

## SPEAKING REGIONAL TRUTH TO WASHINGTON POWER OVER FEDERAL PUBLIC LANDS

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On the twenty-fifth anniversary of the creation of the Environmental Law Center at Vermont Law School, Professor (and former ELC Director) Richard Brooks delivered the Norman Williams Distinguished Lecture in Land Use Planning and the Law, entitled *Speaking (Vermont) Truth to (Washington) Power*.<sup>1</sup> Like many of Professor Brooks' scholarly works, this lecture explored common themes of federalism, sustainability, land use, and environmental protection.<sup>2</sup> His lecture also addressed topics unique to his work alone, including legal value assessments, environmental justice, social justice, and the processes of legal and institutional change.<sup>3</sup> After exploring several examples of statutes passed by the Vermont legislature since the state was established as an independent republic in 1777, Professor Brooks concluded that Vermont's power to effect change on a national scale was somewhat disproportionate to its size (both geographically and based on population) and primarily arose out of Vermont's community-focused, inclusive, and progressive legal and social values.<sup>4</sup>

Because Professor Brooks ("or Brooks," as everyone at Vermont Law School (VLS) refers to him) retired before I began teaching at Vermont Law School, I mostly came to know him through his excellent reputation amongst our mutual colleagues and, of course, through his scholarship. Those who know him well speak fondly of him, and the many kind words they have shared in passing over the years led me to the inevitable conclusion that Brooks has been, in many ways, the heart of Vermont Law School's Environmental Law Center. He is beloved—by our colleagues at

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1. Richard O. Brooks, *Speaking (Vermont) Truth to (Washington) Power*, 29 VT. L. REV. 877, 877 (2005) [hereinafter *Speaking Truth to Power*]. As Brooks acknowledged in his original work, the concept of "speaking truth to power" draws from the Civil Rights movement and the scholarship of Dr. Martin Luther King, Jr. Originally, the phrase was thought to derive from an 18<sup>th</sup> Century Quaker saying.

2. *Id.* at 892-93.

3. *Id.* at 879-80.

4. *Id.* at 888.

VLS, by his former students, and by his peers at other institutions—and you cannot speak with someone who knows him well without seeing them smile.

When I first set out to read Brooks' scholarly works, I discovered some of the basis for this admiration. His scholarship is quite interesting; it usually incorporates an interdisciplinary approach to legal problems or issues and incorporates theory at multiple levels.<sup>5</sup> The subject matter also varies widely: from zoning and coastal management to environmental ethics, philosophy, and history;<sup>6</sup> and he has explored (and embraced) legal, scientific, and social uncertainty in many of his published works.<sup>7</sup> Many of his articles are refreshingly normative but not in a way that alienates the reader,<sup>8</sup> and finally, Brooks' writing continually challenges existing legal paradigms, exploring their weaknesses, suggesting alternatives, and often, rowing against the scholarly tide.<sup>9</sup>

These qualities are all present in Brooks' 25<sup>th</sup> Anniversary Williams Lecture. What interested me most about this talk was its relevance to my own scholarship regarding the national crisis unfolding on federal public lands, driven by the Trump Administration's pursuit of energy development, mining, and "deregulation"—or, in other words, unraveling the protections set in place by previous administrations.<sup>10</sup> From opening submerged lands to offshore drilling to the President's reduction of the Bears Ears and Grand Staircase-Escalante National Monuments, the Trump Administration has charted a course reminiscent of the disposal era of the late nineteenth century, stopping just short of outright transfers of public lands into private and state hands.<sup>11</sup> This is a crisis not only because of the unprecedented speed and breadth of the Department of Interior's efforts to erode previous administrations' environmental and natural resources

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5. See generally Richard O. Brooks, *Cicero's Beloved Republic: The Insufficiency of Expanded Humanistic Rhetoric in the Service of Comparative Law*, 16 ILSA J. INT'L & COMP. L. 73, 75 (2009) (describing the importance of comparative law in ancient Rome).

