

University of Richmond Law Review

Volume 57
Issue 3 *Overlooked America: Addressing Legal
Issues Facing Rural United States*

Article 4

4-1-2023

Rural America as a Commons

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Recommended Citation

Ann M. Eisenberg, *Rural America as a Commons*, 57 U. Rich. L. Rev. 769 (2023).
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KEYNOTE

RURAL AMERICA AS A COMMONS

Ann M. Eisenberg *

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INTRODUCTION

With many ready to dismiss non-urban life as a relic of history, rural America's place in the future is in question. The rural role in the American past is understandably more apparent. As the story of urbanization goes in the United States and elsewhere, the majority of the population used to live in rural places, including small towns and sparsely populated counties.¹ A substantial proportion of those people worked in agriculture, manufacturing, or extractive industries.² But trends associated with modernity—mechanization, automation, globalization, and environmental conservation, for instance—have reduced the perceived need for a rural workforce.³ Roughly since the industrial revolution of the nineteenth century, rural depopulation has continued with some consistency. In 1940, the U.S. rural population peaked at 57% of the total population.⁴ Today, that proportion is 14%.⁵

Ample commentary associates urbanization with societal evolution and a general idea of progress or inevitability.⁶ Livelihoods in agriculture and extractive industries in particular are a difficult way of life. The ongoing presence of rural populations in many regions is a legacy of industries widely understood as no longer

1. Kenneth M. Johnson & Daniel T. Lichter, *Rural Depopulation: Growth and Decline Processes over the Past Century*, 84 RURAL SOC. 3, 3 (2019).

2. In 1900, 41% of the total workforce was employed in agriculture, compared to 1–2% in the early 2000s. CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKIN, ECON. RSCH. SERV. & U.S. DEP'T AGRIC., ECON. INFO. BULL. NO. 3, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2 (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf [<https://perma.cc/THU2-7DWQ>]; In 1840, almost 70% of the labor force worked in agriculture; that figure dropped to 2% in 2000. Ezra Klein & Susannah Locke, *40 Maps that Explain Food in America*, VOX (June 9, 2014), <https://www.vox.com/a/explain-food-america> [<https://perma.cc/S6KJ-6QBB>].

3. Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 844 (2020); Steven M. Virgil, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 9, 16 (2010); Christopher D. Merrett & Cynthia Struthers, *Globalization and the Future of Rural Communities in the American Midwest*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 33, 63–64 (2002).

4. Johnson & Lichter, *supra* note 1, at 3.

5. ELIZABETH A. DOBIS ET AL., ECON. RSCH. SERV. & U.S. DEP'T AGRIC., ECON. INFO. BULL. NO. 230, RURAL AMERICA AT A GLANCE 2 (2021), <https://www.ers.usda.gov/webdocs/publications/102576/eib-230.pdf?v=4409> [<https://perma.cc/52DB-TG4X>].

6. See, e.g., William McGreevey, Arnab Acharya, Jeffrey S. Hammer & Landis MacKellar, *Proximity Matters: How Better Health, Urbanization, and Income Grew Together, 1870-2008*, 15 GEO. J. ON POVERTY L. & POL'Y 605, 615 (2008).

necessary, if not actively harmful.⁷ It is desirable that more people should not be compelled to engage in that type of work as much anymore. Larger cities also offer sustainability benefits by some metrics. Concentrating populations in denser localities can help concentrate public and private resources and make use of those resources more efficiently.⁸

Rural populations' presence in distressed regions borne of fading legacy industries raises questions of whether it is a beneficial use of scarce public resources to support rural regions, and whether the rural way of life is consistent with modern needs.⁹ And thus, the fate of the 14% and their communities, at least in the most struggling regions, is in question.¹⁰

However, the severe and numerous modern crises we face as a society offer good reason to question the sanguine assumptions underlying the urbanization-as-progress narrative. The coasts where the majority of the population is concentrated are becoming uninhabitable.¹¹ Domestic and international climate displacement and migration will increase.¹² Meanwhile, the food system, whose abundance and reliability we are told to value, is killing us with obesity, heart disease, diabetes, cancer, and environmental degra-

7. See generally Michelle W. Anderson, *The Western, Rural Rustbelt: Learning from Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465 (2014); Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. ENV'T. & SUSTAINABILITY L. 305, 403 (2013).

8. See John R. Nolon, *Changes Spark Interest in Sustainable Urban Places: But How Do We Identify and Support Them?*, 40 FORDHAM URB. L.J. 1697, 1700–01 (2013).

9. Cf. Matthew Yglesias, *The Inefficiency of Rural Living*, SLATE (June 6, 2012, 10:13 AM), <https://slate.com/business/2012/06/the-inefficiency-of-rural-living.html> [<https://perma.cc/LM92-EDVF>].

10. Cf. Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 297 (2016); Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1766 (2003) (characterizing rural depopulation as consequence of economic growth and asking "a most embarrassing question: 'Is North Dakota necessary?'").

11. Working Grp. II, IPCC, *Summary for Policy Makers: Climate Change 2022: Impact, Adaptation and Vulnerability* (IPCC Sixth Assessment Report, 2022), <https://www.ipcc.ch/report/ar6/wg2/> [<https://perma.cc/4QLE-XRRK>]; cf. Elizabeth A. Andrews & Jesse Reiblich, *Reflections on Rural Resilience: As Climate Changes, Will Rural Areas Become the Urban Backyard?*, 44 WM. & MARY ENV'T. L. & POL'Y REV. 745, 747 (2020) ("Will rural localities become the receiving communities for climate change refugees retreating from flooding urban areas?"); Michelle Wilde Anderson, *Losing the War of Attrition: Mobility, Chronic Decline, and Infrastructure*, 127 YALE L.J.F. 522, 541 (2017) (advocating for reinvesting in distressed regions due to likely need for populations to relocate there from coasts and deserts in coming decades).

12. Stephanie M. Stern, *Climate Transition Relief: Federal Buyouts for Underwater Homes*, 72 DUKE L.J. 161, 163–65, 169–171 (2022); cf. E. Tendayi Achiume, *Empire, Borders, and Refugee Responsibility Sharing*, 110 CAL. L. REV. 1011, 1037–39 (2022) (calling for acknowledgement of imperial intervention and domination in coerced climate migration).

dition.¹³ Figures on wealth and income inequality are staggering.¹⁴ The modernized cities that many hope rural residents will move to often actively combat affordable housing development.¹⁵ A de facto system of racial apartheid remains entrenched in most aspects of American life.¹⁶ Only the radical even dare fantasize about infrastructure other wealthy countries take for granted, like a functioning and accessible national passenger rail transportation system.¹⁷

While many urbanites are quick to dismiss rural issues as niche issues, geographic inequality, rurality, and rural livelihoods are implicated in one way or another in virtually all the crises described above. Framing the countryside as obsolescent or superfluous overlooks fundamental aspects of the often-invisible urban-rural interdependence that undergirds American life.¹⁸ Cities still rely heavily on rural resources and workers and will need to do so

13. See generally Katherine L. Oaks, *The Public Value of Ecological Agriculture*, 21 VT. J. ENV'T L. 544 (2020); Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 593–95 (2010); William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENV'T L. J. 213, 214–16 (2009).

