis that’s been hiding in plain sight for years . . . Trump supporters ‘were produced in the first instance by the failure of the larger society to give them the skills they need to compete in the greatly changed global economy.’ That’s one’s on us.” (quoting Marc Tucker, *Donald Trump, Education Policy and the Future of American Politics*, HUFFINGTON POST (Dec. 22, 2015), <https://perma.cc/852X-5KLB>)).

<sup>17</sup> Sagoff, *supra* note 10, at 24, 95 (urging joint consideration of the intended goals and means available when formulating, interpreting, and enforcing environmental law, so that ideals do not interfere with the potential to better protect the environment).

<sup>18</sup> Craig & Ruhl, *supra* note 12, at 37 (“[W]hile ecologists rejected an equilibrium paradigm for ecosystems decades ago, environmental law has not caught up.”).

<sup>19</sup> *Climate Change Mitigation*, U.N. ENV’T PROGRAMME, <https://perma.cc/8HMC-7GZU> (last visited Feb. 25, 2017).

<sup>20</sup> *Corporate Average Fuel Economy (CAFE) Standards*, U.S. DEP’T OF TRANSP., <https://perma.cc/E6LM-XLW3> (last visited Feb. 25, 2017).

<sup>21</sup> *Adapting to Climate Change*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/L7TT-XJ37> (last visited Feb. 25, 2017).

rising sea levels.<sup>22</sup> Some scholars have rejected a fully binary distinction between the two approaches.<sup>23</sup> This is in part because global society has passed the point of no return for mitigating all of the effects of climate change.<sup>24</sup> It might have been assumed in previous eras that enough mitigation would preclude the need for adaptation. Now, however, some combination of mitigation and adaptation is necessary.<sup>25</sup>

Over the past several decades, sustainability theory has gained traction as the philosophy on how to achieve these climate governance goals.<sup>26</sup> More recently, resilience theory has emerged as a counter-framework.<sup>27</sup> Sustainability's main weakness, many assert, is that it presupposes stationarity in systems that are actually fluctuating and uncertain.<sup>28</sup> Sustainability has also been criticized for sanctioning current practices of resource consumption.<sup>29</sup> Resilience theory, on the other hand, recognizes that SESs are complex, i.e., innately interdependent.<sup>30</sup> The concept of an SES simply signifies the phenomenon that the ecological and the human spheres do not exist in isolation.<sup>31</sup> Resilience denotes "the capacity of a [complex] system to experience shocks while retaining essentially the same function, structure, feedbacks, and therefore identity."<sup>32</sup> The complexity paradigm is now accepted throughout environmental and natural resources law scholarship.<sup>33</sup> A consensus with similar themes appears to have emerged in

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<sup>22</sup> A. Dan. Tarlock & Deborah M. Chizewer, *Living with Water in a Climate-Changed World: Will Federal Policy Sink or Swim?*, 46 ENVTL. L. 491, 523–25 (2016) (discussing the efforts of New York City and Miami-Dade County to address rising sea levels).

<sup>23</sup> *E.g.*, James E. Parker-Flynn, *The Intersection of Mitigation and Adaptation in Climate Law and Policy*, 38 ENVIRONS ENVTL. L. & POL'Y J. 1, 26 (2014) (seeing mitigation and adaptation as "so closely connected" and "often interdependent," that the author urges "view[ing] mitigation and adaptation through a singular lens to find the interactions between the two").

<sup>24</sup> *Id.* at 3; Eric Holthaus, *The Point of No Return: Climate Change Nightmares are Already Here*, ROLLING STONE (Aug. 5, 2015), <https://perma.cc/878Z-NBT4>.

<sup>25</sup> *See* Parker-Flynn, *supra* note 23, at 46.

<sup>26</sup> *E.g.*, John C. Dembach, *National Governance: Still Stumbling Toward Sustainability*, 39 ENVTL. L. REP. (Envtl. L. Inst.) 10,321, 10,325–26 (Apr. 2009); John C. Dembach & Federico Cheever, *Sustainable Development and Its Discontents*, 4 TRANSNATIONAL ENVTL. L. 247, 286–87 (2015).

<sup>27</sup> Dembach & Cheever, *supra* note 26, at 279–86; Robin Kundis Craig & Melinda Harm Benson, *Replacing Sustainability*, 46 AKRON L. REV. 841, 853–54 (2013).

<sup>28</sup> Robin Kundis Craig, "Stationarity Is Dead" — *Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 15–16 (2010).

<sup>29</sup> Robin Kundis Craig & Melinda Harm Benson, *Replacing Sustainability*, 46 AKRON L. REV. 841, 853–54 (2013).

<sup>30</sup> Tracy-Lynn Humby, *Law and Resilience: Mapping the Literature*, 4 SEATTLE J. ENVTL. L. 85, 91 (2014).

<sup>31</sup> *Id.*

<sup>32</sup> J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems—with Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1376 (2011) [hereinafter Ruhl, *General Design Principles*] (quoting Brian Walker et al., *A Handful of Heuristics and Some Propositions for Understanding Resilience in Social-Ecological Systems*, 11 ECOLOGY & SOC'Y, no. 2, 2006, art. 13, at 2).

<sup>33</sup> Robin Kundis Craig, *Learning to Think About Complex Environmental Systems in Environmental and Natural Resource Law and Legal Scholarship: A Twenty-Year Retrospective*, 24 FORDHAM ENVTL. L. REV. 87, 100–01 (2013) [hereinafter Craig, *Learning to Think*] (arguing that

energy scholarship, calling for an integrative approach to climate policy that reconciles the physical and the societal with joint considerations of energy security, energy independence, and a “green economy.”<sup>34</sup>

But what is the mechanism for “operationalizing resilience”?<sup>35</sup> Several frameworks have gained traction in recent years. New governance, dynamic federalism, transgovernmental networks, and adaptive management are among the most discussed. New governance theory denotes a turn

‘away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving’ governance. The central organizing principles of new governance theory are stakeholder participation, collaboration among interests, diversity of and competition between instruments, decentralization of governance structures, integration of policy domains, flexibility, and an emphasis on noncoerciveness and adaptation.<sup>36</sup>

Dynamic federalism and transgovernmental networks theory similarly emphasize a blurring of traditional jurisdictional and organizational lines.<sup>37</sup> Nonhierarchical interactions and overlapping authority among local, state, and federal governments, they reason, promote information exchange and harmonization of best practices.<sup>38</sup> As relationships evolve over time, “the overlapping structure of authorities becomes less a mangle and more an organism.”<sup>39</sup>

Adaptive management offers a more concrete and readily useable approach to natural resource management. The popular concept evolved from ecologists’ views of how to manage complex nonlinear systems.<sup>40</sup> Its hallmark characteristic is “learning while doing”—embracing iterative decision-making processes in place of rigid front-end decision making.<sup>41</sup> “Adaptive management theory treats almost all governmental interactions as experiments, from which we can continuously learn what works and what

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we are “probably” to the point “where the complexity of ecosystems and socio-ecological systems is accepted as a given by environmental and natural resources law scholars”).

<sup>34</sup> E.g., Victor B. Flatt & Heather Payne, *Not One Without the Other: The Challenge of Integrating U.S. Environment, Energy, Climate, and Economic Policy*, 44 ENVTL. L. 1079, 1086–88 (2014).

<sup>35</sup> Hannah E. Birge et al., *Social-Ecological Resilience and Law in the Platte River Basin*, 51 IDAHO L. REV. 229, 250, 252–54 (2014) (“[P]olicy must become ‘cross-scale, interdisciplinary, and dynamic.’”) (quoting J.B. Ruhl, *Panarchy and the Law*, 17 ECOLOGY & SOC’Y, no. 3, 2012, art. 31, at 1).

<sup>36</sup> Ruhl, *General Design Principles*, *supra* note 32, at 1397 (footnote omitted) (quoting Bradley C. Karkkainen, Response “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004)).

<sup>37</sup> *Id.* at 1398–99.

<sup>38</sup> *Id.* at 1399.

<sup>39</sup> *Id.*

<sup>40</sup> Barbara Cosens et al., *The Adaptive Water Governance Project: Assessing Law, Resilience and Governance in Regional Socio-Ecological Water Systems Facing a Changing Climate*, 51 IDAHO L. REV. 1, 3–4 (2014); Emily Gardner, Note, *Adaptive Management in the Face of Climate Change and Endangered Species Protection*, 40 ECOLOGY L.Q. 229, 232 (2013).

<sup>41</sup> Craig & Ruhl, *supra* note 12, at 10–11.

does not.”<sup>42</sup> Like the other theories, adaptive management seems logical enough, but because it calls for a fundamental overhaul of some basic tenets of U.S. law—namely, finality, certainty, and front-end decision making—the fact of actually making it happen has been a more complicated story.<sup>43</sup>

Thus, despite the increasing detail in discussions of these frameworks, complexity theory and related literature still offer little in hard law to apply.<sup>44</sup> Adaptive management “enjoys widespread support [but] successful implementation in the context of real world natural resource management has been and remains largely elusive.”<sup>45</sup> For instance, Craig and Ruhl note that some agencies have embraced the term without specifying what it is or creating an enabling framework, resulting in what they and others call adaptive management “lite.”<sup>46</sup> Interdisciplinary scholarship in a variety of fields seeks to clarify specific recommendations for reforming law to fit with SESs.<sup>47</sup>

Craig and Ruhl’s 2014 article, *Designing Administrative Law for Adaptive Management*, proposed “the first detailed blueprint for a new legal structure to match adaptive management’s decision-making structure.”<sup>48</sup> Their article details the three main obstacles administrative law poses to implementation of true adaptive management (as opposed to adaptive management lite): public participation requirements, finality requirements, and judicial review.<sup>49</sup> They also note that adaptive management is not suitable for all agency decision-making contexts. Rather, “[t]he sweet spot for using adaptive management is when a management-problem context presents a dynamic system for which uncertainty and controllability are high and risk is low.”<sup>50</sup>

Relevant to the discussion of case studies here, Craig and Ruhl emphasize the importance of stakeholder engagement, which “allows the agency to learn from the affected community when shaping goals and protocols and to communicate agency decision-making assumptions and rationales. To be sure, stakeholder engagement does not necessarily equate with stakeholder support, but lack of engagement is likely to reduce the chances of such support forming.”<sup>51</sup> Although robust public participation within an adaptive management scheme’s highly discretionary, iterative

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<sup>42</sup> Lawrence E. Susskind & Joshua Secunda, “Improving” Project XL: Helping Adaptive Management to Work within EPA, 17 UCLA J. ENVTL. L. & POL’Y 155, 157 (1998–1999).

<sup>43</sup> Craig & Ruhl, *supra* note 12, at 38–40.

<sup>44</sup> *Id.*

<sup>45</sup> Gardner, *supra* note 40, at 237.

<sup>46</sup> Craig & Ruhl, *supra* note 12, at 10–11.

<sup>47</sup> *E.g.*, Ahjond S. Garmestani & Melinda Harm Benson, *A Framework for Resilience-Based Governance of Social-Ecological Systems*, 18 ECOLOGY & SOC’Y, no. 1, 2013, art. 9, at 8; Marleen Schouten et al., *Resilience-Based Governance in Rural Landscapes: Experiments with Agri-Environment Schemes Using a Spatially Explicit Agent-Based Model*, 30 LAND USE POL’Y 934, 941 (2013).

<sup>48</sup> Craig & Ruhl, *supra* note 12, at 61.

<sup>49</sup> *Id.* at 28.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.* at 24–25.

decision-making process would likely be undesirable, Craig and Ruhl emphasize the importance of public participation in “the setup phase of adaptive management” and the periodic “big decisions” agencies must make—indicating the need for “recurring, rather than continual, public participation.”<sup>52</sup> They also argue that pure adaptive management would involve stakeholders in plan formulation earlier in the process than standard administrative procedure would allow.<sup>53</sup>

“Adaptive governance” purports to build upon adaptive management. According to Barbara Cosens and colleagues, “[s]oon after adaptive management was applied, failures of this management approach gave rise to a new literature in which shortcomings in adaptive management were attributed in part to governance issues. The solution was dubbed adaptive governance.”<sup>54</sup> Adaptive governance is considered a form of adaptive comanagement, or a marriage of new governance theory and adaptive management. It maintains the blurring-of-lines principles mentioned above, but focuses more centrally on

improved social understanding of the dynamics of ecological systems. In other words, adaptive governance seeks to capitalize on both the reflexive, iterative, scientifically-based learning characteristic of adaptive management, as well as theories of new governance that extend the function of governing to a broader range of actors acting on a wider spatial and temporal scale.<sup>55</sup>

Tracy-Lynn Humby has described adaptive governance “as a process that responds to feedback received from a managing agency undertaking adaptive management, through collaboration and cooperation across different levels of government, nongovernmental and individual action.”<sup>56</sup>

Humby has addressed the question of whether adaptive governance and adaptive management “mean the same thing,” and concludes that they do not.<sup>57</sup> Rather, she argues that adaptive governance *facilitates* adaptive comanagement by

allowing the emergence and nurturing of social networks that could employ both social capital (trust, leadership, social networks, reciprocity, common rules, norms and sanctions) and social memory (experience for dealing with change, different role-players in social networks playing different social roles) in order to deal with common problems characterized by uncertainty and change.<sup>58</sup>

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<sup>52</sup> *Id.* at 31, 43.

<sup>53</sup> *Id.* at 42–43.

<sup>54</sup> Cosens et al., *supra* note 40, at 4 (footnote omitted).

<sup>55</sup> Humby, *supra* note 30, at 98.

<sup>56</sup> *Id.* (citing Barbara A. Cosens & Mark Kevin Williams, *Resilience and Water Governance: Adaptive Governance in the Columbia River Basin*, 17 *ECOLOGY & SOC'Y*, no. 4, 2012, art. 3, at 2).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Thus, adaptive governance is not a replacement for adaptive management, but is rather a complementary set of hierarchies and networks that are less formal than traditional structures and “help facilitate information flows, identify knowledge gaps, and create nodes of adaptive expertise that can be drawn upon in times of crisis.”<sup>59</sup>

Like adaptive management, adaptive governance succeeds in the right set of circumstances. Humby and others note the importance of leadership and vision by key individuals.<sup>60</sup> Other factors include a legal framework that enables adaptive management; adequate funding for pursuing adaptive management; adequate monitoring, information flows, and knowledge sources; and “a venue for collaboration.”<sup>61</sup> Thus, beyond financial resources and legal authority to act, a key element of adaptive governance is having invested leadership that can galvanize stakeholders and facilitate communication.

Highlighting the mismatched pace between theory and practice at the federal level, actual mitigation initiatives to date have been controversial and of limited impact, with some notable exceptions. In *Massachusetts v. Environmental Protection Agency*,<sup>62</sup> the Supreme Court of the United States directed EPA to regulate carbon dioxide and greenhouse gases under the Clean Air Act<sup>63</sup> if EPA found they contribute to climate change.<sup>64</sup> EPA’s main effort to pursue that implementation, the CPP, is, as of this writing, the subject of “monster litigation” involving more than two dozen states, agencies, and other groups.<sup>65</sup> The Obama Administration did achieve a major mitigation victory when EPA, in partnership with the National Highway Traffic Safety Administration, successfully promulgated standards to reduce greenhouse gas emissions and improve fuel economy for light-duty vehicles—first for model years 2012–2016, then for model years 2017 and beyond.<sup>66</sup>

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<sup>59</sup> *Id.* at 99.

<sup>60</sup> *Id.* at 98–99; Gardner, *supra* note 40, at 269.

<sup>61</sup> Gardner, *supra* note 40, at 269.

<sup>62</sup> 549 U.S. 497 (2007).

<sup>63</sup> 42 U.S.C. §§ 7401–7671q (2012).

<sup>64</sup> *Massachusetts v. U.S. Env’tl. Prot. Agency*, 549 U.S. at 532.

<sup>65</sup> Ellen M. Gilmer, *Both Sides Claim Upper Hand after “Complete Surprise” from Court*, ENERGYWIRE (May 17, 2016), <https://perma.cc/D7AB-J4BE>; accord Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. ENVTL. & SUSTAINABILITY L. 305, 314 (2013) [hereinafter McGinley, *Collateral Damage*]; Carl Pope, *5 Things to Remember About Obama’s Clean Power Plan Rule*, HUFFINGTON POST (July 29, 2014), <https://perma.cc/CEU9-2QFA>; *Sign the Petition: EPA Should Withdraw Clean Power Plan Rule*, NAT’L TAXPAYERS UNION, <https://perma.cc/JV2G-98K9> (last visited Feb. 25, 2017).