6. *Id.*; See generally Richard O. Brooks, *Making the "Mediterranean of the Western Hemisphere" a Sustainable Community: The Connecticut Coastal Management Act and the Long Island Sound*, 13 VT. J. ENVTL. L. 453, 455 (2012) (assessing the Connecticut coastal management laws' concern with ecosystem management and sustainability).

7. Brooks, *supra* note 5, at 75.

8. See Brooks, *supra* note 1, at 880-81 (describing an example of Vermont's role in speaking truth to Washington's power).

9. Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 2 (1991).

10. Julie Turkowitz, *Ryan Zinke is Opening up Public Lands. Just Not at Home*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/us/ryan-zinke-montana.html>; Lauren Katz, *Ryan Zinke Spent his First Year in Public Office Selling Off Rights to Our Public Lands*, VOX (Mar. 16, 2018, 5:25 PM), <https://www.vox.com/policy-and-politics/2018/3/5/16853432/ryan-zinke-interior-department-secretary>.

11. Katz, *supra* note 10.

protection measures, but also because of the permanence of some of these actions inflicted on landscapes and ecosystems throughout the nation.<sup>12</sup> What intrigued me about Brooks' Williams Lecture were the reflections of similar themes in his references to mid-nineteenth century Vermont.<sup>13</sup> In this time period, industry ravaged the state's natural resources (and particularly, its forests), leaving a denuded shell of the state's pre-colonial natural glory. Reading Brooks' lecture brought to mind an obvious parallel between that period of Vermont's history and the present situation facing America's public lands.<sup>14</sup>

I have therefore chosen to pay tribute to Professor Brooks' inspiring work by exploring his theme of speaking local truth to national power and making an attempt to apply this concept west of the 100th meridian, in the so-called public lands states.<sup>15</sup> I have organized this tribute in two parts: (1) an explanation of the Brooks "principle" of speaking local environmental truth to national power and (2) an application of this principle to the western public lands states.

#### THE BROOKS PRINCIPLE OF SPEAKING LOCAL ENVIRONMENTAL TRUTH TO FEDERAL POWER.

Although the principle of effecting national change through local activism is not new to the fields of environmental advocacy or environmental law, the manner in which Brooks frames this concept in his Williams Lecture, and in his other scholarship, is unique. One of the unique aspects of Brooks' Principle, as I'm calling it, is that law and legal change cannot be divorced from an understanding and exploration of the motives of their human drafters. Understanding the human values driving environmental decision-making is an essential element in the effort to make legal change.<sup>16</sup> Carried further, Brooks posits that exploring the economic, ecological, or sociopolitical underpinnings of an environmental crisis or problem helps create a solution that is both tailored and long-lasting.<sup>17</sup>

Finally, Brooks' Principle includes some normative assessments.<sup>18</sup> This is somewhat unusual in legal scholarship, and indeed, many legal scholars

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12. Turkowitz, *supra* note 10; Katz, *supra* note 10.

13. *Speaking Truth to Power*, *supra* note 1, at 885-86.

14. *Id.*

15. *Id.* at 877, note a1. (noting, by Brooks himself in the first footnote, the notion of "speaking truth to power" is not his, and was borrowed from the civil rights movement).

16. *Id.* at 888-89.

17. *Id.* at 892-93.

18. *Id.* at 878.

pride themselves on their scholarly distance from statements about what “should” be, rather than what is.<sup>19</sup> Conversely, legal scholars couch normative statements in objective terms, trying to (perhaps) shield the reader from any personal connection to the reasons why they are writing about a given topic—which may be that the legal scholar cares about the outcome on a deeper level than they can come right out and state in the academic piece. The way Brooks thwarts this tradition by weaving normative statements into his analysis is refreshing, honest, and lends a great degree of authenticity to his work.<sup>20</sup>

