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Ann Eisenberg

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Rural Disaffection and the Regulatory State

Ann M. Eisenberg*

ABSTRACT

In today's polarized social and political climate, rural alienation from government is often dismissed as "just more politics" or a symptom of problematic cultural norms. This Article takes rural disaffection from government seriously, with a focus on rural relationships with the federal regulatory state. The Article argues that rural disaffection from the regulatory state is not solely a cultural or political phenomenon among white conservatives. Rural disaffection is also a broader structural issue that stems in part from the regulatory state's crisis of legitimacy.

Two factors show that rural disaffection from the regulatory state is more diffuse and profound than is often appreciated, implicating the regulatory state's capacity to elicit deference among those it governs. First, as illustrated with a robust synthesis of socio-legal literature on rural views, racially and politically diverse rural populations exhibit overlapping themes of distrust toward the regulatory state based in perceptions of procedural exclusion, agencies' disregard for local conditions, and arbitrary substantive outcomes. This broad, intersectional rural disaffection suggests at least some of the problem lies with the regulatory state itself. Second, objective, structural features of the regulatory state align with rural populations' subjective accounts, including the failure of cost-benefit analysis to accommodate salient rural conditions and the unique, under-mitigated impacts of regulatory developments in rural regions. The pervasive nature of rural disaffection alongside the alignment of structural factors with subjective rural accounts together lend credence to rural populations' sentiments, in turn evoking

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common concerns about democratic accountability and inadequately guided decisionmaking within the regulatory state.

This Article contemplates possibilities for reform based in recognized pathways to help establish institutional legitimacy—including procedural, distributive, and restorative justice—with a view to defusing rural alienation’s destabilizing influence while working toward a regulatory state that is more trustworthy, effective, and fair for all.

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I. INTRODUCTION

Rural communities are associated with heightened rates of antigovernment sentiment.¹ This skepticism or hostility toward government tends to involve the federal government in particular.² The nature and significance of this anti-federal sentiment are regular topics of academic and political contestation.³

1. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1207 (2018).

2. See, e.g., Peter A. Appel, *The Power of Congress Without Limitation: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 118–19 (2001) (describing County Supremacy movement and longstanding “tenuous relationship” between local landowners and local employees of federal agencies); W. Ryan Stephens, *Gray Wolf Rising: Why the Clash Over Wolf Management in the Northern Rockies Calls for Congressional Action to Define “Recovery” Under the Endangered Species Act*, 36 WM. & MARY ENV'T. L. & POL'Y REV. 917, 920 (2012); Dante Chinni, *Tea Party Mapped: How Big Is It and Where Is It Based?*, PUB. BROAD. SERV. (Apr. 21, 2010, 12:30 PM) <https://to.pbs.org/3AUOLA7> (explaining that the Tea Party movement was particularly popular in rural counties). State and local governments also receive their fair share of ire. For instance, Katherine Cramer's book, “The Politics of Resentment” largely focuses on rural antipathy toward Wisconsin's state environmental agency. See generally KATHERINE J. CRAMER, *THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS AND THE RISE OF SCOTT WALKER* (2016) (articulating theory of rural political consciousness and anti-government resentment based on ethnographic study conducted in Wisconsin from 2007 to 2012).

3. See generally Schragger, *supra* note 1, at 1208 (describing antigovernment anti-urbanism as “draw[ing] a direct connection between bigness and the loss of liberty”); Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 872 (2020) (arguing that rural

The persistence of this contestation is unsurprising because rural antigovernment sentiment is complicated. Some antigovernment sentiment is culturally driven. Rural cultural norms have traditionally been linked to “live-and-let-live” philosophies and an embrace of self-reliance that help explain skepticism of government actors perceived as either physically and culturally distant or needlessly meddling.⁴ As an extreme example of the potential cultural nature of anti-federal sentiment, certain rural, antigovernment militants in the West are reportedly motivated by unique religious dogma.⁵ Some antigovernment sentiment can also be explained by sociopolitical tensions both old and new. “Hating big government” and wanting to “drain the swamp in Washington” are regular talking points of right-wing media, xenophobic states’ rights advocates, and the conspiracy theorists that have captured the imagination of many within our highly polarized society.⁶

This Article contemplates that, in addition to these factors, some distrust of federal institutions in rural communities can be explained by federal laws and structures systematically disadvantaging or otherwise having tangible negative impacts in rural communities.⁷ In other words,

frustration with state government “pales in comparison to the particular disdain that rural residents have long reserved for the federal government”); CRAMER, *supra* note 2, at 17 (articulating the importance of understanding rural populations’ understanding of government); ROBERT WUTHNOW, *THE LEFT BEHIND: DECLINE AND RAGE IN SMALL-TOWN AMERICA* (2018) (examining outrage toward federal government throughout rural America); ARLIE HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016) (examining opposition to federal government in Louisiana).

4. See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 489 (2014); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 143–44 (2017). See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW* (1994) (investigating ranching population’s disregard for formal rules in favor of informal rules in conducting their relations); Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RES. & ENV’T. L. 183, 185 (2005) [hereinafter Morrow, *Environmental Front*] (describing New Mexico ranchers as “distrustful of ‘anything that smacks of more government control’”).

5. See John Sepulvado, *Why the Bundy Militia Mixes Mormon Symbolism with Anti-Government Sentiment*, PUB. BROAD. SERV. (Jan. 4, 2016, 5:29 PM), <https://to.pbs.org/3GvRKjn>.

6. Cf. Stephen M. Bainbridge, *Corporate Purpose in A Populist Era*, 98 NEB. L. REV. 543, 552–54 (2019) (describing nineteenth-century roots of modern right-wing populism).

7. See Su, *supra* note 3, at 872–73 (noting discourse’s emphasis on rural values as explaining rural antipathy toward federal government but arguing that “how federal authority is exercised in rural areas” deserves more attention as an explanatory factor); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2064–65 (2017) (arguing that attributing criminal justice concerns to “criminality” erases structural conditions, including law); see also Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1, 6 (2018) (characterizing “urban/rural divide” as partly cultural, “but also structural”); Ganesh Sitaraman, Christopher Serkin & Morgan Ricks, *Regulation and the Geography of*

the Article theorizes that *some* antigovernment sentiment may simply be a rational reaction to government doing a less-than-optimal job.⁸ It may be difficult to untangle the role of law and public institutions as drivers of rural antigovernment sentiment from factors of culture and politics. However, looking at the other side of the mirror of antigovernment sentiment—i.e., what government is actually doing—may illuminate concrete steps for reform that could potentially help defuse the other factors at play.⁹

This Article focuses on rural antigovernment sentiment directed toward the federal regulatory state. “Regulatory state” refers here to federal agencies, the regulations they promulgate and enforce, their localized land use management practices, and these activities’ roles in structuring our political economy.¹⁰

Perceptions of the federal regulatory state among those who live in smaller, remote towns and sparsely populated counties warrant attention for several reasons. First, the regulatory state has transformed substantially over the past several decades.¹¹ Its changed areas of emphasis since the 1970s range from deregulating the transportation sector to increasing regulation of natural resources.¹² Many of these areas of transformation bear unique implications for rural communities that could help explain some rural frustrations.¹³ For instance, a loss of intercity bus service (due to federal deregulation) alongside a simultaneous encroachment into local

Inequality, DUKE L.J. 1763, 1767–68 (2021) (critiquing dominant explanations for rural decline focused solely on “inexorable economic trends”).

8. See Morrow, *Environmental Front*, *supra* note 4, at 185 (arguing that “‘rural anti-environmentalism’ is not an inherent cultural belief but a “‘natural, and possibly unavoidable, response to the current regulatory framework”).

9. Cf. Loka Ashwood, *Rural Conservatism or Anarchism? The Pro-state, Stateless, and Anti-state Positions*, 83 RURAL SOCIO. 717, 719 (2018) (suggesting that most studies of rural politics and rural political attitudes vis-à-vis the state remain superficial).

10. See generally Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369 (2016) (discussing relationships between regulatory state and political economy). “Regulatory state” is used interchangeably in this discussion with “administrative state.”

11. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998) (describing twentieth-century transition of regulatory approach to core common carrier and public utility industries away from priorities of reliability and non-discrimination to modern model of promoting competition and maximizing consumer choice).

12. See discussion *infra* Part IV.

13. Cf. Pruitt & Showman, *supra* note 4, at 466, 480–83. (discussing rural spatiality and economic landscape characterized by substandard infrastructure, human capital deficits, and lack of economic diversification); LOKA ASHWOOD, FOR-PROFIT DEMOCRACY: WHY THE GOVERNMENT IS LOSING THE TRUST OF RURAL AMERICA, 123 (2018) (discussing rural environmental embeddedness); Hannah Haksgaard, *Rural Women and Developments in the Undue Burden Analysis: The Effect of Whole Woman’s Health v. Hellerstedt*, 65 DRAKE L. REV. 663, 686 (2017) (arguing that rurality should be considered a unique and significant part of lived experiences in intersectional analyses).

economic activity (due to federal regulations implementing, for instance, the Endangered Species Act) could help explain a perception of the federal government pulling the rug out from under the community with one hand while pushing them over with the other. Given that, in this example, federal regulations were helping rural communities less and asking more of them than before in ways that seem to disproportionately interact with rural regions' unique geographic features—including greater distances to travel and a greater dependence on land-based livelihoods—that perception would not be entirely baseless.¹⁴

Second, scholars posit that rural communities are more intimately involved with at least some federal agencies than urban or suburban communities are.¹⁵ This would make sense in light of many rural communities' closer proximity to vast expanses of public lands, greater dependence on natural resource-based work, and heavier involvement with agriculture.¹⁶ This means that rural communities may be more directly answerable to federal agencies than other populations—and perhaps, therefore, federal agencies ought to be more answerable to them. Yet, oft-queried problems with agencies' direct democratic accountability are implicated in the seemingly tense relationships between rural communities and federal agencies.¹⁷ The fact that federal regulations are such a political flashpoint for rural communities in and of itself suggests that deeper inquiry is warranted.

Third, administrative law scholarship has begun to recognize that certain aspects of agency decisionmaking have a geography problem.¹⁸ This is in addition to other recurring critiques of central components of the regulatory apparatus, such as problems with cost-benefit analysis emphasizing aggregate welfare and efficiency as its main priorities over

14. See Paul Stephen Demsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987); see also Holly Firlein, *Continental Divides: How Wolf Conservation in the United States and Europe Impacts Rural Attitudes*, 45 ECOLOGY L.Q. 327, 338 (2018) (arguing that rural residents bear disproportionate burdens of wolf conservation and failures to consider rural needs fuels rural “antigovernment sentiment,” raising questions about “basic fairness” and democratic structures).

15. See Su, *supra* note 3, at 867, 873 (observing that federal agencies are more involved in rural communities but not directly responsive to local constituents).

16. See generally Ann Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189 (2020) [hereinafter Eisenberg, *Distributive Justice*] (discussing traditional and modern rural livelihoods).

17. See *infra*, Parts II–III.

18. Cf. Brigham Daniels et al., *Just Environmentalism*, 37 YALE L. & POL'Y REV. 1, 8 (2018) (arguing that due to inattention to conflicts between environmental protection and economic externalities, “justice . . . in the context of environmental protection or natural resource preservation is an open and neglected question”); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1489 (2018) (arguing that “mak[ing] distributional consequences a core concern of the regulatory state” is needed to reduce opposition to “socially beneficial regulations”).

distributional concerns, exacerbating socioeconomic inequality.¹⁹ Thus, an analysis of the relationship between rural populations and the regulatory state should be revealing, both for shedding light on the problem of rural disaffection from government—which contributes to broader problems of urban/rural polarization—and for the path forward to pursuing an administrative state that is fair and effective.

One way to better understand the nature of rural distrust of the federal regulatory state is to expand the scope of inquiry beyond the conservative, white populations who have received so much attention in scholarship and public commentary to date. Such an investigative expansion is worthwhile in its own right. “Rural” is most commonly defined, at least in law, as a type of place, and not a type of person.²⁰ Yet, the rural populations saddled with disproportionate poverty burdens and longstanding, ongoing histories of publicly driven oppression tend to be the Black, Native American, and

19. See generally Karen Tani, *The Limits of the Cost-Benefit Worldview: A Disability-Informed Perspective*, L. & POL. ECON. PROJECT (Oct. 12, 2021), <https://bit.ly/34kQQJG> (critiquing cost-benefit analysis because cost will inevitably be reason to say “no” to necessary measures and for creating artificially narrow lenses on important moral questions); Melissa Luttrell & Jorge Roman-Romero, *Modernizing Regulatory Review Beyond Cost-Benefit Analysis*, L. & POL. ECON. PROJECT (Oct. 11, 2021), <https://bit.ly/3LgZYzK> (arguing that cost-benefit analysis cannot be salvaged through reform due to its inherent classism, racism, and ableism); Elizabeth Popp Berman, *Let’s Politicize Cost-Benefit Analysis*, L. & POL. ECON. PROJECT (Oct. 5, 2021), <https://bit.ly/3uvsuYc> (arguing that progressives should be more strategic in approaching cost-benefit analysis, recognizing it as a “convenient fiction” conservatives deploy to achieve less regulation in general); Zachary Liscow, *Equity in Regulatory Cost-Benefit Analysis*, L. & POL. ECON. PROJECT (Oct. 4, 2021), <https://bit.ly/3gus0ta> (arguing that distributional concerns are missing in regulatory analysis); Lisa Heinzerling, *Climate Change, Racial Justice, and Cost-Benefit Analysis*, L. & POL. ECON. PROJECT (Sept. 28, 2021), <https://bit.ly/3J6TSjp> (noting that President Biden’s stated commitments to racial justice and climate change on the one hand and to continuing to use cost-benefit analysis on the other “are trains racing toward each other on the same track”); Frank Pasquale, *Cost-Benefit Analysis at a Crossroads: A Symposium on the Future of Quantitative Policy Evaluation*, L. & POL. ECON. PROJECT (Sept. 27, 2021), <https://bit.ly/3guDjlo> (arguing that to address modern crises, cost-benefit analysis must be used to enable regulation rather than slow it); see also Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 864 (2018) (arguing that environmental law has generally neglected questions of socioeconomic inequality).

20. The U.S. Census Bureau defines “rural” as any population not in an urban area. See *How Does the US Census Bureau Define Rural?*, *Rural America*, U.S. CENSUS BUREAU, <https://bit.ly/3KpQLnf> (last visited Mar. 8, 2022). An urban area is defined as incorporated localities of 2,500 or more persons. *Id.* This discussion takes a broader view of rural as a concept encompassing places that are geographically isolated, limited in population, and/or unattached to a larger regional economy. See, e.g., Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 *MICH. L. REV.* 1695, 1703 n.46 (2021) (noting that the article’s property law “analysis does not depend on granular distinctions between urban and rural” and that the definition of “rural” is a “subject of significant debate”); Elizabeth Weeks, *One Child Town: The Health Care Exceptionalism Case Against Agglomeration Economies*, 2021 *UTAH L. REV.* 319, 330 (2021) (discussing varied and competing definitions of “rural”).

Latinx populations who have made headlines far less frequently than white conservatives, and who also tend to have different political leanings.²¹ There are bound to be differences in rural experiences across racial lines, given that white populations have not been subject to the racist policies and practices that have displaced and marginalized so many rural people of color.²² Still, if rural communities of diverse racial, cultural, and political backgrounds exhibit some overlapping themes of skepticism of the federal regulatory state, such a finding would suggest that at least part of rural anti-federal alienation lies with the regulatory state itself and should not be dismissed as merely an example of radical rural politics.²³

Another way to assess rural distrust of the regulatory state as a sociopolitical phenomenon versus a structural problem is to assess whether objective structural aspects of the regulatory state align with disaffected rural populations' subjective views. Perceptions and sentiments shared through a subjective lens are relatively easy to discredit.²⁴ Commentators might find a variety of reasons to be dismissive of rural residents' accounts of their frustrations with the regulatory state in the absence of tangible evidence to support those accounts. Some might be tempted to attribute rural antipathy to widespread misinformation,²⁵ "tribalism" and related cultural and political commitments,²⁶ human

21. Cf. Shoemaker, *supra* note 20, at 1707–08; Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 168–73 (2006) (discussing nature and persistence of rural stereotypes); OLUGBENGA AJILORE, CTR. FOR AM. PROGRESS, THE ROLE OF RURAL COMMUNITIES OF COLOR IN THE 2020 ELECTION (Dec. 22, 2020), <https://ampr.gs/3rkXo3I> (discussing mixed, though mostly liberal, political leanings of various populations of color in rural regions).

22. See, e.g., Priya Baskaran, *Thirsty Places*, 2021 UTAH L. REV. 501, 560 (2021); Shoemaker, *supra* note 20, at 1712–21; Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 819–21 (2020); Valena E. Beety, *Prosecuting Opioid Use, Punishing Rurality*, 80 OHIO ST. L.J. 741, 761 (2019); Thomas Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 564–65 (2005).

23. Cf. Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV'T L. REV. 313, 320 (2013) (noting limited literature on how to measure agency legitimacy).

24. Cf. Michael Carolan, *The Rural Problem: Justice in the Countryside*, 85 RURAL SOCIO. 22, 23, 50 (2019) (noting commentators' propensity to "ascribe irrationality" to rural behaviors and arguing that this tendency inhibits "mak[ing] sense of what is happening in the countryside").

25. See, e.g., Neil D. Hamilton, *Myth Making in the Heartland - Did Agriculture Elect the New President?*, 13 J. FOOD L. & POL'Y 5 (2017).

26. See Neil Fulton, *Fake News on Trial: The Jury Trial as a Guard Against Societal Entropy*, 52 TEX. TECH L. REV. 743, 745 (2020) (defining "tribalism" as "us versus them worldview" demanding loyalty to "homogeneous enclaves").

tendencies toward irrationality,²⁷ and other flaws of human cognition.²⁸ A comparison with objective structural conditions can inform how rural perspectives align with verifiable factors, in turn helping inform how much credibility those perspectives warrant in the broader societal conversation.

This Article draws on a synthesis of literature on rural perceptions of the regulatory state, legitimacy theory, and a critical assessment of federal administrative law and institutions to advance a two-fold thesis. The first argument is that although representative experiences do differ across diverse rural populations, ample qualitative evidence suggests that disaffection with the regulatory state is not merely an ideological phenomenon among rural, white conservatives. The permeation of disaffection across rural communities suggests that this alienation is also, at least partly, a symptom of a problem of governance, evoking concerns about the regulatory state's legitimacy.

In particular, white rural populations are typically associated with views that the regulatory state is a threat to traditional, land-based livelihoods, such as mining, ranching, fishing, hunting, and forestry.²⁹ Meanwhile, rural populations of color tend to see the regulatory state as either perpetuating environmental injustices or not offering enough protection from them.³⁰ Yet, a robust synthesis of relevant literature reveals that these themes can be cross-cutting: rural communities of color often also view the regulatory state as a threat to livelihoods, while white rural communities also perceive it as implicated in environmental injustice. Further, although many success stories exist of harmonious relationships between rural communities and federal agencies, diverse rural populations view the regulatory state as procedurally exclusive, detached from local conditions, and failing to serve their interests.³¹

Viewed holistically, this collective and intersectional rural disaffection from the regulatory state points toward a crisis of legitimacy within the regulatory state. For purposes of this discussion, "legitimacy" is defined as government institutions' ability to elicit deference and obedience in governed populations based on the populations' sense that the institutions are fair and trustworthy.³² This legitimacy problem

27. See Jon D. Hanson; & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 745 (1999).

28. See generally Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391 (2006) (discussing human tendencies toward systematic psychological biases and inaccurate predictions).

29. See discussion *infra* Part III.

30. See discussion *infra* Part III.

31. See discussion *infra* Part III.

32. See Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 614 n.12 (2019) (discussing competing definitions of "legitimacy"); Bell, *supra* note 7, at 2071 (discussing under-theorized relationship between concept of distrust and legitimacy theory). Legitimacy is not defined here as a question of

implicates administrative law scholarship's concern with democratic accountability and arbitrary substantive decisionmaking within the regulatory state.³³ In other words, a close examination of the documented rural experience—in which the regulatory state is perceived as antithetical to dignity, inclusion, and survival in one way or another—seems to confirm some of the common concerns raised about the administrative state's legitimacy.