14. According to the Pew Research Center, from 1983 to 2016, upper-income families accumulated 79% of aggregate national wealth, compared to 17% for middle-income families and 4% for lower-income families. In 2018, even before the COVID-19 pandemic, the income of the top 10% of earners was 12.6 times that of the bottom 10%. *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/G2YP-62DT>]. See also Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1786–88, 1790–93 (2020) (connecting socioeconomic inequality to other crises).

15. See Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1203 (2016).

16. See generally Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020); Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

17. See Adam P. Wald, *Planes, Trains & Automobiles: Regulating the Transportation Technologies of Tomorrow*, 26 B.U. J. SCI. & TECH. L. 379, 380 (2020).

18. See J.B. Ruhl & Robin Kundis Craig, *4°C*, 106 MINN. L. REV. 191, 201 (2021) (advocating “redesign” of population distribution, infrastructure, agriculture, and other social-ecological system components to pursue transformational adaptation to climate change). See generally JunJie Wu, Bruce A. Weber & Mark D. Partridge, *Rural-Urban Interdependence: A Framework for Integrating Regional, Urban, and Environmental Economic Insights*, 99 AM. J. AGRIC. ECON. 464 (2017) (discussing feedback loop between rural economic development, natural environment, and urban economic development).

even more in the face of climate change.¹⁹ As such, rural resources, workers, and localities need to be taken more seriously as a critical component of an interdependent national system.

Rural America has received some attention as the locus of important collective resources, such as waterways, wildlife, forests, and public lands, and relatedly, as the site of often severe political contestation.²⁰ However, this commentary has not quite captured how rural America as a holistic entity within broader society is itself collectively important. The physical resources that sit in rural places and the necessary goods produced in rural regions cannot be protected and produced without workers engaging in that work. Those workers—whose numbers need to grow if rural resources are to be conserved, developed, and used sustainably²¹—cannot fully pursue these important public and quasi-public activities without infrastructure to support them and their activities. Even setting aside questions of morality and political destabilization, given the collective importance of rural resources, workers, and infrastructure, the wasting of rural America over the past several decades has been a collective mistake.

Seeking to complicate narratives of urbanization as progress and rural neglect as benign, this Article proposes that rural America itself—not just the bulk of the country’s natural resources that lie within it—can and should be understood as a commons, meaning

19. See generally Laurie Ristino, *Surviving Climate Change in America: Toward A Rural Resilience Framework*, 41 W. NEW ENG. L. REV. 521 (2019); Greg Fulkerson, *Urban Dependency* (2020); Ruhl & Craig, *supra* note 18, at 195–203.

20. See generally Camille Pannu, *Drinking Water and Exclusion: A Case Study from California’s Central Valley*, 100 CAL. L. REV. 223 (2012); Anthony B. Schutz, *Toward a More Multi-Functional Rural Landscape: Community Approaches to Rural Land Stewardship*, 22 FORDHAM ENV’T L. REV. 633 (2011); Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RES. & ENV’T L. 183 (2005); Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423 (2003); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413 (2002); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENV’T L. 1 (2001).

21. See Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L. J. 991, 1034–35, 1039 (2014) (observing constraints in federal land management agencies’ enforcement power of conservation priorities with constrained budgets misaligned with task of monitoring millions of acres of land); Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L. J. 503, 541, 554 (2011) (discussing more labor-intensive nature of sustainable agroecological practices as compared to highly industrialized agriculture); Erin Dewey, *Sundown and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles*, 52 B.C. L. REV. 1105, 1110 (2011) (discussing connections among renewable energy production, labor needs, and facilities siting in rural areas).

a collective resource that we all need and use, and need to use in different ways than we currently do. Understanding rural America as a commons yields surprisingly challenging implications, which in turn help make sense of some aspects of modern urban/rural tensions.

Centrally, it makes sense that varying levels of embeddedness in, entitlement to, proximity to, and cost-bearing of a commons would affect different populations' perceptions of the commons and how to govern it. The commons characterization points toward finding a delicate balance between recognizing the urban majority's entitlement to the rural commons on the one hand, while accounting for higher and more varied levels of rural embeddedness, entitlement, proximity, and cost-bearing in commons governance.²²

Understanding rural America as a commons does not mean that the urban majority is entitled to dominate rural regions. As Joseph Sax said decades ago while contemplating the balance between local and national interests, "[W]e should be reluctant to require people to arrange their lives to serve the demands of some larger, external community . . . for what we think comprises 'our benefit.'"²³ However, recognizing that the urban majority has some level of entitlement to rural America also implies that the urban majority bears responsibility for rural America.

The commons characterization offers a more optimistic path than the de facto national policy of wasting rural places and populations over the past several decades. No matter the ideal governance balance, a commons warrants stewardship. The past 150 years of national policy treating rural places and people as loci merely for extracting value until depletion can evolve into a policy of treating rural resources like the amenities they are.²⁴ And this holistic commons characterization underscores that commons governance cannot simply prioritize physical resources. People and places warrant stewardship for the collective benefit too.²⁵

22. Cf. Joseph Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984) (discussing tensions between national governance priorities and local interests for communities located in national parks).

23. *Id.* at 509.

24. Cf. Loka Ashwood & Kate MacTavish, *Tyranny of the Majority and Rural Environmental Injustice*, 47 J. RURAL STUD. 271, 271 (2016).

25. Cf. Lisa R. Pruitt & Linda Sobczynski, *Protecting People, Protecting Places: What Environmental Litigation Conceals and Reveals About Rurality*, 47 J. RURAL STUD. 326

This Article's length will prevent full elucidation of this theory and its implications, but it can at least offer thoughts to spur further discussion. Part I briefly reviews commons literature. Part II turns to three under-discussed rural amenities—agricultural land, energy production, and infrastructure—and argues that each of these rural puzzle pieces can be understood as (a) amenities or activities with serious collective import for rural and urban populations and (b) amenities or activities characterized by hoarding, abuse, or waste at the hands of the private sector enabled by a legal system that fails to account for that collective import.

Putting these pieces together alongside the location of 70% of the country's natural resources in rural regions, Part II argues that understanding rural America itself as a commons can help inform an approach to governance that better reflects rural America's collective import. Part III offers thoughts about governing rural America as a commons, including the often-unspoken task of balancing differentiated urban and rural stakes in, and entitlements to, the rural commons and how an embrace of a stewardship approach will entail interventions that are both more robust and more thoughtful than measures commonly discussed for addressing rural challenges. Part III looks to provisions of recent historic federal legislation, the Inflation Reduction Act of 2022, to illustrate these points.