The initial substantive premise of the Brooks Principle in the Williams Lecture is that human beings have deliberately separated themselves from nature and, in so doing, have made it easier to destroy nature without thought of consequence.<sup>21</sup> Brooks notes that we have created this separation in part because humans (and particularly those of European origin) have always had somewhat of a fundamental fear of nature, which drives our behavior and, in particular, our laws and legal decisions.<sup>22</sup> Using the astute observation of Robert Frost from so long ago, Brooks reminds us that during the daylight, we all like to stare at the flowers and watch the birds fly by, but at night, most of us feel like we need to shut the windows, draw the blinds, lock the doors, and protect ourselves from the unseen, unknown dangers lurking outside.<sup>23</sup> The role of law, according to Brooks, is to both explore the reasons why we want to shut the windows and then (hopefully) break down the barrier between self and other, to integrate ourselves with nature in a way that allows us to appreciate the manner in which we are so inextricably connected to an ecosystem, or a feature of that ecosystem.<sup>24</sup>

This is a lofty goal for the law, to revise an entire societal paradigm that was hundreds, if not thousands, of years in the making. To start somewhere concrete, Brooks uses Vermont’s history and several examples of Vermont state law that reflected and fostered the integration of humans and nature, dating all the way back to the pre-constitutional period.<sup>25</sup> Setting aside the eradication of Vermont’s indigenous population during the colonial period (which is a pretty large set-aside), Brooks noted that Vermont always had a

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19. See *id.* at 877-78 (describing Norman Williams’s legacy in American land use law and reform).

20. See *Id.* at 878 (statement of Richard O. Brooks) (“I wish to introduce the notion that both people and nature can be segregated-separated off from our community, and that we should pursue the integration of both people and nature as a joint enterprise.”).

21. *Id.* at 878-79 (simplifying the concept into this basic thesis).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 884.

remarkably inclusive and progressive approach to the law.<sup>26</sup> This stretched from the days that the Vermont Constitution was ratified, supporting the abolition of slavery in 1777, through the passage of Act 250, Vermont's famous land use and zoning law, in 1969.<sup>27</sup> These values were reflected in specific provisions of the Vermont Constitution, such as Chapter 2, section 67, which contained a guarantee of public access to game and fish on the public commons, as well as in other statutes and judicial opinions.<sup>28</sup> As Brooks noted, these early Constitutional efforts at inclusion and access to natural resources reflected Vermont's inherent values of integration, rather than segregation (both among its human inhabitants and between them and its natural inhabitants and ecosystems).<sup>29</sup>

Later examples of Vermont's dedication to the value of integration can be seen in the conservation efforts that sprang out of the industrial devastation the state experienced in the nineteenth century.<sup>30</sup> These efforts ultimately led to some of the most progressive state land use and environmental laws in the country.<sup>31</sup> The resulting attempts to define what made Vermont so "Vermont" was also reflected in the writings of ecologists and legal theorists of the early twentieth century, such as George Perkins Marsh: "The ravages committed by man subvert the relations and destroy the balance which nature had established between her organized and her inorganic creations; and she avenges herself upon the intruder, by letting loose upon her defaced provinces destructive energies."<sup>32</sup>

Further attempts to guard against these harms can be seen in the Vermont legislature's codification of the inherent value of Vermont's natural landscape in Title 10 of the Vermont Statutes Annotated, which states:

"Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's non-renewable earth and mineral reserves, and

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26. *Id.* at 881, 884-85.

27. *Id.* at 884; *See generally* Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543, 544-45 (2002), (describing the progressive nature of Act 250).

28. Brooks, *supra* note 1 at 884 and 888.

29. *Id.* at 884.

30. *Id.* at 885-86.

31. *Id.*

32. *Id.* at 885.

protection of the beauty of the landscape are matters of public good.”<sup>33</sup>

These same values also can be seen in Act 250, which was one of the earliest and most conservation-oriented state land use laws in the country.<sup>34</sup> Brooks is careful to note, though, that the Vermont approach to conservation and environmental protection is not a pure “rights-based approach.”<sup>35</sup> Vermont’s legal values system is holistic, inclusive, and broad-scale, rather than individualistic, circumstance-based, and specific.<sup>36</sup> Vermont also takes a consistent, long view of environmental and natural resources management—embracing the notion of “community,” as well as the “ecological setting” in which natural resources lie, or environmental pollutants appear, over a long span of time.<sup>37</sup> These values are not only reflected in state legislation, but also in the opinions of the Vermont Supreme Court and in the actions of various state agencies.<sup>38</sup> Throughout Vermont’s history, therefore, the inclusive, community-based, harmonious value system of Vermonters has shaped both local and state laws, as well as effecting change on the national level.<sup>39</sup>