The Article's second argument is that at least some objective structural features of the regulatory state align with rural populations' fears and perceptions. Overall, the regulatory state has transformed dramatically during the past several decades.³⁴ Deregulation of certain economic sectors in favor of greater private competition has contributed to geographic divergence in regional prosperity.³⁵ Meanwhile, the growth of other aspects of the regulatory state has imposed new obligations on economic activity with disparate significance for different regions. Commentary on environmental law, for instance, is beginning to reckon with the fact that environmental regulations actually can threaten livelihoods that are primarily rural in nature and that these trade-offs should be taken seriously.³⁶

While the overall transformation of the regulatory state has yielded unique, under-mitigated impacts in rural communities, regulatory decisionmaking also bears unique problems for remote and isolated regions. Administrative law scholarship has recognized substantial barriers to public participation in agency rulemaking and land use decisionmaking, which can be exacerbated by factors of geography and socioeconomic inequality.³⁷ Cost-benefit analysis—that central component of the regulatory state's decisionmaking that seeks to place a monetary value on potential trade-offs and “declare a winner by adding up the total dollar amounts on each side of the ledger”³⁸—naturally disadvantages rural workers and environmental justice communities because their small numbers inevitably seem insignificant in processes that emphasize aggregate welfare.³⁹ These objective structural factors,

constitutionality, although relevant debates on that topic may also be implicated. See discussion *infra* Part II. Thus, this inquiry could be considered one concerned with “sociological legitimacy,” as opposed to “legal legitimacy.” Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 378–79 (2019) [hereinafter Bagley, *Procedure Fetish*] (distinguishing between the two concepts).

33. See discussion *infra* Part II.

34. See discussion *infra* Part IV.

35. See generally Sitaraman et al., *supra* note 7 (discussing role of regulatory choices in benefitting some geographic regions and harming others).

36. See discussion *infra* Part IV.

37. See discussion *infra* Part II.

38. See Heinzerling, *supra* note 19.

39. See *infra* Part IV.

alongside literature on rural sentiments, again point toward a crisis of legitimacy in the regulatory state's relationship with rural populations—and possibly others—for procedural and substantive reasons.

The Article concludes with possible pathways to address the problems described here, with a view to making the regulatory state fairer and more effective in general. Because crises of legitimacy stem from conditions of structural exclusion and substantive arbitrariness that make populations view government as generally unfair or unjust, these proposed solutions utilize a justice lens to offer a way forward. Specifically, the Article's proposed solutions focus on the need for enhanced procedural, distributive, and restorative justice within the regulatory state. These aims are meaningful in their own right, but are also key to “connect[ing] the legitimacy of the administrative state to its ability to satisfy public aspirations: to enable a fairer distribution of wealth and political power; to protect us from the predations of private corporations; and to minimize risks to our health, financial security, and livelihoods.”⁴⁰

Procedurally, enhanced bottom-up processes to inform agency policies and localized decisions can help address democratic deficits in rural (and other groups') participation in the regulatory state—with a key focus on incorporating flexibility that is often considered in tension with systems of regulatory decisionmaking. Distributional equity can be pursued through a renewed commitment to geographic considerations for access to infrastructure, drawing on a reinvigorated approach to economic regulation that emphasizes the public interest over private discretion in service provision, as well as through a greater emphasis on geographic and socioeconomic equality in agency decisionmaking.⁴¹ Restorative justice may be achieved through establishing a centralized, coordinated federal avenue to pursue a more comprehensive accounting for the past several decades of poorly mitigated regulatory trade-offs and other harms to welfare effectuated by federal policies in rural communities. Such an effort should be coupled with the pursuit of important national policy goals like facilitating sustainable, racially just agricultural and energy production.⁴² Ongoing developments at the federal level hold promise that some of these measures may come to fruition.⁴³

40. Bagley, *Procedure Fetish*, *supra* note 32, at 400.

41. See Ann M. Eisenberg, *Economic Regulation and Rural America*, 98 WASH. U. L. REV. 737, 771 (2021); see also Sitaraman et al., *supra* note 7, at 1777; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1633–34 (2018).

42. See *infra* Part V.

43. See, e.g., Laura Reiley, *Relief Bill Is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say*, WASH. POST (Mar. 8, 2021), <https://wapo.st/3KxOnMi>.

Critically, the solution to the problems described here is not to weaken socially important regulations or dismantle the regulatory state and its many necessary societal contributions.⁴⁴ This Article is not an extended argument against regulations. The solution, rather, is to enrich our collective understanding of regulatory fairness and how it can best be both incorporated into the regulatory state and felt by populations subject to regulatory governance.⁴⁵

Of course, it is far from clear that adjusting federal agencies' decisionmaking processes is the key to defusing urban/rural polarization. It is also not clear that adjusting decisionmaking processes to defuse rural disaffection is the key to establishing the regulatory state's legitimacy. Yet, the following discussion illustrates that such steps are likely a necessary-but-insufficient piece of these thorny societal problems. These steps are also important for addressing the disaffection and suffering of rural populations who are not associated with political polarization, yet who remain marginalized by regulatory processes and priorities.

The Article proceeds as follows. Part II provides a brief introduction to the basic structure of the federal regulatory state and scholarly discussions and controversies surrounding it. Section III.A introduces legitimacy theory and identifies three conditions scholars recognize as giving rise to institutional legitimacy vis-à-vis a particular population, the absence of which in turn undermines legitimacy: a population's sense (1) of procedural inclusion and fair treatment by the institution; (2) that the institution's outcomes are not arbitrary, unfair, or irrational; and (3) that the institution is not merely another group wielding its power to the detriment of that population. Part III.B synthesizes literature on diverse rural communities' views of the regulatory state and argues that common themes of procedural exclusion and a sense of being disrespected, dissatisfaction with outcomes, and a general "us-versus-them" perspective point toward a crisis of legitimacy borne of problems that are also notably consistent with scholarly critiques of the regulatory state.

Part IV argues that certain objective, structural features of the regulatory state align with the literature on rural populations' subjective experiences, further buttressing the argument that the regulatory state is facing a crisis of legitimacy in its relationship to rural communities. Specifically, Part IV.A observes that issues of class, race, and geography can indeed function as barriers to rural populations' meaningful participation in agency decisionmaking. Part IV.B shows how agency

44. See Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 393–94, 401–10 (2019) (noting agencies' involvement in monitoring wage theft, ensuring food safety, and protecting clean water).

45. Cf. Revesz, *supra* note 18, at 1506–08 (discussing the administrative state's struggles to incorporate questions of fairness and distributive factors).

decisionmaking, by way of processes such as cost-benefit analysis, has likely not adequately taken salient rural conditions into account, meaning regulatory trade-offs felt by rural communities are probably more severe than outside decisionmakers and commentators have recognized or accounted for. Part IV.C explores the legal history of deregulation, unearthing a story of rural legislators protesting rural communities' structural exclusion from the regulatory state. The overall picture that emerges is that over the past several decades, the regulatory state has simultaneously abandoned, exploited, and encroached upon rural communities in ways that would help explain the sentiments explored in Part III.

Part V addresses avenues for enhancing the regulatory state's legitimacy through measures geared toward incorporating procedural, distributive, and restorative justice. Part V.A argues that messier, more human-centric processes are key to incorporating marginalized communities' voices in regulatory decisionmaking. Part V.B argues that geographic equity and socioeconomic equality must become more central concerns of the regulatory state. Part V.C suggests that a centralized federal approach to addressing rural socioeconomic marginalization—both the marginalization stemming from the regulatory state's activities and otherwise—may be a particularly effective avenue to counteracting challenging regulatory trade-offs in rural communities.

II. THE STRUCTURE OF AND CONTROVERSIES SURROUNDING THE REGULATORY STATE

This Part offers a brief summary of the regulatory state's basic structure and three of the main controversies surrounding the regulatory state's provenance, organization, and activities. These controversies include the regulatory state's constitutionality under separation of powers principles, its avenues for public participation, and the decisionmaking structures that guide agency conduct.

This discussion is meant to provide a simplified overview of a complex and far-reaching body of literature and is not meant to be comprehensive or analytical. Rather, this summary is provided to create a frame of reference for the Article's subsequent, more granular investigation of rural populations' experiences with the regulatory state in Part III and the examination of how some of these controversies implicate questions of geography and equity in Part IV. The discussion returns in particular to the debates surrounding public participation and cost-benefit analysis, while the constitutional questions are reviewed primarily to illustrate the regulatory state's highly politicized nature as an object of public concern.

A. *A Basic Map of the Regulatory State*

As the authors of a popular administrative law textbook explain, “Modern government is administrative government.”⁴⁶ That is, “[m]uch of modern life is a product, in large part, of the activities of administrative agencies.”⁴⁷ Yet, the ubiquity of administrative government does not make it uncontroversial.⁴⁸ Rather, “administrative law doctrine is closely entangled with high-level political disputes about the actual and appropriate role of government.”⁴⁹

The first federal agencies in the United States were executive agencies created under the purview of the executive branch and run by the president’s cabinet officials.⁵⁰ Up until the late nineteenth century, the role of these agencies in regulating societal activities was relatively modest.⁵¹ The passage of the Interstate Commerce Act (ICA) in 1887 created the first congressional or “independent” federal agency, known as the Interstate Commerce Commission (ICC).⁵² The ICC was primarily created to regulate the railroad industry so that the industry would not discriminate against less geographically desirable regions.⁵³ The ICA provided that the ICC’s commissioners would be appointed by the president with the advice and consent of the Senate.⁵⁴ Although the president had the power to remove ICC commissioners, the agency was designed to have some independence from the executive branch and political parties.⁵⁵

46. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 1 (6th ed. 2006).

47. *Id.*

48. *See id.* at 13.

49. *Id.*; *see also* David B. Spence, *Regulating Competition, Both the Forest and the Trees*, 70 EMORY L.J. ONLINE 13, 15 (2021) (“At the heart of the ideological conflict between the American political parties lies a fundamental disagreement about regulation and the proper relationship between government and markets.”).

50. *See* BREYER, *supra* note 46, at 15.

51. Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1719 (2019) (noting the Civil War as a turning point after which administrative state expanded notably, in part through congressional creation of new agencies).

52. *See* Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 11, 24 Stat. 379, 383 (1887) [hereinafter ICA]. It did so subsequent to Supreme Court decisions including *Munn v. Illinois*, which upheld the government’s power to regulate private industries. *See Munn v. Illinois*, 94 U.S. 113, 135–36 (1876).

53. *See* BREYER, *supra* note 46, at 16.

54. *See* ICA § 11.

55. Over the subsequent several decades, the ICC’s jurisdiction expanded from oversight of the railroad industry to regulate most forms of commercial transportation. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1359 (1998).

Today, executive agencies and independent agencies retain some differences but share many commonalities.⁵⁶ Although the defining line between the two types of agencies is not always clear,⁵⁷ “[g]enerally speaking, executive agencies are subject to direct presidential control, while independent agencies are typically designed by statute to be comparatively free from presidential control.”⁵⁸ Prominent examples of executive agencies include: the U.S. Department of Agriculture (which includes the Forest Service), Department of Energy, Department of the Interior (which includes the Bureau of Indian Affairs, Bureau of Land Management, Fish and Wildlife Service, and National Parks Service), Department of Labor, and Department of Transportation.⁵⁹ Prominent examples of independent agencies include: the U.S. Environmental Protection Agency, Farm Credit Administration, Nuclear Regulatory Commission, Postal Service, Federal Communications Commission, Occupational Safety and Health Review Commission, and Consumer Financial Protection Bureau.⁶⁰

Variations among them notwithstanding, federal agencies engage in similar processes and are subject to consistent requirements. Agencies’ most significant activity is arguably the promulgation of rules, which have the effect of law, and which are created in order to implement statutes passed by Congress.⁶¹ To promulgate rules, agencies must comply with the mandates of the Administrative Procedure Act of 1946 (APA).⁶² Although most agencies have an organic statute establishing them and

56. See Kadie Martin, *So Much to Comment on, So Little Time: Notice-and-Comment Requirements in Agency Informal Rulemaking Under the Administrative Procedure Act*, 61 B.C.L. REV. E.SUPP. II.-132, II.-132 (2020), <https://bit.ly/3tIpS7m> (discussing universal requirements for federal agencies under the Administrative Procedure Act); Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 YALE L. & POL’Y REV. 323, 330 (2015) (discussing procedures and norms common across agencies, notwithstanding agency differences); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1208 (2014) (explaining that all agencies are technically part of the executive branch, whether they are understood as independent or executive).

57. See *id.* at 1208, 1209 (arguing that political factors decide agency independence more than any bright-line definition).

58. JARED P. COLE & DANIEL T. SHEDD, CONG. RSCH. SERV., R43562, ADMINISTRATIVE LAW PRIMER: STATUTORY DEFINITIONS OF “AGENCY” AND CHARACTERISTICS OF AGENCY INDEPENDENCE 1 (2014), <https://bit.ly/3u2xO57>; see also Rao, *supra* note 56, at 1207.

59. See *Newspaper & Current Periodical Reading Room*, LIBR. OF CONG., <https://bit.ly/3rV47R2> (last visited Feb. 14, 2022); *Bureaus & Offices*, U.S. DEP’T INTERIOR, <https://on.doi.gov/3H0DY9E> (last visited Feb. 14, 2022).

60. See LIBR. OF CONG., *supra* note 59.

61. See COLE & SHEDD, *supra* note 58.

62. See 5 U.S.C. §§ 500–504, 553; see also Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 733 (2021) (describing the APA as “the quasi-constitution of the modern administrative state”).

outlining their powers and responsibilities, “the APA provides the ‘default’ procedures that agencies must follow when conducting rulemaking and adjudications.”⁶³ In addition to the APA, other federal statutes and executive orders direct all agencies to take common actions, including the National Environmental Policy Act (NEPA),⁶⁴ the National Historic Preservation Act (NHPA),⁶⁵ President Clinton’s Executive Order 12898 on Environmental Justice,⁶⁶ and President Biden’s more recent Executive Order on Advancing Racial Equity and Support for Underserved Communities.⁶⁷ Federal agencies also manage roughly 606.5 million acres of public land.⁶⁸

Courts also play a substantial role in the regulatory state. The APA establishes the standards for judicial review of agencies’ decisions.⁶⁹ The Supreme Court in turn has crafted a body of law articulating standards for courts’ review of agency actions. Centrally, the 1984 Supreme Court decision of *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, established the standard by which a court reviewing an agency’s action defers to the agency’s construction of its organic statute.⁷⁰ Courts provide a substantial check on agency power, and agencies may conduct their activities with a view to potential challenges of their conduct in court.

In sum, the federal regulatory state can be understood as a complex ecosystem involving executive and congressional mandates of power to agencies to carry out public initiatives, executive implementation of agency mandates, and judicial review of agency activities. Agencies’ activities are diverse and far-ranging, affecting the public in a variety of ways through rulemaking, adjudication of disputes, land management, and other discretionary conduct. The question of how power is allocated—across the three federal branches, within agencies themselves, between agencies and the public, and among stakeholders who engage with agencies—largely shapes the most charged controversies surrounding the regulatory state, as discussed below.

63. COLE & SHEDD, *supra* note 58, at 8.

64. 42 U.S.C. §§ 4321–4347 (2009).

65. 54 U.S.C. § 100101; National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3094 (2014).

66. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

67. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

68. See CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), <https://bit.ly/33YM2sT>.

69. See 5 U.S.C. §§ 701–706 (2000).

70. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

B. *Controversies Surrounding the Regulatory State*

A robust body of literature explores the myriad controversies surrounding the regulatory state. This Section briefly describes three among the most prominent of those controversies: (1) the highly politicized question of the regulatory state's constitutionality; (2) the public's ability to hold the regulatory state accountable through participation in agency processes; and (3) cost-benefit analysis as a way to assess particular regulations' potential downsides and benefits before the regulations' promulgation.

1. Politics and the Regulatory State's Constitutional Pedigree

The advent and growth of the regulatory state have been the subjects of debate since the beginning. Many law schools' administrative law courses are designed around what is often considered the fundamental question bedeviling federal agencies: Is this system of governance actually consistent with the U.S. Constitution? Jody Freeman wrote twenty years ago,

Agencies can claim, after all, only a dubious constitutional lineage The combination of executive, legislative, and adjudicative functions in administrative agencies appears to violate the separation of powers principles embodied in the Constitution. Worse yet, despite their considerable discretionary power to impact individual liberty and property rights, allocate benefits and burdens, and shape virtually every sector of the economy, agencies are not directly accountable to the electorate.⁷¹

The nondelegation doctrine is often at the heart of the debate over federal agencies' constitutionality. The U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."⁷² Nicholas Parrillo explains, "[s]ince the nineteenth century, the Supreme Court has construed this language to mean Congress cannot give away its legislative powers: there is a constitutional limit on how much power Congress can delegate by statute to the President or to administrators in the Executive branch."⁷³ Courts will therefore strike

71. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–46 (2000).

72. U.S. CONST. art. I, § 1.

73. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1293 (2021) [hereinafter Parrillo, *Critical Assessment of the Originalist Case*] (citing *Field v. Clark*, 143 U.S. 649, 681–94 (1892)).

down congressional delegations of power that appear overly broad.⁷⁴ However, as courts have done so in only three instances to date, the nondelegation doctrine has not been considered a particularly strong mandate.⁷⁵

Ideologically, many have disagreed with the Court's weak enforcement of the nondelegation doctrine. Sides in debates over the regulatory state's constitutionality often align with conservative and liberal political views.⁷⁶ Conservative Supreme Court justices decry agencies as unconstitutional and over-reaching.⁷⁷ Unsurprisingly, this view is associated with a strong commitment to a firmer nondelegation doctrine.⁷⁸

The liberal view, meanwhile, is associated with concerns that agencies are "insufficiently zealous" in pursuing their regulatory mandates and with robust defenses of the regulatory state's constitutional basis.⁷⁹ Scholars now anticipate that today's highly conservative Supreme Court is likely to revisit the nondelegation doctrine with a view to weakening agencies' power.⁸⁰ Such a development has concerning implications for pressing public matters such as climate change, which require swift and aggressive action that many agree agencies are best positioned to pursue.

Conservative judges and scholars have attacked the regulatory state's constitutional legitimacy on other grounds. For instance, *Chevron* has been criticized as an improper transfer of judicial authority to interpret law to agencies themselves, supposedly violating, as with the nondelegation doctrine, principles of the separation of powers.⁸¹ Critics have otherwise argued that courts' deference to agency interpretations of law, procedure, and factfinding violates various constitutional provisions or norms.⁸²

74. See *id.*; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that statutes will be upheld if they provide "intelligible principle" to those implementing the law).

75. See Parrillo, *Critical Assessment of the Originalist Case*, *supra* note 73, at 1293.

76. See, e.g., Bagley, *Procedure Fetish*, *supra* note 32, at 346 (describing congressional Republicans' proposals to "discipline a regulatory state that, in their view, does too much and with too little care").

77. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–24, 71 (2017).

78. *Id.*

79. Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1618 (2019); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the Constitution was not originally understood to contain a nondelegation doctrine).

80. See Parrillo, *Critical Assessment of the Originalist Case*, *supra* note 73, at 1294.

81. See Sunstein, *supra* note 79, at 1678–79 (rejecting criticisms of *Chevron* as unjustified transfer of authority to agencies); Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

82. See Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 873 (2020).

Certainly, politics are not always the motivating factor behind debates over the regulatory state. Scholars and judges of all backgrounds have tackled concerns such as the risk of agency capture, questions about efficiency and consumer welfare, and the appropriate balance of bureaucratic expertise versus competing factors, such as public participation.⁸³ Nonetheless, this context helps explain, in part, why rural antipathy toward the regulatory state might be dismissed as another example of politics as usual. The size, legitimacy, and efficacy of the regulatory state are common political flashpoints at the highest levels of national politics. A stance for or against the regulatory state evokes this charged, national political controversy. Part III explores how a more nuanced analysis of rural views reveals that they are more than an outgrowth of this ideological battle over the size and nature of the federal government.