I. CHARACTERISTICS OF A COMMONS

What constitutes a commons? The concept is much discussed, and even, some might argue, overplayed.²⁶ According to scholarship across diverse disciplines, virtually anything with public import or collective usage is a commons: natural resources, public lands, “parking spots, knowledge and culture, intellectual property, medical care, tax rights, marketing, the allocation of criminal defense, government budgets, the presidential nomination process,

(2016) (discussing environmental advocates' exclusion of rural environmental justice communities in advocacy); Sax, *supra* note 22, at 502, 504–05 (discussing how legal doctrines and national priorities fail to value communities facing displacement, and how viewing rural populations' presence among natural resources as a question of “community” rather than “natural resource management” affects governance considerations).

26. See generally Brett M. Frischmann, Alain Marciano & Giovanni Battista Ramello, *Retrospectives: Tragedy of the Commons after 50 Years*, 33 J. ECON. PERSP. 211 (2019).

and credit default swap markets” have all been characterized as commons.²⁷

The classic example of a “common pool resource” is that it is vulnerable to “rivalry, overexploitation, and degradation.”²⁸ As Brigham Daniels explains, “[t]he script of the tragedy of the commons is simple. We have a valued commons resource; we fail to limit access to the resource adequately, and the result is a free-for-all that threatens collective interests.”²⁹ Commons resources become exhausted when “we see a rush to satisfy narrow self-interests work[ing] to the detriment of broader interests—individually rational decisions leading to collective catastrophes.”³⁰ Strained fish populations, scarce grazing land, and vulnerable forests all illustrate classic commons examples of shared resources that risk exhaustion through competitive overuse. In sum, a commons is some sort of collectively important resource that is (a) consumed in some fashion and (b) challenged by competing users.³¹

But characterizing a commons is often simply a question of scale, and a commons does not need to be an explicitly public or actively shared resource. The entire earth, for instance, has been portrayed as a commons.³² Eric Freyfogle argues that “a commons exists in any setting characterized by interconnection and interdependence, whether ecological or social, which is to say essentially everywhere.”³³

In their 2016 article, *The City as a Commons*, Sheila Foster and Christian Iaione advanced the idea that the commons concept could be helpfully applied to geographic spaces whose mix of public and private resources were used collectively by inhabitants. They used the framework to ask “how [urban] space is used and for whose benefit” in the face of increasing pressures of privatization

27. Sheldon Bernard Lyke, *Diversity as Commons*, 88 TUL. L. REV. 317, 324–25 (2013); see also Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899, 907 (2010) (characterizing groundwater aquifers, beaches, air sheds, polar ice caps, parking spots, sidewalk vending, government budgets, silence, and e-mail inboxes as commons).

28. Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 287–88 (2016).

29. Daniels, *supra* note 27, at 901.

30. *Id.* at 901–02.

31. *Id.* at 906.

32. Eric T. Freyfogle, *A Good that Transcends: Culture Change and Our Common Home*, 2014 B.Y.U. L. REV. 1415, 1420.

33. *Id.* at 1422.

and commodification.³⁴ The commons argument weighs against the threat of economic elites' enclosure of urban resources "which might otherwise be more widely shared by a broader class of city inhabitants."³⁵ The authors asked whether the commons concept might "provide a framework and set of tools to open up the possibility of more inclusive and equitable forms of 'city-making.'"³⁶

Foster and Iaione observed that characterizing something as a commons has implications well beyond the act of labeling. They argued that a commons characterization can be "less a *description* of the resource and its characteristics and more of a *normative claim* to the resource."³⁷ That claim may be:

[T]o open up (or to re-open) access to a good—i.e., to recognize the community's right to access and to use a resource which might otherwise be under exclusive private or public control—on account of the social value or utility that such access would generate or produce for the community.³⁸

Many of Foster's and Iaione's observations apply to rural America writ large as well, which I define as the smaller towns and more remote regions of the country, in addition to the non-coastal portions of the nation often dismissed as "flyover country."³⁹ Important questions loom as to how and for whose benefit rural space is used in the face of increasing pressures of depopulation, privatization, commodification, and ownership concentration.⁴⁰ Economic elites' enclosure of rural resources impedes broader sharing, locally and nationally, of the benefits of those resources. Tools to approach the possibility of more inclusive, equitable, and sustainable "rural-making" have eluded modern commentators outside the small fields of rural sociology and law and rurality. Thus, these same factors warrant asking whether rural America is a commons, and, if so, how it might be better governed as such.

34. Foster & Iaione, *supra* note 28, at 282, 284.

35. *Id.* at 284.

36. *Id.* at 285.

37. *Id.* at 288.

38. *Id.*

39. See Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 177–78 (2006) (discussing competing definitions of rural).

40. See Vanessa Casado Pérez, *Ownership Concentration: Lessons from Natural Resources*, 117 NW. U. L. REV. 37, 47 (2022); Marcello De Maria, *Understanding Land in the Context of Large-Scale Land Acquisitions: A Brief History of Land in Economics*, LAND, Jan. 2019, at 1, <https://doi.org/10.3390/land8010015> [<https://perma.cc/A69P-PVAB>].

II. RURAL AMERICA AS A COMMONS

Portions of rural America have already received attention as the locus of certain commons resources.⁴¹ Setting aside more oft-discussed rural natural resources and public lands, the discussion below contemplates agricultural land, rural energy, and rural infrastructure as resources with commons characteristics. Altogether, these pieces paint a picture of rural America itself as a holistic commons that warrants more strategic intervention.

To illustrate these resources as part of the rural commons as a whole, the discussion focuses on their collective implications beyond the classic example of exhaustion of natural resources. Specifically, this discussion focuses on each of these rural puzzle pieces as: (1) activities or amenities with serious collective import for rural and urban populations and (2) activities or amenities historically and currently characterized by hoarding, abuse, or waste at the hands of the private sector enabled by a legal system that fails to account for that collective import.

A. *Agricultural Land as a Common Resource*

1. Collective Import

Despite the physical distance of agricultural land from the majority of the population, decisions about how agricultural land is used have intimate effects on Americans' bodies and other aspects of U.S. society.⁴² Scholars generally agree that the crops U.S. farmers produce end up in American food, whether those products are healthy or not.⁴³ Michael Pollan drew public attention to these connections in his 2007 book, *Omnivore's Dilemma*, in which he illustrated how large-scale monoculture production of corn in the "Corn Belt" contributes to corn's presence in "virtually every processed food in our grocery stores," including animal products.⁴⁴

41. See, e.g., Ristino, *supra* note 19, at 522–23.

42. David V. Fazzino II, *Whose Food Security? Confronting Expanding Commodity Production and the Obesity and Diabetes Epidemics*, 15 DRAKE J. AGRIC. L. 393, 403 (2010).

43. *Id.*; Lawrence F. Dempsey, *Feeding the Racial Disparity in Disease: How Federal Agricultural Subsidies Contribute to a Racial Disparity in the Prevalence of Diet Related Illness*, 7 BIOTECHNOLOGY & PHARM. L. REV. 109, 131 (2014).

44. Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 595 (2010); MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 20 (2006).