<sup>66</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts 523, 531, 533, 536, 537); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts 523, 531, 533, 536, 537); John M. Broder, *Limits Set on Pollution from Autos*, N.Y. TIMES, Apr. 2, 2010, at B1. The Supreme Court upheld some of EPA’s asserted authority to regulate greenhouse gases emitted by motor vehicles. *Util. Air Regulatory Grp. v. U.S. Env’tl. Prot. Agency*, 134 S. Ct. 2427, 2449 (2014). For a broader discussion of regulation of greenhouse gases, see generally Alex Ritchie,

Despite some progress, scholars agree that attempted and existing regulations are insufficient to achieve meaningful climate mitigation goals.<sup>67</sup> Ruhl additionally notes that “the policy world’s fixation on achieving, or blocking, federal greenhouse gas emission legislation as part of our national strategy for climate change mitigation has contributed to our neglect of national policy for climate change adaptation.”<sup>68</sup>

Federal adaptation efforts have quietly gained ground and may be positioned for a smoother path than mitigation if subsequent administrations continue to pursue them. In 2013, President Obama issued Executive Order 13,653 which directed agencies to undertake vulnerability assessments and planning for adaptation.<sup>69</sup> The Obama Administration also created seven Regional Climate Hubs, which involve partnerships among the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, and the United States Department of the Interior, among other entities.<sup>70</sup> Adaptation may be a more feasible and less controversial pursuit than mitigation for a variety of reasons. Adaptation offers more immediate rewards than efforts to tackle air pollution because the effects can be seen and enjoyed right away.<sup>71</sup> Further, because of this smaller, more immediate scale, there is less incentive for organized political opposition to adaptation, as opposed to mitigation, where large industries may incur costs for compliance. However, as of 2015, “[m]ost agencies [we]re in formative stages of their assessments and strategic planning” and few examples existed of day-to-day agency activities that were different as a result of their explicit adaptation efforts.<sup>72</sup>

Another interesting and important aspect of adaptation is that, by its nature, it encompasses a variety of jurisdictions, government levels, and legal disciplines that have traditionally been treated as distinct from one another.<sup>73</sup> Existing measures that were created before climate science was recognized will, in practice, continue to be drawn upon as part of efforts to manage the effects of climate change.<sup>74</sup> These measures may range from the

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*Scattered and Dissonant: The Clean Air Act, Greenhouse Gases, and Implications for the Oil and Gas Industry*, 43 ENVTL. L. 461 (2013).

<sup>67</sup> E.g., Parker-Flynn, *supra* note 12, at 16; Ruhl, *Climate Change Adaptation*, *supra* note 13, at 369.

<sup>68</sup> Ruhl, *Climate Change Adaptation*, *supra* note 13, at 365–66.

<sup>69</sup> Preparing the United States for the Impacts of Climate Change, Exec. Order No. 13,653, § 5, 3 C.F.R. at 330, 333 (2014).

<sup>70</sup> Press Release, U.S. Dep’t of Agric., Secretary Vilsack Announces Regional Hubs to Help Agriculture, Forestry Mitigate the Impacts of a Changing Climate (Feb. 4, 2014), <https://perma.cc/TAA3-BGMA>.

<sup>71</sup> Parker-Flynn, *supra* note 12, at 6–7.

<sup>72</sup> JANE A. LEGGETT, CONG. RESEARCH SERV., R43915, CLIMATE CHANGE ADAPTATION BY FEDERAL AGENCIES: AN ANALYSIS OF PLANS AND ISSUES FOR CONGRESS 1 (2015).

<sup>73</sup> Ruhl, *Climate Change Adaptation*, *supra* note 13, at 390; *see also* Parker-Flynn, *supra* note 12, at 21–22 (discussing “mainstreaming, a process whereby adaptation measures are integrated into some aspect of related government policy such as water management, disaster preparedness, and emergency planning or land-use planning” (citations omitted)).

<sup>74</sup> *See* Ruhl, *Climate Change Adaptation*, *supra* note 13, at 433 (“Participating in, rather than against, the complex policy mix that will form around adaptation keeps environmental concerns

smallest municipal stormwater management scheme to a vast forestry management plan. This Article therefore treats certain legal mechanisms, such as the National Wildlife Refuge Act and strategies to minimize human conflict, as natural parts of climate adaptation policy, even if they were not created with that intent.

For effective SES governance, room remains to inform what works, what does not, and what adjustments can be made in the legal frameworks seeking to operationalize complexity and resilience theory. Craig points out that

the incorporation of complexity theory into environmental and natural resources law scholarship remains nascent, albeit growing, especially from the perspective of finding an adequate governance system for climate change adaptation. . . . [W]ork remains to be done . . . [and] much of environmental and natural resources law remain based in paradigms of complicatedness, predictability, and stationarity . . . an increasingly problematic mismatch in a climate change era.<sup>75</sup>

The discussion below seeks to contribute to the ongoing dialogue on effective resilience-based governance of SESs. To that end, the next section examines a social issue that arises in SESs of various scales and poses conflicts to effective governance: a bitter, longstanding rift between labor and environmental interests.

### III. THE WORK–ENVIRONMENT RIFT: CURRENT MANIFESTATIONS AND POTENTIAL REMEDIES

#### *A. Preliminary Note on Definitions, Demographics, and Methodology*

The labor landscape today is dramatically different from the one of sixty years ago. Union membership has seen major declines for decades and is currently estimated at about 11% of workers.<sup>76</sup> Further, while the concept of the “American worker” tends to bring to mind for many an image of a white, male factory laborer, in fact, a substantial proportion of American workers today are women, and particularly women of color, in the service industry.<sup>77</sup>

This Article is therefore not an inquiry into “the working class,” the full spectrum of modern laborers, or any modern labor movement. Rather, it is

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within the dialogue, not an afterthought . . . And recalibrating how environmental law uses instruments and institutions to fulfill its objectives will allow it to keep pace with the demand for an adaptive adaptation policy.”)

<sup>75</sup> Craig, *Learning to Think*, *supra* note 33, at 93, 101–02.

<sup>76</sup> Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary (Jan 27, 2017), <https://perma.cc/96FC-ZQYJ> (reporting that the union membership rate in 2016 was 10.7%).

<sup>77</sup> Amanda Marcotte, *Who’s Behind the Fast Food Strikes? Working Women*, SLATE: XXFACTOR (Sept. 2, 2013), <https://perma.cc/3J55-3X2K>.



primarily an examination of residents of rural areas who have expressed some kind of work-related entitlement to the natural resources proximal to them. The inquiry draws upon disciplines that use hybrid methodologies combining traditional legal scholarship with qualitative analyses typically associated with sociology or anthropology.<sup>78</sup> Fields that use similar interdisciplinary methods and synthesized discussions of space, place, scale, law, power, and inequality include legal geographies, environmental justice, and social movements theory.<sup>79</sup>

While not the face of modern labor, the demographic of interest here is strongly “work-identified.”<sup>80</sup> The perceived entitlements to proximal natural resources are linked to the desire for the continuation of historical economic activity. Thus, the longstanding work–environment rift discussed below is relevant to understanding this group’s alienation from government and environmentalism. Because “labor” tends to refer to the days of a more cohesive workforce and the age of unions, this section uses “work” as its default term, to serve as a more malleable label that did apply in the era of unions, but applies to unions and in other contexts today.

### *B. The Work–Environment Rift*

Political scientists, sociologists, and advocates on both sides have remarked upon the persistent and counterintuitive divide between work–

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<sup>78</sup> Pruitt & Sobczynski at 3, at 327.

<sup>79</sup> *Id.*; see also Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 2–3 (2001) (while there is a gap between legal scholarship and social movement literature, “these two fields display considerable overlap in both their subject matter and their methodology; they study the same phenomena and draw on the same theoretical sources in doing so. Yet, they communicate only fitfully, if at all, with one another. . . . [S]ocial movement scholars study the way these movements are formed, organized, and operated, while legal scholars study the movements’ specific effect on the decisions of courts, legislatures, and administrative agencies. . . . [L]egal scholarship observes and analyzes the influence and impact of social movements, but tends to ignore their origins. . . . [L]egal scholars have much to gain from broadening their perspective and making contact with the social movements literature.”); Hari M. Osofsky, *The Geography of “Moo Ha Ha”: A Tribute to Keith Aoki’s Role in Developing Critical Legal Geography*, 90 OR. L. REV. 1233–39 (2012) (“Although law and geography is still an underdeveloped intersection as compared to law and economics or law and political science, interdisciplinary work in this area has grown rapidly over the last thirty years. . . . A wide range of law and geography scholars . . . have been exploring the ways in which geographic assumptions and unequal spatialization of power constitute and are constituted by law, often building upon . . . earlier law and geography work and Foucault’s relatively brief commentary on the value of space.”); Lisa R. Pruitt, *The Rural Lawscape: Space Tames Law Tames Space*, in *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* 190, 190–91 (Irus Braverman et al. eds., 2014) [hereinafter Pruitt, *Space Tames*]; cf. Peter M. Rosset & Maria Elena Martínez-Torres, *Rural Social Movements and Agroecology: Context, Theory, and Process*, 17 ECOLOGY & SOC’Y, no. 3, 2012, art. 17, at 1 (describing rural social movements as driven in part by efforts to gain autonomy and control over territory).

<sup>80</sup> Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 802 (2011) [hereinafter Pruitt, *Class Culture Wars*].

related interests and environmental interests.<sup>81</sup> The absence of alliances between workers' advocates and environmental advocates—which sometimes blossoms fully into adversarial relations—fascinates commentators because, on its face, it seems like these two groups should be naturally aligned. Environmental regulation should appeal to workers because of benefits such as enhanced workplace safety and workers' protections should appeal to environmentalists as part of a progressive agenda to benefit the greater good. Yet the rift has been a recurring theme in environmental debates since the birth of the environmental movement.<sup>82</sup> It behooves us to dig deeper into the issue from a policy standpoint, as potential pathways to help bridge this rift could translate to potential pathways for more cohesive, better informed climate governance.

A starting point could be to critique the environmental movement. The movement has been criticized for addressing the concerns of social elites and overlooking the interests of people of color, for instance.<sup>83</sup> Although counterexamples abound, the environmental movement has been called a “white, middle-class phenomenon,”<sup>84</sup> or otherwise out of touch with the complexities of modern society.<sup>85</sup> Self-described environmentalist Gregory Mengel argues that the environmental movement “is shaped by unacknowledged race and class privilege, such that it has simply not been able to make itself relevant to people of color and low income white people.”<sup>86</sup> He attributes these shortcomings to the fact that traditional concern for preservation and veneration for the wild and

[e]ven appeals to scientifically legitimate concerns such as biodiversity and ecosystem integrity often tap into . . . deeper emotional currents, which are rooted in a Romantic or aesthetic attitude, and which are more typical of city dwellers who conceive their relationship to the natural world in terms of leisure outdoor activities.

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<sup>81</sup> *E.g.*, BRIAN K. OBACH, LABOR AND THE ENVIRONMENTAL MOVEMENT: THE QUEST FOR COMMON GROUND 9 (2004).

<sup>82</sup> *See id.* at 10.

<sup>83</sup> Gregory Mengel, *Race and Class Privilege in the Environmental Movement*, PACHAMAMA ALL. (Sept. 19, 2012), <https://perma.cc/63EZ-SGFJ>.

<sup>84</sup> *Id.* *See generally* Nannette Jolivet Brown, *The Many Faces of Environmental Justice: Which One Speaks the Truth?*, 56 LA. B.J. 420, 421 (2009) (discussing the tension between the civil rights movement and the environmental movement); Stephanie Tai, *Environmental Hazards and the Richmond Laotian American Community: A Case Study in Environmental Justice*, 6 ASIAN AM. L.J. 189 (1999) (discussing how environmental justice movement has devoted little attention to cultural norms' relationships with exposure to environmental hazards); Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23 (1996) (using a feminist lens to examine the relationship between biases such as sexism, racism, and classism in the environmental justice movement).

<sup>85</sup> MICHAEL SHELLEBERGER & TED NORDHAUS, THE DEATH OF ENVIRONMENTALISM: GLOBAL WARMING POLITICS IN A POST-ENVIRONMENTAL WORLD (2004), <https://perma.cc/3AZ6-K54S>.

<sup>86</sup> Mengel, *supra* note 83.

People who depend directly on nature for their livelihood . . . are understandably unmoved by the Romantic appeals of traditional preservationism.<sup>87</sup>

Mengel also points to conferring moral weight to “what amounts to luxury consumption”—such as “buying local” or driving a hybrid car—“despite the fact that the ability to make such choices relies on the systemic unearned privileges that go with being white and middle-class in the U.S.”<sup>88</sup>

Mengel similarly notes that those who do not meet accepted environmental standards “may be seen as somehow different or deficient.”<sup>89</sup> Lisa Pruitt and Linda Sobczynski have examined this theme in their analysis of a case study where a high-polluting concentrated animal feeding operation (CAFO) was sited “in a sparsely populated, highly impoverished county in the Ozark highlands.”<sup>90</sup> In 2014, a national environmental nonprofit sought an injunction of federal loan guarantees for the CAFO, citing noncompliance with the National Environmental Policy Act<sup>91</sup> and the Endangered Species Act<sup>92</sup> (ESA).<sup>93</sup> Pruitt and Sobczynski noted the plaintiffs’ exclusion of a narrative highlighting the effects of the CAFO on the community, positing that “the conservation-oriented plaintiffs and attorneys may have viewed [nearby] poor white residents as transgressing wilderness—as having trashed pristine nature by their very presence—and thus as unworthy of advocacy.”<sup>94</sup> More generally, Pruitt has argued that liberal elites—presumably, the shapers of environmental law and advocacy—“shun and ridicule the white working class, [and] similarly express disdain for rural and small-town residents.”<sup>95</sup>

Environmental sociologist Stefania Barca has described the work–environment rift as “the classical opposition between Marxism and environmentalism, which has formed a serious impediment to possible alliances and coalitions between the two movements at the political level.”<sup>96</sup> However, she and others challenge the common wisdom that

<sup>87</sup> *Id.* The popular film *Deliverance* (its damaging and inaccurate portrayal of Appalachia set aside for the moment) illustrates this idea somewhat: the city-dwelling visitors to a wild region revere its natural purity, but the “hillbilly” local residents do not seem to share their enthusiasm. *DELIVERANCE* (Warner Bros. 1972).

<sup>88</sup> Mengel, *supra* note 83. A South Park episode that aired in 2006 provides a good illustration of this cultural critique’s appearance in pop culture. People who drive Priuses are portrayed as self-righteous, self-appointed heroes. Rather than polluting the atmosphere with smog, the plot involves the Prius drivers polluting the air with a fictional substance called “smug.” *South Park: Smug Alert!* (Comedy Central television broadcast Mar. 29, 2006).

<sup>89</sup> Mengel, *supra* note 83.

<sup>90</sup> Pruitt & Sobczynski, *supra* note 3, at 327. This occurred in Newton County, Arkansas. *Id.*

<sup>91</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

<sup>92</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

<sup>93</sup> Pruitt & Sobczynski, *supra* note 3, at 327.

<sup>94</sup> *Id.* at 326. See generally NANCY ISENBURG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* (2016) (discussing the “white trash” trope throughout American history).

<sup>95</sup> Pruitt, *Class Culture Wars*, *supra* note 80, at 768 (footnote omitted).

<sup>96</sup> Stefania Barca, *On Working-Class Environmentalism: A Historical and Transnational Overview*, *INTERFACE*, Nov. 2012, at 61, 64.

environmentalist sympathies do not make meaningful manifestations among working class groups. Passage of the Clean Air Act and the Clean Water Act,<sup>97</sup> for instance, has been attributed to a “coalition between oil, chemical, atomic, steel and farm workers unions with some environmental organizations.”<sup>98</sup> Barca also notes the example of “the alliance between environmentalists and trade unionists that arose spontaneously in the streets of Seattle, with the slogan ‘Teamsters and Turtles’, during the 1999 protests against the [World Trade Organization].”<sup>99</sup>

Barca argues that “[e]nvironmentalism . . . is a misleading unifying label, that tends to hide the existence of nonmainstream varieties of environmental struggle, which are the object of various forms of cultural, social and political silencing.”<sup>100</sup> She notes that “[e]mpirical research has demonstrated how the subaltern classes, manual workers, indigenous peoples and the poor in general are often the first to defend the environment in which they work and live, or from which they get their livelihood.”<sup>101</sup> In *To Save the Land and the People*, for instance, Chad Montrie documents the under-discussed history of popular opposition to surface coal mining in Appalachia.<sup>102</sup> He argues that “the campaign to abolish striping was primarily a movement of farmers and working people of various sorts, originating at the local level.”<sup>103</sup> He noted the need to call attention “to the role played by common folk in the conservation, preservation, and environmental movements.”<sup>104</sup>

The environmental justice movement has pursued the intersection of environmentalism, race, and class. Barca argues that it has shifted environmentalism “towards a better understanding of the connections between work and the environment.”<sup>105</sup> The environmental justice movement

is concerned with the unequal distribution of social costs between different human groups according to distinctions of class, race/ethnicity, and spatial placement. Environmental injustice is strongly related to space, i.e. to the unequal distribution of pollution and environmental degradation at local, national or transnational level: distinctions such as urban/rural, center-periphery or north-south are of primary relevance for the understanding of environmental injustice.<sup>106</sup>

Nevertheless, while the environmental justice movement has brought work and environmental concerns together somewhat, the movement has

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<sup>97</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2012).