2. Public Participation and Democratic Accountability

Across agencies, public participation in agency processes takes place most commonly during agency policymaking and through direct collaboration with agencies managing land. Public participation in policymaking usually takes the form of notice-and-comment rulemaking mandated by section 553(c) of the APA.⁸⁴ Under this process, an agency must announce a Notice of Proposed Rulemaking (NPRM), then offer the public the opportunity to provide comments on the proposed rule.⁸⁵ Agencies regularly receive thousands of comments when they issue a NPRM, which are often submitted online through a portal at regulations.gov. Agencies are also required to “adequately explain new

83. See generally Sharon B. Jacobs, *Agency Genesis and the Energy Transition*, 121 COLUM. L. REV. 835 (2021) (articulating potential risks and benefits of creating new agencies); Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636 (2021) (examining tension between expansion of agency powers to fight important problems versus concerns about agency accountability); Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491 (2019) (examining tension between model preferencing presidential control over agencies versus model prioritizing agencies as bureaucratic experts); Kenta Tsuda, *Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review*, 7 MICH. J. ENV'T & ADMIN. L. 131 (2017) (arguing that agencies should be forced to consider distributional impacts of major regulatory actions to address the regulatory state legitimacy problem); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (articulating need for effective institutional design to insulate agencies from interest group pressures).

84. See 5 U.S.C. § 553(c).

85. See 5 U.S.C. § 553(b)(3).

regulations to the public,” which they do in the Code of Federal Regulations.⁸⁶

Public participation in policymaking is largely geared toward making policies’ substance informed and transparent.⁸⁷ As Jonathan Choi explains, “These procedures play a key role in administrative law—they are thought to increase public engagement, democratic accountability, agency legitimacy, the diversity of views in the regulatory process, and the quality of the regulation ultimately produced.”⁸⁸ Public participation can also have downsides, as it is time-consuming, costly, and may delay the implementation of important measures.⁸⁹

Agencies’ direct collaboration with the public may come in the form of consultation on land use planning, public lands management, or project siting.⁹⁰ For instance, local stakeholders are involved in the creation of NEPA’s requisite environmental impact statement, the NHPA’s consultation with Native American tribes for culturally or religiously significant sites, and Executive Order 12898’s requirement for agencies to take environmental justice concerns into account to the greatest extent possible.⁹¹

Both avenues for public participation have been objects of regular criticism. Concerning rulemaking, Sant’Ambrogio and Staszewski observe,

86. See Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of Mayo and Chevron*, 38 YALE J. REGUL. 818, 821 (2021).

87. See Choi, *supra* note 86, at 821–22; cf. Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 58 (2019) [hereinafter Parrillo, *Should the Public Get to Participate*] (querying whether the public should be entitled to participate in agencies’ issuance of informal guidance for similar reasons).

88. Choi, *supra* note 86, at 821–22.

89. Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 928–29 (2009).

90. Mark Squillace, *Rethinking Public Land Use Planning*, 43 HARV. ENV’T L. REV. 415, 426–32 (2019) (detailing public participation procedures in land use planning used by Forest Service and Bureau of Land Management and role of National Environmental Policy Act); Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining “The Public” in Public Land Law*, 48 ENV’T L. 311, 363 (2018) (noting National Environmental Policy Act role as providing public opportunities to participate in decisionmaking affecting public land and resources); David A. Lewis, *Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy*, 22 N.Y.U. ENV’T L.J. 274, 303 (2015) (describing National Historic Preservation Act requirement that federal agencies consult with the public on federal undertakings on historic resources). Another public-facing component of the regulatory state is the important, but under-appreciated, role of regulatory monitors in their capacity as enforcers of civil law. See Van Loo, *supra* note 44, at 378.

91. See National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.); 54 U.S.C. § 302706(b); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

Although *formally* quite open and democratic, *in practice* well-organized groups of sophisticated stakeholders often dominate public participation in notice and comment Typically absent, however, are most regulatory beneficiaries, smaller regulated entities, state, local, and tribal governments, unaffiliated experts, stakeholders with situated knowledge of the regulatory issues, and the general public.⁹²

Scholars have called for broadening and facilitating even more robust and meaningful public participation in rulemaking, though efforts to date have encountered a variety of barriers.⁹³

Similar critiques shape the conversation on stakeholders' direct collaboration with federal agencies. Federal land management and planning initiatives often encounter local opposition and complaints about federal procedures.⁹⁴ For instance, local government officials have reported finding federal policies too complex and laden with jargon to navigate.⁹⁵ Federal-local collaboration is often perceived as perfunctory, with the public lacking meaningful opportunities to influence the outcomes of decisions that affect them.⁹⁶ These themes are explored in more depth in Part III.

3. Cost-Benefit Analysis

Criticism of the regulatory state grew in the 1970s and '80s. A central argument advanced during this period, which gained particular traction during the "Reagan Revolution" of deregulation in the 1980s, was that excessive regulation needlessly and inefficiently infringed markets to the detriment of businesses and consumers.⁹⁷ Thus, during this period, measures to slow down or require extra checks on new regulations found a place in the administrative law decisionmaking apparatus.⁹⁸

92. Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 797 (2021).

93. See, e.g., Julie Moroney, *Reviving Negotiated Rulemaking for an Accessible Internet*, 119 MICH. L. REV. 1581, 1603 (2021) (detailing the rise of negotiated rulemaking and its decline due to agency skepticism of benefits, costliness, and political disputes); see generally Coglianese et al., *supra* note 89 (noting widespread recognition of need to improve the agency rulemaking process, especially in regard to transparency and public participation).

94. See generally Squillace, *supra* note 90 (arguing that land use planning on public lands is "broken").

95. See Bryan et al., *Cause for Rebellion? Examining how Federal Land Management Agencies & Local Governments Collaborate on Land Use Planning*, 6 J. ENERGY & ENVTL. L. 1, 14 (2015).

96. See *id.*

97. William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721, 771 (2018).

98. See *id.*; Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1204 (2012).

In 1978, President Carter's Executive Order 12,044 "established procedures for analyzing the impact of new regulations and minimizing their burdens."⁹⁹ Two years later, the Paperwork Reduction Act of 1980 created the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget, the mandate of which was to review and approve all new reporting requirements.¹⁰⁰ The following year saw the birth of cost-benefit analysis with President Reagan's Executive Order 12,291, which directed OIRA to ensure that any draft regulation's benefits exceeded its costs.¹⁰¹ President Clinton's Executive Order 12,866 of 1993 modified cost-benefit analysis somewhat, but "retained OIRA's review of significant new regulations" through cost-benefit analysis.¹⁰²

Today, OIRA's use of cost-benefit analysis continues. Cost-benefit analysis involves comparing "the benefits for the public with the costs of complying with the regulation."¹⁰³ Although cost-benefit analysis appears to provide a quantitative, rational foothold to guide the passage of new regulations, like the issues described above, this mode of decisionmaking has been subject to scrutiny and controversy. Key questions surrounding cost-benefit analysis include what factors count as costs or benefits, how they should be weighed against one another, how seemingly unquantifiable factors can be quantified, and what the implications of these calculations ought to be.¹⁰⁴

"Defenders of cost-benefit analysis extol it as a pillar—if not the foundation—of rational governance."¹⁰⁵ Yet, throughout the past several decades, critiques of cost-benefit analysis have often been fierce.¹⁰⁶ Many find the idea of cost-benefit analysis repugnant in light of its insistence on monetizing things that are arguably priceless. One commentator characterizes cost-benefit analysis as risking "represent[ing] the conceit of a technocratic elite imposing its own vision of the good on the rest of

99. Exec. Order No. 12,044, 43 Fed. Reg. 12661 (Mar. 23, 1978) *repealed by* Exec. Order No. 12,291, 43 Fed. Reg. 13193 (Feb. 17, 1981); *see* Susan Dudley, *A Brief History of Regulation and Deregulation*, REGUL. REV. (Mar. 11, 2019), <https://bit.ly/3Mx31UY>.

100. *See* Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980); *see* Dudley, *supra* note 99.

101. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981); *see* Revesz, *supra* note 18, at 1491.

102. Dudley, *supra* note 99; Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

103. Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 VA. L. REV. 579, 580 (2012).

104. *See* Benjamin Minhao Chen, *The Expressiveness of Regulatory Trade-Offs*, 55 GA. L. REV. 1029, 1032–33 (2020) (critiquing agencies' assigned monetary values for avoiding death from cancer and rape in prison as having underlying premises that health interests of cancer victims and avoiding rape "could become too pricey to avert").

105. *Id.* at 1033.

106. *See* Ori Sharon, *Finding Eden in A Cost-Benefit State*, 27 GEO. MASON L. REV. 571, 572 (2020) (describing criticisms of cost-benefit analysis).

society.”¹⁰⁷ He posits, “To the extent that agencies are formulating policies and making rules based on an analysis that many citizens reject, they—and their decisions—suffer from a legitimacy deficit, a state of affairs that might undermine trust in the administrative state.”¹⁰⁸ Livermore and Revesz argue that cost-benefit analysis is flawed, but at the very least worth salvaging as the best hope for critical needs like climate reform.¹⁰⁹ This theme is explored in more depth in Part IV.

To conclude this Part, the regulatory state’s legitimacy (constitutional and otherwise) and effectiveness have been lauded and attacked on several fronts in ways that often overlap with commentators’ political leanings. Delegation and deference, public participation, and cost-benefit analysis are all particular flashpoints for controversy surrounding federal agencies and their many activities. As the subsequent Parts will show, several of these themes arise in rural populations’ perceptions of, and experiences with, the regulatory state. This unique but important story adds additional wrinkles to the ongoing saga of the role of the regulatory state in American life.

III. RURAL VIEWS OF THE REGULATORY STATE AS A SYMPTOM OF LEGITIMACY PROBLEMS

This Part uses the lens of legitimacy theory to articulate a novel analysis of rural perceptions of the regulatory state and shed light on those perceptions’ significance. Section III.A provides an overview of legitimacy theory as a useful lens through which to assess particular populations’ relationships with government. Part III.B then applies aspects of legitimacy theory to a broad body of literature on rural communities’ sentiments toward federal regulations and agencies, observes the commonalities between this literature and administrative law’s key controversies, and argues that subjective rural accounts seem symptomatic of broader problems of legitimacy within the regulatory state.

A. Legitimacy Theory as a Lens to Assess Populations’ Relationships with Government

Commentary on the controversies surrounding the administrative state often refers to problems with, and concerns about, its legitimacy, as illustrated above. But “legitimacy” can mean many things; administrative law scholars invoke it, often without defining it, to refer to questions

107. Chen, *supra* note 104, at 1035.

108. *Id.*

109. See generally MICHAEL A. LIVERMORE & RICHARD REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH (Oxford Univ. Press 2020) (arguing that cost-benefit analysis can and should be salvaged to create effective policy and restore faith in government).

concerning constitutional authority, procedural processes, and democratic accountability.¹¹⁰ As such, a brief overview of aspects of legitimacy theory is warranted before an exploration of how this lens relates to rural perceptions of the regulatory state. As with the administrative law controversies described above, this discussion is not meant to debate the contours of legitimacy theory, so much as to establish some commonly accepted features of legitimacy to serve as a frame of reference in the subsequent discussion.

Understood broadly, legitimacy theory turns on questions of populations' acceptance of, and compliance with, government.¹¹¹ The idea of legitimacy is premised on the assumption that people subject to laws and governance are invariably not going to be happy with every decision that government makes. The crux of legitimacy, though, is that even where governed populations are dissatisfied or disagree with governmental decisions, if the institution, law, or decision in question is perceived as legitimate, people will accept and comply with outcomes based on their trust of, and deference to, the relevant institutions—and not merely because of the threat of force or other form of coercion.¹¹² A particular governing body has a strong incentive for itself or its decisions to be perceived as legitimate because ensuring compliance by force or coercion is substantially more costly than when a population tends to comply voluntarily.¹¹³

Binding decisions, laws, institutions, and governments perceived as illegitimate will encounter resentment, resistance, and outright disobedience. A state of illegitimacy gives rise to the phenomenon observed in sociology literature known as anomie, or the state where law and government leave populations “to see themselves . . . subject only to the brute force of the state while excluded from its protection.”¹¹⁴ A population's state of normlessness, anomie, and legal cynicism all denote some form of alienation from government and society. Monica Bell explains these phenomena as about “more than distrust,” but rather, “a sense that the very fabric of the social world is in chaos—a sense of social estrangement, meaninglessness, and powerlessness, often as a result of

110. Cf. Hammond & Markell, *supra* note 23, at 320 (observing that “there is little literature on how to measure agency legitimacy in the absence of” judicial review).

111. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376 (2006) [hereinafter Tyler, *Psychological Perspectives*]; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 112 (2006).

112. See Tyler, *Psychological Perspectives*, *supra* note 111, at 376.

113. See *id.*; cf. Morrow, *Environmental Front*, *supra* note 4, at 195–96 (observing that New Mexico ranchers are unwilling to cooperate with federal agencies and question agencies' credibility and authority, while FWS is also unable to enforce ESA regulations by coercion).

114. Bell, *supra* note 7, at 2057.

structural instability and social change.”¹¹⁵ Rather than being a cultural issue, “[i]t is a sense founded on legal and institutional exclusion and liminality.”¹¹⁶ Bell contrasts this condition with law that is “well designed and properly enforced,” which serves to “reassure community members that society has not abandoned them, that they are engaged in a collective project of making the social world.”¹¹⁷

Scholarly conversations on legitimacy tend to converge around key conditions that give rise to a particular law or institution’s legitimacy or lack thereof. Taking the liberty of simplifying a complex area for purposes of discussion, the following analysis focuses on three of the conditions commonly understood to give rise to legitimacy: (1) a population’s sense of procedural inclusion, respect, and fair treatment; (2) a sense that even if outcomes are not favorable, they are nonetheless rational, reasonable, or at least not arbitrary; and (3) for a particular community or group, a sense that the institution or law serves them in addition to other members of society; or in other words, the presence of a non-antagonistic relationship and the absence of a sense that the institution or law in question is merely a locus of power for another group’s interests.

1. Procedural Inclusion, Respect, and Fair Treatment

An individual or group that is the object of an institution’s governance is more likely to accept that governance as legitimate if they accept the fairness of procedures that influence decisions that affect them.¹¹⁸ This aspect of legitimacy is a central component of procedural justice literature.¹¹⁹ People’s experiences of procedural fairness are associated with the common facets of inclusive, democratic processes, including opportunities to be heard (sometimes called “voice”) and transparency in decisionmaking.¹²⁰

115. *Id.* at 2084. This discussion draws on Bell’s writing to articulate conditions of legitimacy, but it is worth noting that she situates her theory of “legal estrangement” as distinct from, or advancing, literature on legitimacy theory, adding a focus on collective experiences and social/structural inclusion as opposed to legitimacy literature’s traditional emphases on individual experiences, distrust, and noncompliance with the law. *See id.* at 2089–90.

116. *Id.* at 2084–85.

117. *Id.* at 2085.

118. *See* Tyler, *Psychological Perspectives*, *supra* note 111, at 378 (discussing the work of John Thibaut).

119. *See, e.g.*, Justin Sevier, *A [Relational] Theory of Procedure*, 104 MINN. L. REV. 1987 (2020).

120. *See* Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN. ST. L. REV. 745, 766 (2017); *see also* Hammond & Markell, *supra* note 23, at 359–62 (discussing the importance of timeliness, transparency, access, and measurability in establishing agency legitimacy).

Whether or not an opportunity to voice concerns is meaningful or perfunctory—i.e., whether an individual or group has the opportunity to actually influence an outcome—can also inform the sense of fairness and in turn, legitimacy.¹²¹ A perception of neutrality, impartiality, and the consistent application of processes among decisionmakers can be key to perceptions of fairness as well.¹²² In the context of the administrative state, Hammond and Markell have observed that judicial review of agency activities, although not always available, “is considered a critical legitimizer” by providing a third party’s review of agency actions as well as eliciting and articulating additional information explaining agencies’ decisions.¹²³

Both positive and negative experiences of procedure can also be subtler than formal processes and have more quotidian flavors. For instance, even perceptions that government actors have behaved disrespectfully “feed[] into an overall disbelief in the legitimacy of the law.”¹²⁴ How government actors treat individuals and groups “affects feelings of standing, self-worth, and beliefs about one’s social identity and whether the social groups to which one belongs are valued.”¹²⁵ In that vein, institutions’ failures to treat people with dignity and respect or to acknowledge their concerns and identities can give rise to a sense of procedural exclusion and unfairness.¹²⁶

2. A Sense that Outcomes Are Fair, Reasonable, Rational, or at Least Not Arbitrary

A second component of legitimacy is the perception by the governed that outcomes are not arbitrary or that outcomes are otherwise informed by rational factors. This component relates to the first: undesirable outcomes are more likely to be perceived as fair if the processes that produced them were perceived as fair.¹²⁷ However, it is possible for institutions and their procedures to be perceived as legitimate, while the governed still question “the fairness, validity, or appropriateness of the

121. See Quintanilla, *supra* note 120, at 767; see also Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 175 (2005) (distinguishing between “decision control” and “process control” and noting that the body of literature on process control has received much more attention in literature).

122. See Quintanilla, *supra* note 120, at 767.

123. See Hammond & Markell, *supra* note 23, at 314.

124. Bell, *supra* note 7, at 2100.

125. Quintanilla, *supra* note 120, at 764.

126. See Bell, *supra* note 7, at 2100 (quoting Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003)); see also Quintanilla, *supra* note 120, at 766 (describing procedural justice as including components of procedural fairness and treatment fairness).

127. See Tyler, *Psychological Perspectives*, *supra* note 111, at 378.

laws or regulations that an authority is enforcing.”¹²⁸ In other words, legitimacy may turn on “whether or not one agrees with the values that are supposed to be implemented and complied with.”¹²⁹ A perception that rules being enforced are reasonable, appropriate, or fair in turn fuels perceptions of legitimacy.¹³⁰

Social science and administrative law literature has historically been somewhat dismissive of the role of outcomes and the opportunity to actually influence decisions in perceptions of fairness and legitimacy.¹³¹ This is largely because of the critical role fair procedures play in populations’ acceptance of outcomes, whether those outcomes are favorable or not.¹³² Some studies have indeed shown that the ability to control decisions matters substantially less than the ability to simply voice concerns.¹³³

Nonetheless, scholars have observed the importance of substantive outcomes to perceptions of legitimacy, in addition to this factor’s significance simply being quite intuitive. Hammond and Markell observe, “[M]ost scholars acknowledge that the distributive consequences of a process also are important to assessments of the legitimacy of that process.”¹³⁴ In other words, “if change seems unobtainable,” it undermines the perception of procedural fairness, and “a process may be viewed as arbitrary or useless, undermining its overall legitimacy.”¹³⁵ Nicholas Bagley has noted that, in fact, “procedures can also undermine legitimacy and frustrate accountability” when designed solely for procedure’s sake.¹³⁶ Thus, some attention to actual outcomes and the distributional effects of decisions—attention that is surely paid by those affected by the decisions—is warranted in an assessment of legitimacy.

128. Kristina Murphy et al., *Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?*, 3 REGUL. & GOVERNANCE, no. 1, Mar. 2009, at 3.

129. *Id.* at 19.

130. *See id.*

131. *See, e.g.*, Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U.L.Q. 787, 818 n.150, 826 n.190 (2001).

132. *Cf.* Bagley, *Procedure Fetish*, *supra* note 32, at 369 (criticizing administrative law’s embrace of proceduralism as a sign of reluctance to grapple with the trade-offs that administrative law inevitably entails).

133. *See, e.g.*, Welsh, *supra* note 131, at 818 n.150, 826 n.190.

134. Hammond & Markell, *supra* note 23, at 329 (citing Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 790–91 (1993–1994)).