Modern agricultural land uses contribute to an obesity rate of 42%,⁴⁵ heightened rates of diabetes among minority populations,⁴⁶ and the persistence of widespread food insecurity.⁴⁷ Although some might attribute these trends to individuals' lifestyle choices, obesity rates are rising globally with increased industrial agriculture, and "no national success stories" exist for efforts to curb any country's obesity pandemic.⁴⁸ Certainly, other factors, such as car-centric urban design and food deserts, also influence these trends.⁴⁹ However, it would be difficult to credibly dispute that agricultural land uses and the policies that enable them play a role in a "toxic food culture" that contributes to the overconsumption of unhealthy foods at the center of several public health crises.⁵⁰

Agriculture is also a major industry with other impacts on the economy, the environment, and public health. Industrialized agriculture—an industry worth tens of billions of dollars per year⁵¹—remains a central source of carbon emissions, water pollution,

45. *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/data/adult.html> [<https://perma.cc/S2QZ-MDT7>] (May 17, 2022); Patricia L. Farnese, *Remembering the Farmer in the Agriculture Policy and Obesity Debate*, 65 FOOD & DRUG L.J. 391, 392 (2010).

46. See, e.g., Dempsey, *supra* note 43, at 129–30; Fazzino II, *supra* note 42, at 403–04.

47. Emily M. Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL'Y 17, 18 (2013). However, agriculture's causal role in these conditions is the object of debate. See Farnese, *supra* note 44, at 392; see generally Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CAL. L. REV. 1173 (2019).

48. Olga Khazan, *The Paradox of Obesity and Produce*, THE ATLANTIC (June 2, 2014), <https://www.theatlantic.com/health/archive/2014/06/eating-more-fruits-and-vegetables-wont-stop-obesity/371992/> [<https://perma.cc/E6W9-XJUN>].

49. See, e.g., Mark J. Nieuwenhuijsen, *Influence of Urban and Transport Planning and the City Environment on Cardiovascular Disease*, 15 NATURE REV. CARDIOLOGY 432, 432 (2018); Dianna M. Smith & Steven Cummins, *Obese Cities: How Our Environment Shapes Overweight*, 3 GEOGRAPHY COMPASS 518, 525–26 (2009).

50. Although the U.S. Department of agriculture disagrees, "most commentators concur that current agricultural policies are unsustainable" and "promote unhealthy eating and environmental problems ranging from water pollution to soil erosion to weed proliferation." Debra L. Donahue, *Livestock Production, Climate Change, and Human Health: Closing the Awareness Gap*, 45 ENV'T L. REP. 11112, 11119 (2015); see also Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 AM. J.L. & MED. 315, 325–27 (2015) (describing how agricultural industry interests drive food policies that lead to unhealthy eating habits and health disparities); Farnese, *supra* note 44, at 392 (examining potential links between agricultural policy and obesity).

51. *Farming and Farm Income*, U.S. DEPT AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income> [<https://perma.cc/64BZ-2XGQ>] (2022).

water waste, and soil depletion.⁵² Agricultural activities' effects extend far beyond the farm. In short, despite the invisibility of agricultural production to most of the population, agricultural land and business operations have serious ramifications for far-reaching aspects of society.

2. Hoarding, Abuse, and Waste at Hands of the Private Sector Enabled by Law

Despite agricultural land uses' collective import, property law, agricultural policy, and environmental regulations have enabled hoarding, abuse, and waste of agricultural land and resources by private operations. To begin with the property problem, agricultural land tenure has received increasing attention of late as a thorny problem with private contours and collective implications.⁵³ In her article, *Fee Simple Failures*, Jessica Shoemaker argues persuasively that distribution and management of agricultural land has reached crisis levels.⁵⁴ 98% of agricultural land is "owned and controlled by people who are white."⁵⁵ Ownership of agricultural land also grows ever-concentrated in the hands of a shrinking number of powerful absentee landlords.⁵⁶

Shoemaker observes that the very rationale for private property law in the early United States embraced a vision of agricultural labor and stewardship, rewarding White male Europeans for working the land as part of interconnected communities.⁵⁷ Yet, today even that limited vision of (relatively) diversified ownership and local investment by enfranchised landowners has largely been lost. Property law, particularly the everlasting nature of the fee simple absolute, has contributed to "dynastic" agricultural land tenure that far more closely resembles the medieval English feudal

52. Keith E. Sealing, *Attack of the Balloon People: How America's Food Culture and Agricultural Policies Threaten the Food Security of the Poor, Farmers, and Indigenous Peoples of the World*, 40 VAND. J. TRANSNAT'L L. 1015, 1028–29 (2007).

53. See, e.g., Pérez, *supra* note 40; Jesse J. Richardson Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799 (2016).

54. Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695 (2021); see also Leib, *supra* note 47, at 18 (characterizing entire food system as in crisis).

55. Shoemaker, *supra* note 53, at 1699.

56. *Id.* at 1700; Sealing, *supra* note 52, at 1025 (describing high level of concentration of industrialized agriculture industries).

57. Shoemaker, *supra* note 54, at 1698.

systems early Americans purported to reform.⁵⁸ The proliferation of state “right-to-farm” laws protecting agribusinesses from nuisance suits has further cemented their dynastic position within rural communities and society more broadly.⁵⁹

Property law is not the only culprit enabling unsustainable modern agriculture. Federal and state subsidies for, and regulations of, agriculture have largely discounted nutrition, public health, and climate change, which many attribute to lobbying efforts by powerful industry interest groups.⁶⁰ For similar reasons, weak federal and state regulatory frameworks and enforcement allow pollution and industry consolidation to remain relatively unchecked.⁶¹ The esoteric and technical nature of agricultural law acts as a barrier to greater scrutiny and democratization.⁶² The fact that most law schools do not offer even one agricultural law course points to a concession of this area to only the highly specialized practitioner and expert, despite the area’s collective import.⁶³

The collective implications of these conditions in agricultural land tenure are multifold. The racialized, corporatized concentration of agricultural land corresponds with heavy agricultural industrialization. That strict commodification of land, crops, and animals harms the public by way of the crises described above. In turn, the commodification, privatization, and concentration of agricultural land fuels hierarchical and abusive approaches to labor,

58. *Id.* at 1700, 1702; see also Daniel B. Rosenbaum, *Reforming Local Property for an Era of National Decline*, 70 BUFF. L. REV. 1115, 1116 (2022).

59. Danielle Diamond, Loka Ashwood, Allen Franco, Lindsay Kuehn, Aimee Imlay & Crystal Boutwell, *Agricultural Exceptionalism, Environmental Injustice, and U.S. Right-to-Farm Laws*, 52 ENV'T L. REP. 10727, 10727 (2022).

60. See MacKenzie Thurman, *Climate-Smart Agriculture Certification: A Call for Federal Action*, 122 COLUM. L. REV. F. 37, 56 (2022).

61. See Margot J. Pollans & Matthew F. Watson, *FDA As Food System Steward*, 46 HARV. ENV'T L. REV. 1, 2–3 (2022); Margot J. Pollans, *Eaters, Powerless by Design*, 120 MICH. L. REV. 643, 659 (2022); Laura Killalea, *Horrible Outcomes for Pigs and Humans Alike: North Carolina’s Right to Farm Law as an Unconstitutional Taking of Property Near Pork Production Facilities*, 13 GEO. WASH. J. ENERGY & ENV'T L. 68, 81 (2022).