<sup>98</sup> Barca, *supra* note 96, at 67.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 64.

<sup>101</sup> *Id.* at 65.

<sup>102</sup> See generally CHAD MONTRIE, *TO SAVE THE LAND AND THE PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA* (2003).

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Id.*

<sup>105</sup> Barca, *supra* note 96, at 62.

<sup>106</sup> *Id.* at 65 (citations omitted).

struggled to influence mainstream policymaking, and conservation and environmental justice advocacy efforts remain largely distinct.<sup>107</sup> Similarly, Barca acknowledges that even in the progressive developments of the 1960s and 1970s, just as “workplace and social justice issues remained external”<sup>108</sup> to environmentalists’ mission, so too did the labor movement remain “bound by union acceptance of the structure of industry decision making.”<sup>109</sup>

Sociologist Brian Obach has conducted one of the most in-depth inquiries into the work–environment rift in his book, *Labor and the Environmental Movement: The Quest for Common Ground*. Like Barca, he notes that although examples exist of close cooperation between unions and environmentalists, “[i]n many cases the ties between these two movements are tenuous. . . . Despite examples of intermittent collaboration, there has also been a great deal of conflict between environmental and union interests over the decades.”<sup>110</sup> According to Obach,

Some theorists have noted that labor and environmental movement participants face particular difficulties [when attempting to collaborate] because of the cultural differences that divide [them]. Middle-class professionals dominate the environmental movement and they are embedded in a different cultural milieu than blue-collar workers. The views of members of these two groups on political action, the nature of work, organizational functioning, the basis of knowledge, and the role of nature differ in some important ways.<sup>111</sup>

However, critical to this discussion, Obach argues that workers do not tend to be at the forefront of anti-environmental initiatives; rather, they are more likely to be recruited by industry. He says:

[W]orkers are not typically the lead opponents of environmental measures. . . . Environmental movement organizations are most commonly pitted against private-industry executives who wish to avoid the costs and constraints of environmental regulation. . . . Employers seek to enlist workers to rally against environmental measures by using the threat that losses or decreases in profit suffered as a result of [environmental measures] may result in layoffs or a complete shutdown. Knowing that a threat to corporate profits will not move the public, a more sympathetic victim is necessary to win public support, and workers are the obvious group to serve this purpose. Industry opponents of environmental measures will typically fade into the background and carry on low-profile lobbying while workers are presented as the public face of environmental opposition. Often cast as issues of jobs versus the environment, these conflicts have captured the most attention and have helped to shape the

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<sup>107</sup> Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENVTL. L. REV. 149, 153 (2013).

<sup>108</sup> Barca, *supra* note 96, at 69.

<sup>109</sup> *Id.* (quoting ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 372 (rev. ed. 2005)).

<sup>110</sup> OBACH, *supra* note 81, at 9.

<sup>111</sup> *Id.* at 20 (citations omitted).

perception that environmental protection is antithetical to economic expansion, job preservation, and the interests of workers generally.<sup>112</sup>

Thus, while environmentalists and workers' advocates often come down on opposite sides of environmental issues, they are not necessarily natural enemies. Rather, "the interests of workers become tied to those of their employers, at least in terms of preserving the enterprise that provides profit for one and wages for the other."<sup>113</sup> The discussion in the next section seeks to illustrate this phenomenon, its effects on federal law, and other relevant angles, including critical differences between urban and rural life.

### C. Two Anti-Environmental, Anti-Federal Social Movements

This section describes two social movements, then assesses the influences that drive them and their significance to federal climate policy. These two movements were selected based on their strong rhetoric in opposition to the federal government alongside strong rhetoric in opposition to environmental regulation. The movements' political and corporate influences are set aside for this discussion. Of interest here is a populist embrace of the symbolism of environmental regulation as anathema to workers' well-being, and concomitant manifestations of alienation within a demographic that has embraced that symbol.

These movements are not the first time that "jobs versus environment" rhetoric has been used. This dichotomy is a classic trope in environmental debates.<sup>114</sup> However, this particular examination is warranted for several reasons. First, discussion of the jobs-environment dichotomy has been more nuanced in recent years.<sup>115</sup> While it is often used as political propaganda, for individual workers, there may be truth to support the outrage in some instances.<sup>116</sup> These specific movements also appear frequently in the public

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<sup>112</sup> *Id.* at 9–10 (citations omitted).

<sup>113</sup> *Id.* at 11.

<sup>114</sup> Alex Geisinger, *Uncovering the Myth of a Jobs/Nature Trade-Off*, 51 SYRACUSE L. REV. 115, 116 (2001).

<sup>115</sup> *E.g.*, Motoko Rich & John Broder, *A Debate Arises on Job Creation and Environment*, N.Y. TIMES, Sept. 5, 2011, at B1; Steve Inskeep, *Video and Transcript: NPR's Interview with President Obama*, NAT'L PUB. RADIO (Dec. 21, 2015), <https://perma.cc/4QYP-ASDB> (statement of President Obama) ("But that's not to suggest that everybody who objects to my policies may not have perfectly good reasons for it. If you are living in a town that historically has relied on coal and you see coal jobs diminishing, you probably are going to be more susceptible to the argument that I've been wiping out the economy in your area.").

<sup>116</sup> The Environmental Law Collaborative began a robust examination of relevant themes with its 2016 initiative exploring "Zero-Sum Environmentalism." *See, e.g.*, Robin Kundis Craig, *Zero Sum Games in Pollution Control: The Games We Create Versus the Games We Discover* (Univ. of Utah Coll. of Law, Research Paper No. 200 Feb. 2, 2017) [hereinafter Craig, *Zero Sum*], <https://perma.cc/PV8B-AQK5>; James E. Salzman, *Strategies for Zero Sum Challenges*, (UCLA Sch. of Law, Public Law Research Paper No. 17-10, Feb. 7, 2017), <https://perma.cc/6D2Y-SBBE>; J.B. Ruhl, *Seeing Past the Zero Sum Game in Environmental Policy – Harder Than It Looks* (Mar. 3, 2017) [hereinafter Ruhl, *Zero Sum*] (unpublished manuscript), <https://perma.cc/9DBL->

discourse, and they are two among the most prominent anti-environmental campaigns of the current climate change era. Most urgently, they have both been extreme enough in one respect or another so as to brush up against undermining the country's political stability.<sup>117</sup> Finally, combined, these regions and movements span a significant portion of the country—but mostly “flyover country” that does not receive as much attention as other regions. In light of these movements' influence on public sentiments and policymaking, as scholars continue to grapple with how the law must be restructured, the discourse should address how the law can account for these and comparable natural resource-related social issues that continue to catalyze conflict.

### 1. *The Land Transfer Movement*

The Land Transfer Movement refers to the joint and parallel efforts of legislators, groups, and individuals committed to transferring public lands in the west from federal ownership to the states.<sup>118</sup> Two main rationales are advanced to support these efforts. First, supporters argue that current patterns of federal ownership are “unconstitutional.”<sup>119</sup> The precise parameters of this alleged unconstitutionality are not necessarily clear or consistent. Framed from another angle, some advocates insist that the federal government has broken a promise to states that federal ownership would be phased out when territories entered into statehood.<sup>120</sup> In addition, supporters assert that “states are dedicated to multiple-use management and would be more efficient owners,” as opposed to the federal government's supposed mismanagement of the land.<sup>121</sup>

A robust body of interdisciplinary scholarship has rejected these assertions. Constitutional law scholars reject sympathizers' constitutional

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WBYF; *see also* Geisinger, *supra* note 114, at 137 (arguing that environmental regulation does not cause net job losses at the societal level).

<sup>117</sup> Hoffmann, *supra* note 7, at 27 (discussing standoffs between ranchers and federal land managers as compromising the rule of law).

<sup>118</sup> *See id.* at 22; *see also* Robert B. Keiter & John C. Ruple, *The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands 1* (S.J. Quinney Coll. of Law Research Paper No. 99, 2015) (describing and critiquing changes if transfer proponents succeed).

<sup>119</sup> COAL. OF W. STATES, <https://perma.cc/VSA2-7HNY> (last visited Feb. 25, 2017); *see also* Richard D. Clayton, Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505, 516–25 (1980) (analyzing certain western state laws, and describing and critiquing constitutionally rooted arguments against federal control of public lands).

<sup>120</sup> Kochan, *supra* note 7, at 1134, 1146–47.

<sup>121</sup> Keiter & Ruple, *supra* note 118, at 1; *accord* Andrea Collins, *To Transfer or Not to Transfer, That Is the Question: An Analysis of Public Lands Title in the West*, 76 MONT. L. REV. 309, 324 (2015) (“Advocates believe states' natural resources are being mismanaged and feel each state deserves a larger piece of the pie.”); Richard Lee Simmons, Comment, *The Sale of Our Land: A Look at Public Land Transfers*, 5 ARIZ. J. ENVTL. L. & POL'Y 1068, 1068 (2015) (“Supporters of the land transfer argue that it would improve public access, generate more economic growth, and better protect the environment.”); Robert H. Nelson, *States Should Take Control of Our Outmoded Public Land System*, CONVERSATION (Apr. 16, 2015), <https://perma.cc/K7GB-JB4W>.

arguments.<sup>122</sup> Natural resources scholars reject more pragmatism- or management-based arguments for a mass land transfer.<sup>123</sup> Environmental law scholars note the potential for even worse environmental degradation on western lands and the likely increase in privatization that would accompany state ownership.<sup>124</sup> Most recently, Michael Blumm and Olivier Jamin have discussed the Malheur occupation in the context of this larger movement, deeming the occupation “the latest of a long history of unsuccessful opposition against the Constitution’s Property Clause” and warning that divestiture would be a radical reshaping of public lands law.<sup>125</sup>

The military branch of the movement dates back to the so-called Sagebrush Rebellion. The Sagebrush Rebellion arose as a backlash to the wave of federal environmental and conservation legislation passed in the 1970s, such as the Federal Land Policy and Management Act<sup>126</sup> (FLPMA).<sup>127</sup> In the movement’s initial wave,

livestock operators—after years of growing federal interference with their activities . . . righteously or otherwise, banded together to beat back the rapidly tightening tentacles (again, righteous or not depending on your preferences) of the federal government. Asserting ancient and highly questionabl[e] entitlements, the rebels sought to ‘return’ to state governments federal lands increasingly regulated by the federal government.<sup>128</sup>

Throughout the past several decades, the movement, whose tactics have involved bombings and other armed protests,<sup>129</sup> has overlapped somewhat with a rise in right-wing militias who have a variety of ideological gripes with

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<sup>122</sup> Les Zaitz, *Demands by Oregon Standoff Leaders Defy Logic and Law, Authorities Say*, OREGONIAN (Jan. 23, 2016), <https://perma.cc/38JS-E57Y>.

<sup>123</sup> *E.g.*, Keiter & Ruple, *supra* note 118, at 1.

<sup>124</sup> *E.g.*, Hillary M. Hoffmann, *The Flawed Law and Economics of Federal Land Seizure Statutes*, NAT. RESOURCES & ENV’T, Fall 2015, at 34, 37; Simmons, *supra* note 121, at 1068.

<sup>125</sup> Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. (forthcoming 2017) (manuscript at 54), <https://perma.cc/STL9-C9SM>.

<sup>126</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

<sup>127</sup> *See* Marshall Swearingen & Kate Schimel, *Timeline: A Brief History of the Sagebrush Rebellion*, HIGH COUNTRY NEWS (Feb. 4, 2016), <https://perma.cc/3CJX-QQ6Z> (FLPMA ended homesteading in the west and established more intensive management of federal lands).

<sup>128</sup> Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 968–69 (1982). Other movements and groups with similar ideology have ebbed and flowed alongside the Sagebrush Rebellion. *See* Swearingen & Schimel, *supra* note 127 (discussing “Posse Comitatus, a movement whose members hold the county sheriff to be the highest law of the land”); Hoffmann, *supra* note 7, at 22 (“In the 1980s and 1990s, the Sagebrush Rebellion was repackaged and reinvigorated as the ‘County Supremacy,’ or ‘County Home Rule,’ Movement.”).

<sup>129</sup> Robin Bravender, *Bundys Fuel ‘Round Two’ of Sagebrush Rebellion*, GREENWIRE (Jan. 6, 2016), <https://perma.cc/CM6C-SY9B>.



the federal government.<sup>130</sup> Violence toward federal land managers, not all of which is movement-motivated, remains more common than many realize.<sup>131</sup>

The Rebellion gained some legitimacy in the public eye when Ronald Reagan, “a self-proclaimed Sagebrush rebel,” became president in 1981.<sup>132</sup> The seed for its modern political rebirth appears to have been planted with Utah’s passage of H.B. 148 in 2012,<sup>133</sup> which sought to transfer 31.2 million acres of federal public land to Utah.<sup>134</sup> H.B. 148 gave the federal government a deadline of December 31, 2014, to “extinguish title” to more than 20 million acres.<sup>135</sup> Today, lawmakers from nine western states regularly introduce bills seeking to unravel federal ownership of public lands.<sup>136</sup> In 2014, the national Republican Party made a call for state ownership of federal lands part of its

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<sup>130</sup> Michael Kimmel & Abby L. Ferber, “*White Men Are This Nation: Right-Wing Militias and the Restoration of Rural American Masculinity*,” 65 RURAL SOC. 582, 586 (2000).

<sup>131</sup> This includes standoffs such as Cliven Bundy’s in March 2014. See Hoffmann, *supra* note 7, at 14 (“The national news media descended as soon as word spread that weapons and private militias were involved, in pursuit of a modern day Wild West story.”). But receiving far less attention than the Bundys is “a long history of violence toward federal public lands officers.” Wiles, *supra* note 5. *High Country News* calls this trend “an ominous pattern of hostility toward government employees.” Ray Ring & Marshall Swearingen, *Defuse the West: Public-Land Employees are Easy Targets for a Violent, Government-Hating Fringe*, HIGH COUNTRY NEWS (Oct. 27, 2014), <https://perma.cc/V9WU-7H67> (describing that all over the west, people have threatened, assaulted, yelled bigoted slurs toward, shot at, and otherwise endangered public employees, including by “hurling firebombs”). These incidents average from one to a few dozen confrontations per year and span from Texas to Colorado to Washington to Alaska; targets have included employees of BLM, the United States Fish and Wildlife Service, and the National Park Service, which are sub-agencies of the United States Department of the Interior, as well as the Forest Service, a subagency of the United States Department of Agriculture. Elizabeth G. Daerr, *Study Finds Park Rangers Facing Increased Violence: Fugitives are Drawn to Isolation of Parks, Putting Rangers At Risk*, NAT’L PARKS, Nov./Dec. 2001, at 12, 12–13; Ring & Swearingen, *supra*; Wiles, *supra* note 5. Some of the violence does not stem from animosity toward federal employees themselves, but rather, because public employees are tasked with policing those who would use the cover of vast federal wilderness to flee law enforcement or pursue illegal activities such as drug trafficking. See Daerr, *supra*, at 12–14. From a broader perspective, Hillary Hoffmann argues that these conflicts result from resource scarcity and “are nothing new to natural resources scholars, regional historians, or local residents. Now, the cycle includes a new variable: the uncertainties associated with climate change.” Hoffmann, *supra* note 7, at 15 (footnote omitted).

<sup>132</sup> Bravender, *supra* note 129 (noting that during the 1980 presidential election campaign, Ronald Reagan said “count me in as a rebel” while campaigning in Utah).

<sup>133</sup> Transfer of Public Lands Act, 2012 Utah Laws 1811 (codified at UTAH CODE ANN. §63L-6-101 to -104 (West 2016)).

<sup>134</sup> Simmons, *supra* note 121, at 1068; see also Collins, *supra* note 121, at 310 (describing the movement as “recently revitalized”).

<sup>135</sup> § 3, 2012 Utah Laws at 1812 (codified at UTAH CODE ANN. §63L-6-103(1) (West 2016)); Kochan, *supra* note 7, at 1135.