135. Hammond & Markell, *supra* note 23, at 330.

136. Bagley, *Procedure Fetish*, *supra* note 32, at 369.

3. A Sense of a Non-Antagonistic Relationship and that the Law/Institution is Not Merely Another Group Wielding Its Power in an Exclusive Manner

A third component of legitimacy may be understood as a more or less amicable or tolerant collective or community-level relationship with the institution or law in question. This component, too, interacts with the two conditions discussed above. Procedural exclusion, unfair treatment, and unfavorable substantive outcomes have a signaling effect, communicating to excluded groups that they are unworthy of protection—which implies that someone else, whoever *is* included, is more worthy of that protection.¹³⁷

If a population believes that an institution serves someone other than them, the institution is perceived as a threat more broadly than by the specifics of its unfair processes or outcomes. Legitimacy literature has often emphasized that individuals tend to draw conclusions about laws or institutions from their own personal experiences. However, other people's negative experiences can also “feed into a more general, cultural sense of alienation,” making perceptions of illegitimacy emerge from “the cumulative, collective experience of procedural and substantive injustice.”¹³⁸ Communities may hold a “collective memory” of interactions with government actors, or a “cultural conception of what it is like to interact” with government actors “that emanates in part from membership in a group or identity category.”¹³⁹

This sense of collective alienation may relate to a sense that neutral-seeming laws in fact have negative, differing experiences for the group in question.¹⁴⁰ Bell links this idea to “legal closure,” or the phenomenon of law becoming “a means of hoarding legal resources for the socially and socioeconomically advantaged while locking marginalized groups out of the benefits of” governance, thereby leaving some areas “essentially lawless”—over-scrutinized, yet under-protected—“while others may be rigorously defended over and above the degree to which they are at

137. See Quintanilla, *supra* note 120, at 765; Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1288 (2018) (citing Bell, *supra* note 7).

138. Bell, *supra* note 7, at 2105; see also Faith E. Gifford, Michael D. Reisig, *A Multidimensional Model of Legal Cynicism*, 43 LAW & HUM. BEHAV. 383, 384 (2019) (noting the importance of vicarious experiences and accounts in individuals' development of legal cynicism that fuels perceptions of low legitimacy); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1421 (2015) (noting the importance of vicarious experiences in forming beliefs about legitimacy).

139. See Bell, *supra* note 7, at 2106.

140. See *id.* at 2115.

risk.”¹⁴¹ The legal closure concept helps capture the fact “that there are both losers and winners” in the ways certain institutions are run.¹⁴²

If these conditions—procedural injustice, perceptions of arbitrary substantive outcomes, and a sense of collective exclusion and antagonism—are all present, they create a recipe to “effectively banish whole communities from the body politic.”¹⁴³ The next Section turns to the question of how rural populations’ perceptions of the regulatory state interact with these aspects of legitimacy theory.

B. Rural Perceptions of the Regulatory State as a Crisis of Legitimacy

This discussion applies the legitimacy framework established above to the question of rural communities’ relationships with the regulatory state, proceeding through each of the conditions described above in turn. The discussion concludes that rural communities’ disaffection with the regulatory state closely mirrors the conditions giving rise to legitimacy problems, which are also strikingly consistent with the controversies surrounding the regulatory state discussed in Part II.

Methodologically, the following analysis reflects an attempt at a far-reaching, novel synthesis of modern socio-legal literature on rural perceptions of the regulatory state. Although some works were undoubtedly missed, the subsequent discussion involved: (1) a review of prominent works of sociology¹⁴⁴ and rural sociology,¹⁴⁵ drawing out any mentions of perceptions of federal agencies; (2) a review of literature on Westlaw based on key word searches for mentions of perceptions of the regulatory state among rural populations, with a focus on including rural populations of diverse racial and ethnic backgrounds; and (3) additional searches in online databases for literature discussing rural sentiments toward federal agencies and their activities.

Several caveats temper this discussion. First, while the following discussion emphasizes the regulatory state’s role in rural disaffection, the literature on rural sentiments places a parallel, undeniable emphasis on the

141. *Id.* at 2114–15.

142. *See id.*

143. *See* Swan, *supra* note 137, at 1288 (citing Bell, *supra* note 7).

144. These include HOCHSCHILD, *supra* note 3; CRAMER, *supra* note 2; WUTHNOW, *supra* note 3; STEPHANIE A. MALIN, *THE PRICE OF NUCLEAR POWER: URANIUM COMMUNITIES AND ENVIRONMENTAL JUSTICE* (Rutgers Univ. Press 2015); and JILL LINDSEY HARRISON, *PESTICIDE DRIFT AND THE PURSUIT OF ENVIRONMENTAL JUSTICE* (MIT Press 2011).

145. These include JENNIFER SHERMAN, *THOSE WHO WORK, THOSE WHO DON’T: POVERTY, MORALITY, AND FAMILY IN RURAL AMERICA* (Univ. of Minnesota Press 2009) [hereinafter SHERMAN, *THOSE WHO WORK*]; JENNIFER SHERMAN, *DIVIDING PARADISE: RURAL INEQUALITY AND THE DIMINISHING AMERICAN DREAM* 19 (2021) [hereinafter SHERMAN, *DIVIDING PARADISE*]; and ASHWOOD, *supra* note 13.

role of television and social media in influencing at least some rural views. Influences such as right-wing news outlets and Facebook conspiracy theorists are playing a clear role in shaping fear and antigovernment sentiment among rural, conservative, and white populations in general. However, the literature also acknowledges that these influences seeking to foment and exploit this fear and alienation are not planting the seeds of this alienation themselves, but taking advantage of seeds that were already planted.¹⁴⁶

The second caveat is that the average person's understanding of how government works is not necessarily the most specific, nuanced, detailed, or even accurate.¹⁴⁷ One would be hard-pressed to find rural residents who would blame the Bus Regulatory Reform Act of 1982 for their hometown's struggles. Studies of rural perceptions of concrete aspects of the regulatory state are scarce. Thus, the following discussion uses an interpretive lens to filter the language of laypeople through the broader legal and institutional context they may be alluding to, even if indirectly. Objective structural features of the regulatory state are explored in Part IV in order to complement this discussion of subjective views.

Third, it is difficult to generalize about rural communities and their sentiments. As commentary on this topic repeatedly emphasizes, rural America is not monolithic. This discussion has intentionally sought out a variety of rural stories. But it does seem worth attempting to conscientiously reconcile current rural challenges into a cohesive narrative in light of unique rural conditions alongside today's societal befuddlement by those conditions.¹⁴⁸ The following represents a synthesis of qualitative, anecdotal data in order to unearth common themes that emerge across the diverse landscapes, economies, and populations outside the urban centers

146. Cf. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 19 ("Building upon themes that were widespread in the mainstream media, old-timers were able to relate antigovernment discourse to their own experiences of disempowerment in the rural West."); WUTHNOW, *supra* note 3, at 11–12 (claiming that rural outrage that surprised many after the 2016 presidential election "was there well before, and would have been evident had anyone bothered to look. It did not happen overnight and is unlikely to diminish anytime soon").

147. Cf. SHERMAN, *DIVIDING PARADISE*, *supra* note 145; *but see* WUTHNOW, *supra* note 3, at 178 (noting farmers' in-depth knowledge of "the government" encompassed "multiple federal and state agencies and different types of laws, agricultural regulations, and legislation").

148. Cf. Laura McKinney, *Reinventing Rural Environmental Justice*, in *REINVENTING RURAL: NEW REALITIES IN AN URBANIZING WORLD* 57 (Lexington Books 2016) (noting unique features of rural environmental injustice, neglect of rural conditions in literature, and Superfund remediation process's structural features disadvantaging rural cleanup and prioritizing urban remediation); Lisa R. Pruitt, *The Rural Landscape: Space Tames Law Tames Space*, in *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* (Irus Braverman et al. eds., 2014) (articulating the uniqueness of rural relationships with law).

of the United States. This analysis includes studies focused on such diverse places as California, Colorado, Georgia, Louisiana, New Mexico, Utah, Washington State, and Wisconsin, and across Black, Native American, Latinx, and white rural populations. Further, critically, not all of the grievances described in the following, despite being grouped together under certain categories, are assumed to be moral equivalents. It is clear, for instance, that a Native American tribe losing hunting rights on land that has been considered sacred for thousands of years is simply not the same as a white rancher having to shrink her grazing area. Nonetheless, the common outcome of such exclusions—alienation from an agency and a perception of it as an impediment to a way of life—seems important to highlight.

Fourth, this discussion spans multiple federal agencies, including the U.S. Department of Interior's Fish and Wildlife Service and Bureau of Land Management, the Department of Agriculture, the Nuclear Regulatory Commission, the Department of Energy, the Environmental Protection Agency, and the Department of Health and Human Services. While each of these agencies implicates different legal mandates and processes, structural themes relevant to the regulatory state as a whole are elucidated in Part IV. Further, while strengths and success stories in rural-federal relationships certainly exist, this Section focuses on weaknesses and problems first in order to offer a diagnosis. Part V draws on those strengths and success stories to illuminate solutions.

1. Rural Communities Perceive Procedural Injustice in Interactions with the Regulatory State Through a Common Sense of Procedural Exclusion, Powerlessness, and Being Belittled

A key ingredient in illegitimacy problems is the experience of some form of procedural injustice. As discussed above, procedural injustice may be defined as “experiences in which individuals feel treated unfairly” by government, perceptions that government actors have behaved disrespectfully, and perceptions of a dismissive stance on the part of government toward community members’ rights and concerns.¹⁴⁹ Other literature on procedural justice emphasizes the importance of rights of participation, opportunities to voice concerns regarding binding decisions, and acceptance of decisions’ soundness or substantive accuracy, at least to a reasonable degree.¹⁵⁰ The literature on rural populations’ perceptions of

149. See Bell, *supra* note 7, at 2100.

150. See generally Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 320 (2004) (articulating the theory of procedural justice as an essential prerequisite for legitimacy).

the regulatory state seems largely in alignment with this aspect of illegitimacy.

One of the most prominent themes among rural feelings toward the regulatory state is a sense of powerlessness in rural communities' relationships with federal agencies and the federal government more broadly.¹⁵¹ This sense of exclusion has even been characterized as feeling bullied or belittled in interactions with federal agencies. For instance, rural sociologist Jennifer Sherman's 2014 study of longtime residents of Paradise Valley, Washington, a declining farming and ranching community, elicited many of these themes from those she interviewed. Sherman did not, unlike other researchers, hear "talk of either moral outrage or minorities having cut the line."¹⁵² Instead, "much of the frustration that old-timers [longtime local residents] expressed had to do with the experience of being unimportant or unheard," especially in their relationships with federal agencies including the U.S. Forest Service and Bureau of Land Management; many residents "connected antigovernment sentiments to concrete experiences of vulnerability or abuse at the hands of these larger entities."¹⁵³

In an earlier study by Sherman in the northern California timber community of Golden Valley, she found a similar sense of disempowerment among residents. Sherman conducted the study from 2003 to 2004, just over a decade after the Fish and Wildlife Service listed the spotted owl as a protected endangered species in 1990, a federal move that saw substantial local opposition at the time and had severe subsequent economic ripple effects. Sherman observed irony in the national media coverage of the controversy as one of "owls versus loggers" because "both owls and loggers were affected populations that had little to no agency in the decisions."¹⁵⁴ She noted that, "While loggers had major stakes in the outcome, ultimately they were just workers within the forest industry They were unable to influence the outcome in any area except the public's imagination," a powerlessness that in turn fueled their perception of the listing as an unwarranted attack on their way of life.¹⁵⁵

These feelings of exclusion and belittlement at the hands of federal agencies have been observed in diverse rural communities.¹⁵⁶ For instance,

151. See, e.g., MALIN, *supra* note 144, at 53 (noting that residents in former Colorado uranium communities expressed a sense of powerlessness and vulnerability about lack of government transparency and environmental degradation).

152. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 176.

153. *Id.* at 176–80; see also Su, *supra* note 3, at 844 (noting common rural sense of lack of agency and control).

154. SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 35.

155. *Id.* at 36.

156. As another example, one scholar attributes a lawsuit filed by the New Mexico Department of Game and Fish against the United States Fish and Wildlife Service as "a

complaints about procedural exclusion have been raised in the context of federal agencies' obligations to consult with Native American tribes and Western local governments affected by large public land holdings.¹⁵⁷ Rowe, Finley, and Baldwin argue that while some federal consultations with tribes comport with best practices and often meet the legally required procedural minimums, "consultations usually meet the letter of the law while providing tribes with little opportunity to meaningfully shape agency decisions."¹⁵⁸ This has led to "a widespread perception among tribes" that consultation processes fail "to adequately and substantively incorporate tribes' concerns in the planning process."¹⁵⁹ Others report that agencies do not necessarily comply with legal requirements due to a lack of enforceability, and thus, "tribal officials understandably become disillusioned and the federal-tribal relationship suffers long-term damage."¹⁶⁰

Rural sociologist Loka Ashwood found similar sentiments surrounding public meetings that the Nuclear Regulatory Commission conducted in a community of Black and white residents in Burke County, Georgia. These meetings were perceived as "scripted actions defined by bureaucratic rules."¹⁶¹ White and Black residents alike in Burke County felt hopeless, even threatened, in their relationships with the local nuclear power plant that the NRC was perceived to support to the severe detriment of the community.¹⁶² If local residents went up against "the system"—the joint powerhouse of the plant and the NRC—it was understood that there would be backlash, such as lost jobs.¹⁶³ Local activist Reverend Samuel Franklin attempted to support the efforts of white activists who came from

direct response to fears that distant elites were usurping local control" over conservation efforts. Firlein, *supra* note 14, at 339–40; *see also* Stephanie A. Malin, *Depressed Democracy, Environmental Injustice: Exploring the Negative Mental Health Implications of Unconventional Oil and Gas Production in the United States*, 70 ENERGY RSCH. & SOC. SCI. 1 (2020) (attributing rural residents' sense of powerlessness, barriers to participation in decisionmaking, and lack of access to information about unconventional oil and gas production to "federal regulatory vacuum" of the sector).

157. *See* Matthew J. Rowe et al., *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV'T L. & POL'Y 1, 3 (2018).

158. *Id.* at 19.

159. *Id.* at 5; *see also* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. IND. L. REV. 21, 49 (1999); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417 (2013); Kurt E. Dongoske et al., *Environmental Reviews and Case Studies: The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews*, 17 ENV'T PRAC. 36 (2015).

160. Routel & Holth, *supra* note 159, at 467.

161. *See* ASHWOOD, *supra* note 13, at 167.

162. *See id.* at ix ("William, like his black and white Burke County neighbors, harbors a deep-seated distrust of the government.")

163. *See id.* at 161.

out of town to advocate reform, but “ma[d]e it clear that he had little hope in the efficacy of their go-through-the-government ways.”¹⁶⁴ Ashwood highlights “a simple truth relied on by those perpetually disinherited in the Burke County [B]lack community: God, not government, would deliver justice.”¹⁶⁵

In the local government context, many local government officials, especially in the West where federal agencies manage large amounts of public land, have complained about agencies’ “highly variable planning processes” and the use of “technocratic language that means very little to local communities,” exacerbating local feelings of exclusion and powerlessness.¹⁶⁶ As one scholar states,

when larger governmental units, like the federal government, ignore issues raised by smaller units, like state and local government, it appears as though the larger units are dismissing rural communities and their concerns By failing to account for the issues raised by smaller governmental units, larger governmental units effectively disregard rural communities.¹⁶⁷

2. Rural Communities’ Unfavorable Views of the Regulatory State Are Often Based on a Common Sense of Deep Frustration with Substantive Outcomes

Rural residents have also expressed disillusionment or frustration with the substantive outcomes of federal agencies’ decisions that affect them.¹⁶⁸ Rural commentary tends to characterize federal agencies as capricious, unpredictable, and failing to serve local needs, if not actively harming residents.¹⁶⁹ Overall, federal regulatory processes are perceived as detached, heartless, and meaningless, seeking to impose uninformed plans on rural communities through one-size-fits-all frameworks with little regard for local conditions and needs.¹⁷⁰ Two common themes among rural

164. *Id.* at 159; cf. HARRISON, *supra* note 144, at 131 (explaining that residents complaining of pesticide poisoning were dismissed by regulatory officials).

165. ASHWOOD, *supra* note 13, at 158.

166. See Bryan et al., *supra* note 95, at 20; see also Su, *supra* note 3, at 867, 873 (observing that unlike local governments, federal agencies are not directly responsive to local constituents and agencies tend to use “top-down” approach in rural communities).

167. Firlein, *supra* note 14, at 341.

168. See Su, *supra* note 3, at 874.

169. See SHERMAN, DIVIDING PARADISE, *supra* note 145, at 19; Brody Hinds, Comment, *Twenty-Five Years Later: The Amendments to the National Historic Preservation Act and Tribal Consultation*, 42 AM. INDIAN L. REV. 141, 141–42 (2017) (“[F]ederal managers in charge of sacred sites are frequently unaware of their significance to Native peoples and often do not know the best way to preserve them.”).

170. See WUTHNOW, *supra* note 3, at 106–09; Robert Bonnie et al., *Understanding Rural Attitudes Toward the Environment and Conservation in America*, DUKE NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS 18 (2020), <https://bit.ly/3IW6Xvi> (describing how rural interviewees and focus group participants viewed federal

frustrations with substantive outcomes emerged in this analysis: (1) a perception that agency outcomes make it harder to make a living; and (2) a perception that agency outcomes fail to protect rural residents from threats.

a. A Perception that Agency Outcomes Make It Harder to Make a Living

Threats to livelihoods are a prominent theme in the literature on rural sentiments toward the regulatory state. Perceptions of those threats range in degree and depend upon who is asked. On one end of that spectrum, sentiments may involve relatively mild frustrations with agency decisions that seem inconvenient or unwise. On the other hand, sentiments may involve a deep sense of betrayal and oppression. The experiences of Black farmers at the hands of the U.S. Department of Agriculture provide a particularly egregious illustration of a federal agency crushing a rural population's livelihoods while also failing to offer protection from threats, the theme discussed below. Through its support of discriminatory county commissioners who undermined Black farmers' access to essential credit and benefit programs, and its failure to investigate subsequent civil rights complaints, the USDA's role in the massive dispossession of Black-owned farmland over the past several decades helped the agency earn its reputation as "the last plantation" among Black rural populations.¹⁷¹

Diverse rural populations continue to perceive the regulatory state as a danger to livelihoods and economic well-being. For instance, certain Native American tribes have expressed fears about the regulatory state as a threat to local economic dependence on coal extraction.¹⁷² Tribes have also struggled to maintain subsistence livelihoods due to a lack of control over public lands they have historically depended on for survival.¹⁷³ As one example, one commentator describes "widespread dissatisfaction

bureaucratic processes as favoring one-size-fits-all policies that did not consider rural needs in environmental policymaking and created potentially unnecessary hardships).

171. See *Pigford v. Glickman*, 185 F.R.D. 82, 85–89 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000); Angela P. Harris, *(Re)integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157, 179 (2015) (attributing 98% decrease in Black farmers between 1920 and 1997 to partition suits and "credit discrimination perpetrated by the federal government itself through the USDA").

172. Julie Turkewitz, *Tribes That Live Off Coal Hold Tight to Trump's Promises*, N.Y. TIMES (Apr. 1, 2017), <https://nyti.ms/3hMRxi7> (quoting Crow tribe energy director as saying "Obama was a great president" but his energy policies "would have devastated the tribe").