62. Joshua Ulan Galperin, *Legitimacy, Legality, Legacy, and the Life of Democracy*, 45 VT. L. REV. 563, 569 (2021) (acknowledging potential to dismiss agricultural decision-making structures as esoteric despite their being “broadly important as they govern the ground floor of food policy in this country”); Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 3 (2020) (arguing that USDA decision making structures are not “too esoteric to be meaningful”).

63. *Programs by Category*, ABA (2023) https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category/ [<https://perma.cc/92SY-CY5N>] (showing that only two law schools in the United States offer specialized agricultural law programs).

livestock, and competition, harming people, animals, and places at local and national scales.⁶⁴ While some would characterize this food system as efficient and productive, and certainly many farmers are pushing back against these trends, the evidence of the overall system's structural brutality and unsustainability is overwhelming.

The collective implications of agricultural land and activities alongside the concentration of this resource in the hands of the few raises the question explored below: do urban majorities have a right, obligation, or impetus to intervene to better manage this common good, and to wrest this resource away from the small segment of society that dominates and abuses much of it? And if so, how might that be done?

B. *Rural Energy as a Common Resource*

1. Collective Import

U.S. prosperity over the past century has largely been fueled, quite literally, by rural energy production. For instance, Nick Stump has addressed how “Appalachia, with its vast deposits of coal and oil and gas, has been absolutely central in the United States” to economic growth.⁶⁵ Appalachia has “been pillaged as a ‘national sacrifice zone’ or an ‘energy sacrifice zone’ because both the land and the people have been exploited in order to keep energy prices low for the nation . . . to drive economic growth and ultimately . . . to facilitate capital accumulation among elite energy interests.”⁶⁶

Appalachia has not been alone as a site of rural energy production fueling regional and national needs. Conditions surrounding Western coal production have often mirrored the Appalachian experience, particularly in proximity to Indigenous communities.⁶⁷ Over the past two decades, most of the country's sites of shale gas

64. See generally Courtney G. Lee, *Racist Animal Agriculture*, 25 CUNY L. REV. 199 (2022); Thurman, *supra* note 60.

65. Priya Baskaran, *Remaking Appalachia: Ecosocialism, Ecofeminism, and Law: A Conversation with Author Nicholas F. Stump and Professor Priya Baskaran*, 69 UCLA L. REV. DISCOURSE 106, 113 (2021).

66. *Id.* at 113.

67. See generally Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. 437 (2010).

extraction through hydraulic fracturing have been concentrated in “poorer, rural areas” in diverse regions.⁶⁸ Poor rural and Indigenous communities in the South have borne the greatest burdens of nuclear energy production.⁶⁹

Certainly, urban communities, particularly communities of color, experience disproportionate burdens of energy production as well, especially with the siting of power plants run on fossil fuels.⁷⁰ But environmental justice conversations often overlook how the extraction and production processes of the fossil fuel economy to date have fundamentally involved the exploitation of rural resources, workers, and localities.⁷¹ Energy, as we see each day when we charge our phones and cool and heat our homes and workplaces, is everywhere. But a substantial proportion of it comes from far-off places invisible to the average energy consumer.

Yet, rural regions’ historical contributions to energy production are only half the story. Looking forward, rural energy production has a key role to play in decarbonizing the economy to address climate change.⁷² Rural land, resources, and workers are essential, scholars largely agree, to the task of transitioning away from fossil fuels.⁷³

Naumann and Rudolph observe that a lack of mainstream attention to energy transitions as a rural phenomenon is “surprising” because “materializations of energy transition discourses are intimately entwined with, and shaped by, rural conditions, which likewise shape rural areas.”⁷⁴ Rural regions have gained “new importance” in how “rural landscapes are utilized, perceived and

68. Matthew Castelli, *Fracking and the Rural Poor: Negative Externalities, Failing Remedies, and Federal Legislation*, 3 IND. J. OF L. AND SOC. EQUAL. 281, 281 (2015); Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice-Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1079 (2014).

69. Kylie M. Allen, *Indigenous Nuclear Injuries and the Radiation Exposure Compensation Act (RECA): Reframing Compensation Toward Indigenous-Led Environmental Reparations*, 10 ARIZ. J. ENV'T L. & POL'Y 264, 266 (2020); LOKA ASHWOOD, *FOR-PROFIT DEMOCRACY: WHY THE GOVERNMENT IS LOSING THE TRUST OF RURAL AMERICA* (2018).

70. See generally Lara J. Cushing, Shiwen Li, Benjamin B. Steiger & Joan A. Casey, *Historical Redlining is Associated with Fossil Fuel Power Plant Siting and Present-day Inequalities in Air Pollutant Emissions*, 8 NATURE 52 (2022).

71. See generally, ASHWOOD, *supra* note 67.

72. Matthias Naumann & David Rudolph, *Conceptualizing Rural Energy Transitions: Energizing Rural Studies, Ruralizing Energy Research*, 73 J. RURAL STUD. 97, 97, 99 (2020).

73. See generally Shelley Welton, *The Bounds of Energy Law*, 62 B.C. L. REV. 2339, 2379 (2021).

74. Naumann & Rudolph, *supra* note 72, at 97.

governed” because of their necessity for large-scale renewable energy generation “and as sites for adapting to and mitigating climate change[.]”⁷⁵

Leading energy law scholars recognize that “deep decarbonization will require a massive build-out of utility-scale wind and solar farms. This, in turn, will necessitate the construction of a large, nationally connected system of transmission lines to deliver electricity from remote, rural areas to ‘load centers’—high-population areas that consume a greater amount of electricity.”⁷⁶

In sum, rural energy production has brought collective gains in the past and is collectively needed now and in the future. Yet, much like with agricultural land uses, rural energy production is largely invisible to the urban majority.

2. Hoarding, Abuse, and Waste at Hands of the Private Sector Enabled by Law

The legal history of rural energy production exhibits some overlapping and divergent themes with agricultural land governance. A similar combination of private property regimes and passive state and federal regulation has enabled fossil fuel companies to accumulate concentrated land ownership, exploit workers and localities, and pollute landscapes with minimal consequences.⁷⁷ Historically, the quasi-public activity of rural energy production has been characterized by exaggerated domination of a small amount of industry players, who have in turn greatly exacerbated global vulnerability to climate change.

Despite the public import of energy production, federal law and regulations have simply never reined in the fossil fuel sector to the extent necessary to counteract the sector’s many harms or to distribute the sector’s gains equitably. To date, federal policymakers and regulators have adopted a laissez-faire approach to shale gas extraction, allowing the industry to hoard its economic benefits while imposing burdens on land, workers, and infrastructure in

75. *Id.*

76. Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 988 (2022).