<sup>136</sup> *E.g.*, Utah Test and Training Range Encroachment Prevention and Temporary Closure Act, H.R. 4579, 114th Cong. (2016); Bolts Ditch Access and Use Act, H.R. 4510, 114th Cong. (2016); Abby Kessler, *Land Management Bills Spark Heated Debate*, E&E DAILY (Feb. 26, 2016), <https://perma.cc/XN4A-UWGU>; Scott Streater, *Panel Grills Tidwell on Rancher Animosity, Federal Ownership*, E&E DAILY (Feb. 25, 2016), <https://perma.cc/5DTA-7RTA>.

platform.<sup>137</sup> The Bundys are also credited with starting “round two of the Sagebrush Rebellion.”<sup>138</sup>

The Land Transfer Movement has thus evolved into far more than a fringe campaign.<sup>139</sup> The movement’s rationales appeal to a substantial faction of western residents despite scholarly rejection of them.<sup>140</sup> A small, bipartisan public opinion poll conducted in 2014 in eight western mountain states found that a majority of Utah residents (52%) and a plurality of Wyoming residents favored a transfer of public lands to the states.<sup>141</sup> Across the states, a slight majority (54%) of people identifying as conservative Republicans supported a mass transfer.<sup>142</sup> The survey concluded that a majority of overall residents would vote in opposition to a formal transfer proposal.<sup>143</sup> Nonetheless, the activities of sympathetic western legislators and other Bundy-esque, Sagebrush Rebel figures reveal a persistent, concerted, and impactful effort to transfer federal lands to state ownership.<sup>144</sup> Similarly, despite the extremeness of the occupation at Malheur, the occupiers found sympathizers all over the country.<sup>145</sup> In October 2016, an Oregon jury’s surprising acquittal of Ammon and Ryan Bundy and five other occupiers prompted arguments that law enforcement and the justice system treated them leniently, and that they would have received far harsher treatment if they were black, Muslim, or Native American.<sup>146</sup>

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<sup>137</sup> REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016, at 21–22 (2016), <https://perma.cc/Y2XU-X2YC>.

<sup>138</sup> Bravender, *supra* note 129.

<sup>139</sup> See, e.g., Richard M. Mollison & Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97, 97 (1982) (describing Sagebrush Rebellion as “a political movement with widespread support in several western states”).

<sup>140</sup> See, e.g., Collins, *supra* note 121, at 323 (“[T]he transfer movement is alive and well in Montana.”).

<sup>141</sup> Memorandum from Lori Weigel, Pub. Opinion Strategies & David Metz, FM3 on Western Voter Attitudes Toward Management of Public Lands to Interested Parties 2 (Sept. 23, 2014), <https://perma.cc/6X37-WXRZ> (describing Wyoming’s residents as “divided”). The survey included Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, and Wyoming—this region substantially overlaps the Great Basin. *Id.* at 1. In a 2015 poll, 71% of Arizona residents believed public lands belonged to country as a whole. Simmons, *supra* note 121, at 1071. Another survey showed that residents of almost all western states except Utah do not want federal lands transferred to the states. Ralph Maughan, *Survey: Westerners Don’t Want State Control of Public Lands*, WILDLIFE NEWS (Sept. 26, 2014), <https://perma.cc/L26V-PUM6>.

<sup>142</sup> Weigel & Metz, *supra* note 141, at 2.

<sup>143</sup> *Id.* at 5.

<sup>144</sup> See generally John Sepulvado, *GOP Politicians Planned and Participated in Key Aspects of Refuge Occupation*, OR. PUB. BROADCASTING (Mar. 18, 2016), <https://perma.cc/WM9T-MAA6>.

<sup>145</sup> Lynne Palombo, *Oregon Standoff: Occupiers and Sympathizers Revealed*, OREGONIAN (Mar. 26, 2016), <https://perma.cc/7MC5-Y8N8>.

<sup>146</sup> Courtney Sherwood & Kirk Johnson, *U.S. Jury Acquits All Defendants in Refuge Siege*, N.Y. TIMES, Oct 28, 2016, at A1; see also Bradley W. Parks, *41 Days and 8 Months Later: Dissecting the Oregon Standoff Trial*, OR. PUB. BROADCASTING (Oct. 30, 2016), <https://perma.cc/QK6G-H8H9> (noting that the acquittal coincided with the forcible removal of indigenous protesters of Dakota Access pipeline and came weeks after civil rights activists in Portland were pepper-sprayed and forcibly removed from City Hall by police); Chauncey

The occupation involved political as well as militant tactics. Although they received less attention than the occupiers, several lawmakers associated with the Coalition of Western States (COWS)—whose platform is dedicated to “stopping Government overreach”<sup>147</sup>—went to Malheur despite opposition from local officials.<sup>148</sup> They shared information with the protestors, negotiated on their behalf, and attempted to persuade federal representatives to compromise by ceding control of federal lands.<sup>149</sup> In a recorded phone conversation, Nevada Assemblywoman Michele Fiore, a member of COWS, went so far as to opine that the Bureau of Land Management (BLM) is a “bureaucratic agency of—basically—terrorism.”<sup>150</sup>

Fiore and the Bundys illustrate the centrality to this movement of the belief that the federal government is the enemy. As Carol Rose articulates, “Sagebrush westerners sniff something like the odor of a royal domain in the special status of the federal public lands, a domain controlled by dictatorial bureaucrats who hold their region in a subordinate status.”<sup>151</sup> She continues,

[T]o some, like Cliven Bundy and his militiamen friends, the federal public lands are a constant reminder of the potential ascendancy of distant autocracy. It is not just the executive branch that could seemingly use the public lands to undermine the liberties of the people; it is the entire federal government.<sup>152</sup>

Yet, milder manifestations of these sympathies exist among people who do not take up arms in their name. Many Americans are sympathetic to the notion that ranchers’ livelihoods and other local concerns should not be impinged by federal land use schemes. This anti-federal skepticism is intertwined with skepticism toward conservationism. In an explanation of ranchers’ “real grievances” after the Malheur occupation, Richard Miller opined:

[I]t [is] unfair to let the Bundys stand in for the real grievances so many have [in this region]. Even for those that advocate for less grazing on public lands—I am probably among them—have to recognize that there are legitimate concerns of the ranchers that are trying to make a livelihood in these places. The Bundys have made a carnival side-show of these concerns. Even if we were to achieve some environmentally optimal result that eliminated grazing on public lands, some solution for the economies of these rural places must begin. Otherwise, the Bundys will be able to be martyrs in what is otherwise simply the enforcement of the rule of law we all expect and desire.<sup>153</sup>

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Devega, *#CrimingWhileWhite Does Pay: Ammon Bundy and Weaponized White Privilege Prevails Again in Oregon*, SALON (Oct. 31, 2016), <https://perma.cc/R4DK-98S4> (same).

<sup>147</sup> COAL. OF W. STATES, *supra* note 119.

<sup>148</sup> Sepulvado, *supra* note 144.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Rose, *supra* note 5, at 111.

<sup>152</sup> *Id.* at 112.

<sup>153</sup> Stephen R. Miller, *As Bundy’s Malheur Takeover Ends, the Real Concerns of Sagebrush Country Ranchers Linger*, LAND USE PROF BLOG (Jan. 26, 2016), <https://perma.cc/39DG-38BF>.

The traditional environmental law response to these sympathies has been to emphasize the environmental degradation caused by overgrazing and seek to minimize overgrazing.<sup>154</sup> The harmful effects of overgrazing are indeed glaring.<sup>155</sup> In the interest of recognizing complex systems and minimizing alienation, however, perhaps there is both the need and the potential for the law to react with more nuance.

## 2. *The War on Coal Campaign*

In response to the Obama Administration's efforts to regulate emissions from coal-fired power plants, legislators, industry proponents, and other groups, including unions, began decrying what they deemed a "War on Coal." The term War on Coal "was coined by industry public relations specialists as a core principle of a multi-million dollar public relations campaign."<sup>156</sup> Patrick McGinley describes the movement as an industry-financed initiative seeking "to persuade the public that increased costs engendered by stricter workplace safety and environmental regulations would destroy tens of thousands of jobs and the 'way of life' of coalfield families."<sup>157</sup> Like the Land Transfer Movement, the War on Coal campaign relies heavily on rhetoric decrying federal "overreach."<sup>158</sup> The campaign has involved a combination of think-tank studies, legislative reports, and other strategies to support allegations that various federal regulatory initiatives would dismantle the Appalachian coal industry, jeopardize jobs, and compromise energy security with "severe economic repercussions in rural communities."<sup>159</sup> McGinley argues that these strategies aggressively demonize environmentalists, policymakers, and others who would seek to regulate coal.<sup>160</sup>

The Obama Administration did indeed take steps to regulate the coal industry, including enhanced workplace safety, waste disposal, and air pollution requirements.<sup>161</sup> The alleged injustice behind these regulations, the War on Coal campaign maintains, is that coal remains a desirable energy source that should not be impeded: it keeps utility rates cheap, provides reliable fuel for electricity, and provides a source of economic activity on

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<sup>154</sup> *E.g.*, Michelle M. Campana, Comment, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. ENVTL. L.J. 403, 458 (2002).

<sup>155</sup> See Mark Squillance, *Grazing in Wilderness Areas*, 44 ENVTL. L. 415, 419–21 (2014) (describing the harmful effects of overgrazing as a danger to native plants, stream hydrology, cryptogamic soil crusts, clean water, atmospheric dust particulate concentration, water supply, wildlife, archaeological sites, recreational resources, and aesthetic resources).

<sup>156</sup> Patrick Charles McGinley, *Climate Change and the War on Coal: Exploring the Dark Side*, 13 VT. J. ENVTL. L. 255, 314 (2011) [hereinafter McGinley, *Dark Side*].

<sup>157</sup> McGinley, *Collateral Damage*, *supra* note 65, at 314.

<sup>158</sup> *E.g.*, EPA Mining Policies: Assault on Appalachian Jobs—Part II: Hearing Before the Subcomm. on Water Res. & Env't of the H. Comm. on Transp. & Infrastructure, 112th Cong. 8 (May 11, 2011) (statement of Michael Carey, President, Ohio Coal Association).

<sup>159</sup> McGinley, *Collateral Damage*, *supra* note 65, at 315, 334.

<sup>160</sup> McGinley, *Dark Side*, *supra* note 156, at 317.

<sup>161</sup> McGinley, *Collateral Damage*, *supra* note 65, at 315–16.

which many communities have historically depended.<sup>162</sup> While many argue that the cheap price of natural gas led to coal's demise,<sup>163</sup> the limited regulation of natural gas to date could also be considered a policy choice.<sup>164</sup>

The War on Coal campaign's tactics have ranged from subtle to belligerent. On the belligerent end, politicians such as Senate Majority Leader Mitch McConnell (R-Ky.) have openly denounced the regulations as "war."<sup>165</sup> Discussing a subtler approach, sociologists Shannon Bell and Richard York characterize Friends of Coal, a self-described volunteer, grassroots organization, as a "countermovement to the environmental justice movement" manufactured by the West Virginia Coal Association, a trade group.<sup>166</sup> Bell and York describe Friends of Coal's tactics as "elaborate framing efforts to maintain and amplify coal's status as the economic identity of West Virginia" in order to "counter the coal industry's loss of citizens' employment loyalties."<sup>167</sup> As with the Land Transfer Movement, grassroots sympathies, anti-federalism, job concerns, and the embrace of natural resource use all interact. Bill Raney, president of Friends of Coal, beseeches readers of their newsletter to "Call Washington . . . call the media . . . let them know you are a Friend of Coal and that you won't stand by and let them steal your future."<sup>168</sup>

The War on Coal campaign appealed to many residents of struggling coalfield communities. For instance, in West Virginia's 2014 midterm elections, one commentator argues:

By maximizing divisive political rhetoric based on a presupposed War on Coal, an 80-year minority party was able to unseat multiple incumbent politicians and take control of the state political landscape. . . . [T]he War on Coal campaign appealed to the worldview of many West Virginia voters . . . [and] provided the easiest avenue for politicians to utilize divisive rhetoric in distracting voters from other, more relevant issues.<sup>169</sup>

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<sup>162</sup> *E.g.*, Bruce Carlson, Opinion, *The Political War on Coal*, LEDGER INDEP. (Maysville, Ky.) (Apr. 25, 2016), <https://perma.cc/T378-42VW>.

<sup>163</sup> *E.g.*, Jeff Brady, 'America First' Energy Plan Challenges Free Market Realities, NAT'L PUB. RADIO (Feb. 7, 2017), <https://perma.cc/ZD8T-PZ4H>; *see also* Inskip, *supra* note 115 (President Obama arguing that cheap natural gas contributed to coal's decline rather than his Administration's regulations).

<sup>164</sup> Mayuca Salazar, Note, *The North American Gas Markets and the Role of Regulatory Agencies (NEB/Canada, FERC/USA, and CRE/Mexico)*, 2 TEX. J. OIL & ENERGY L. 167, 170–79 (tracing the history of natural gas regulation in the United States from light regulation to price control and then back to light regulation).

<sup>165</sup> Coral Davenport, *McConnell Wants States' Help Against an Obama 'War on Coal'*, N.Y. TIMES, Mar. 20, 2015, at A1.

<sup>166</sup> Shannon Elizabeth Bell & Richard York, *Community Economic Identity: The Coal Industry and Ideology Construction in West Virginia*, 75 RURAL SOC. 111, 126 (2010).

<sup>167</sup> *Id.* at 126, 128.

<sup>168</sup> Bill Raney, *From the President's Desk . . . The State of Coal*, COAL FACTS (W. Va. Coal Ass'n, Charleston, W. Va.), 2010, at 5 (alterations in original), <https://perma.cc/3J97-WK3Q>.

<sup>169</sup> Matthew Henry Burns, "War on Coal": The Effects of Divisive Political Rhetoric on the Public Policy Process in West Virginia 79 (Feb. 2015) (unpublished M.P.A. thesis, American Public University), <https://perma.cc/3C9P-XW9W>.

Working class opposition to coal industry regulations has appeared strong: groups including the United Mine Workers Association, the International Brotherhood of Electrical Workers, boilermakers, steelworkers, and other workers have all opposed the regulations in one manner or another.<sup>170</sup>

The War on Coal campaign differs in some significant ways from the Land Transfer Movement. The War on Coal campaign appears to lack a militant arm, for instance. It also concerns private land uses rather than public lands, although perhaps the parallel public resource relevant to the War on Coal would be air rather than land. However, the movements' overarching themes are similar: misguided environmental regulation, imposed by an unsympathetic and distant federal government, is an illegitimate encroachment on the rights and way of life of workers and their communities.

As of 2016, the campaign had come to a head as the “war” was actually being fought on a courtroom battlefield. The Attorney General of West Virginia, Patrick Morrissey, purported to “lead the fight against EPA’s rules regulating carbon dioxide emissions from new and existing coal-fired power plants.”<sup>171</sup> West Virginia and twenty-eight other states and state agencies filed suit challenging the CPP and arguing that EPA had exceeded its authority in its attempt to require states to develop plans to reduce greenhouse gas emission from existing fossil fuel-fired electric generating units under the Clean Air Act.<sup>172</sup> In February 2016, the Supreme Court granted the plaintiffs a stay of the implementation of the Plan, pending the resolution of legal challenges.<sup>173</sup> Again, this battle is largely political. But it behooves us to ask: could the formulation of the CPP have done more to prevent this costly legal conflict?

### *3. The Movements' Commonalities and Significance*

The movements' overarching theme—federal environmental regulation as an illegitimate encroachment on workers' livelihoods—is clear. But they have more in common than even this. As an initial matter, each of these movements has a natural geospatial association, and the movements can best be understood by picturing them in specific regions. For the Land Transfer Movement, it is “the West.” The Great Basin, which encompasses most of Nevada, half of Utah, and parts of Wyoming, Idaho, Oregon, and

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<sup>170</sup> *E.g.*, Jessica Lilly, *UMWA Joins Coal Industry to Oppose EPA Regs*, W. VA. PUB. BROADCASTING (June 2, 2014), <https://perma.cc/P6AT-GS24>; *IBEW Sues EPA to Stop Clean Power Plan*, INT'L BROTHERHOOD ELECTRICAL WORKERS (Nov. 19, 2015), <https://perma.cc/9SR3-P5T7>; EP Newswire, *Boilermakers Union Leader Lambasts EPA's Clean Power Plan, Offers Alternative*, COUNT ON COAL (Feb. 24, 2016), <https://perma.cc/T3F7-VGPA>.

<sup>171</sup> *Proposed EPA Rules for New and Existing Coal-Fired Power Plants*, OFF. W. VA. ATT'Y GEN. PATRICK MORRISSEY <https://perma.cc/UFS8-N4FF> (last visited Nov. 7, 2016).