173. See, e.g., Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 229 (2014); Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 37 (2005) (noting rural residents' and Natives' prioritization of allocation of fish and game among different users).

among the Alaska Native community with the limited nature of the federal subsistence program” managed by the Department of Interior.¹⁷⁴

Predominately white residents in extractive and land-based industries often see the regulatory state as a threat to their livelihoods.¹⁷⁵ The Fosters, a married couple interviewed by Sherman in her Paradise Valley study, expressed the perception that agencies made their way of life harder. “[L]ike a number of other farmers and ranchers in the area,” Sherman observed, the Fosters “experienced the government as an outside force whose whims were unpredictable and seldom responsive to their needs.”¹⁷⁶ The law itself was considered an unpredictable barrier to making a living. Interviewees working in farming and ranching “often faced overwhelming challenges related to changing regulations. In addition to labor laws and water regulations, grazing permits were a major source of frustration for a number of old-timers in the cattle industry, many of whom complained at length about the decrease in public land available to them.”¹⁷⁷

The Fosters explained that “over the years government regulations and interventions had repeatedly challenged their livelihood.”¹⁷⁸ They added, “We had to get out of the orchard industry because [of] regulations . . . [W]e couldn’t keep up with . . . what the government wanted to do [I]t was ridiculous, but it was the law.”¹⁷⁹ The couple said that “changing labor regulations made it difficult” to continue in the orchard business and “they also struggled with changing rules regarding irrigation.”¹⁸⁰ Changes in conservation priorities “contributed to their experiences of loss and betrayal.”¹⁸¹ In general, the sense of powerlessness felt by locals in Paradise Valley “was exacerbated by the feeling that those same agencies [the Forest Service, BLM, and state Department of Ecology] gave back little to the community, abandoning local populations while continually imposing new obstacles.”¹⁸²

Agency decisions are also often considered detached from local needs and knowledge.¹⁸³ One rancher:

174. Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 ALASKA L. REV. 187, 215 (2016).

175. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 178 (noting that longtime rural residents considered “land use policies and government regulations” to be “the most immediate threat to their livelihoods”).

176. *Id.* at 182.

177. *Id.* at 183.

178. *Id.* at 183.

179. *Id.* at 181–82.

180. *Id.* at 182.

181. *Id.* at 184.

182. *Id.* at 180.

183. *See, e.g.*, Bonnie et al., *supra* note 170, at 19 (“I think the biggest frustration [is] . . . the people that try and regulate things aren’t the people involved in the day to day, so they think they know what’s good or best but they’re not having people that are actually part of what they’re trying to regulate in the conversation.”).

described fighting with the Fish and Wildlife Agency over grazing rights to public lands, explaining that it failed to recognize that grazing was only detrimental to ecosystems when cows were fenced in too tightly. [She said,] “[T]hey have attorneys writing these things up, and attorneys answering why you shouldn’t graze, but they don’t address animal health or biosecurity or things that are important. . . . They kind of harassed us and it’s unbelievable. . . . We had to sell a lot of cows because we just had our private land to graze them on.”¹⁸⁴

In her Paradise Valley study, Sherman found that antigovernment discourse on the news mirrored rural residents’ “personal trials, including individual experiences with seemingly capricious agencies, institutions, and agendas that had negatively impacted their lives and livelihoods[,] . . . [exhibiting] raw frustration with specific agencies and interventions that impacted their daily existence and way of life.”¹⁸⁵ Even an employee of the U.S. Forest Service described it as top-down, bloated, and useless, stating, “we all agree that we [the Forest Service] do nothing.”¹⁸⁶

Another study highlighted rural residents’ frustrations with conservation initiatives that were perceived as an imposition of disproportionate local burdens based on detached or uninformed urban priorities.¹⁸⁷ In response to Fish and Wildlife efforts to conserve wolf populations, a rancher in New Mexico stated,

People in the East view this part of the country as empty public lands and think it should stay that way. They don’t have a clue what it’s like. All this is done on a whim. Why should ranchers be prepared to take losses just so some New York City guy can sleep well knowing there’s wolves in the wild?¹⁸⁸

Another rancher said, “Take the wolves and plant em in Central Park, cause they impose it on us to have these goddamn wolves!”¹⁸⁹ In a similar vein, in Sherman’s study of Golden Valley, she found that locals universally blamed the Fish and Wildlife Service spotted owl listing for “the sudden and devastating deterioration of their town and the local labor market.”¹⁹⁰

184. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 183.

185. *Id.* at 179.

186. *Id.* at 180; CRAMER, *supra* note 2, at 150–51, 189.

187. *See* Firlein, *supra* note 14, at 339.

188. *Id.*

189. *Id.* (internal quotations omitted).

190. SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 35.

b. A Perception that Agency Outcomes Fail to Protect
Locals from Threats

Many rural residents crave greater protection from, or remediation of, threats, including severe environmental and public health hazards. This desire for protection comes in a variety of forms; unexplained cancer clusters and inedible fish surrounding polluted sites in Louisiana, Georgia, and Utah, for instance, drive residents' sense of a need for action.¹⁹¹ Yet those residents, too, often find reason to question whether the regulatory state has their best interests in mind.¹⁹²

One Louisiana resident interviewed by sociologist Arlie Hochschild, African American U.S. Army Lieutenant General Russel Honoré, remarked how the U.S. Environmental Protection Agency "passes the buck" to the industry-captured state government of Louisiana, leaving residents vulnerable to private sector whims and hazardous pollution.¹⁹³ Black residents interviewed by Ashwood in Burke County, Georgia, expressed similar views: they desperately wanted protection from hazards associated with the local nuclear plant, but the NRC was regularly perceived to side with industry over locals.¹⁹⁴

In the predominately white town of Monticello, Utah, where two Superfund sites were designated in 1989 due to legacies of uranium processing, environmental sociologist Stephanie Malin found that the federal government was perceived as having abandoned local residents after using them for decades of energy production.¹⁹⁵ The Superfund sites "have been linked to ongoing, contested, and under-addressed environmental and health issues," including cancer clusters.¹⁹⁶ However, multiple federal agencies, including the Department of Energy and the Agency for Toxic Substances and Disease Registry, "did not conclude that the cancer clusters were related to uranium exposure, despite noting

191. See HOCHSCHILD, *supra* note 3, at 32, 59 ("Everyone I talked to wanted a clean environment."); Malin, *supra* note 144, at 57 ("Most uranium community residents know that the federal government and corporations have still not adequately addressed the legacies of uranium's previous booms . . .").

192. As one example, a West Virginia activist working to counteract coal's legacy through community gardening complained, "Your larger USDA grants, the Community Food Projects grants, going back and looking at the funded ones, they're all in urban areas. And I think rural – it's an area that people have their own assumptions about, they think that people are really self-sufficient." Elyzabeth W. Engle, "Coal Is in Our Food, Coal Is in Our Blood": *Everyday Environmental Injustices of Rural Community Gardening in Central Appalachia*, 24 LOCAL ENV'T 746, 755 (2019).

193. See HOCHSCHILD, *supra* note 3, at 59

194. See ASHWOOD, *supra* note 13, at 167.

195. See MALIN, *supra* note 144, at 60. Malin's fieldwork took place from 2005 to 2009. See *id.* at 3.

196. *Id.*

elevated rates of various cancers in the community.”¹⁹⁷ This has led to community members feeling “ignored by federal agencies and scientists, reporting . . . that they did not receive satisfactory responses to their public health concerns.”¹⁹⁸ This dissatisfaction spurred the growth of a local activist group devoted to holding federal agencies accountable “because they were tired of seeing neighbors suffer illnesses without explanation and felt they deserved more honesty from the federal government,” and that they should “make the federal government right the wrong they did to the community.”¹⁹⁹

In sociologist Jill Lindsey Harrison’s California-based study examining the phenomenon of “pesticide drift”—the problem of hazardous pesticides moving through the air into residential areas—interviewees were similarly disillusioned with federal regulatory institutions. Activists interviewed in the study included “a diverse array of Latino/a farmworkers and their family members, other low-income agricultural community residents of color, and white, middle-class, and upper-middle class professionals.”²⁰⁰ Interviewees expressed the belief that cooperative tactics with federal and state regulatory officials (as well as with industry) “have failed to protect residents from pesticide exposure,” motivating activists to adopt more confrontational tactics with government institutions.²⁰¹

In general, a notable feature of rural concerns about both economic and environmental precarity, and the role of federal agencies in relation to both, is that the industries locals economically depend upon may well also be the industries that pose the greatest threats to local ecologies and public health.²⁰² Due to rural regions’ relative isolation and lack of economic alternatives, this tension can result in a unique alchemy influencing rural sentiments toward industry and the regulatory state, which may strike outsiders as contradictory.²⁰³

197. *Id.* at 63. The Agency for Toxic Substances and Disease Registry is an agency of the U.S. Department of Health and Human Services. *See Agency for Toxic Substances and Disease Registry*, ATSDR, <https://bit.ly/3DuCPXa> (last visited Mar. 31, 2022).

198. MALIN, *supra* note 144, at 63.

199. *Id.*

200. HARRISON, *supra* note 144, at 22. The populations disproportionately affected by pesticide drift are mostly Latino immigrant farm working communities. *See id.* at 41.

201. *Id.* at 172.

202. *See, e.g.,* Stephanie A. Malin & Kathryn Teigen DeMaster, *A Devil’s Bargain: Rural Environmental Injustices and Hydraulic Fracturing on Pennsylvania’s Farms*, 47 J. OF RURAL STUD. 278 (2016) (describing “devil’s bargain” faced by small Pennsylvania farmers involved with shale gas extraction and associated inequities).

203. *Cf.* HOCHSCHILD, *supra* note 3, at 32 (describing, as part of “Great Paradox” of rural voters seeming to vote against their interests, the presence of “great pollution and great resistance to regulating polluters” in Louisiana).

Specifically, many residents remain loyal to the polluting industries that employ them or those they know, while other residents desire environmental justice and for the polluting industries to leave. Race, class, and views of federal agencies interact with these factors. For instance, although white rural workers and residents often bear environmental injustice burdens too, they are more likely than communities of color to enjoy some of the hazardous industries' economic benefits.²⁰⁴ These interacting factors help explain white rural populations' propensity to want less government intervention despite perceiving industry's threats, and to side with industry over the regulatory state because at least industry has something to offer them—unlike agencies, which are perceived to be ineffectual anyway.²⁰⁵ These disparities also help explain rural minorities' greater desire for protection through the regulatory state rather than wanting agencies to simply leave them alone, even though many remain hopeless or disillusioned that such protection is attainable.²⁰⁶

3. Rural Communities Experience a Community-Level Sense of Tension with the Regulatory State

Members of a community may perceive maltreatment targeted toward others as a sign that the community as a whole stands in tension with a particular institution.²⁰⁷ Vicarious negative experiences can “feed into a more general, cultural sense of alienation,” making perceptions of illegitimacy emerge from “the cumulative, collective experience of procedural and substantive injustice.”²⁰⁸ Communities may develop a “collective memory” of interactions with government actors, or a “cultural conception of what it is like to interact” with government actors “that emanates in part from membership in a group or identity category.”²⁰⁹ In short, this prong involves a sense of distrust of institutions and their

204. Thomas E. Shriver & Gary R. Webb, *Rethinking the Scope of Environmental Justice: Perceptions of Health Hazards in a Rural Native American Community Exposed to Carbon Black*, 74 RURAL SOC. 270, 272 (2009).

205. Cf. HOCHSCHILD, *supra* note 3, at 166 (describing local resident's loss of a horse due to environmental contamination, but her insistence not to “allow her sadness to interfere with her loyalty to industry”); *id.* at 17 (quoting local resident describing government as “too big, too greedy, too incompetent, too bought”).

206. See ASHWOOD, *supra* note 13, at 158; Shriver & Webb, *supra* note 204, at 278, 284–85 (describing Native American interviewees in rural environmental justice community as perceiving “an institutionalized system of racism, neglect, and denial” and lack of assessment or standards by EPA, the Centers for Disease Control, OSHA, and in particular the Oklahoma state environmental agency to address severe local contamination).

207. See Bell, *supra* note 7, at 2104.

208. *Id.* at 2105.

209. See *id.* at 2106.

activities not because “they do bad things to me,” but because “they do bad things to us.”

This factor also emerges as a theme in the literature on rural relationships with the regulatory state. In particular, there is a collective sense of the regulatory state as a frequent antagonist in an “us-versus-them” relationship. Rural populations often express resignation to the fact that agencies serve some group or population other than them.²¹⁰ The “us” tends to connote a place-based identity under attack—local, rural, or industry-related, for instance—although it also intersects with overlapping identities, such as race and class.²¹¹ The “them,” or the populations or entities agencies are perceived to serve to the detriment of rural residents, tend to include urban residents and corporations.²¹² The antagonistic relationship, then, is that rural residents often perceive the regulatory state to serve corporate interests and urban elites in an attack on rural ways of life. For rural communities of color, these perceptions are also intertwined with the understanding that the regulatory state systematically prioritizes the interests of white people.²¹³

The regulatory state’s perceived fealty to concentrated corporate interests in general is a regular theme among diverse rural residents’ views.²¹⁴ For instance, in Sherman’s Paradise Valley study, she observed that “[m]any old-timers . . . found federal rules and regulations capricious, serving large and outside interests while oppressing and impoverishing small-scale operations.”²¹⁵ This sense of joint corporate-regulatory

210. See, e.g., SHERMAN, *DIVIDING PARADISE*, *supra* note 144, at 180–81.

211. See, e.g., ASHWOOD, *supra* note 13, at 69 (quoting several local residents characterizing nuclear plant as a “they” threatening local landownership, aesthetics, and traditions in interest of greed); SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 35.

212. Cf. SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 38 (describing Northwestern loggers’ sense that spotted owl controversy was “a clash of urban versus traditional rural cultures, with the latter being overwhelmed and devalued by the former”); James R. Rasband, *The Rise of Urban Archipelagos in the American West: A New Reservation Policy?*, 31 *ENV’T L.* 1, 44 (2001) (suggesting that urban newcomers to Western archipelagos advocating preservation and recreation on public lands ought to recognize interests of communities that preceded them in Western land uses).

213. See, e.g., ASHWOOD, *supra* note 13, at 173 (quoting a Black local resident describing the local nuclear plant as “white authority”).

214. See SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 180–81 (discussing the statements of a former farmer-turned-construction worker that “[h]is experiences in the 1980s with government buyouts for small farmers had convinced him that the government served only large corporate interests Many old-timers . . . found federal rules and regulations capricious, serving large and outside interests while oppressing and impoverishing small-scale operations”); see also Chris M. Messer & Thomas E. Shriver, *Corporate Responses to Claims of Environmental Misconduct: The Case of Phelps Dodge and Blackwell, Oklahoma*, 30 *DEVIAANT BEHAV.* 647, 660–65 (2009) (articulating the polluting company’s use of relationships with EPA and CDC and compliance with their standards in efforts to legitimize its environmental misconduct).

215. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 181.

antagonism may involve more of an urgent sense of immediate violence, as with agencies' perceived failure to address problems of worker abuse, pesticide poisoning, and other forms of industry exploitation in Harrison's pesticide drift study.²¹⁶ A central theme of Ashwood's several years of fieldwork in Georgia revolved around both actual and perceived regulatory fealty to corporate interests in a system Ashwood calls "for-profit democracy."²¹⁷ A local former NRC regulator Ashwood spoke to emphasized the importance of plant profits and balanced budgets in the short-term over safety and long-term planning to NRC decisionmaking and stated, "Industry is *the* biggest stakeholder, with the most influence It is not the public. It is not Congress, because industry influences them."²¹⁸

The regulatory state's perceived fealty to urban elites also emerges often as a theme. The discussion above of disappointments with agency decisionmaking illustrates this view: conservation initiatives, in particular, are often viewed as uninformed urbanites imposing an impractical and oppressive vision on regions they neither care about nor understand.²¹⁹ Although "jobs versus environment" tensions are a classic example, the perception of urbanites imposing their priorities on rural regions through the regulatory state is not limited to that conflict. For instance, one study documented rural educators' belief that federal education laws, administered through the Department of Education, are "designed primarily for urban and suburban districts and poorly suited for rural districts."²²⁰

Generally, scholars have described rural perceptions of the regulatory state's effect on their lives as the feeling that their very way of life is being taken from them.²²¹ This sense of attack may have to do with the disappointment in substantive outcomes discussed above; losses of livelihoods and environmental destruction can each represent the deterioration of a regional culture. But many also lament the destruction or enclosure of both private and public local landscapes that they had once engaged with more intimately, freely, safely, and meaningfully.²²² Federal

216. See HARRISON, *supra* note 144.

217. ASHWOOD, *supra* note 13, at 69.

218. *Id.* at 16.

219. *Id.*; see also Bonnie et al., *supra* note 170, at 28.

220. Lars D. Johnson et al., *Federal Education Policy in Rural America*, BELLWETHER EDUC. PARTNERS 16 (Dec. 31, 2014), <https://bit.ly/3r0KOpX>; Deena Dulgerian, *The Impact of the Every Student Succeeds Act on Rural Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 111, 112 (2016).

221. See Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH L. REV. 345, 348 (2006).

222. See, e.g., SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 35; see also STEVEN STOLL, *RAMP HOLLOW: THE ORDEAL OF APPALACHIA* (2017) (examining the history of Appalachian land dispossession and coal extraction).

agencies are often viewed as culpable in this enclosure, whether as landowners themselves that newly restricted access or as supporters of dominant industry players. Thus, many rural residents view federal agencies as playing a role in helping take their childhoods, landscapes, memories, and folkways away.²²³

Importantly, as Ashwood observes, the sense of “us-versus-them” is not as simple as “rural versus federal agencies and their real beneficiaries.” For instance, both Black and white residents of Burke County, including those who worked for the nuclear plant, viewed the NRC and the nuclear power plant as a dominating threat. But racial segregation and tension remained poignant in the community such that Black and white residents did not see themselves as united as one community against the plant.²²⁴ Black residents in fact attempted to recruit Ashwood (who is white) during her field research to reach out to white locals to protest the construction of new reactors.²²⁵ Thus, while rural marginalization is common across both of these communities, experiences and reactions vary based on other intersectional identities. In their views of the regulatory state, shaped by hopelessness and powerlessness, white locals, Ashwood observed, turned to right-wing politics, while Black locals turned to the church.²²⁶

Rural communities of color are often certain that the regulatory state operates in service of white supremacy, providing small- and large-scale material benefits to white populations to rural minorities’ severe disadvantage.²²⁷ The explanations for this view often involve egregious stories of federal agencies’ complicity in racial marginalization. For instance, one study involving interviews with Black farmers in the Mississippi Delta revealed that “[t]hey believed that the [USDA lending agency] Farmers Home Administration (FmHA) ha[d] intentionally tried to drive them out of business by not providing loans in a timely manner and by foreclosing on their operations.”²²⁸ The distrust Native American communities often hold toward the federal government and its agencies

223. See ASHWOOD, *supra* note 13, at 8–10, 69.

224. See *id.* at 232 (noting the observation in Burke County that Black and white people rarely interacted, informing scholarly decision to present black and white experiences distinctly).

225. See *id.*

226. ASHWOOD, *supra* note 13, at 14 (describing local residents as “turning to guns and God” as an “outlet for justice and the retribution denied by what Karl Polanyi called the market society”).

227. See, e.g., MALIN, *supra* note 144, at 140 (describing activists’ views on environmental racism and the regulatory state’s complicity therein).

228. Spencer D. Wood & Jess Glibert, *Returning African American Farmers to the Land: Recent Trends and a Policy Rationale*, 27 REV. BLACK POLITICAL ECON. 43, 57 (2000).

has been characterized as centuries old, informed by the trauma of displacement, genocide, and other forms of violence.²²⁹

To be clear, rural populations have often expressed enthusiastic sentiments about federal agencies' aspirations and activities. For instance, one New Mexico rancher, despite his skepticism of the Endangered Species Act, described it as "a thing of beauty."²³⁰ But the evidence explored here is ample and concerning. Throughout the country and across demographics—despite important variations—scholarly investigations have found themes of hopelessness, powerlessness, disappointment, frustration, betrayal, and antagonism in rural populations' perceptions of the regulatory state. These themes are largely in alignment with the conditions giving rise to perceptions of government illegitimacy. The next Part compares these subjective accounts to certain objective structural features of the regulatory state in order to further contextualize rural sentiments.