77. See, e.g., W. VA. CTR. ON BUDGET & POL’Y & AM. FRIENDS SERV. COMM., WHO OWNS WEST VIRGINIA? (2013), <https://wvpolicy.org/wp-content/uploads/2018/5/land-study-paper-final3.pdf> [<https://perma.cc/D53W-AFFX>]; see also STEVEN STOLL, RAMP HOLLOW: THE ORdeal OF APPALACHIA (2017).

rural communities and beyond.⁷⁸ The friendly federal approach to fracking reflects a continuation of its traditions with coal, an industry which abused workers, communities, and landscapes with minimal oversight until the late twentieth century.⁷⁹ Yet, when federal law has intervened, it has often done so ineffectually. For instance, many agree that the Surface Mining Coal and Reclamation Act of 1977 actually facilitated the rise of mountaintop removal coal mining rather than curtail or mitigate it.⁸⁰

Emergent trends in the rural renewable energy sector already indicate ripeness for similar risks of hoarding and abuse. “Carbon supremacists” advocate reducing carbon emissions as swiftly as possible with little regard to distributional considerations, which promotes the risk of continuing the private sector’s free-for-all to exploit rural energy.⁸¹ Sociologist Loka Ashwood has extensively documented how the Nuclear Regulatory Commission and a nuclear plant in rural Georgia have coordinated to subjugate the local community for value extraction driven by profit motives and the “tyranny of the majority.”⁸² The proliferation of wind farms in rural regions has caused local agitation.⁸³ Rural necessity means rural residents and workers remain vulnerable to the collective sacrificing them in the name of the greater good, as has played out over decades of fossil fuel production.⁸⁴ Critically, the designation of a resource as a commons does not imply that those within or near the commons must be relegated to subservience or have their needs diminished as mere obstacles to the collective’s goals.

78. Ann Eisenberg, *Beyond Science and Hysteria: Reality and Perceptions of Environmental Justice Concerns Surrounding Marcellus and Utica Shale Gas Development*, 77 UNIV. PITT. L. REV 183, 186–87, 189 (2015) (discussing federal exemptions of shale gas extraction from all major environmental statutes).

79. Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Social Injustice in the Coalfields*, 19 J. ENV’T & SUSTAINABILITY L. 305, 361 (2013).

80. JUDAH SCHEPT, *COAL, CAGES, CRISIS* 87 (2022); McGinley, *supra* note 79, at 10.

81. See SHALANDA H. BAKER, *REVOLUTIONARY POWER: AN ACTIVIST’S GUIDE TO THE ENERGY TRANSITION* (2021).

82. See Ashwood, *supra* note 69, at 10.

83. See SAMANTHA GROSS, BROOKINGS INST., *RENEWABLES, LAND USE, AND LOCAL OPPOSITION IN THE UNITED STATES* 9 (2020), https://www.brookings.edu/wp-content/uploads/2020/01/FP_20200113_renewables_land_use_local_opposition_gross.pdf [<https://perma.cc/68VQ-SXTX>].

84. Welton, *supra* note 73, at 2379 (noting the risk that transformation to renewable energy may exacerbate longstanding inequalities, continuing to shunt burdens of large renewable energy infrastructure onto marginalized rural communities); Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 19 (2019).

In short, we continue to need rural energy as a collective good, but without an approach to rural energy as a commons, the energy sector may hoard, abuse, and waste this collective amenity as well. The collective implications of rural energy alongside the history of abuses raises the question explored below: do urban majorities have a right, obligation, or impetus to ensure effective governance of this common good, and to prevent the benefits of rural energy from being concentrated among the tiny elite that has historically dominated and abused it? And if so, how can that be done while accounting for different levels of rural embeddedness in, entitlement to, and cost-bearing of the collective good of rural energy?

C. Rural Infrastructure as a Common Resource

1. Collective Import

Rural infrastructure as a collectively important good can be understood on two scales. The most prominent scale is the national one. For instance, much of the existing on-the-ground national transportation infrastructure runs through rural places.⁸⁵ Traveling great distances on the ground necessitates travel over highways and railroads hosted by more population-sparse places. Both people and resources rely on this transportation network to move around the country. Other national networks, such as energy and telecommunications infrastructure, are also largely woven together across rural regions.⁸⁶ That rural-hosted infrastructure plays a key role in the national economy.⁸⁷

The pursuit of enhanced national resilience involves the pursuit of better national infrastructure and regional systems, including in transportation, energy transmission, broadband deployment, and other sectors.⁸⁸ A national network of high-speed, low-

85. See generally USDA RD, RURAL TRANSPORTATION AND INFRASTRUCTURE: INFORMATION AND GUIDANCE, https://www.rd.usda.gov/files/508_RD_CFRuralTransportation_Guide916193.pdf [<https://perma.cc/B6X6-UGJX>].

86. See generally TRIP, RURAL CONNECTIONS: CHALLENGES AND OPPORTUNITIES IN AMERICA'S HEARTLAND (2020), https://tripnet.org/wp-content/uploads/2020/05/TRIP_Rural_Roads_Report_2020.pdf [<https://perma.cc/62FF-QAMP>].

87. See generally *id.*

88. Cf. David Schaper, *Potholes, Grid Failures, Aging Tunnels and Bridges: Infrastructure Gets a C-Minus*, NPR (Mar. 3, 2021, 12:01 AM), <https://www.npr.org/2021/03/03/973054080/potholes-grid-failures-aging-tunnels-and-bridges-nations-infrastructure-gets-a-c> [<https://perma.cc/D93F-8NYP>] (explaining the possible detrimental effects of America's suboptimal infrastructure).

emissions passenger trains, for instance, far beyond Amtrak's currently limited reach, would substantially reduce national greenhouse gases contributing to climate change.⁸⁹ Building out and enhancing these systems throughout the country, even in relatively population-sparse regions, would not just benefit rural regions by helping make them more prosperous and connected. Better national infrastructure reduces costs and eases barriers to travel, the shipping of goods, disaster recovery, and other aspects of a thriving society.

Rural infrastructure is also collectively important on more localized scales. The collective importance of local rural infrastructure can be understood in two ways. First, the political and social upheaval of the past decade has illustrated that regional deterioration yields negative sociopolitical implications beyond the moral implications of letting entire regions decay. The widespread attention to rural anger and resentment, and those feelings' manifestations as increasing support for authoritarianism, suggest that the collective allowing rural regions to unravel has not, in fact, worked out well for the collective.⁹⁰

The second way in which local rural infrastructure is collectively important is that the collective is likely going to use and rely on local rural infrastructure more heavily in the face of current and oncoming crises. The COVID-19 pandemic has already cast a new light on the desirability of population-sparse life, with many urban downtowns suffering from population outflow.⁹¹ Coastal retreat, other forms of climate migration, freshwater scarcity, and sea level rise all suggest that the interior and more remote regions of the country will gain new desirability as places to live in the near future.⁹² Once again putting aside questions of moral obligations to

89. See David Konarske Jr, *Amtrak: The Failure of Passenger Preference and Politics of Nonenforcement*, 53 LOY. U. CHI. L.J. 583, 585 (2022); Darren A. Prum & Sarah L. Catz, *High-Speed Rail in America: An Evaluation of the Regulatory, Real Property, and Environmental Obstacles a Project Will Encounter*, 13 N.C. J.L. & TECH. 247, 284 (2012).