<sup>172</sup> *West Virginia v. U.S. Env'tl. Prot. Agency*, No. 15-1363 (D.C. Cir. Oct. 23, 2015). Oral arguments in the case were held on September 27, 2016. Coral Davenport, *Appeals Court Hears Challenge to Obama's Climate Change Regulations*, N.Y. TIMES, Sept. 28, 2016, at A13.

<sup>173</sup> *Chamber of Commerce v. U.S. Env'tl. Prot. Agency*, 136 S. Ct. 999 (2016) (mem.).

California, can serve as an illustration.<sup>174</sup> For the War on Coal Campaign, the central and northern parts of Appalachia—the heart of coal country including Pennsylvania, eastern Ohio, West Virginia, western Maryland, Kentucky, southwest Virginia, and eastern Tennessee—can serve as an illustration.<sup>175</sup>

Understanding these movements in relevant geospatial contexts helps to illustrate what drives them. First, each of these regions is characterized by a history of federal absenteeism and a reputation for lawlessness. In the West, in the decades from the 19th century's fourfold increase in public land size through the 1970s, public land law was characterized by "near-total absence of government oversight of the frontier," congressional ratification of "questionable land-grabbing behaviors," and federal statutes, such as the 1934 Taylor Grazing Act,<sup>176</sup> that failed to meet their stated aims.<sup>177</sup> Efforts since the 1970s to shift toward stewardship, conservation, and recreation have seen some success.<sup>178</sup> However, many current or would-be users still insist upon an "open-access" model where government limitations on private uses are disfavored.<sup>179</sup> To this day, the stewardship model remains halfheartedly enforced.<sup>180</sup>

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<sup>174</sup> *The Great Basin*, NAT'L PARK SERV., <https://perma.cc/6THL-E84H> (last visited Feb. 25, 2017).

<sup>175</sup> *Subregions in Appalachia*, APPALACHIAN REGIONAL COMMISSION, <https://perma.cc/R4NV-DWZE> (last visited Feb. 25, 2017).

<sup>176</sup> 43 U.S.C. §§ 315 to 315o-1 (2012). The Grazing Act purported to limit ranchers' ability to use public lands, but involved "wildly inflated estimates of available forage," meaning that forage allocations to established domestic livestock producers were nominal only. Fairfax, *supra* note 128, at 969; accord George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act* (pt. 2), 13 ENVTL. L. 1, 27 (1982).

<sup>177</sup> Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1021, 1025 (2014); Hoffmann, *supra* note 7, at 20–21.

<sup>178</sup> Huber, *supra* note 177, at 1031–32.

<sup>179</sup> *Id.* at 1031 & n.218; see also Coggins & Lindeberg-Johnson, *supra* note 176, at 23–24 ("Even the popular romanticization of western history does not ignore the homesteader harassment, range wars, illegal claims and conspiracies, and other grubby commonplaces of those lawless days. . . . [E]stablished ranchers used a variety of devices to monopolize use of the public lands when they could not settle, buy, or steal them outright. . . . All the while, Congress stood aloof from the fray. . . . The Department of the Interior, on the occasions when it was so inclined, was largely powerless to prevent the obvious damage to [public resources] and the deterioration of public morality. Frontier life encouraged disregard for sophisticated legal rules and discouraged behavior thought 'civilized' in the East. The rancher prized individualism and lived by rudimentary notions of self-interest. Those frontier attitudes have been altered, but not eradicated, by the course of history." (footnotes omitted)).

<sup>180</sup> See Huber, *supra* note 177, at 1032–35 (explaining the durability of private land claims on public land and the challenges of administering those claims); Miller, *supra* note 153 ("[T]he remoteness of sagebrush country feels like it is a world apart; it is, but when it's federal land, the rules of law apply in ways that are not common for a place where things are still done with a handshake. . . . [F]ederal law is something altogether different. It doesn't bend like the state and local officials; it comes at you the same no matter where. That is what is hard for people born to this place to get. . . . [T]he feds . . . don't play by house rules, and what appears like the general application of the rule of law to anyone who doesn't live here feels like bald tyranny to those used to being able to intimidate their way out of enforcement by state or local officials.").

The northern and central regions of Appalachia similarly have a history of ineffective government oversight. Many commentators have recognized the coal industry, rather than the government, as the most powerful regional entity. McGinley characterizes the early 20th century social order in Appalachia as completely dominated by coal companies.<sup>181</sup> Then, as recently as the early 21st century, “running a political campaign against the coal industry in the Appalachian region [was] an election failure guarantee,” in part because of the millions of dollars the industry spent on gubernatorial, legislative, and judicial campaigns.<sup>182</sup> Federal legislation seeking to regulate Appalachian society has also had little influence.<sup>183</sup> The Surface Mining Control and Reclamation Act of 1977<sup>184</sup> (SMCRA), for instance, required that mining operators restore surface land to its original contour,<sup>185</sup> but Appalachian plaintiffs have largely been unable to recover remedies for widespread subsidence problems because of state courts’ favorable treatment of coal operators.<sup>186</sup> The long acceptance of devastating mountaintop removal and stream-filling practices under the Clean Water Act also illustrates how residents have largely been left to fend for themselves.<sup>187</sup>

The other side of the coin of federal absenteeism is the regions’ respective reputations as lawless societies. Western states saw “range wars” fought in the 19th century over grazing rights.<sup>188</sup> Appalachia had its own “mine wars” and is known for famous family feuds.<sup>189</sup> Both regions are

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<sup>181</sup> Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 26 n.11 (2004).

<sup>182</sup> Mark Baller & Leor Joseph Pantilat, Comment, *Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice*, 37 ENVTL. L. 629, 649, 656 (2007).

<sup>183</sup> Cf. Gail McGowan Mellor, *The Hanged Census Worker: Why Appalachia Hates Feds*, HUFFINGTON POST (Mar. 12, 2009), <https://perma.cc/E2BE-234J> (“The U.S. government began its life back in 1791 by shafting the Appalachian area. People have not forgotten it, perhaps because it has yet to stop happening.”).

<sup>184</sup> Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2012).

<sup>185</sup> *Id.* at § 1266(b)(1).

<sup>186</sup> Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905, 936 (2002); Ken Ward Jr., *30 Years Later, Mine Law’s Success Debated*, CHARLESTON GAZETTE-MAIL (July 22, 2007), <https://perma.cc/2B9N-GP2F> (“[M]ajor questions remain about [SMCRA’s] effectiveness. Across the Appalachian coalfields, citizens still complain about strip mining. They say blasting rattles their homes and cracks foundations, mud and chemicals are dumped into streams, scalped forests and hills contribute to flooding and valley-fill waste piles bury hundreds of miles of streams. Even some longtime coal industry supporters and regulators are starting to wonder if the law . . . has not lived up to its promise.”).

<sup>187</sup> See generally David C. Holzman, *Mountaintop Removal Mining: Digging into Community Health Concerns*, 119 ENVTL. HEALTH PERSP. A476, A482–83 (2011) (discussing the human health and ecological consequences of mountaintop removal mining). In recent news, Congress voted, largely along party lines, to rescind the Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016), promulgated by the Obama Administration. Hiroko Tabuchi, *G.O.P. Reverses Obama-Era Rule to Protect Streams from Coal Mining*, N.Y. TIMES, Feb. 3, 2017, at A17.

<sup>188</sup> Hillary M. Hoffmann, *A Changing of the Cattle Guard: The Bureau of Land Management’s New Approach to Grazing Qualifications*, 24 J. ENVTL. L. & LITIG. 243, 249 (2009).

<sup>189</sup> Davis, *supra* note 186, at 908 (discussing the Hatfield–McCoy feud); Jessica Lilly & Roxy Todd, *Suppressed Mine Wars History Being Revived Inside Appalachia*, W. VA. PUB.



known for disengagement with government, vigilantism, feuds, and a preference for informal dispute resolution.<sup>190</sup> While these characterizations tend to play on unfair stereotypes, they also may indicate the presence of cultures where the rule of law has a looser hold than in more urban, population-dense areas.<sup>191</sup>

The federal absenteeism and lawlessness parallels are of course linked to the rural nature of life in both regions—another commonality between the movements. Scholars writing about rural law, development, and sociology have consistently noted the lack of attention rural issues receive in scholarship and policymaking.<sup>192</sup> A “live-and-let-live” philosophy, attachment to private property rights, and skepticism of government are all cultural tendencies associated with rural areas.<sup>193</sup> Significantly, the face of each social movement discussed here is a working resident of a rural area—the beleaguered rancher for the Land Transfer Movement and the beleaguered coal miner for the War on Coal campaign.

A slightly subtler commonality between the two regions is that residents of each have relatively limited opportunities to participate in autonomous land use decision making. Seventy percent of the land in the Great Basin is publically owned.<sup>194</sup> Although federal agencies are shifting toward participatory decision-making models, the postpreservation-era model, when enforced, has been top-down and technocratic.<sup>195</sup> Westerners

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BROADCASTING (Feb. 5, 2016), <https://perma.cc/LXP2-WGNQ> (discussing the conflicts between workers, labor unions, and mine company guards).

<sup>190</sup> Charles Conrad & Lucinda Sinclair-James, *Institutional Pressures, Cultural Constraints, and Communication in Community Mediation Organizations*, in CONFLICT AND ORGANIZATIONS: COMMUNICATIVE PROCESSES 69, 78–80, 85 (Anne Maydan Nicotera ed., 1995) (Appalachia); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1–2, 4–5, 282 (1991) (western United States).

<sup>191</sup> Pruitt, *Space Tames*, *supra* note 79, at 207.

<sup>192</sup> *E.g.*, Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 975 (2005).

<sup>193</sup> ELLICKSON, *supra* note 190, at 53–54, 250–52; Ann Eisenberg, *Addressing Rural Blight: Lessons from West Virginia and WV LEAP*, 24 J. AFFORDABLE HOUSING 513, 523–24 (2016); Pruitt & Sobczynski, *supra* note 3, at 331–32.

<sup>194</sup> Alicia Torregrosa & Nora Devoe, *Urbanization and Changing Land Use in the Great Basin*, in COLLABORATIVE MANAGEMENT AND RESEARCH IN THE GREAT BASIN—EXAMINING THE ISSUES AND DEVELOPING A FRAMEWORK FOR ACTION 9 10 (Jeanne C. Chambers et al. eds., 2008), <https://perma.cc/AU6P-PA6R>.

<sup>195</sup> See Kirsten M. Leong et al., *The New Governance Era: Implications for Collaborative Conservation and Adaptive Management in Department of the Interior Agencies*, 16 HUM. DIMENSIONS WILDLIFE 236, 237–39 (2011) (arguing that the Department of the Interior has adopted a public engagement model of decision-making sporadically and informally); *id.* at 237 (“Previous eras relied on scientific management principles and technocratic decision-making, which emphasize fixed goals, stable systems, reductionism, certainties, prediction and control, competition among interests, and expert authority governance.”); see also Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND, RESOURCES, & ENVTL. L. 67 (2003) (assessing whether existing legal framework controlling public lands accommodates role for collaborative groups); Bryan, *supra* note 9, at 149 (arguing that federal agency land use planning “is so highly discretionary that it has become inexcusably inconsistent from one agency to the next, and experienced as arbitrary by the communities involved”).

who do not favor federal land ownership could be said to suffer a sort of reverse environmental justice issue, bearing a disproportionate burden of conservation interests compared to other Americans without opportunities for meaningful participation. In Appalachia, the opposite influences have led to a similar result: aggressive land acquisition by private interests for several centuries has resulted in dramatically high rates of land ownership by out-of-state, corporate entities, stymieing local decision-making power.<sup>196</sup> If one is looking for someone to blame for poverty, or anything else in the Great Basin, the federal government as landlord is an easy target.<sup>197</sup> If one is looking for someone to blame in Appalachia, federal indifference to the region's plight could easily be blamed, as with SMCRA. In either case, the end result is a sense of powerlessness and anger.<sup>198</sup>

The crux of these commonalities is that the two social movements would have logical appeal to some working residents of these regions and comparable ones. The rule of law in their respective regions has always been tenuous, yet they lack a voice in land use decision making—decision making that typically plays a role not just in determining natural resource uses, but also in communities' cultural and economic development. Meanwhile, after several decades of devastating economic trends and population loss, rural life is harsh and opportunities are limited.<sup>199</sup> Hostility toward environmental regulation and bristling at exercises of federal authority, which may have the effect of changing traditional economic pursuits focused on natural resources, becomes unsurprising. Indeed, sociologists credit the past several decades of poverty and economic crises with the rise of antigovernment militias in the 1990s.<sup>200</sup> In places that it has done little to regulate historically, federal policy may seek to limit decision-making power even further, while reducing or repositioning the few economic opportunities that were traditionally available.<sup>201</sup> Adding the influence of politicians, industry players, and questionable media sources to the mix, it is no wonder that an EPA or BLM agenda is lost on a substantial faction of this demographic, and that anti-environmental, anti-federal alienation continues to germinate.<sup>202</sup>

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<sup>196</sup> Ann M. Eisenberg, *Land Shark at the Door? Why and How States Should Regulate Landmen*, 27 FORDHAM ENVTL. L. REV. 157, 177–78 (2016).

<sup>197</sup> See Miller, *supra* note 153 (“In the weird world of renewable, non-compete grazing permits, there are families that have grazed federal land for generations but do not own it. There is an odd tenant-farmer reality: some of these families have been here for generations but do not own any land. This creates immense hostility, especially when new conditions are placed on those permits.”).

<sup>198</sup> See generally JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

<sup>199</sup> See Miller, *supra* note 153 (“[I]t is hard to underestimate the effects of globalization on these remote farms.”); Kimmel & Ferber, *supra* note 130, at 584 (discussing the economic restructuring of rural America).

<sup>200</sup> See, e.g., Dyer, *supra* note 4 (discussing how poverty, economic problems, and racism lead to belief in conspiracy thinking).

<sup>201</sup> Miller, *supra* note 153.

<sup>202</sup> Alienation is used here for its meaning in common usage: the feeling of absence of connectedness. However, there is perhaps a connection to be made with Marx's theory of alienation. See KARL MARX, *Alienated Labor*, in KARL MARX: SELECTED WRITINGS 85 (David

This alienation could be seen as a natural outgrowth of rural life. Pruitt has argued that “formal law and rural spatiality are fundamentally at odds with each other because the presence of law as a force of the state—as an ordering force—is in tension with the material character of rurality, as well as with rurality’s associated sociospatial features.”<sup>203</sup> It could alternatively be seen as a form of anomie or legal cynicism, the complex evolution of a social group’s perception that the law is illegitimate, possibly stemming from “procedural injustice.”<sup>204</sup> However this phenomenon might best be described, it should be recognized that these groups see themselves as a part of the SESs in which they reside, yet external to the governance regimes that seek to influence those systems. That influence, it is presumed here, could achieve much-needed, enhanced effectiveness if members of this demographic considered themselves internal to both frameworks.

It has likely not helped this alienation that the environmentalist response to concerns about jobs has at times been to vilify or ignore the jobs advocates, to treat workers in traditionally polluting industries as morally inferior, or to treat employment prospects as an economic issue that is not environmentalism’s job to solve.<sup>205</sup> This response is not necessarily unsympathetic. The jobs advocates are often industry players who use the image of the workers’ need as a means to pursue their own interests.

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McLellan ed., Oxford Univ. Press 2d ed. 2000) (1844) (discussing how political economy leads to workers becoming more valueless the more they produce).

<sup>203</sup> Pruitt, *Space Tames*, *supra* note 79, at 190. These features, she explains, include “low population density, small population clusters, and a dominance of what is perceived as nature over the built environment.” *Id.*

<sup>204</sup> See, e.g., David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190 (2011); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011). These concepts, denoting perceptions of law as illegitimate, are discussed more frequently with regard to disconnects between minority communities and the police or courts. A comparison of that area of scholarship and this discussion reveals interesting parallels. See, e.g., ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016); Monica C. Bell, *Police Reform & the Dismantling of Legal Cynicism*, 126 YALE L.J. (forthcoming 2017).

<sup>205</sup> See, e.g., Geisinger, *supra* note 114, at 115–16 (“In his March 25, 1999 testimony to the U.S. Senate regarding the potential impacts of the Kyoto Protocol, the president of the United Mine Workers of America estimated that enacting the greenhouse gas emissions reductions envisioned by the protocol would result in a loss of over 1 million American jobs. Environmentalists of course dispute[d] these job loss claims as unfounded or at least extremely exaggerated.” (footnotes omitted)). I am perhaps guilty of this myself. In an article on shale gas development, I argued that economic need should not be taken into account for communities deciding whether to allow shale gas development. Ann M. Eisenberg, *Beyond Science and Hysteria: Reality and Perceptions of Environmental Justice Concerns Surrounding Marcellus and Utica Shale Gas Development*, 77 U. PITT. L. REV. 183 (2015). Meanwhile, some residents of southern New York were threatening to secede because of their desire to take advantage of fracking’s economic benefits. Susanne Craig, *Former Hub of Manufacturing Ponders Next Act*, N.Y. TIMES, Sept. 30, 2015, at A20. Of course, this is not an argument that economic opportunity should trump public health and safety consideration. But as Ruhl has noted, confrontational attitudes and insistence upon preservation has not necessarily helped the environmental movement. Ruhl, *Climate Change Adaptation*, *supra* note 13, at 433.