IV. STRUCTURAL ASPECTS OF THE REGULATORY STATE THAT ALIGN WITH RURAL VIEWS

In his study of small towns throughout the United States, sociologist Robert Wuthnow observes that "[r]ural communities' views of Washington[, D.C.] usually emerge in two competing narratives: on the one hand, the government ignores us and doesn't do anything to help with our problems, and, on the other hand, the government constantly intrudes in our lives without understanding us and thus makes our problems worse."²³¹ Sherman found similar attitudes in her study of Paradise Valley, where longtime residents "described senses of being both invaded and abandoned."²³²

This Part explores how feelings such as these and those examined above find a basis in objective structural aspects of the regulatory state. Section IV.A observes that a rural sense of powerlessness and exclusion from regulatory decisionmaking is not inconsistent with the literature on barriers to public participation. Section IV.B asserts that regulatory trade-offs and burdens in rural communities have almost certainly been underappreciated based on the ways agency decisionmaking processes tend to operate. Section IV.C assesses the legal history of the deregulation

229. See Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 382 (2003); see also Nathan Munier et al., *Determinants of Rural Latino Trust in the Federal Government*, 37 HISP. J. BEHAV. SCI. 420, 432–34 (2015) (connecting distrust of federal government in rural Latino population in Illinois to harsh federal measures taken against immigrants and sense that federal institutions ignore Latinos' concerns and "are incapable of taking their desires seriously").

230. See Morrow, *Environmental Front*, *supra* note 4, at 193.

231. WUTHNOW, *supra* note 3, at 9.

232. SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 176.

era as a story of the regulatory state excising rural regions from a substantial part of its purview, in turn helping explain the perception of rural abandonment or exclusion by the regulatory state. The overall picture that emerges is that over the past several decades, the regulatory state has simultaneously abandoned, exploited, and encroached upon rural communities in ways that would help explain the sentiments explored in Part III.

A. Are Rural Populations Structurally Excluded from Agency Avenues for Public Participation?

The common sense of voicelessness expressed by rural residents in the discussion above is not particularly surprising viewed alongside the structure of, and literature on, avenues for public participation in agency decisionmaking. First, NPRMs are widely recognized to be inaccessible to average people.²³³ The same barriers that marginalize individuals and populations in other ways—including race and class—act as barriers to participation in regulatory governance.

Geography, though, is likely an underappreciated barrier to participation in NPRMs. For instance, most comments on NPRMs are submitted online today. However, rural residents and tribes have substantially more limited access to the high-speed internet that would help make them equal participants in that process.²³⁴ Even if a particular rural resident or under-resourced interest group had the means to participate in an NPRM, it is not clear that such participation would afford the meaningful “voice” associated with perceptions of procedural justice.

As to local collaborations between residents and agencies, the legal frameworks for these processes are highly variable and context specific. This suggests that whether a local public meeting is considered perfunctory or not could largely turn on an individual agency or bureau’s professional culture and commitment to collaboration.²³⁵ In any event, the rural sentiments expressed above are not unrealistic when compared to the structure and nature of processes for local-federal collaboration.

233. Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 797 (2021).

234. FED. COMM’NS COMM’N, FCC-19-44, 2019 BROADBAND DEPLOYMENT REPORT 16.

235. See, e.g., Ann Eisenberg, *Alienation and Reconciliation in Social-Ecological Systems*, 47 ENV’T L. 127 (2017) (discussing collaborative, multi-stakeholder planning process at Malheur Wildlife Refuge as example of success story).

B. Are Rural Populations Subject to Unfavorable Substantive Outcomes of Agency decisions?

The two types of unfavorable substantive agency outcomes discussed above that are frequent objects of concern for rural communities include: (1) agency decisions as a threat to livelihoods; and (2) agency action (or inaction) providing inadequate protection from environmental threats. This Section explores how agencies' decisionmaking processes may well help explain these rural fears. The discussion first proposes that cost-benefit analysis and endangered species listings bear unique, underappreciated implications for rural welfare. Because rural populations are, by definition, smaller and more sparse, their numbers will inevitably seem less significant than other populations, positioning them as sacrificial groups to bear disproportionate regulatory trade-offs in the name of aggregate welfare. Decisionmaking processes have also not fully taken geography into account, suggesting that additional, salient rural conditions have likely not been factored into regulatory decisionmaking. The insignificance of rural numbers and distributional considerations to agency decisionmaking processes also help explain the regulatory state's perceived ineffectuality in the face of rural environmental injustice.

1. Regulatory Trade-Offs and Rural Livelihoods

a. Cost-Benefit Analysis

As a central component of agency rulemaking, cost-benefit analysis centers on the mandate to federal agencies that they must, upon

recogniz[ing] that the private sector and private markets are the best engine for economic growth . . . assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures . . . and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.²³⁶

Agencies must adopt a regulation "only upon a reasoned determination that the benefits of the intended regulation justify its costs."²³⁷ The executive Office of Management and Budget (OMB),

236. Exec. Order No. 12,866, 3 C.F.R. § 1(a) (1993).

237. *Id.* § 1(b)(6).

through its Office of Information and Regulatory Affairs (OIRA), is directed to provide coordinated review of agency rulemaking.²³⁸

Since the advent of modern environmental law in the 1970s,²³⁹ resource-dependent communities have complained that environmental regulation poses unique risks to their livelihoods.²⁴⁰ As of 1970, more than one third of rural employment was based in manufacturing, mining, agriculture, forestry, and fishing.²⁴¹ These sectors have remained important lifelines for rural communities even until the late twentieth century and today. These livelihoods have also often been among relatively few economic opportunities for rural communities for a variety of reasons; rural communities may lack other options because of distance from population centers, exploitative treatment by corporations, other drivers of a lack of economic diversification, and cultural attachments to traditional ways of life.²⁴²

Thus, the potential trade-off with increased regulation is apparent: if someone makes a living off of natural resources, and the law restricts the use of those natural resources, that person's livelihood seems positioned to suffer.²⁴³ During the environmental era, legislators representing rural constituents complained about more limited rural capacity to comply with new federal standards;²⁴⁴ disproportionate impacts on rural communities, such as unequal strains on profit margins for small businesses in rural areas

238. *Id.* § 2(b).

239. *See* 42 U.S.C. § 7401 et seq.; 29 U.S.C. § 651 et seq.; 16 U.S.C. § 1531 et seq.; 33 U.S.C. § 1251 et seq.

240. *See, e.g.,* Frederick H. Buttel, *Environmentalization: Origins, Processes, and Implications for Rural Social Change*, 57 *RURAL SOCIO.* 1, 24 (1992) (expressing hope that environmentalism “adds to rather than detracts from the quest of the majority of the world’s population to earn an adequate livelihood, have economic security, and live in dignity”); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1220 (1977) (observing that uniform federal emission limitations on new cars imposed high costs on rural areas while yielding few compensating benefits).

241. *See* Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 *B.C. L. REV.* 189, 206–07 (2020).

242. *See* SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 4.

243. *See* Daniels et al., *supra* note 18, at 7–8 (describing zero-sum conflicts between livelihoods and environmental protections, such as “endangered predators” being “pitted against ranchers and river ecosystems against farming communities”); *cf.* Wendy Lee Anderson, Book Note, 24 *ECOLOGY L.Q.* 377, 387 (1997) (reviewing THOMAS MICHAEL POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* (1996)) (criticizing the characterization of anti-environmental backlash as solely funded by corporations when local appeal seems apparent).

244. *See, e.g.,* 122 *CONG. REC.* 16,490, 16,542 (1976) (statement of Rep. Ichord) (complaining that expansion of the Clean Water Act 404 permit program was “an unconscionable harassment to many rural Americans who have enough to worry about without additional Federal redtape and penalties”).

compared to those in cities, and other forms of inequity;²⁴⁵ and likely negative unintended consequences for rural populations, including population loss, if certain restrictions or prohibitions were implemented.²⁴⁶

Commentary on the effects of environmental regulations on employment regularly emphasizes that environmental regulations do not cause net, long-term job losses at a societal level and that job losses “tend to be dwarfed by the overall effects on public welfare.”²⁴⁷ This emphasis on net job losses arguably reflects the tacit view that cost-benefit analysis’s prioritization of aggregate welfare is an adequate measure of a particular regulation’s desirability. However, more recently, environmental legal scholarship has been reckoning with the fact that environmental regulations’ effects on livelihoods in resource-dependent rural communities are meaningful and need to be taken seriously in the interest of fairness and defusing rural disaffection’s destabilizing force.²⁴⁸

Key aspects of cost-benefit analysis reveal why it would indeed be inadequate to ensure full consideration of distributional needs in resource-dependent rural communities.²⁴⁹ Centrally, cost-benefit analysis calculations do not traditionally or formally include anticipated jobs to be lost as a result or indirect impact of a proposed regulation.²⁵⁰ Even where

245. See, e.g., 123 CONG. REC. 10,359, 10,409 (1977) (statement of Rep. Roberts) (raising concern about rural businesses’ ability to contribute mandated cost coverage for wastewater treatment plants and arguing that such cost contributions would be less of a burden for urban businesses).

246. See *Predatory Mammals and Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries*, 92nd Cong. 341 (1972) (statement of Mr. Abner Rice, President, Oregon Sheep Growers Association) (warning that predator control bill would cause chaos for sheep grazers and force rural people off their land).

247. See N.Y.U. INST. FOR POL’Y INTEGRITY, DOES ENVIRONMENTAL REGULATION KILL OR CREATE JOBS? (2017), <https://bit.ly/32vMezA>; HOCHSCHILD, *supra* note 3, at 284–85 (questioning trade-offs between environmental conservation and jobs, noting lack of regulatory effects on net employment and overall economic growth); Daniels et al., *supra* note 18, at 4 (arguing that “environmentalists often resist, ignore, or dismiss” the connection between environmental protection measures and their economic consequences, “even when the economic consequences of environmental protection are obvious and even when those consequences fall hardest on the poor and vulnerable”).

248. Cf. Revesz, *supra* note 18, at 1495, 1577–78.

249. Cf. Ian Scoones, *Livelihoods Perspectives and Rural Development*, 36 J. PEASANT STUD. 171, 172 (2009) (describing the “[l]ivelihoods perspective[.]” common in rural development studies which examines “how different people in different places live,” with particular emphasis on how people make a living using an approach in which one “look[s] at the real world, and tr[ies] [to] understand things from local perspectives”); Buttel, *supra* note 240, at 24 (remarking that environmentalism meant a new and dramatic reversal of rural “inconsequentiality,” “bring[ing] rural societies and their environments center stage,” and that environmentalization would “be crucial in determining whether the new forms of social regulation of the economy that emerge will either reinforce the growing inequality of the past decade or lead to new channels for the mobilization of subordinate class demands”).

250. See Masur & Posner, *supra* note 103, at 603–23.

OIRA does consider job losses, it lacks a standard for “how many jobs must be lost for a regulation to be impermissible.”²⁵¹ A likely explanation for the exclusion of a more formalized job loss analysis is the common assumption among economists that regulatorily-driven shocks to labor markets will even out over time as displaced workers find new work.²⁵²

This approach poses unique problems for rural communities in two ways. First, rural labor markets are more limited. The reasoning that job markets will “clear” and recover may make some sense in some urban contexts where labor markets are relatively robust. But it overlooks key conditions in rural communities. A region’s ability to be resilient in the face of a rash of job losses “will vary based on the population of the region and the economic diversity of the industries present in it.”²⁵³ But as has been demonstrated time and again with regular economic upheavals, rural labor markets are less resilient, often dependent on one industry, and less likely to bounce back from a shock, regulatory or otherwise. A shock to such a labor market will have profound ripple effects, going so far as to create the risk of regional fiscal collapse.²⁵⁴

Second, unique barriers impede displaced rural workers’ capacity to start over again. As Masur and Posner observe, “Geographically isolated workers may find it harder to travel to another location or find a new job in the original location.”²⁵⁵ Regionally concentrated job losses generally make it more costly for the unemployed to find new work.²⁵⁶ These barriers to mobility mean that a key assumption many economists have as to regulation, which is often reflected in regulatory decisions—that a lost job is not all that dire because any given worker can find a new job—simply does not hold up in the rural context.²⁵⁷

Discrete, region-specific job losses stemming from regulatorily-driven industry contractions are indeed observable.²⁵⁸ It may also be more

251. *Id.* at 582.

252. *See id.* at 582–83.

253. *Id.* at 632.

254. *See generally* Adele C. Morris et al., *The Risk of Fiscal Collapse in Coal-Reliant Communities*, COLUM. CTR. GLOB. ENERGY POL’Y. (2019), <https://brook.gs/3gCSAAD> (detailing risks of fiscal collapse of coal’s decline to coal-reliant communities).

255. *See* Masur & Posner, *supra* note 103, at 620.

256. *Id.*

257. *Cf.* HOCHSCHILD, *supra* note 3, at 51 (observing that many workers in Louisiana petrochemical plants were torn between their love of local wilderness and their need to maintain jobs in polluting industries).

258. *See* Marc A.C. Hafstead & Roberton C. Williams III, *Unemployment and Environmental Regulation in General Equilibrium*, 160 J. PUB. ECON. 50, 51 (2018) (acknowledging that “imposing a pollution tax causes a substantial employment drop in the polluting sector” and “a substantial shift in employment between industries”); *see also* Firlein, *supra* note 14, at 339 (quoting ranchers complaining of “The disproportionate burdens placed on rural communities” by conservation efforts and how urban communities “are not the ones who bear the costs of such conservation”).

difficult to measure regulations' trade-offs in rural places than is typically acknowledged. Trade-offs are more complex than an easily quantifiable number of layoffs that can be attributed to an easily identifiable new regulatory provision.²⁵⁹ What is the cost to a rural business owner of having to seek out more information about federal standards (likely with a worse internet connection), consult expertise on such standards (though lawyers are far harder to find in rural regions), and then, if necessary, comply with the standards (at some expense that does not necessarily involve layoffs)?²⁶⁰ A result that seems likely is that those with fewer resources will have to fall by the wayside while those with more resources can play the game by the new rules. The question, then, is whether rural workers are inevitably destined to bear disproportionate regulatory trade-offs in certain contexts because cost-benefit analysis assumes urban conditions and discounts suffering if it comes in smaller numbers.

b. Endangered Species Listings

Other regulatory processes minimize or overlook costs imposed on rural communities as well. For instance, in *The Costs of Critical Habitat*, Klick and Ruhl observe that the U.S. Fish and Wildlife Service (FWS), which is charged with implementing the Endangered Species Act (ESA), currently takes the position that designating certain geographic areas as critical habitats for endangered species “entail[s] no incremental costs beyond those already triggered by the original listing of the species as endangered.”²⁶¹ After assessing the effects of the critical habitat designation on home values in four Arizona counties, their study concludes that the designation reduced property values in those counties by between three and four percent.²⁶² They therefore conclude that the FWS position is “in error,” and that such effects in fact render the critical habitat designation to be “welfare reducing,” the agency having underestimated the regulatory action’s economic effects.²⁶³

Returning to the livelihoods theme, the listing of the spotted owl as an endangered species is largely considered old news at this point. But the regional ramifications of this listing for timber communities remain

259. Cf. Sharon, *supra* note 106, at 581 (observing that “taken to the extreme, a wholly preservationist world is devoid of people”).

260. Cf. WUTHNOW, *supra* note 3, at 101 (observing local officials’ frustration with “unfunded mandates” from federal regulations, such as a requirement to install a new sewage treatment plant, that communities could not afford).

261. Jonathan Klick & J.B. Ruhl, *The Costs of Critical Habitat or Owl’s Well That Ends Well* (Nov. 20, 2020) (research paper, U. Penn. Inst. L. & Econ. Rsch. Paper No 20-57).

262. *See id.*

263. *See id.*

poignant. Sherman's study of Golden Valley centered on the listing's lasting aftermath. She explains:

The 1990 listing of the northern spotted owl as threatened under the [ESA] would alter the economic landscape of Golden Valley irrevocably. The spotted owl decision . . . resulted in federally enforced bans on timber harvesting through much of the Pacific Northwest to preserve the owl's habitat. This decision affected all of the local public forests, which made up nearly 80 percent of the land in Jefferson County [where Golden Valley is located]. Timber harvests in the region dropped by 80 percent between 1989 and 1994 as a result.

The spotted owl ruling was destructive to virtually all aspects of Golden Valley's economy . . . Most residents who were there at the time remember the 1990s as a period of community-level depression, from which they are still struggling to emerge.²⁶⁴

Recent commentary has observed that widespread unwillingness to acknowledge the potential costs of environmental regulations such as those implementing the ESA likely exacerbates public opposition to those regulations. Henson, White, and Thompson, deeming the ESA to be the "signature environmental law of the United States," argue that while the ESA has achieved meaningful ecological successes, it continues to face opposition from substantial segments of the public in part because of the unwillingness to acknowledge unintended consequences, including the perceived and *actual* costs borne by rural landowners.²⁶⁵

Again, two unique rural factors suggest that rural communities bear unique consequences of these decisionmaking processes. First, rural residents have a greater tendency to be land rich but cash poor.²⁶⁶ Rural livelihoods in ranching and farming, for instance, often involve a state of illiquidity, with all of a family's resources being "tied up in the land."²⁶⁷ Thus, a phenomenon such as that observed by Klick and Ruhl bears unique implications for rural economic welfare in particular, given disproportionate rural reliance on land as both wealth and livelihood. And second, rural residents are more likely not only to have resource-dependent

264. SHERMAN, *THOSE WHO WORK*, *supra* note 145, at 31.

265. See generally Paul Henson et al., *Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense*, 68 *BIOSCI.* 861 (2018) (arguing that ESA has been successful in meeting its core mission but improvements in implementation could lessen political controversy and make ESA more effective).

266. Nathaniel Lee, *Here's Why the Ultra-Wealthy Like Bill Gates and Thomas Peterffy are Investing in U.S. Farmland*, CNBC (Aug. 20, 2021), <https://cnb.cx/35vQXCT>; Jon Christensen, *Land Rich, But Cash Poor, in the West*, N.Y. TIMES (Nov. 23, 1997), <https://nyti.ms/3JZNnzH> (noting tendency of Western ranching families to be "land rich and money poor" with "everything . . . tied up in the land").

267. *Id.*; Roger E. McEowen, *The Illiquidity Problem of Farm and Ranch Estates*, AGRIC. L. & TAX'N BLOG (Aug. 19, 2021), <https://bit.ly/3tXyqkI>.

livelihoods, but also to be more generally “environmentally embedded,” having more intimate and varied relationships with land and natural resources in general than non-rural residents.²⁶⁸ Thus, restrictions on people’s relationships with land and natural resources likely also represent unquantifiable losses in livelihoods, cultural norms, and ways of life.

2. Regulatory Decisionmaking and Rural Environmental Injustice

The issues driving the oversight of the economic regulatory trade-offs borne by rural communities also help explain the regulatory state’s limitations in addressing rural environmental injustice. The overarching issue is that regulatory decisionmaking emphasizes aggregate welfare, in turn embracing a utilitarian approach that justifies minority sacrifice in a system Ashwood labels “tyranny of the majority,” drawing on Alexis de Tocqueville.²⁶⁹ In other words, the regulatory state demonstrates a more general lack of capacity (or political will) to meaningfully take distributional considerations into account.²⁷⁰

Jedediah Purdy offers an explanation for this failure: environmental law and its associated regulatory decisionmaking apparatus were born during a time period of relative national socioeconomic equality and prosperity.²⁷¹ It was, in fact, formed around the assumption that economic inequality was declining.²⁷² Questions of justice and distribution, then—including economic trade-offs and the siting of hazardous facilities—have been neglected by environmental agencies’ decisionmaking processes.²⁷³

Features of the regulatory state both implicitly and explicitly embrace the worthiness of rural populations as sacrifices in the name of progress. For instance, the Code of Federal Regulations mandates that nuclear power plants must be located only in rural places.²⁷⁴ While some would point out the logic in such an approach, such a practice can nevertheless help explain rural disaffection from the regulatory state. Critiques of cost-benefit analysis as failing to address environmental injustice number in the many.²⁷⁵ For rural communities of color—the “minority of

268. See ASHWOOD, *supra* note 13, at 190.

269. *Id.* at 10.