90. See Ian Scoones, Marc Edelman, Saturnino M. Borrás Jr., Ruth Hall & Wendy Wolford, *Emancipatory Rural Politics: Confronting Authoritarian Populism*, 45 J. PEASANT STUD. 1, 7–9 (2017).

91. William H. Frey, *America's Largest Cities Saw the Sharpest Population Losses During the Pandemic, New Census Data Shows*, BROOKINGS (June 8, 2021), <https://www.brookings.edu/research/the-largest-cities-saw-the-sharpest-population-losses-during-the-pandemic-new-census-data-shows/> [https://perma.cc/JR8H-R85M].

92. See generally MICHELLE WILDE ANDERSON, *THE FIGHT TO SAVE THE TOWN: REIMAGINING DISCARDED AMERICA* 27 (2022); Free Range with Mike Livermore, *Michelle Wilde Anderson on America's Cities*, at 11:30 (Oct. 5, 2022) (downloaded using iTunes).

distressed localities, rural regions acting as the geographic safety net raise the question of whether the urban majority that may need to use that safety net should wait until the crises worsen to ensure that the rural refuge has adequate broadband, schools, streets, drinking water, wastewater treatment, and other essentials of civic life.⁹³

2. Hoarding, Abuse, and Waste at Hands of the Private Sector Enabled by Law

Rural regions used to enjoy more robust public protections in their access to infrastructure, at both national and local scales. At the scale of national interconnectedness, with the era of congressional deregulation from the 1970s and forward, public oversight of infrastructure industries gave way to greater private discretion as to which localities would be served.⁹⁴ Following deregulation, the private sector has largely abandoned rural infrastructure, contributing to the cycle of many rural regions' downward socioeconomic spirals.⁹⁵

The legal history of transportation infrastructure illustrates how the private sector has been deputized to shape an essential rural good despite that infrastructure's collective import, and how the private sector has, perhaps unsurprisingly, failed to steward rural infrastructure. Rural communities used to enjoy more or less satisfactory levels of access to passenger trains, passenger buses, and air travel. Subsequent to the withdrawal of federal oversight through measures such as the Airline Deregulation Act of 1978 and the Bus Regulatory Reform Act of 1982, rural transportation infrastructure shrank, isolating rural regions from the rest of the country to our collective detriment.⁹⁶

At the local level, rural infrastructural decay has been spurred by a variety of factors.⁹⁷ But much like at the national level, the inadequacy of localities' public amenities can largely be attributed

93. See generally ANDERSON, *supra* note 92, at 243 (articulating vision of resident-centered governance for distressed local governments).

94. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L. J. 1763, 1767–69 (2021).

95. *Id.* at 1789–91.

96. See Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 445–46 (1987).

97. See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 483–84 (2014).

to the retreat of federal and state actors from protecting and supporting those amenities, and the inadequacy of the private sector to maintain them.⁹⁸ Rural local governments are experiencing the same fiscal crises, service provision gaps, and privatization pressures as local governments of diverse sizes throughout the country.⁹⁹ Rural difference, however—including remoteness, population-sparseness, and limited economies of scale—means that when cities are able to somewhat overcome this shifting governance regime through mechanisms such as public-private partnerships and philanthropic activities, these privately driven compensatory measures are often unavailable to protect rural infrastructure.¹⁰⁰

Critically, characterizing rural infrastructure as a common good raises different questions than those posed above for agricultural land and rural energy. Rural infrastructure does not necessarily warrant the urban majority reclaiming its entitlement to it, unlike the hoarded and abused goods of agriculture and energy. In one sense, the urban majority is *already* entitled to rural infrastructure; infrastructure is an example of a common good that is non-rivalrous, or shared without depletion.¹⁰¹ However, just as property rights entail property responsibilities,¹⁰² entitlement to infrastructure suggests an obligation to take care of that infrastructure. Viewed holistically, rural infrastructure belongs to all of us, whether to facilitate national interconnectedness, to support the rural workers we need, or as a resource we might want to take direct advantage of in the future. So, if rural infrastructure is a common good, that characterization implies that the urban majority needs to demand and facilitate better stewardship of it.

The summation of the above three puzzle pieces—agricultural land, rural energy, and rural infrastructure—as common goods is that rural America belongs to us all in one fashion or another, but

98. See generally ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 309–12 (2013) (detailing drop-in federal support for local government activities since the 1980s).

99. See generally ANDERSON, *supra* note 92; Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J. L. & SOC. POL'Y 47 (2011).

100. See generally Ann M. Eisenberg, *Rural Blight*, 13 HARV. L. & POL'Y REV. 187 (2018); see also Ann M. Eisenberg, *Economic Regulation and Rural America*, 98 WASH. U. L. REV. 737 (2021).

101. See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 942 (2005).

102. See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1065–67 (2009).

the collective is not taking care of these resources. Karl Marx's "metabolic rift" offers substantial explanatory power to clarify the disconnect between ongoing rural necessity and urban ignorance about that necessity.¹⁰³ The metabolic rift refers to the divergence over time between the places where food and fiber are produced, and the increasingly distant places where they are consumed, alongside populations' increasing distance from nature.¹⁰⁴ The metabolic rift reveals urbanization—at least dramatic agglomeration urbanization associated with the rise of modern mega-cities—as yielding inherent justice and sustainability concerns.

In any case, the hoarding, abuse, and waste of the rural commons indicate that a substantially different governance regime is warranted to better account for the collective import of the commons that is rural America.

III. GOVERNING RURAL AMERICA AS A COMMONS

The question of how to govern rural America as a commons touches on questions surrounding the so-called urban/rural divide that have already received some scholarly and political attention, such as classic questions of "jobs versus the environment."¹⁰⁵ However, the overarching commons framework—recognizing that rural America itself is, in fact, a commons—can help facilitate an enhanced approach with more meaningful normative guidance. Centrally, governing rural America as a commons necessitates recognizing different levels of entitlement to, embeddedness in, proximity to, and cost-bearing of commons governance, and seeking to reconcile these competing relationships.

Varied levels of entitlements to the rural commons are reflected in legal claims, most particularly property law,¹⁰⁶ and moral claims, such that the urban majority might assert due to rural resources' collective import, that a rural community might assert due to their direct connections to the resources, or that an Indigenous tribe might assert for longstanding cultural rights not currently recognized by law. Differing levels of proximity, embeddedness, and cost-bearing of the commons are reflected in the fact that any

103. Cf. ASHWOOD, *supra* note 69.

104. Geoffrey Garver, *Confronting Remote Ownership Problems with Ecological Law*, 43 VT. L. REV. 425, 444 (2019).

105. Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 282 (2019).

106. See Shoemaker, *supra* note 54, at 1739.

majoritarian decisions made that affect the rural commons have more diffuse effects on the urban majority with more immediate, yet still varied, effects on local rural stakeholders.