Furthermore, the jobs need does not reduce the need for and urgency of environmental protection.

Overall, this dialogue is a sensitive one. Environmentalists seeking to expand the discourse might fear being seen as sanctioning environmental degradation, or as asking: “But what about the white people?” in a time where institutional racism is a clear and pressing societal concern. Ammon Bundy’s acquittal, for instance, attributed by many to white privilege, stood in stark contrast to events that took place simultaneously in North Dakota, where police violently suppressed indigenous residents protesting the Dakota Access pipeline.<sup>206</sup> Even worse, given the association of rural antigovernment militias and the Bundys themselves with white supremacist views, one might fear being seen as asking, “But what about the white supremacists?”<sup>207</sup>

This discussion does not seek to absolve people like the Bundys of their moral shortcomings, or to advocate strengthening legal or social institutions that perpetuate white supremacy. Rather, it seeks, first, to call attention to the cultural rifts discussed above, to question the effectiveness of environmentalism’s sometimes “us-versus-them” mentality, and to spur examination of prejudices still treated as socially acceptable in many spheres. One resident of Appalachia observed, “We’re probably one of the last few groups that it’s still politically correct to make fun of . . . It’s still OK to tell, you know, hillbilly, redneck jokes.”<sup>208</sup> This discussion seeks further to highlight that suggestions as to environmental regulations’ potential to hurt individuals’ employment prospects are not always mere propaganda.<sup>209</sup> The demise of the coal industry, for instance, is necessary and desirable. Yet, the death of coal has also left northern and central Appalachia even more socioeconomically devastated than it was before.<sup>210</sup> While environmental advocacy has tended to treat environmental wins as nonzero sum scenarios,<sup>211</sup> to individuals who bear particular costs, the scenarios may in fact be zero sum. Perhaps we can blame the choices of the residents and politicians of Appalachia for this devastation, or dismiss it as collateral damage for the greater cause. However, we could also look to a legal scheme that has treated issues in disciplinary silos and failed to account for SES complexity.

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<sup>206</sup> E.g., Peniel Joseph, Opinion, *The Privileges of Protesting While White*, CNN (Oct. 30, 2016) <https://perma.cc/95HW-78UV>; Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NAT’L PUB. RADIO: THE TWO-WAY (Sept. 4, 2016), <https://perma.cc/5B9S-RDUR>.

<sup>207</sup> Matthew Pulver, *This Is What White Supremacy Looks Like: A Party at the Bundy Ranch, a Funeral in North Charleston*, SALON (Apr. 10, 2015), <https://perma.cc/L8G9-QLAL>.

<sup>208</sup> Pam Fessler, *In Appalachia, Poverty Is in the Eye of the Beholder*, NAT’L PUB. RADIO (Jan. 18, 2014), <https://perma.cc/E6GD-T4NN>.

<sup>209</sup> Miller, *supra* note 153.

<sup>210</sup> Economists appear to agree that environmental regulation does not cause a *net* loss of jobs in a society. E.B. GOODSTEIN, *JOBS AND THE ENVIRONMENT: THE MYTH OF A NATIONAL TRADE-OFF* 11 (1994) (“But in this case, there seems to be universal accord that, on an economy-wide basis, the ‘jobs versus the environment’ debate is based purely on myth.”).

<sup>211</sup> Ruhl, *Zero Sum*, *supra* note 116; Craig, *Zero Sum*, *supra* note 116.

*D. The Curative Potential of Collaborative Decision Making*

The jobs–environment nexus is precisely the type of issue that we now recognize is necessary to accommodate through a holistic legal apparatus equipped to interact with SESs of various scales. Resilience, energy, and other scholarship has increasingly called for integrative policy approaches that reconcile environmental harms, climate, and economic development.<sup>212</sup> The good news is that the types of new governance models being discussed in climate scholarship also offer hope for reconciling work and the environment, and for mitigating the alienation and cultural divides that catalyze the movements discussed above.

Commentators have specifically pointed to collaborative decision making as a potential pathway to mending the work–environment rift. Discussing the instances where collaborative decision-making has proven effective, Obach argues, “actual *individuals* have to interact in a concerted manner to establish relations with one another.”<sup>213</sup> For instance, he describes how collaborative decision making and the opportunity to interface brought a harmonious ending to a bitter conflict between tannery workers and environmentalists in Gloversville, New York. Two representatives of the respective groups

were asked to simply talk about the issues that they confronted in Gloversville. . . . This interaction caused both of them to begin to rethink their relationship. The conference workshop was the first civil interaction between these two movements leaders, and the simple sharing of concerns in this forum allowed for greater understanding of one another’s position in the dispute. . . . These interactions allowed for crucial trust building between the two activists as well as a greater appreciation for one another’s views on the issues that divided them.<sup>214</sup>

From a policy standpoint, he points to the importance of creating “brokerages”—people and entities that can facilitate these dialogues.<sup>215</sup>

Obach and Barca argue that labor–environmentalist cooperation has proven quite influential when it occurs. Obach observes, “[w]hen unions and environmentalists have positive relations with one another and form an ongoing alliance, they present a formidable political force potentially capable of redirecting economic and environmental policy in fundamental ways.”<sup>216</sup> Barca argues that corporate and political actors strive to widen rifts between labor and environmental groups because if they do not, “the awareness of the organic connections existing between labor, environment and health is capable of producing a radical critique of the economic system and a new emancipatory discourse, which is potentially very dangerous for

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<sup>212</sup> *E.g.*, Flatt & Payne, *supra* note 34.

<sup>213</sup> OBACH, *supra* note 81, at 19 (emphasis omitted).

<sup>214</sup> *Id.* at 4–5.

<sup>215</sup> *Id.* at 207.

<sup>216</sup> *Id.* at 14.

the political-economic order.”<sup>217</sup> Obach notes, “[a] deeper understanding of this type of cooperation is important because a single organization is rarely capable of advancing any significant political goal by itself. . . . [T]he ability to enlist a range of allies in political struggles is often a crucial determinant of success.”<sup>218</sup>

The collaborative decision-making component of adaptive governance thus holds significance in its potential to address the work–environment rift. The subsequent discussion of case studies addresses in more detail how adaptive governance also cuts to the other cultural issues discussed above by reducing the rigidity of legal schemes; facilitating information exchange, bottom-up governance, and trust-building; validating diverse experiences; and personalizing the federal government. The next section revisits Malheur and argues that Malheur’s 2013 management plan was not just an example of successful multistakeholder planning. It also offers an important example of bridging the rift between work and environment, through processes that look a lot like adaptive governance, to the benefit of federal climate policy.

#### IV. THE MALHEUR REFUGE: A CLIMATE-ERA PLANNING PROCESS?

For those who had not heard of the Malheur Refuge prior to Bundy’s occupation, the impression might have been that Malheur is an area rife with conflict or the site of a modern-day ranch war. As an initial matter, however, one would be hard-pressed to consider Bundy and the other occupiers to be “stakeholders” in the Malheur SES—that is, individuals who would be entitled to some form of input in the Refuge’s management.<sup>219</sup> Only three of the twenty-five occupiers were residents of Oregon.<sup>220</sup> No evidence suggests that they had attempted to communicate with those connected to Malheur prior to the occupation. Malheur appears to have been a strategic political choice for the protest.<sup>221</sup>

In fact, the Malheur landscape does have a history of conflict among other ranchers, birders and other conservationists, Native tribes, and various government agencies.<sup>222</sup> Nevertheless, in recent history, Malheur has been lauded for its efforts to funnel this conflict into a multistakeholder, collaborative planning process pursuant to the National Wildlife Refuge

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<sup>217</sup> Barca, *supra* note 96, at 67.

<sup>218</sup> OBACH, *supra* note 81, at 7.

<sup>219</sup> See generally Mark S. Reed et al., *Who’s in and Why? A Typology of Stakeholder Analysis Methods for Natural Resource Management*, 90 J. ENVTL. MGMT. 1933 (2009).

<sup>220</sup> *Faces of the Malheur Occupation*, *supra* note 1.

<sup>221</sup> See Blumm & Jamin, *supra* note 125, at 53–54 (noting that most of the occupiers did not come from Oregon, yet “seized the opportunity presented by the sentencing of two local ranchers to obtain publicity for their cause”).

<sup>222</sup> See generally NANCY LANGSTON, *WHERE LAND AND WATER MEET: A WESTERN LANDSCAPE TRANSFORMED* 12–62 (2003) (describing tensions going back as early as the 1870s, including the attempt to drive the Paiute Tribe from the Malheur Lake basin, so that Euro-Americans could claim it for their own).

System Improvement Act of 1997,<sup>223</sup> which directed all refuges to adopt and implement comprehensive conservation plans setting forth management guidance for the next fifteen years.<sup>224</sup> One commentator described the process as “community-led conservation.”<sup>225</sup> Many agree that it was innovative.<sup>226</sup> This section notes a few characteristics of the planning process and substantive elements that reflect the type of governance some call for to accommodate SESs.

### *A. Background and the Collaborative Planning Process*

The remote Refuge, created under President Teddy Roosevelt in 1908,<sup>227</sup> comprises approximately 187,000 acres, or around 290 square miles, within the lake system of the northwestern Great Basin.<sup>228</sup> Its wildlife includes a famously rich array of bird populations, with more than 320 species of birds and 58 mammal species observed there.<sup>229</sup> Prior to its use as a refuge, the

<sup>223</sup> Emma Marris, *How Malheur Became the Epicenter of Community-Led Conservation*, AUDUBON (Summer 2016), <https://perma.cc/FAA5-ECWR> (“The Malheur occupation depicted a landscape locked in conflict—but it was far from the truth.”).

<sup>224</sup> National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 7(a)(2), 111 Stat. 1252, 1258 (codified as amended at 16 U.S.C. § 668dd(e)(1) (2012)). Other laws influence the Comprehensive Conservation Planning process, including the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012); the National Historic Preservation Act, 54 U.S.C. §§ 300301–307108 (Supp. II 2015); the Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012); Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157 (2012). In addition to statutes, several executive orders influence the process. Responsibilities of Federal Agencies to Protect Migratory Birds, Exec. Order No. 13,186, 3 C.F.R. at 719 (2002); Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 3 C.F.R. at 304 (2001); Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. at 859 (1995); Intergovernmental Review of Federal Programs, Exec. Order No. 12,372, 3 C.F.R. at 197 (1983); Protection of Wetlands, Exec. Order No. 11,990, 3 C.F.R. 1977 at 121 (1978); Floodplain Management, Exec. Order No. 11,988, 3 C.F.R. at 117 (1978).

<sup>225</sup> Marris, *supra* note 223.

<sup>226</sup> *E.g.*, Nancy Langston, Opinion, *The Surprising History of the Malheur Wildlife Refuge*, HIGH COUNTRY NEWS (Feb. 2, 2016), <https://perma.cc/CSK6-MRLN>.

<sup>227</sup> The Refuge was created by an Executive Order entered on August 18, 1908, by President Theodore Roosevelt. Exec. Order No. 929 (1908), *microformed on* Presidential Executive Orders & Proclamations (1789-1983) (Cong. Info. Serv.) (“It is hereby ordered that all smallest legal subdivisions which touch the shore line of Lakes Malheur and Harney and the streams and waters connecting these lakes . . . are hereby reserved, subject to valid existing rights, and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds. The taking or destruction of birds’ eggs and nests, and the taking or killing of any species of native bird for any purpose whatsoever . . . is prohibited and warning is expressly given to all persons not to commit within the reserved territory any of the acts hereby enjoined. This reserve to be known as Lake Malheur Reservation.”). The Refuge’s name was subsequently changed twice, culminating with Malheur National Wildlife Refuge per Presidential Proclamation No. 2416 issued on July 25, 1940. Proclamation No. 2416, 3 C.F.R. at 49, 54 (1940).

<sup>228</sup> Dave Semnara, *Angry Birders: Standoff at Oregon Refuge Has Riled a Passionate Group*, N.Y. TIMES: IN TRANSIT (Jan. 8, 2016), <https://perma.cc/F484-4MRY>.

<sup>229</sup> *Id.*

area was an essential source of water for the Paiute Indians, who were pushed out by cattle ranchers.<sup>230</sup>

From the 1930s to the early 1970s, “refuge staff was beset by continual complications and battles with ranchers, farmers, and finally conservationists” over scarce resources at Malheur.<sup>231</sup> “In the 1970s, when concern about overgrazing reduced—but did not eliminate—refuge grazing, violence erupted again. Some environmentalists denounced ranchers as parasites who destroyed wildlife habitat. A few ranchers responded with death threats against environmentalists and federal employees.”<sup>232</sup> But the 1990s saw momentum gaining for local interest in collaborative decision making.<sup>233</sup>

The planning process for the Malheur National Wildlife Refuge Comprehensive Conservation Plan (Conservation Plan) began in earnest in 2008 under Refuge Manager Tim Bodeen.<sup>234</sup> The National Wildlife Refuge System Administration Act of 1966<sup>235</sup>, the National Wildlife Refuge System Improvement Act of 1997, and subsequent policy documents offered some guidance as to how to proceed.<sup>236</sup> However, in light of refuges’ highly varied histories, authorities, and needs, planning processes were mostly left to local discretion.<sup>237</sup> After Bodeen announced his interest in pursuing an approach involving more public participation than was traditional, some were skeptical; according to one observer, “early on it looked like the process at Malheur might implode due to all the mistrust.”<sup>238</sup> Planners agreed to focus

<sup>230</sup> LANGSTON, *supra* note 222, at 27–28; Kelly House, *Burns Paiutes to Ammon Bundy: You’re Not the Victim*, OREGONIAN (Feb. 7, 2016) <https://perma.cc/5C9J-GJFC>.

<sup>231</sup> Richard J. Finkmoore, *Recent Books on the National Wildlife Refuge System and Its Uncertain Future*, 44 NAT. RESOURCES J. 1239, 1242 (2004) (reviewing LANGSTON, *supra* note 222); accord DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH (1983).

<sup>232</sup> Langston, *supra* note 226.

<sup>233</sup> *Id.* (“Paiute tribal members, ranchers, environmentalists and federal agencies collaborated on innovative grazing plans to restore bird habitat while also giving ranchers more flexibility.”).

<sup>234</sup> Malheur National Wildlife Refuge, Harney County, OR, 74 Fed. Reg. 31,046 (June 29, 2009); U.S. FISH & WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION FOR THE MALHEUR NATIONAL WILDLIFE REFUGE COMPREHENSIVE CONSERVATION PLAN AND ENVIRONMENTAL IMPACT STATEMENT I (2013) [hereinafter MALHEUR ROD], <https://perma.cc/5MQU-MZJX>.

<sup>235</sup> 16 U.S.C. §§ 668dd–668ee (2012).

<sup>236</sup> MALHEUR NAT’L WILDLIFE REFUGE & U.S. FISH & WILDLIFE SERV., MALHEUR NATIONAL WILDLIFE REFUGE: COMPREHENSIVE CONSERVATION PLAN 1-4 to -13 (2013) [hereinafter CONSERVATION PLAN].

<sup>237</sup> Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 592–612 (2002) [hereinafter Fischman, *National Wildlife Refuge*] (“[Surveying] the hodgepodge of instruments, authorities, and purposes to illustrate the centrifugal forces that resist cohesive, systemic management.”); Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L.J. 77, 92–94 (2007) [hereinafter Fischman, *From Words to Action*] (“[T]he [2006 Goals and Refuge Purposes] Policy reflects a surrender to the centrifugal forces of local, particularized priorities and a relegation to secondary status of the organic mission to connect the refuges into a system that is more than the sum of its parts.”).