270. See Sidney A. Shapiro & Robert R. M. Verchick, *Inequality, Social Resilience and the Green Economy*, 86 UMKC L. REV. 1 (2018).

271. See Purdy, *supra* note 19, at 810.

272. See *id.* at 864.

273. See *id.* at 810.

274. See ASHWOOD, *supra* note 13, at 102 (citing Title 10, Part 50, Code of Federal Regulations – “Domestic Licensing of Production and Utilization Facilities”).

275. See, e.g., Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 104 (2003); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1575 (2002) (explaining that “cost-benefit analysis rationalizes and reinforces” patterns of

minorities”²⁷⁶—the regulatory state’s structural disregard for environmental distributional concerns bodes particularly poorly.

C. What Other Factors Might Explain Rural Communities’ Sense of Structural Exclusion by the Regulatory State?

Much of the rural frustrations described above characterize the regulatory state as very much present in their communities. But a subjective sense of having been abandoned by the regulatory state also finds footing in objective regulatory developments over the past half-century. The under-appreciated story of *deregulation* in rural decline reveals a pattern of structural exclusion. An exploration of the late twentieth-century legislative history of deregulation reveals a story of at least some rural legislators fighting to keep their communities under the protection of the regulatory state’s oversight of infrastructure industries, and more often than not, losing that fight.

In the mid-twentieth century, the political tides had turned against the aspects of the regulatory state that oversaw certain infrastructure industries’ rates and service obligations.²⁷⁷ A movement born at the University of Chicago popularized the intellectual framework now known as law and economics. This movement and related rhetoric among lawyers, economists, and conservative politicians insisted that economic regulation was inefficient and undesirable for both service providers and consumers.²⁷⁸ Public anger had also grown toward regulated industries, which were often perceived as expensive and overly bureaucratized. Thus, policymakers in the deregulatory era proceeded, step by step, to dismantle the regulatory framework that had at least aimed to support, protect, and grow rural communities, even if its mechanisms remained imperfect.

The rail companies of the 1970s in particular were facing a variety of challenges. While rail travel and freight shipping were predominant transportation modes until around 1930, the federal government actively invested in and supported competing modes of transportation following World War II. Highway development, automobile production, and airline

pollution being “dumped on the poor”); Catherine A. O’Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and “Acceptable” Risk to Native Peoples*, 19 STAN. ENV’T L.J. 3, 17 (2000); Joseph P. Tomain, *Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking*, 1 KAN. J.L. & PUB. POL’Y 101, 110 (1991).

276. ASHWOOD, *supra* note 13, at 172.

277. See Paul W. Barkley, *The Effects of Deregulation on Rural Communities*, 70 AM. J. AGRIC. ECON. 1091, 1092 (1988).

278. William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721, 771 (2018); cf. Peter H. Schuck, Book Review, 90 YALE L.J. 702, 706 (1981) (reviewing JAMES Q. WILSON, *THE POLITICS OF REGULATION* (N.Y. Basic Books eds. 1980)) (suggesting that the gains from the traditional regulatory system were worth the costs).

travel siphoned business away from the railroad companies, making them increasingly less profitable. Rural communities in the 1970s were also facing crises in rail transportation with shortages of freight cars, unreliable service and deferred rail line maintenance, and abandonment of service altogether on low-density branch lines.²⁷⁹

Some rail companies went bankrupt in the wake of this increased competition.²⁸⁰ Other companies' response to this competition was called "slow motion abandonment" or "de facto abandonment" of their less profitable lines, prior to seeking legal permission from the Interstate Commerce Commission (ICC) for official abandonment.²⁸¹ This "inevitable" slow abandonment would involve a sort of foot-dragging approach to ensuring that the ICC would allow the company to abandon a less-profitable line. Prior to applying to the ICC for permission, railroads would first "stop spending any money to maintain a branch line, causing it to literally fall apart," thereby making service "progressively worse" and making it unsafe for trains to be operated on the line. Once the rail company had already ensured the branch was in disrepair and would be particularly costly to maintain, it would then make a sympathetic-seeming case to the ICC for abandonment, which the Commission would "almost always approve."²⁸² This practice had deleterious effects on local shippers who relied on freight service, either driving them away from using rail service or driving the shippers out of business altogether.²⁸³

In response to these conditions, policymakers pursued the Staggers Rail Act of 1980 (SRA), which would become one of the legislative lynchpins of the deregulatory era. Congress had already begun deregulating transportation industries with the Airline Deregulation Act of 1978.²⁸⁴ The congressional discussions surrounding the SRA resembled a sequel, nearly 100 years later, to the discussions that led to the Interstate Commerce Act (ICA). Where the ICA brought railroads under federal control, the SRA would seek to set them (relatively) free, further setting the stage for loosening federal oversight of other infrastructure industries.

While one might react to the conduct of railroad companies by concluding they warranted less freedom, rather than more, policymakers

279. See L. Orlo Sorenson, *Impacts of Rail Deregulation on Rural Communities*, 15 POL'Y STUD. J. 760, 765 (1987) [hereinafter Sorenson, *Impacts of Rail Deregulation*].

280. See, e.g., 126 CONG. REC. H24,827 (daily ed. Sept. 9, 1980) [hereinafter Staggers Rail House Debates] (statement of Rep. Lee) ("We in the Northeast know firsthand about the problems facing railroads. It was but a few years ago that the six major railroads in the Northeast were bankrupt.").

281. See *id.* at 24,840-41.

282. See *id.* at 24,840.

283. See *id.*

284. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. § 41713).

favoring the SRA saw increased private discretion as the key to a better transportation system.²⁸⁵ Proposed measures to make rail companies more viable included giving “substantially reduced priority” to shipper (i.e., consumer) protection, reduced administrative control of potential monopolistic practices, and reduced commitment to maintaining specific services that would not otherwise be maintained.²⁸⁶ The proposed solution to the above foot-dragging by rail companies was to allow the companies to impose a surcharge on less profitable lines in order to cover the costs they would otherwise be expending.²⁸⁷

The prospect of deregulating the railroads was controversial, however, and advocates for rural interests and small towns early on perceived the risks posed to them if regulators weakened the ICA era’s mandates for non-discriminatory universal service at just and reasonable rates. During debates in the House of Representatives during the fall of 1980, Michigan Representative Albosta raised poignant concerns about the SRA’s potential impacts on various regions of Michigan. Albosta noted, first off, that giving the railroads more freedom was not necessarily the only and most obvious option for rail transportation reform, and that “we could buy all the track to be abandoned in the country for the price of 10 miles of urban subway.”²⁸⁸ Albosta characterized the SRA as “like major surgery: we are allowing railroads to cut off limbs to save the trunk. Yet we could someday have the need and the ability to go back and save those limbs.”²⁸⁹ He warned,

“We should cross off these tracks with caution, for we may never be able to bring them back, even in an emergency . . . Why destroy them without at least waiting to see whether we truly need each limb, or whether we can save the health of the American railroad system and bring it back to a point where its arteries are full of life again, and the trunk can support the limbs again?”²⁹⁰

Recognizing the potentially devastating regional effects of losing rail access, policymakers discussed the possible scope and nature of future rail line abandonments that would come with increased rail company discretion. For instance, Albosta commented,

285. See Stagers Rail House Debates, 126 CONG. REC. H24,834 (daily ed. Sept. 9, 1980) (statement of Rep. Harkin) (“We must allow our railroads to have the flexibility to succeed. We must create a climate that will see railroads desiring to expand, not looking to get out of the business.”).

286. See Sorenson, *Impacts of Rail Deregulation*, *supra* note 279, at 765.

287. See 126 CONG. REC. 24,804, 24,840 (1980).

288. *Id.* at 24,870.

289. *Id.*

290. *Id.*

There is no question in the minds of any of the people on that railroad [from Cadillac to Grand Rapids, Michigan,] and there is no question in the minds of the people who have designed this particular bill that the shortline railroad's future could be jeopardized. It is the only railroad there and closing it will not only hurt the local economy of Michigan but affect this country's ability to bring rail traffic through another route besides the Chicago gateway.²⁹¹

Concerns such as these were answered with reassurance that line abandonments would not become more likely. For instance, Congressman Florio pushed back against Albosta's worries, insisting that "we have more than fully addressed that problem in this legislation . . . [with] a multitude of programs, branch line assistance programs, and a rail banking provision in the Amtrak Act . . . dealing with the opportunities to stop inappropriate abandonments."²⁹² Similarly, Congressman Madigan remarked that rail companies' ability to charge a surcharge for less profitable lines would help keep those lines running, and if not, that local commissions would still be able to hold rail companies accountable for reduced quality in service.²⁹³

Congressman Dingell of Michigan went further in his indictment of aspects of the SRA. One of the central tensions of legislative debate pitted a provision known as the Eckhardt amendment against a provision known as the Staggers-Rahall-Lee compromise. The Eckhardt amendment, according to a memo from Georgia Congressman Ginn to President Jimmy Carter appealing for help opposing it, would "gut" the deregulation bill by curtailing railroads' freedom to set their own rates.²⁹⁴ The compromise, by contrast, would shift power back to the rail companies by removing geographic and product competition as considerations from determinations of market dominance—meaning railroads would be

291. *Id.* at 24,840. Similar concerns had been raised on the floor of the Senate. South Dakota Senator George McGovern observed,

Even from a purely social standpoint, ensuring the viability of the Nation's rail system is an essential step in preserving the vitality of rural America. Railroads determined the settlement patterns in much of the country, as elevators were built along branch lines, and settlements sprung up at key junctions. A century later, the economies of these rural towns still depend on their access to rail transportation. Preserving the rural rail system is an indispensable part of the effort to maintain rural vitality.

126 CONG. REC. 7,247, 7,274 (1980).

292. 126 CONG. REC. 24,804, 24,871 (1980). The Amtrak Act replaced the prior system of regulated passenger rail system with a more limited system run by Amtrak, a federally owned enterprise. *See id.*

293. *See id.* at 24,840–41.

294. *See* Memorandum from Congressman Ronald Ginn (Ga.), to President Jimmy Carter, 175 DAILY COMP. PRES. DOC. 2 (Sept. 4, 1980).

considered market-dominant less frequently, thereby triggering ICC intervention to regulate rates less frequently.²⁹⁵

In supporting the Eckhardt amendment, Dingell declared to his colleagues that they had before them “a clear choice. If you go with Staggers-Rahall-Lee, you will endorse a proposal written at the request of Conrail—and other larger railroads—and one which allows for blatant discrimination against small short line railroads, shippers, utilities and consumers.”²⁹⁶ Although Dingell agreed “that railroads ought not be forced to operate in the red,” he believed the compromise would “solve the problem of a minor dislocation with major surgery” by creating “a system whereby larger railroads—the Conrails and the Southerns—can enrich their incomes.”²⁹⁷ But, Dingell opined, this was a Machiavellian scheme where the end attempts to justify the means:

The provisions of the Staggers-Rahall-Lee compromise can be used in a discriminatory fashion to allow large railroads . . . to force small shippers to use other modes of transportation to pay exorbitant rates thereby making them noncompetitive. At the same time, rates for competing traffic can be held down leaving shippers with no other alternative than to abandon the service of certain small short line railroads to the whim and caprice of a larger monopolistic railroad. The end result of this arbitrary and offensively discriminatory rate manipulation is clear to me—wholesale abandonment of hundreds of small short line rail carriers across the Nation, straight into the hand of the railroad monopoly.²⁹⁸

The House ultimately adopted both the Eckhardt Amendment and the Staggers-Rahall-Lee Compromise, weakening the Amendment’s provisions and shifting the balance of power back toward the rail companies.²⁹⁹ Concerns about rural vitality notwithstanding—likely having been reassured by the protections built in for rural communities—ninety-five percent of congressional representatives voted in favor of the Staggers Rail Act in its final form.

By the time the prospect of deregulating intercity bus service was before Congress a mere year later, representatives of rural districts seemed

295. *Staggers Rail Act: Oversight, Hearing Before the Subcomm. on Com., Transp., and Tourism of the Comm. on Energy and Com. H.R.*, 98th Cong. 13 (1983) [hereinafter *Staggers Rail Act: Oversight*] (Statement of Rep. Rahall).

296. 126 CONG. REC. 24,804, 24,840–41 (1980).

297. *Id.* at 24,841

298. *See id.* He continued, “I reiterate that my colleagues have a choice. You can support the Eckhardt amendment which provides for a fair and expedited rate proceeding in rate division cases of rate divisions between railroads or you can accept the Staggers-Rahall-Lee Conrail compromise which promotes arbitrary rate discrimination, demise of smaller railroads, and wholesale abandonments of short line carriers.” *Id.*

299. *Id.*; *see also* *Staggers Rail Act: Oversight*, *supra* note 295.

even more skeptical, having now seen both airline and rail deregulation play out on the ground and after being promised that rural communities would not be hurt.³⁰⁰ Legislative conversations surrounding what would ultimately become the Bus Regulatory Reform Act of 1982 exhibited similar themes, with legislative debate starting just a few months after the election of Ronald Reagan to the presidency. One of the bill's proponents characterized the bill as "a natural extension of our efforts . . . to promote flexibility in the regulatory structure surrounding the Nation's transportation industries."³⁰¹ Another proponent said the bill was "a responsible effort that meshes both the philosophy of deregulation with the practicalities of the Federal-State climate in which the intercity bus industry has developed during the past half century."³⁰² The proposed bill would relax entry requirements into the interstate bus industry, permit a higher volume of intrastate busing, permit bus companies greater leeway in abandoning their operations, and reduce federal oversight of prices charged.³⁰³

Noting "the unorthodox manner in which this bill has been handled and rushed through," Missouri Representative Taylor remarked:

I do believe it is time that we slow down our urge to deregulate and try to calm our deregulation fever. Rural America, especially, has been hurt by our efforts at airline deregulation, and many Members have personal experience with the inability of the airline industry to serve small towns and small communities. In this regard, we were assured several years ago by the administration and by the committee at that time that small cities and towns would be served by commuter and charter airlines since the big scheduled airlines had left their communities. That simply has not happened, and I doubt that it ever will. Now the committee comes to the floor in a heated rush with a bill that could cause further damage to rural America's transportation systems. We have no airplanes in small towns and cities, and we will soon have fewer interstate and intercity buses. . . . Many people in this Nation, especially in rural areas isolated from big population centers and in small towns between major population centers, rely on well-

300. See 127 CONG. REC. 28,181 (1981) ("West Virginia and many rural parts of our Nation have indeed been impacted by airline deregulation, trucking deregulation, or loss of train service through elimination of many Amtrak routes, and in many parts of this country roads are very difficult and very expensive, if not downright impossible to build. So for much of rural America the bus company is the only game in town. For many of our 14,000 small towns across America, this is the only game left in town.").

301. *Id.* at 28,175 (statement of Rep. Anderson).

302. *Id.* at 28,177-78 (statement of Rep. Clausen).

303. See *id.* at 28,175. Debate in House of Representatives about Bus Regulatory Reform Act of 1981, Nov. 19, 1981, p.28175. For abandonment procedures, "State denials of the carrier's application to discontinue its intrastate service over the same route are presumed to be unreasonable burdens on interstate commerce and not in the public interest." *Id.*

regulated bus transportation systems. Most of these people, by the way, are our senior citizens, those who would have to pay the high cost of airline travel, and who cannot afford it even if airline travel were still available.³⁰⁴

He added, "I think it is time for us to take a look and see whether in our passion for deregulation fever we are in fact penalizing rural America especially in serving their transportation needs."³⁰⁵

Representative Kazen of Texas thanked Taylor for raising these "flashing red lights," observing that,

if this bill passes today in the form that it is written, we are going to wake up tomorrow, those of us who represent rural districts, and find out that we have no transportation whatsoever. Airlines do not stop, the train does not stop, and now they are going to take the bus stops away from us. You know, I heard a while ago a Member say the old refrain about how are you going to keep them down on the farm. This is the way you are going to keep them there, because they are not going to have any way of getting out.³⁰⁶

Representative Roberts of Kansas pointed out that it had become cheaper for him to fly from New York to Miami than the far shorter trip from Dodge City to Wichita, and that trucking deregulation had made it more costly to procure supplies for rural hospitals.³⁰⁷

Skeptics were once again given reassurance that the bill contained enough safeguards to ensure service to rural areas and small towns.³⁰⁸ One congressman replied to mention of the safeguards, "[R]ural America has been hurt by deregulation. I realize the bill contains 'safeguards' designed to protect rural communities but we have been down that road before."³⁰⁹

Congresswoman Smith of Nebraska raised concerns about the bill's provision to permit the ICC to preempt state decisions on rates and rules.³¹⁰ She explained,

304. *Id.* at 28,172 (Debate in House of Representatives about Bus Regulatory Reform Act of 1981). At the beginning of debates, he said, "I would certainly urge everyone from the rural areas to be here to listen to this, to be sure that you are adequately protected by these safeguards that will be described by the Members who will be handling this bill on the floor, because I think it is important that you satisfy yourselves that these protections are there." *Id.* at 28,173.

305. *Id.* at 28,172.

306. *Id.*

307. *See id.*

308. *See id.* at 28,181.

309. *Id.* at 28,173 (statement of Rep. Roberts of Kansas).

310. *See* 127 CONG. REC. 28,181, 28,183 (1981). "The major opposition was found in the ranks of legislators from rural states who feared loss of service to small towns and cities without air or rail passenger service. These fears [we]re justified . . . The [new] one-sided appeal process for carriers mean[t] virtually unrestrained freedom to exit markets."

If airline deregulation is the model for this legislation, then rural Nebraska has nothing to hope for in terms of adequate and reasonably priced transportation. Already, certain bus lines that have served my State in the past are abandoning service to small communities. In most cases, these bus companies were the sole source of public transportation I make this point to show how eager these bus companies are to abandon service to small communities and to show how inadequate the so-called protection for small communities provisions in this bill will be if they ever become law.³¹¹

She later added,

We were assured that rail deregulation was all taken care of with full protection for communities that already had air service. But it has not worked out that way. We have had no end of trouble. We have had hearings. We have had hearings on subsidies. We have small airlines that have gone out of business, they have gone broke. We have had delays in getting answers. We have much poorer service than we did before. I am now very much afraid that we will have less and less bus service. We do not have air service and we do not have Amtrak. We cannot leave rural America without service I urge a 'no' vote.³¹²

Each time a new deregulatory measure was introduced, representatives from rural areas raised fears about the likely harms that would befall their constituents, although some were also “caught up in the fervor for deregulation.”³¹³ And policymakers from other areas did recognize the risks deregulation posed to geographically disadvantaged regions.³¹⁴ Rural representatives were offered safeguards, usually in the form of special assistance to be provided to small towns, or a promise to study service abandonments in rural places.³¹⁵ These conversations continued as Congress marched down the path in the 1970s, '80s, and '90s of deregulating additional transportation modes, telecommunications, international trade, and agriculture.³¹⁶

Today, whether economic deregulation is considered successful or not depends upon who is asked and what that commentator is measuring.

William E. Thoms, *Unleashing the Greyhounds—The Bus Regulatory Reform Act of 1982*, 6 CAMPBELL L. REV. 75, 97 (1984).

311. 127 CONG. REC. 28,184 (1981).

312. *Id.* Congressman Roberts of South Dakota stated, “I have severe reservations about the deregulation of the intercity bus industry Complete deregulation . . . is detrimental to the well-being of rural America.” *Id.*

313. Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1782 (2021).

314. See Sorenson, *Impacts of Rail Deregulation*, *supra* note 279, at 765 (“Although concerns about the consequences of deregulation were expressed by agricultural and rural interests, the advocates of change prevailed.”).