A central problem with the urban majority seeking to govern the rural commons, despite the urban majority's normative claim to the rural commons, is that the urban majority has historically often sought input and control over certain resources without offering concomitant stewardship for those more deeply embedded in the commons.¹⁰⁷ Literature on "urbanormativity" demonstrates trends in urban majorities imposing poorly tailored laws that assume urban conditions on rural communities, often in the name of the greater good, to rural communities' detriment—failing to take into account rural embeddedness, proximity, and cost-bearing, for instance, or using rural resources for short-term extractive purposes without regard for the eventual depletion of resources, people, and places.¹⁰⁸

Agricultural land tenure offers an example where it is tempting to advocate greater urban intervention into the rural commons. By facilitating rural depopulation and agricultural concentration, the urban majority has ceded swaths of rural regions to increasingly small groups of economic elites who abuse agricultural land, and in turn, the public's health, often with apparent impunity.¹⁰⁹ The urban majority might shy away from instincts to intervene in the face of agriculturalists' highlighting their greater entitlements to, embeddedness in, and cost-bearing of the rural commons, as well as their current contributions to the national food system.

Even in this sphere, urban acknowledgment of rural importance risks missing the mark on different interventions with resources largely located in rural regions. For example, scholars have proposed that farmers currently being compensated to leave land fallow could similarly be compensated to host renewable energy production facilities.¹¹⁰ While compelling proposals such as this would address one collective need—expediting emissions reductions—they risk sacrificing other collective and local needs, such as the

107. See e.g., Sax, *supra* note 22, at 501–02.

108. See STUDIES IN URBANORMATIVITY: RURAL COMMUNITY IN URBAN SOCIETY 7 (Gregory M. Fulkerson & Alexander R. Thomas eds. 2006); Ashwood & MacTavish, *supra* note 24.

109. See Rosenbaum, *supra* note 58, at 1116.

110. See, e.g., Hannah J. Wiseman, Samuel R. Wiseman, and Chris Wright, *Farming Solar on the Margins*, 103 B.U. L. REV. (forthcoming March 2023).

need to not further entrench and reward current hierarchies of inequitable and unsustainable agricultural land ownership.

This is an instance where urban education, assertions of entitlement, and contestation might strike a better balance for taking care of the common good that is agricultural land rather than acquiescing to “a rural landscape that benefits only a chosen few.”¹¹¹ Given the extreme conditions reflected in agricultural land tenure, alongside the vulnerability and lack of political power of non-elite local groups subject to the consequences of that land tenure, it would seem to behoove the urban majority to consider intervention through redistributive policies that democratize and improve the quasi-public activity of farming.

The Inflation Reduction Act pursues some interventions in this vein. Its provision entitled, “Support for Underserved Farmers, Ranchers, and Foresters” provides for appropriations for technical support for underserved farmers; for “improv[ing] land access (including heirs’ property and fractionated land issues) for underserved farmers, ranchers, and forest landowners”; for equity commissions to “address racial equity issues within the Department of Agriculture”; and to provide financial support for victims of the Department of Agriculture’s history of racial discrimination.¹¹²

This measure seems poised to help counteract the trends of racialized land concentration in agriculture by democratizing access to agriculture and helping remedy some past harms. But one wonders what measures that go even further would look like. While the prospect of more aggressive intervention, such as outright land reform, tends to be a non-starter in the United States, Shoemaker’s analysis gives us permission to consider it seriously.¹¹³

Another provision of the Inflation Reduction Act illustrates the promise and peril of seeking to balance national interests and rural ones. Several provisions of the IRA facilitate a 10% tax credit for locating facilities in an “energy community.” An “energy community” is defined as:

- (i) a brownfield site [as defined under CERCLA],
- (ii) a metropolitan statistical area or non-metropolitan statistical area which—

111. Shoemaker, *supra* note 54, at 1703.

112. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22007, 136 Stat. 1818, 2021–23 (2022).

113. Shoemaker, *supra* note 54, at 1746.

(I) has (or, at any time during the period beginning after December 31, 2009, had) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas . . . and

(II) has an unemployment rate at or above the national average unemployment rate for the previous year . . . or

(iii) a census tract—

(I) in which—

(aa) after December 31, 1999, a coal mine has closed, or

(bb) after December 31, 2009, a coal-fired electric generating unit has been retired, or

(II) which is directly adjoining to any census tract described in subclause (I).¹¹⁴

On the one hand, this provision looks promising. It seems wise for federal law to incentivize locating renewable energy facilities in localities that are currently burdened with brownfields, the loss of coal, oil, and natural gas revenues and employment, and coal mine or plant closures. Such incentives might help offset the losses borne by fossil fuel communities in transition, while also pursuing the important national policy goal of renewable energy production. These communities will undoubtedly be found across a variety of landscapes, but many communities falling into this category are likely to be rural—contributing to the rural common good of energy production.

However, this provision also raises questions about how the siting will be pursued. Will the community have an avenue to request such a facility? Or might such a facility be imposed upon them? Will the facility's siting require a Community Benefits Agreement such that the community's contributions to collective needs will be reflected in equitably distributed local benefits, beyond the mere act of hosting the facility? Will such community benefits be funneled into capacity-building enterprises, such as schools and telecommunications infrastructure? If there were an application process to solicit facilities, would communities with the greatest needs be afforded support in order to access and effectively leverage those resources?

In other words, thrusting renewable energy production onto rural communities would not constitute stewardship of the rural

114. Inflation Reduction Act of 2022 § 13101(g)(11)(B).

commons, but merely continued patterns of extraction and exploitation that risk continuing to facilitate hoarding and waste of the rural commons and their deleterious consequences. Stewardship of the rural commons while maximizing its collective benefits entails taking care of the workers, localities, and infrastructures that facilitate production of the collective's goods. Or, if the rural commons must inevitably be used for short-term sacrifice for the collective good, perhaps such a policy priority should be made explicit, and more ambitiously and equitably compensated than similar sacrifices of the past.

Governance questions viewed through the commons lens move beyond band-aid approaches that often receive the most attention for rural communities, such as attempting to create a handful of short-term jobs for a struggling place, recreating the boom-bust cycles that have left the commons of rural America in such a precarious position. Thus, while incentivizing renewable energy siting in struggling fossil fuel communities is a sound idea, the commons governance lens demands more: planning with a view to the long-term, prioritizing stewardship of places and people, and balancing national and local interests, neither subsumed by the other.

CONCLUSION

Those who are ready to let distressed rural regions fade away overlook the collective import of those regions. Food production, energy production, national infrastructure, and local infrastructure are all in a state of crisis. Rural regions are key to pursuing more sustainable visions in all of these spheres. Understanding rural America as a commons helps clarify this collective import and inform a sounder version of governance than that pursued for the past decades. The challenge in this commons governance is striking the delicate balance among national needs and local ones, accounting for varied levels of entitlement to, embeddedness in, proximity to, and cost-bearing of the rural commons. Future scholarly efforts can help illuminate how to incorporate this approach into discrete governance contexts.