<sup>238</sup> Bernton, *supra* note 1.



on three tenets: commitment, honesty, and communication.<sup>239</sup> The Conservation Plan describes its process as “a three-year collaborative effort by dozens of stakeholders working closely with each other and with Refuge staff and experts.”<sup>240</sup> It contextualizes the process further:

The Refuge is a cherished place, widely embraced by all kinds of people for its ability to provide for wildlife, recreation, and support of local communities. However, it has also been a flashpoint for conflict and controversy over the past few decades. This controversy has created deep divisions and distrust between the Refuge and stakeholders as well as between the stakeholders themselves. In the meantime, the ecological health of the Refuge’s waterways and wetlands—long recognized as some of North America’s most important habitat for migratory birds—was in steep decline as common carp came to dominate most wet areas while other invasive non-native species spread throughout the Refuge.<sup>241</sup>

Years 2009, 2010, and 2011 involved dozens of meetings with congressional representatives, tribes, county commissioners, community and business organizations, federal and state agencies, academics, a specialized ecology work group, and individuals—including ranchers, other local residents, neighboring landowners, past Refuge employees, activists, and other concerned citizens.<sup>242</sup> In addition to six open houses, planners had listening posts at local events and several workshops with local participants focused on specific issues, such as priority resources of concern and the invasive carp problem.<sup>243</sup> Planners regularly mailed out planning updates to organizations, officials, and local residents, provided notice of events in local press and on the Refuge’s website, and published notices in the *Federal Register*; once in 2009 and twice in 2012.<sup>244</sup>

Despite initial public skepticism, “with the help of a facilitator, people kept coming to the meetings.”<sup>245</sup> Leaders took measures to recognize tensions while still streamlining communication. Meeting attendees

had green cards that they could hold up when they agreed with a plan objective, yellow that they could show to indicate concerns, and red that stood

<sup>239</sup> MALHEUR ROD, *supra* note 234, at 1.

<sup>240</sup> Colby Marshal et al., *Forward to CONSERVATION PLAN*, *supra* note 236, at i, i.

<sup>241</sup> *Id.*

<sup>242</sup> CONSERVATION PLAN, *supra* note 236, app. J at J1–J6 (listing six meetings with congressional representatives and/or their aides, four meetings with tribes, eleven meetings with elected officials, thirty-two meetings with community/business organizations, eleven meetings with collaborators, forty meetings with agencies and academia, and twenty-five meetings with individuals).

<sup>243</sup> *Id.* app. J at J1, J4–J6.

<sup>244</sup> *Id.* app. J at J1, J6–J7; Malheur National Wildlife Refuge, Harney County, OR; Final Comprehensive Conservation Plan and Final Environmental Impact Statement, 77 Fed. Reg. 75,644 (Dec. 21, 2012); Malheur National Wildlife Refuge, Harney County, OR; Draft Comprehensive Conservation Plan and Draft Environmental Impact Statement, 77 Fed. Reg. 13,139 (Mar. 5, 2012); Malheur National Wildlife Refuge, Harney County, OR, 74 Fed. Reg. 31,046 (June 29, 2009).

<sup>245</sup> Bernton, *supra* note 1.

for flat out opposition. When someone held up a red card, the group would go back and work on the objective some more.<sup>246</sup>

The Conservation Plan concluded:

This non-traditional and collaborative planning process has helped rebuild the relationships and communication necessary to produce a remarkable consensus around the core principles embedded in the Refuge's 15-year CCP:

- Ongoing collaborative approach to implementation, built around partnerships and a shared commitment to the long-term sustainability of the Refuge and the larger Harney Basin's wildlife, habitats, and human communities;
- Commitment to science-based, active adaptive management, driven by monitoring and evaluation of results, with Refuge decision making that is transparent and informed by stakeholder involvement;
- Focus on aquatic ecosystem health and the subsequent benefits to waterways, wetlands, and upland habitats.<sup>247</sup>

A central result of this collaborative, participatory process was an effort to reconcile cattle grazing with ecosystem protection, and to involve ranchers more centrally in landscape management.<sup>248</sup> "The plan affirmed that cattle, if carefully controlled and monitored, could help achieve refuge management goals, such as knocking back invasive plants. It called for rigorous and ongoing reviews to find out what strategies work, and what don't, for the federal grazing leases now extended to 13 area ranches."<sup>249</sup> This effort seemed to have a positive effect on ranching stakeholders. For instance, despite one rancher's ongoing disagreements with some Refuge management decisions, he reported that Refuge leadership "earned his respect."<sup>250</sup> The rancher stated, "To me, what is important is that the [R]efuge has really listened and taken a more collaborative approach . . . . Automatically, that helps build better relations with the community."<sup>251</sup>

The planning process was also credited with helping "lay the groundwork for another cooperative program to protect sage grouse that

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<sup>246</sup> *Id.*

<sup>247</sup> Marshal et al., *supra* note 240, at i.

<sup>248</sup> One major point of consensus that emerged from the planning process was that invasive carp was a problem for everyone. Stakeholders then collaborated to address the issue with creative solutions. For instance, some ranchers have turned the invasive carp into organic fertilizer to use on their fields. Virginia Gewin, *Turning Point: Carpe Freedom*, 532 *NATURE* 533, 533 (2016).

<sup>249</sup> Bernton, *supra* note 1.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

started in Harney County.”<sup>252</sup> In 2013, when the sage grouse (*Centrocercus urophasianus*) was a candidate for listing under the ESA, one researcher observed that “[r]anchers in southeast Oregon [we]re working with land managers and conservation groups to develop immediate plans to protect the sage-grouse, improve habitat, and ultimately restore health to the sagebrush grasslands for the benefit of both wildlife and ranch life.”<sup>253</sup> The program recruited ranchers to take manageable steps on their land to protect the sage grouse, “such as by removing weeds or uprooting junipers that offered perches for predators—moves that can also improve pastures.”<sup>254</sup> In the hope of warding off a listing of the sage grouse under the ESA, “ranchers in Harney County [we]re developing strategies to protect habitat on both public and private lands, and in turn, sustain their ranches.”<sup>255</sup> “‘We started saying what’s good for the bird is good for the herd,’ said Tom Sharp, a Harney County rancher who helped launch the cooperative effort that grew to encompass 53 ranches and 320,000 acres.”<sup>256</sup> The work drew praise from United States Department of the Interior Secretary Sally Jewell, who referred to Harney County’s approach as the “Oregon Way” and promoted it as a model.<sup>257</sup> The initiative is believed to have helped prevent the sage grouse from being listed under the ESA.<sup>258</sup>

Sharp commented further:

Ranchers and environmentalists came to realize that they wanted the same thing... Juniper and weeds hurt sage-grouse and cattle grazing. By approaching the problem as a land management problem, not a species problem, we could develop plans that would benefit grazing *and* sage-grouse. And ranchers *are* land managers, so the approach made sense. Cattle across the West stand to benefit from rangeland improvements. What’s good for the bird is good for the herd.<sup>259</sup>

Sharp and an extension agent both “work[ed] with public land agencies to make sure the conservation plans and monitoring methods [we]re consistent across a landscape of many ownerships and managements.”<sup>260</sup> Sharp attributed the success of the initiatives to relationships, trust, and “talking and working together.”<sup>261</sup>

Commentators observed that the Conservation Plan’s development process was unusually extensive in its emphasis on collaboration and

<sup>252</sup> *Id.*; accord Ann Haas, *Farmers and Ranchers in Eastern Oregon sign on as Partners to Conserve the Sage-grouse, a Candidate Species*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/FV2B-UZG4> (last updated June 17, 2014).

<sup>253</sup> Peg Herring, *Good for the Bird, Good for the Herd*, OR.’S AGRIC. PROGRESS (Winter 2013), <https://perma.cc/D2QT-494A>.

<sup>254</sup> Bernton, *supra* note 1.

<sup>255</sup> Herring, *supra* note 253.

<sup>256</sup> Bernton, *supra* note 1.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

participatory decision making.<sup>262</sup> Commentators also agree that this approach appeared to lead to strong community backing of the plan.<sup>263</sup> Environmental historian Nancy Langston, one of few social scientists to study the Refuge in depth, hailed the Conservation Plan as “a landmark collaborative conservation plan for the refuge . . . [that] offers great hope for the local economy and for wildlife.”<sup>264</sup> One journalist deemed it a “sort of symbol . . . that shows how federal agencies can reach out to different groups with different agendas—tribes, environmentalists and ranchers—and find common ground on how to manage the nation’s public lands.”<sup>265</sup> In light of Malheur’s accolades, several commentators noted the misaligned reasoning of the occupiers’ choice of Malheur for their occupation. Portland Audubon Society’s conservation director observed, “[i]t is ironic that they picked Malheur . . . In a landscape that is very conflicted, it is a place of collaboration.”<sup>266</sup> Speaking after the occupation, United States Fish and Wildlife Service biologist Linda Sue Beck said, “[t]he militants picked the wrong refuge to take over. I think they thought it would be easier to sway the locals, but our partnerships are strong.”<sup>267</sup> Blumm and Jamin conclude that “[t]he Malheur Refuge was an odd place for revolt against public land management because the local population generally accepted the refuge management plan, evidenced by the fact that there was no appeal after the plan’s promulgation.”<sup>268</sup>

Langston argues that it is not a coincidence that complexity and conflict resulted in successful management in this instance. Rather, she suggests that “conflicts among different users of Malheur Lake Basin eventually improved refuge management, for those conflicts disrupted the hold of narrow orthodoxies on resource management.”<sup>269</sup> As she elaborates,

[C]onflict eventually forced groups in Oregon to embrace a political process in which stakeholders coming from different perspectives had to jostle against, argue with, and listen to one another in ways that modified their actions and beliefs. Because no one can ever have perfect knowledge of how dynamic ecological systems work, this process moved the refuge toward much better solutions than any one group could have found on its own. . . . Only when political conflict in the 1970s forced them to allow other stakeholders to have a voice did they begin to question some of their own assumptions that seemed so self-evident when they hadn’t been required to answer to anyone else.<sup>270</sup>

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<sup>262</sup> Langston, *supra* note 226.

<sup>263</sup> Blumm & Jamin, *supra* note 125, at 53–54; Herring, *supra* note 253; Gewin, *supra* note 248.

<sup>264</sup> Langston, *supra* note 226.

<sup>265</sup> Bernton, *supra* note 1.

<sup>266</sup> Marris, *supra* note 233.

<sup>267</sup> Gewin, *supra* note 248.

<sup>268</sup> Blumm & Jamin, *supra* note 125, at 53–54.

<sup>269</sup> LANGSTON, *supra* note 222, at 9.

<sup>270</sup> *Id.*

Of course, not everyone agrees that the process was successful.<sup>271</sup> Acquiescence to ranching interests, some argue, can also be seen as giving in to interest groups and allowing them to pursue activities “well-known to cause severe damage to riparian and avian habitats.”<sup>272</sup> These commentators call for “do[ing] away with the incompatible uses of grazing and haying on the Refuge.”<sup>273</sup> Indeed, it would be unreasonable to presume that “win-win” outcomes are always achievable. Nonetheless, it is worth asking whether attitudes such as these have undermined environmental policy in the past.<sup>274</sup> Malheur illustrates the value to consensus and conciliation, even if outcomes are imperfect.

### *B. Significance to Climate Governance*

It remains to be seen whether the substance of the Malheur Conservation Plan will stand the test of time, uncertainty, and system shocks. Even so, the process that went into creating the plan exemplified, and perhaps improved upon, the tenets scholars have sought to clarify as necessary parts of dynamic SES governance. The planning process involved what Craig and Ruhl deem the “setup phase” of adaptive management, where periodic, intensive public participation can improve stakeholder buy-in and enhance outcomes.<sup>275</sup>

Elements believed to facilitate successful adaptive governance include: strong leadership; robust public participation; social structures contributing to policy formation; transgovernmental networks; innovative and diverse forms of information exchange; lack of insistence on a one-size-fits-all approach; and a general embrace of flexibility.<sup>276</sup> From the successful leadership of Tim Bodeen to the effort to reconcile grazing and habitat protection, the Malheur process appears to have synthesized many of these elements. Further, although this was the setup phase for a more iterative, ongoing management process, the setup process itself seems to have positioned Malheur well to have a flexible yet cohesive social apparatus to draw upon in reaction to system shocks. The example of the sage grouse success story suggests the process’s benefits transcend the creation of the Conservation Plan.

Yet, the significance of this process goes deeper than highlighting successful adaptive governance. The process also cuts to the issues at the heart of the two social movements discussed above, including the work–

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<sup>271</sup> *E.g.*, Erik Molvar, Opinion, *4 Lessons from the Bundy’s Oregon Misadventure*, HILL (Feb. 2, 2016), <https://perma.cc/D28Q-RCTC>; Kristin Ruether, *Malheur Was Taken over by Ranchers Long Before the Bundys Came Along*, WILDLIFE NEWS (Feb. 3, 2016), <https://perma.cc/CL2F-9PXU>.

<sup>272</sup> Ruether, *supra* note 271.

<sup>273</sup> *Id.*

<sup>274</sup> Laura Jean Schneider, Opinion, *Ranch Diaries: The Anti-Ranching, Misinformed Discourse Around Malheur*, HIGH COUNTRY NEWS (Jan. 13, 2016), <https://perma.cc/VNS4-VXVV>.

<sup>275</sup> Craig & Ruhl, *supra* note 12, at 31.

<sup>276</sup> Humby, *supra* note 30, at 124–27.

environment rift. The four common themes driving the movements were: 1) a history of federal absenteeism, 2) rural alienation, 3) lack of a voice in land use decision making, and 4) jobs versus environment tensions.

First, bottom-up processes mitigated all of these issues. Michelle Bryan argues, “if meaningful collaboration became the standard practice, some of the underlying furor over federal lands management could subside.”<sup>277</sup> The Malheur example suggests this is true. The collaborative process puts a face to the nefarious “federal government” and provides an opportunity for trust and mutual respect to be established. It recognized and accounted for rural alienation and lack of a voice in land use decision making by providing an avenue for local experience to be acknowledged, vocalized, and respected; both ranchers quoted above mentioned talking and listening as critical to their enthusiasm for local planning initiatives. Finally, through information exchange and a more flexible hold on preservationism, the process sought to reconcile jobs and the environment.

From a broader, societal perspective, each instance of a successful plan like Malheur’s stands to help mend the rift between workers and environmentalists. Each opportunity for collaborative decision making can furnish mutual understanding and alliances. Critically, as Obach called for, the federal government can act as a much-needed broker between labor and environmental interests.<sup>278</sup> These connections, in turn, can help fuel reconciliation toward a more effective national climate policy. Multiple plans following this and similar processes throughout the nation could be seen as stitching labor and environment together, one conversation at a time, to the benefit of federal climate policy.

It could be suggested that Malheur’s example is of limited help because its enabling legislative framework is unique. The refuge system has an unusual, meandering, and piecemeal legal history.<sup>279</sup> Each refuge is governed like a small fiefdom with a hodgepodge of legal authorities determining its management, including individual refuges’ declarations of purpose.<sup>280</sup> The National Wildlife Refuge System Improvement Act of 1997 was criticized for its lack of detailed guidance.<sup>281</sup> Is this scenario generalizable?

Craig and Ruhl’s Model Adaptive Management Procedure Act (MAMPA) has already established a framework for the potential codification of comparable public participation processes.<sup>282</sup> In the formulation of an agency’s “Initial Adaptive Management Plan,” MAMPA provides for “opportunities for public comment on [the] proposed plan,” with “reasonable efforts to identify and offer reasonable opportunities for involvement to representatives of interested members of the public and relevant

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<sup>277</sup> Bryan, *supra* note 9, at 148.

<sup>278</sup> OBACH, *supra* note 81, at 207.

<sup>279</sup> Fischman, *National Wildlife Refuge*, *supra* note 237, at 462; *see also* Fischman, *From Words to Action*, *supra* note 237, at 82, 118 (explaining how the National Wildlife Refuge System Improvement Act of 1997 presents an unusual question of legal status).

<sup>280</sup> Fischman, *From Words to Action*, *supra* note 237, at 89.

<sup>281</sup> *Id.* at 87.

<sup>282</sup> Craig & Ruhl, *supra* note 12, at 14.

stakeholder groups . . . [T]he exact number of participating representatives and their final composition shall be left to the agency's sound discretion."<sup>283</sup> Of course, agency-level decision making is more far-reaching than refuge-level decision making. Nevertheless, perhaps the Malheur example suggests that these provisions could go a bit further by providing for utilization of diverse sources of information and comparable mechanisms to mediate stakeholder conflicts.

Malheur's significance may also lie in a discipline other than administrative law. Malheur was a success in part because it employed many of the best practices embraced by land use planners. These practices, in turn, are formulated with the precise goal of tailoring localized policy to localized circumstances—a necessary factor in complexity-based regulation. To recreate these benefits in other circumstances, organic administrative acts can provide for robust, recurring public participation that involves aggressive, multilateral communication, opportunities for meaningful information exchange, and actual willingness to adjust outcomes based on public input.

At the very least, the Conservation Plan is one step ahead of regulations such as the CPP—the War on Coal campaign's main target—because the Conservation Plan's value has not been undermined by a conflict over whether it should be in place at all.<sup>284</sup> EPA climate mitigation initiatives may not be the first place we would look to try to implement a model like Malheur's. A refuge is conducive to landscape-level collaboration and decision making, and such an approach could be prohibitively expensive on a national scale. Yet, there is potential for adaptive governance or similar principles to enhance EPA mitigation initiatives. The next section considers these issues.