315. See Sitaraman et al., *supra* note 313, at 1782.

316. See *id.* at 1785–1815.

Scholars have observed that it can be difficult to isolate and assess the impacts of particular deregulatory measures in rural communities in light of other factors that affect regional prosperity.³¹⁷ Not every deregulatory measure had the same impact, and some impacts were mixed. For instance, in the freight-shipping sphere, some rural shippers seemed to benefit from reduced freight costs in rail and truck transportation subsequent to rail deregulation.³¹⁸

Yet, deregulation's tangible negative effects for rural communities have revealed legislators' pre-deregulation fears as sound. Rural abandonment is easily observed in the transportation sector. Many shorter railroad lines serving small rural communities were abandoned after the SRA passed, although studies have suggested that small communities are usually affected more psychologically than economically by rail line abandonment.³¹⁹ Following intercity bus deregulation in 1982, "the number of rural communities served by long-distance bus service declined sharply," reduced by more than two-thirds, "with many of the service discontinuations concentrated in rural communities."³²⁰ Although Amtrak promised to maintain a viable national passenger train system, and passes through forty-seven states, "the majority of rural residents (almost 6 in 10) live outside of its service area."³²¹ Indeed, "fewer than 200 nonmetro places are served by passenger rail service."³²² Ongoing federal support for smaller airline service subsidizes a mere 135 rural destinations today, mostly in Western regions and Alaska.³²³

317. See Barkley, *supra* note 277, at 1095.

318. See generally Bert J. Kellerman, *The Impact of 1994's Further Deregulation of the Trucking Industry: The Rural Shippers' View*, 6 J. MKTG. THEORY & PRAC. 92 (1998); Sorenson, *Impacts of Rail Deregulation*, *supra* note 279, at 775-76; L. Orlo Sorenson, Book Review, 1 GREAT PLAINS RSCH. 174 (1991) (reviewing JOHN F. DUE ET AL., *TRANSPORTATION SERVICE TO SMALL RURAL COMMUNITIES: EFFECTS OF DEREGULATION* (Iowa State Univ. Press 1990)) (explaining that studies indicated relatively little negative effect on truck service following deregulation, with cost impacts either neutral or positive).

319. See Dennis M. Brown, *Rail Freight Consolidation and Rural America*, 13 RURAL DEV. PERSPS. 19 (1998); see also *id.* at 21 ("Immediately following passage of the Staggers Rail Act of 1980, abandonments increased sharply for major railroads, growing nearly 140 percent during 1980-85 compared with the previous 20 years."); Sorenson, *Impacts of Rail Deregulation*, *supra* note 279, at 775-76 ("Available evidence on relative rail rate changes in grain shipment suggests a disadvantage for smaller rural communities Hypothesized loss of special benefits of regulation of railroads for agriculture and rural communities has not occurred because those benefits largely did not exist.").

320. U.S. DEP'T OF AGRIC., ECON. RSCH. SERV., *RURAL TRANSPORTATION AT A GLANCE 4* (2005), <https://bit.ly/3AHcvri>.

321. *Id.*

322. *Id.*

323. See *id.*; see also Richard Beilock & James Freeman, *Florida Motor Carrier Deregulation: Perspectives of Urban and Rural Shipper/Receivers*, 66 AM. J. AGRIC. ECON. 91, 97 (1984) (noting that although majority of shippers and receivers saw benefits from deregulation, those that did not were concentrated in small communities).

The lens through which deregulation is assessed is important. While ample commentary celebrates service providers' and shippers' increased profits, less discussion centers on regional vitality and related concerns like poverty. In all the literature on deregulation's effects in rural communities, a theme does emerge: deregulation meant reduced private sector obligations to serve rural communities; rural communities often did indeed receive less or worse service after deregulation; and deregulation has thus been a central, albeit under-appreciated, factor in today's challenging rural socioeconomic conditions.³²⁴ Although not universally and not uniformly, deregulation did, ultimately, contribute to rural marginalization. As Sitaraman, Serkin, and Morgan observe, these patterns held true across transportation, telecommunications, trade, and antitrust.³²⁵ Deregulation also led directly to a rapid increase in corporate consolidation, a matter which receives increasing scrutiny today in an era of outsized corporate power alongside egregious social inequality.³²⁶

Given the priorities that policymakers chose despite the trade-offs—a mass contraction of infrastructure industries, to the detriment of geographically disadvantaged regions—the deregulatory era should be understood as a decision to do less for rural communities in order to do more for service providers, urban and suburban consumers, and other perceived interests. While there might have been some wisdom or necessity behind that trade-off, commentary on rural socioeconomic marginalization should at least recognize this development as a choice pursued with some knowledge of the risks. This regulatory retreat reveals part of the story of the modern regulatory state's tense relationship with rural America.

Viewed holistically, this era involved a massive retreat of an important component of the regulatory state from rural America. Before deregulation, rural communities were folded into the scope and protections of this form of protective regulation; they were a central part of the economic regulatory fabric. Post-deregulation, rural America became aberrant—a special exception to this part of the regulatory system, warranting special assistance, special reports, and special protections. In addition to the tangible negative effects of deregulation and those effects' downstream impacts—such as widespread loss of intercity bus service

324. Cf. JENNIFER SHERMAN, *DIVIDING PARADISE*, *supra* note 145, at 5 (discussing the impacts of national and global economic restructuring on rural communities, including increased poverty and unemployment in rural areas compared to urban ones).

325. See Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1782 (2021); Surekha Carpenter & Sonya Ravindranath Waddell, *The Landscape of the Rural Fifth District: Does Race Matter?*, FED. RES. BANK OF RICHMOND (Mar. 11, 2021), <https://bit.ly/3obtpJH> (noting “40 percent of manufacturing employment among the rural black population in the South was lost between 2001 and 2017”).

326. See, e.g., Brown, *supra* note 319.

making already struggling places less attractive and viable—rural America was pushed to the periphery of the regulatory state’s protections. In other words, the regulatory state’s retreat from rural America reflected government’s reduced concern with rural space, physically, socially, and legally—a form, that is, of structural exclusion. This regulatory retreat juxtaposed alongside the regulatory encroachments described above may help explain the seemingly contradictory sense of abandonment and invasion expressed by many rural residents.

V. JUSTICE-BASED PATHWAYS TOWARD REGULATORY LEGITIMACY

An emergent theme in the limited literature on the rationality of rural populations’ skepticism of the regulatory state is this: socioeconomic inequality, once considered outside the paradigm of the regulatory state, must become centrally embedded into its priorities alongside other objectives, such as environmental conservation and workplace safety.³²⁷ Injecting considerations of equality into the regulatory state can and should come in several forms. Drawing on this literature and scholarship on legitimacy and related concepts, this Part proposes three avenues to help address rural disaffection from the regulatory state by helping the regulatory state serve rural communities and other marginalized populations more meaningfully.

Sections A–C below explore the following. First, where there has been structural exclusion, there needs to be structural inclusion. This structural inclusion needs to not merely make people “feel heard,” but to allow them a path to actually influence outcomes of decisions that affect them. Second, where geographic considerations and small-seeming costs have been disregarded in the name of aggregate welfare, those costs need to be taken seriously, with more robust efforts to both assess and offset them. And third, in light of the overwhelming growth in socioeconomic, racial, and geographic inequality over the same time period examined here, and where there has been little effort to correct this concerning concentration of resources, it is past time to consider more aggressive schemes for more equitable distributions of resources across landscapes and populations, which also take into account the ongoing import of rural populations, workers, and resources to issues of national sustainability.

In short, this Part explores the prospect of incorporating enhanced procedural, distributive, and restorative justice into the regulatory state’s relationship with rural America.

A. Procedural Justice in the Regulatory State’s Relationship with

327. Shapiro & Verchick, *supra* note 270; Purdy, *supra* note 19, at 810; Daniels et al., *supra* note 18, at 7–8.

Rural Populations

The procedural problems in rural relationships with federal agencies are multifold. Processes are often perceived as top-down and uninformed by local conditions. Where rural populations are included in decisionmaking, it is a common perception that a box is being checked; decisions have already been made, but federal regulators are holding public meetings or other fora in order to make people “feel heard”—even if they lack meaningful opportunities to influence actual outcomes.

The rural experience is consistent with now decades-old literature raising alarms about democratic accountability in the regulatory state. This democratic deficit is particularly concerning in rural regions, where federal agencies often take on the roles and responsibilities traditionally under the purview of local governments, but without the associated intimacy and accountability of local governments.³²⁸

In the context of rulemaking and other policy formulations, scholarship has explored options for making what is in general an esoteric, detached, and inaccessible process more accessible to regular people. The advent of e-rulemaking opened up rulemaking to entire new populations, but providing input on rules is still very much the purview of “professional commenters with major knowledge and resource advantages.”³²⁹ The much-noted digital divide across urban and rural communities also makes e-commenting less accessible to rural communities. The General Services Administration has recently issued a proposal to make notice-and-comment rulemaking more deliberative, interactive, and responsive to broader segments of the public.³³⁰ These steps toward a “deliberative ‘national town meeting’” sound promising for addressing procedural equity for rural communities and others.³³¹

In the more localized processes, the stories of successful federal-rural engagement are often described as intimate and messy. Federal managers adjust plans and outcomes based on rural input.³³² They become familiar with local knowledge and conditions and incorporate that expertise into decisionmaking, treating rural residents as peers or partners rather than regulated entities. In short, rural populations are meaningfully included in the federal regulatory apparatus, and the apparatus does more to hold itself

328. See Su, *supra* note 3, at 872.

329. See Connor Raso & Bruce R. Kraus, *Upvoting the Administrative State*, BROOKINGS (Apr. 2, 2020), <https://brook.gs/31ykjOD>.

330. See Modernizing Services for Regulation Management, 84 Fed. Reg. 72,364 (Dec. 31, 2019).

331. See Raso & Kraus, *supra* note 329.

332. Cf. Firlein, *supra* note 14, at 350 (advocating that federal agencies use geographically specific surveys in wolf conservation both to tailor programs to local conditions and to signal to rural communities that their concerns matter and address local feelings of helplessness by informing programs that serve their interests more effectively).

accountable to them. As one example, Rowe, Finley, and Baldwin describe a success story of mixed-race rural participation in decisionmaking over a proposed railroad expansion in which, after a series of meetings and intensive engagements, local residents were able to prevent the unwelcome and risky project.³³³

The question in the agency context is how to systematize these messier, more intimate practices into formalized agency procedures. But perhaps the answer lies in the fact that the strength in this approach is not in procedural mandates.³³⁴ Rural disaffection provides a cautionary tale of the risks of attempting one-size-fits-all policy solutions for governance questions that are unique, sensitive, and variable. Thus, a more productive path might entail leaning into the messiness of human-to-human collaboration, emphasizing “[e]xperimenting agency-by-agency,” and learning from successes as they come.³³⁵

Of course, an objection to more devolved, collaborative decisionmaking within federal agencies is that it will be resource-intensive and costly. But perhaps rural disaffection and its many social, environmental, and political costs illustrate that such an investment would be worth the potential trade-offs.

B. Distributive Justice in the Regulatory State’s Relationship with Rural Populations

The discussion above touches on the crux of the distributional problems with the regulatory state. Administrative law processes are preoccupied with volume in numbers and aggregate welfare. While this of course seems intuitive viewed through one lens, through the lens of distributive injustice, it is deeply problematic. Minority groups are always bound to lose, bearing disproportionate costs in the name of the majority. This “tyranny of the majority” renders sacrificial populations mere externalities in the march toward collective progress.

But agency decisionmaking can do more to take distributional issues and geographic considerations into account. The foundational step is to take the costs that have historically been treated as minor or tolerable into account in a meaningful way.³³⁶ There has been too much tolerance from decisionmakers and commentators to allow people other than themselves to lose livelihoods, for instance, or to bear the burdens of a local nuclear plant. These costs—which have been rationalized or brushed away in the name of the aggregate welfare—need to be taken seriously.

333. See Rowe et al., *supra* note 157, at 27–30.

334. See Bagley, *Procedure Fetish*, *supra* note 32, at 350.

335. See Parrillo, *Should the Public get to Participate*, *supra* note 87, at 124.

336. Cf. Revesz, *supra* note 18, at 1500.

Richard Revesz has argued persuasively that distributional consequences can and should be made a core concern of the regulatory state, even though such a move challenges the longstanding orthodox view within administrative law scholarship that distributional issues should be dealt with through tax policy.³³⁷ Drawing on examples such as the Obama administration's efforts to revitalize struggling coal communities, Revesz argues that we have models for using "coordinated mechanisms that could be adapted to provide effective government-wide distributional responses."³³⁸ These mechanisms could be built into the executive branch as "[a] new institutional structure" that would "proactively monitor economically significant regulations for unusually large negative distributional effects on particular groups" in order "to coordinate appropriate executive responses" in the form of compensatory measures.³³⁹ Of course, taking this one step further would be to recognize that even small distributional effects on particular groups are worthy of attention and offsetting measures.

This does not mean that regulations can never affect anyone or that all possible costs must be offset or compensated. The natural concern here is that necessary evolutions in regulatory policy will be impeded because of a need to pay dues to every special interest and even the most minor concern from an affected group. Yet, in this era when legislative stagnation, political polarization, and other obstacles consistently impede effective but necessary policymaking, it seems worth thinking more creatively about distributional considerations in regulatory decisionmaking.

C. Restorative Justice in the Regulatory State's Relationship with Rural Populations

Both before and after the federal political transitions of 2020 and 2021, the idea of a potential new rural agency or a "rural czar" has gained some momentum as a possible avenue to address rural losses more effectively than existing efforts have. Rural advocates and members of Congress have pushed for President Biden "to appoint a rural envoy within the White House to oversee a national strategy to uplift rural communities facing severe health and economic challenges."³⁴⁰ One commentator proposed that Vice President Kamala Harris—"too smart and energetic to be just the vice president"—should be given "a more important job" as President Biden's "de facto secretary of rural development, in charge of

337. *See id.*

338. *Id.* at 1578.

339. *Id.* at 1555.

340. Liz Crampton, *America's Rural Crisis Triggers Calls for Biden to Name Rural Czar*, POLITICO (Jan. 25, 2021, 5:00 AM), <https://politi.co/32JPwPH>.

closing the opportunity gap, the connectivity gap, the learning gap, the start-up gap—the anger and alienation gap—between rural America and the rest of the country.”³⁴¹

One group of progressive rural activists, RuralOrganizing.org, proposes that President Biden should create a national Office of Rural Prosperity with the mandate “to address the unique structural challenges of rural housing, education, healthcare, small business development, and job creation.”³⁴² The group proposes this move not only because of the associated policy needs, but also because their extensive polling of more than 7,000 rural residents suggested that these topics were what “mattered most to them.”³⁴³

An organization doing parallel work focused primarily on fossil fuel-reliant communities advances a similar proposal. The philanthropic Just Transition Fund advocates the establishment of a White House Office of Economic Transition “to address the crisis facing coal communities from Navajo Nation to Appalachia and beyond.”³⁴⁴ The office would “coordinate and oversee” a “new national community transition program . . . to help synchronize ongoing efforts and leverage new public and private sector investments.”³⁴⁵

Common themes across these proposals are that the current landscape of federal rural development programs is piecemeal, scattered, and neither ambitious nor effective enough to achieve the goal of counteracting federally-exacerbated rural socioeconomic distress, not to mention the need for radical restorative racial justice and an overarching goal of supporting rural prosperity. The USDA “is most often tasked with leading federal rural policy.”³⁴⁶ But the USDA’s status as the main avenue for rural development is problematic in four main ways. First, the USDA itself has a sordid history with active facilitation of racial discrimination, playing a substantial role in Black farmers’ land dispossession. Second, the USDA has not been given the tools to centralize and coordinate federal efforts on rural development. Although the USDA is tasked formally with addressing rural economic development, rural hunger, and other rural programs, federal rural programs exist in multiple departments. Yet, “[w]ithout a

341. Thomas L. Friedman, *Kamala Harris Deserves a More Important Job*, N.Y. TIMES (Dec. 15, 2020), <https://nyti.ms/3IO6awX>.

342. Matthew Hildreth, *Joe Biden Should Pledge to Create a National Office of Rural Prosperity*, STORM LAKE TIMES (Sept. 9, 2020), <https://bit.ly/33VJqfX>.

343. *Id.*

344. *NET Partners Urge Biden Administration to Set Up White House Office of Economic Transition Now*, NAT’L ECON. TRANSITION, <https://bit.ly/3us0qoX> (last visited Feb. 11, 2022).

345. *The Platform*, NAT’L ECON. TRANSITION, <https://bit.ly/3KVRl0A> (last visited Feb. 14, 2022).

346. Hildreth, *supra* note 342.

centralized interdepartmental agency or coordinating body to oversee implementation—and comparatively little investment in rural development research and policy development—it’s hard for tax dollars tagged for rural places to make a real impact.”³⁴⁷

Third, in light of the dramatic transformation of the U.S. agricultural sector over the past few decades, the USDA is an outdated locus for rural development programming. In addition to its role in racial discrimination, the USDA has also helped drive the farm consolidation that has driven rural populations out of the countryside, detached farming practices from local community attachment and investments, and exacerbated agricultural pollution and environmental injustice. Thus, only six percent of rural counties today are actually farm-dependent. According to RuralOrganizing.org’s polls, “only one in ten rural voters think USDA programs benefit small farms and small towns. Two-third[s] think that USDA programs benefit big corporations and big farms instead of small farms, small businesses, and rural Americans—and the rest don’t know what to think.”³⁴⁸

The USDA’s ongoing centrality to federal rural development programs is also harmful in that it continues to promote the misconception among U.S. society as a whole that rural is synonymous with agriculture. When urban and suburban residents see large federal subsidies directed to “farms” and “farmers,” they may see this as rural residents and communities receiving a windfall. This perceived windfall might make urban and suburban residents skeptical of the idea that rural communities need yet more public investments. In fact, most rural residents today work in education, healthcare, and other social services. A better future for rural communities does involve agriculture—ideally, investments and policy support in sustainable, diversified agricultural programs that offer more wholesome relationships than current colonial-extractive relations between agribusinesses and local workers and communities. But a better future for rural communities must also involve substantial non-agricultural investments, particularly in the areas of natural resource conservation and clean energy production, in addition to infrastructure development, education, and healthcare.

The combination of the USDA’s problems alongside the emerging chorus of voices demanding an avenue that is both more centralized and more ambitious suggests that some kind of new apparatus is necessary, whether it is a National Office of Rural Prosperity or a “de facto” Secretary of Rural Development. The recent, massive set of benefits directed to rural communities in the American Rescue Plan reflects an important step in the

347. *Id.*

348. *Id.*

direction toward restorative justice and meaningful, forward-looking policies in rural communities.³⁴⁹ A federal agency devoted to managing such programs in the future could go a long way toward restoring costs borne by rural communities.

CONCLUSION

What should be done about rural disaffection from government? This question drives much of the conversation on urban/rural tensions. Unfortunately, many attempts to answer this question only scratch the surface, inadvertently reifying an overly simplified stereotype that leads to few meaningful answers. An over-emphasis on conservative, white, rural anger diminishes meaningful rural concerns while simultaneously erasing other rural views and communities, especially communities of color.

Reorienting this conversation toward more diverse, subjective experiences alongside objective structural factors is more illuminating in terms of what has happened to exacerbate urban/rural tensions and what can be done about them. The regulatory state's simultaneous abandonment of, and imperfectly managed encroachment into, rural communities is one such structural factor. Rural residents' disaffection from the regulatory state is not merely ideological, nor irrational. It is at least in part based on real experiences and meaningful living conditions that are all too easy for urbanites and urban-centric policymaking to overlook. The rural relationship with the regulatory state is one characterized by a crisis of legitimacy driven by experiences of exclusion, abandonment, and disillusionment.

These findings are consistent with literature on the regulatory state's weaknesses to date in incorporating concerns of socioeconomic equality and democratic accountability. If the regulatory state can take procedural, distributive, and restorative justice more seriously—and it has ample pathways to do so—it stands to heal its relationships with marginalized communities and make more meaningful public contributions in rural regions and beyond.

349. See Matthew Hildreth, *How Biden Administration Can Maximize COVID Relief in Small Towns, Rural Areas*, GO ERIE (June 7, 2021, 2:53 PM), <https://bit.ly/3ocRbEZ>.