#### V. ADMINISTRATIVE RULEMAKING AND THE CLEAN POWER PLAN: PROCESS UNDERMINING SUBSTANCE?

The rulemaking process that went into development of the CPP followed the normal formula. First, in June 2014, EPA issued a notice proposing a rulemaking to establish “emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units.”<sup>285</sup> The proposal cited the authority of Clean Air Act section 111(d),<sup>286</sup> which requires EPA's Administrator to prescribe regulations to establish procedures under which states must create plans to establish standards for certain air pollutants.<sup>287</sup> Within two

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<sup>283</sup> *Id.* at 68.

<sup>284</sup> A search of relevant databases reveals the absence of any litigation concerning the Conservation Plan as of this writing.

<sup>285</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

<sup>286</sup> *Id.* at 34,832.

<sup>287</sup> 42 U.S.C. § 7411(d) (2012).

months, twelve states and industry representatives filed suit in the United States Court of Appeals for the District of Columbia Circuit to block the draft rule; the court rejected those challenges as premature in June 2015.<sup>288</sup>

Stakeholders provided more than 4.3 million comments on the proposed rule, the final version of which EPA announced in August 2015.<sup>289</sup> Under the final rule, EPA

establish[ed] for the first time [greenhouse gas] emission guidelines for existing power plants. These final emission guidelines, which rely in large part on already clearly emerging growth in clean energy innovation, development and deployment, will lead to significant carbon dioxide (CO<sub>2</sub>) emission reductions from the utility power sector that will help protect human health and the environment from the impacts of climate change.<sup>290</sup>

In February 2016, the Supreme Court stayed the plan pending a resolution of the renewed case before the D.C. Circuit.<sup>291</sup>

That political and corporate interests would react as they always have to environmental reform efforts is no surprise. Nevertheless, it is worth asking whether more could have been done to garner popular support for this climate mitigation initiative.<sup>292</sup> Critically, a public opinion poll conducted in 2016 found that 69% of voters had heard “just a little or nothing at all” about EPA’s CPP.<sup>293</sup> For those who were familiar with the CPP, 89% of Democrats favored it, but less than half of Republicans did.<sup>294</sup> Only 44% of Republicans, compared to 91% of Democrats and 68% of independents, believed that reducing greenhouse gases from energy production should be a high priority.<sup>295</sup> Sixty-eight percent of Republicans found persuasive the argument that reducing greenhouse gases would cause job losses, and therefore should be set at a low priority, compared to 31% of Democrats and 51% of independents who found the argument unconvincing.<sup>296</sup> In fact, the poll report concluded that “*much of the opposition to the CPP appears related to concerns about workers who would lose jobs in the course of an energy transition, particularly those in the coal industry.*”<sup>297</sup> The poll’s results suggest that lack of public knowledge accounted in large part for the lack of popular support for the CPP. For those who were familiar with the CPP, perceptions related to the work–environment rift undermined support as well.

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<sup>288</sup> Murray Energy Corp. v. U.S. Env’tl. Prot. Agency, 788 F.3d 330, 336 (D.C. Cir. 2015).

<sup>289</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,704 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

<sup>290</sup> *Id.* at 64,663.

<sup>291</sup> Chamber of Commerce v. U.S. Env’tl. Prot. Agency, 136 S. Ct. 999 (2016).

<sup>292</sup> This inquiry sets aside for now any actual legal interpretation of the CPP’s legitimacy under the Clean Air Act and the Constitution.

<sup>293</sup> STEVEN KULL ET AL., PROGRAM FOR PUB. CONSULTATION, CONSIDERING THE COST OF CLEAN: AMERICANS ON ENERGY, AIR QUALITY AND CLIMATE 15 (2016), <https://perma.cc/79ZF-GUKB>.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 8.

<sup>296</sup> *Id.* at 7.

<sup>297</sup> *Id.* at 20 (emphasis added).



The Obama Administration's earlier successful creation of the "tailpipe rule" limiting greenhouse gas emissions for vehicles<sup>298</sup> stands in contrast to the CPP and also suggests the work-environment rift played a role in opposition to the CPP. While the tailpipe rule faced backlash, it did not inspire a visceral, widespread, populist movement against it like the CPP did.<sup>299</sup> The tailpipe rule's more minimal impact on jobs and production could explain the absence of backlash to the rule, whereas the CPP's wider reach likely inspired more aggressive political pushback.

Given the lack of public familiarity with the CPP and the potential for adaptive governance and other forms of collaborative decision making to bridge the work-environment rift, perhaps the lack of enthusiasm for the CPP is as much an issue of process as it is an issue of ideology. Compare the experience of the rancher participating in the Malheur conservation planning process (which is, by its nature, a federal climate adaptation initiative) to the experience of a coal miner in West Virginia participating in the creation of the CPP (the flagship federal climate mitigation initiative)—both of whom, the data suggest, are more likely to identify as Republican.<sup>300</sup> With the former, the rancher talks to his neighbors, hears new information, contributes information, and enjoys some level of transparency in decision-making processes. With the latter, the miner seems unlikely to be aware of a notice-and-comment period for a new rule, let alone to participate in the comment process. More likely, he might hear about the rule in highly politicized contexts.<sup>301</sup> For the miner, the climate mitigation initiative lacked interaction, information exchange, and transparency. Yet the CPP affects him, just as the Malheur plan would affect stakeholder ranchers.<sup>302</sup> Is it a surprise that the miner would be more likely to hold anti-CPP sympathies?

It is not unheard of to discuss adaptive management in the context of EPA and air pollution control, although scholars acknowledge that "EPA's history and structure make it a challenging locale in which to attempt" it.<sup>303</sup> From 1995 to 2002, EPA experimented with a novel form of regulatory intervention that it called Project XL, standing for "Excellence in Leadership."<sup>304</sup> The program offered "regulatory flexibility in exchange for commitments to achieve better environmental results—results superior to those that would otherwise have been attained through full compliance with

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<sup>298</sup> See *supra* note 66 and accompanying text.

<sup>299</sup> See, e.g., John M. Broder, *Limits Set on Pollution from Auto*, N.Y. TIMES, Apr. 2, 2010, at B1 (noting that the rule represented a "truce" between car manufacturers and regulators).

<sup>300</sup> See Asma Khalid, *Republicans' White Working-Class Trap: A Growing Reliance*, NAT'L PUB. RADIO (Jan. 18, 2016), <https://perma.cc/GQN5-6QRP>.

<sup>301</sup> See, e.g., Phil Kerpen, Opinion, *Obama Declares a War on Coal*, FOX NEWS (June 25, 2013), <https://perma.cc/PAV7-9ZTF> (framing President Obama's Climate Action Plan as a "War on Coal").

<sup>302</sup> See Steve Inskip, *In Kentucky, the Coal Habit Is Hard to Break*, NAT'L PUB. RADIO (Jan. 12, 2016), <https://perma.cc/P5QP-TATH> (interviewing a miner who voted for President Obama in the first election but not the second, in part because of coal regulation).

<sup>303</sup> Susskind & Secunda, *supra* note 42, at 155–56.

<sup>304</sup> *Id.* at 155; *Project XL*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/FK2N-MAB4> (last visited, Feb. 25, 2017).

regulations.”<sup>305</sup> Implementers envisioned XL projects as “‘real world’ tests of innovative strategies to achieve cleaner and less expensive results than conventional regulatory techniques.”<sup>306</sup> Through these “experiments,” Project XL sought to both implement and evaluate adaptive management strategies.<sup>307</sup>

Project XL encountered a variety of problems, however. Striving for “cooperation among the regulated community, non-governmental environmental groups (NGOs), the public, and [EPA’s] own philosophically divided staff” proved tense.<sup>308</sup> Disagreements also arose over to how to exercise agency discretion.<sup>309</sup>

Lawrence Susskind and Joshua Secunda nonetheless concluded that Project XL did achieve some significant results, and their 1999 article, *Improving Project XL*, offered simple and achievable suggestions for improvement. They argued in favor of: internal agreement on the Project’s goals; internal discussion of philosophical disagreements; a facilitated, agency-wide dialogue; and the use of “a collaborative, problem-solving process aimed at defining the goals of Project XL” in conjunction with stakeholders.<sup>310</sup> Susskind and Secunda acknowledged that achieving these measures would be difficult, but argued further that “a crosscutting Office of Reinvention” and a specialized advisory committee could facilitate these processes.<sup>311</sup> They also advocated consensus-building, through which they believed “conflicting interests and goals can be charted and reconciled, institutional and policy barriers identified and surmounted, and a mutually acceptable agenda agreed upon.”<sup>312</sup> They concluded that despite Project XL’s weaknesses,

[It] still ha[d] the potential to move all stakeholders (including EPA) towards the institutionalization of collaborative process for formulating improved environmental compliance goals. The steps required to do so can be achieved within the confines of the existing XL initiative. They include: a focus on problem solving as opposed to win-lose negotiation; information sharing and open deliberation among all stakeholders; meaningful participation by all interested and affected parties at all stages of the process; and a new perception of rulemaking as the ongoing formulation of provisional solutions to emerging problems.<sup>313</sup>

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<sup>305</sup> Susskind & Secunda, *supra* note 42, at 156.

<sup>306</sup> *Id.* at 157.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 158.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 159.

<sup>311</sup> *Id.* at 159, 161–62.

<sup>312</sup> *Id.* at 162.

<sup>313</sup> *Id.* at 170.

Critics pointed to Project XL's high costs and management mistakes.<sup>314</sup> Nevertheless, one has to wonder what the state of the CPP would have been if Susskind and Secunda's vision had been used to create it—a vision that sounds more like the Malheur planning process and adaptive governance than like administrative rulemaking.

The CPP's content does reveal some consideration of jobs and economic transitions in hard-hit communities. Drafters included the Partnerships for Economic Opportunity and Workforce and Economic Revitalization (POWER) Plus Plan directing billions of dollars to coal communities as an integral part of the CPP.<sup>315</sup> The rule directs states, in crafting plans to comply with the CPP under its cooperative federalism model, to contemplate and prioritize employment opportunities.<sup>316</sup> The Sierra Club lauded the Administration for “listening to recommendations from unions, economic justice advocates, and their environmental allies,” and building those recommendations into the policy.<sup>317</sup> It also seems entirely possible that the aggressive political backlash to this controversial measure may have been unpreventable.

Yet, perhaps the CPP and the procedures used to create it could have done more. Unlike the Malheur planning process, the unilateral “listening” function of administrative rulemaking here did not account for the alienation, autonomous decision making, or federal absenteeism that are the focus of this inquiry. A two-way conversation with or facilitated by Tim Bodeen is simply not the same as typing a comment into *Regulations.gov*. Further, although the CPP sought to address the work–environment rift, those efforts achieved little because most people either did not know about them or were not persuaded as to their effectiveness.

The crux of what Susskind and Secunda point to, and its common theme with the Malheur planning process, is the need for environmental regulation to progress along a spectrum enshrined in the model for public participation developed by the International Association for Public Participation (IAP2)—again, returning to relatively simple principles of land use planning.<sup>318</sup> This need is based both in environmental complexity and in the impetus to pursue consensus and buy-in, and to minimize alienation and conflict. The full order from least to most inclusive forms of planning on this spectrum proceeds, “Inform, Consult, Involve, Collaborate, Empower.”<sup>319</sup>

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<sup>314</sup> Allen Blackman & Janice Mazurek, *The Cost of Developing Site-Specific Environmental Regulations: Evidence from EPA's Project XL*, 27 ENVTL. MGMT. 109, 118–20 (2001).

<sup>315</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,670–71 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INVESTING IN COAL COMMUNITIES, WORKERS, AND TECHNOLOGY: THE POWER+ PLAN (2015), <https://perma.cc/RJ4S-9FGV>.

<sup>316</sup> *Id.* at 64,710, 64,917.

<sup>317</sup> Dean Hubbard & Alejandra Núñez, *Labor and the Clean Power Plan: More Jobs, More Justice*, SIERRA CLUB: COMPASS (Aug. 21, 2015), <https://perma.cc/3WQL-BQKT>.

<sup>318</sup> INT'L ASS'N FOR PUB. PARTICIPATION, STUDENT WORKBOOK: PLANNING FOR EFFECTIVE PUBLIC PARTICIPATION, at i (2006).

<sup>319</sup> *Id.* at 35.

Decision makers provide the most minimal level of public involvement at the level of “Inform,” where they let the public know what they are doing without relinquishing any control.<sup>320</sup> The opposite end of the spectrum is the “Empower” point, where the public wields final decision-making power.<sup>321</sup> Malheur’s successful process was at the “Collaborate” point, the second most involved type of decision making. One might argue that EPA’s decision-making process is at the “Consult” point because it sought to inform the public, solicited concerns, and provided some feedback as to how public input influenced policy formation.<sup>322</sup> However, the process could also be considered at or even below the “Inform” point, in light of the limited and impersonal nature of the processes used to gather public input and the failure of basic aspects of the plan to reach people. In sum, the CPP rulemaking process could be considered almost entirely top-down, procedures with contrary aims notwithstanding.

A more hands-on approach—with multiple, nonperfunctory, face-to-face interactions in different regions—while less efficient, might have achieved or approached a different result for the CPP. Perhaps then labor interests’ buy-in to the plan could have embarrassed politicians and industry out of their lawsuit. A question for further research is how seemingly high, front-end expenses in pursuit of collaboration compare to and mitigate the risk of the expense of litigation when regulations are so hotly contested.

The entire EPA decision-making apparatus need not be overhauled to pursue these shifts. Relatively simple procedural changes such as those called for by Susskind and Secunda could make EPA’s decision-making process more closely resemble the process at Malheur, reducing conflict and alienation. Those procedures could take many forms: field-employee-facilitated regional dialogues resulting in recommendations that might actually be implemented; municipality- or county-based processes for producing more in-depth feedback; or asking local coalitions to workshop draft rules and assess feasibility based on their respective localities’ circumstances. While the CPP sought to use the cooperative federalism model to facilitate states’ tailored decision making after the CPP went into effect,<sup>323</sup> perhaps the CPP could have been a more minimalist establishment of procedures to start consideration of substantive matters from the bottom up. The principles these and other possible routes should encapsulate would be meaningful consideration of local decision making tailored to local social-ecological conditions; facilitation of stakeholder discourse with a view to problem-solving, to secure buy-in and produce better outcomes; information exchange that would educate the public about the rationales behind policy proposals, while also eliciting relevant considerations from the public; and some form of human interaction that could serve to personalize “the federal government.”

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<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,710 (Oct. 23, 2015).

An additional reconceptualization may be useful in this context, in the theme of dissolving the artificial barriers that impede progress on climate policy. We tend to think of air pollution as an environmental issue and public lands disputes as a natural resource management issue. For coal miners, though, questions of air pollution and energy *are* land use and natural resource issues. Indeed, “the persistent application of the distinction [between land use and environmental law] is both artificial and antiquated, impeding efforts to improve ecological well-being.”<sup>324</sup> The land use–environmental law distinction has been criticized for “sever[ing] decision-making processes from local ecological conditions that are experienced by nearby residents.”<sup>325</sup> When we view an environmental issue such as air pollution through a land use/natural resources lens, though, we may be less inclined to balk at the prospect of a closer-to-home, more involved planning and management process of the type seen with public lands. Such a conceptual shift may be the first step toward reworking climate mitigation governance into a more effective, less polarizing framework—at least from the angle considered here.

## VI. CONCLUSION

Environmental ethicist Mark Sagoff commented in a 1986 article that “Americans often conceive the ends of environmental law independently from the means necessary to achieve them.”<sup>326</sup> He proposed that “we should instead deliberate over the means and ends together, lest the perfect environment Americans contemplate in theory become an obstacle to the good environment we can achieve in fact.”<sup>327</sup> Reconciliation of opposing interests could lead to an adequate environment, while conflict has already contributed to disastrous consequences.

Adaptive governance in both climate adaptation and mitigation stands to help SESs withstand shocks, in part through helping to mend current social threats to system stability. The Malheur case study shows the framework’s potential benefits for addressing social conflicts thus far under-discussed in climate scholarship, while the CPP demonstrates business-as-usual obstacles. Federal brokerage of work–environment dialogues is a particularly important component of this scheme. This vehicle can also serve to address the voicelessness, exclusion of residents of rural areas (and like-minded people) who have been alienated from government and environmentalism.

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<sup>324</sup> Spyke, *supra* note 16, at 55.

<sup>325</sup> *Id.* at 56.

<sup>326</sup> Sagoff, *supra* note 10, at 24.

<sup>327</sup> *Id.*