Many of the laws Brooks mentions, and the litigation he focuses on, particularly in the environmental context, arose out of the federalist structure of various statutes, such as the Clean Water Act and the Clean Air Act.<sup>40</sup> These Acts reserve primary regulatory authority in the federal government but allow states to assume primacy if they can satisfy a certain set of Congressionally prescribed criteria.<sup>41</sup> Thus, Vermont’s progressive water quality standards were spurred by the federal requirement in the Clean Water Act that applied a minimum threshold of acceptable pollution in all navigable waterways.<sup>42</sup> The judgments that Vermont attorneys pursued against Midwestern power plants were a result of the federalist structure of the Clean Air Act, which also required states to develop

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33. *Id.* at 886-87.; VT. STAT. ANN. tit. 10, § 6042 note (Utilization of Natural Resources) (2004).

34. RICHARD O. BROOKS ET AL., TOWARD COMMUNITY SUSTAINABILITY: VERMONT’S ACT 250, THE CRITERIA FOR SUSTAINABLE DEVELOPMENT 1 (1996).

35. Brooks, *supra* note 1, at 888-89.

36. *Id.*

37. *Id.*

38. *Id.* at 889.

39. *Id.* The only exception to this is seen in Vermont’s recent treatment of its indigenous peoples, which has been problematic, and sometimes tragic, since the state’s founding in 1777. *See State v. Elliott*, 616 A.2d 210, 215 (1992).

40. *Id.* at 883.

41. 33 U.S.C. § 1312 (2002); 42 U.S.C. §§ 7401, 7402(a), 7410(a)(1) (1990).

42. 33 U.S.C. § 1312 (2002).

minimum air pollution criteria or be subject to the new federal standards.<sup>43</sup> So, in some sense, the progressive laws, regulations, and legal choices Vermont made were spurred by federal action, although the degree to which Vermont implemented these federal statutes and regulations was largely a reflection of Vermont values.

THE BROOKS PRINCIPLE OUT WEST: SPEAKING LOCAL TRUTH TO POWER  
IN THE PUBLIC LANDS STATES.

After doing some serious mulling over this portion of my contribution to the festschrift, I can say, at the outset and in the interest of full disclosure, that I have not answered my ultimate question—does the Brooks Principle apply west of the 100th meridian?<sup>44</sup> However, in the paragraphs that follow, I will attempt to explain my thinking around the answer to this question. If the word choice in this section seems tentative, that is deliberate, because the elements of Brooks' Principle—especially the notions of integration, speaking local environmental truth to national power, and developing ecosystem-based legal structures—might translate to the public lands states out west, although the path forward could be a bit trickier due to the history, laws, and somewhat incongruous values of those states.

To start, the laws that shaped the West generally reflect the values of Manifest Destiny, rather than the works of Robert Frost or Aldo Leopold.<sup>45</sup> Mineral and timber development, along with access to and control of water (necessary to accomplish these objectives, as well as to fuel settlements in the arid west) drove the establishment of states like Colorado, Montana,

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43. Brooks, *supra* note 1, at 893; 42 U.S.C. § 7410(a)(1) (1990).

44. See Leroy K. Latta, Jr., *Public Access over Alaska Public Lands As Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811, 813 (1988) (describing how public lands states are the states made up of land acquired from foreign governments or tribes after the ratification of the Constitution); see John R. Schwabrow, *Supervision of Operations Under Federal and Indian Oil and Gas Leases by the U.S. Geological Survey*, 8 ROCKY MTN. MIN. L. INST. 241, 241, 264 (1963) (exemplifying how the term is often used in Natural Resources Law to refer to the states containing the greatest percentage of federal public lands, which are Colorado, Wyoming, Montana, New Mexico, Arizona, Nevada, Utah, Idaho, Oregon, Washington, and California).

45. John W. Ragsdale, Jr., *The American Legacy of Public Land Rebellion*, 48 URB. LAW. 599, 601 (2016); Heidi M. Biasi, *The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton's Quest to "Win the West"*, 9 BUFF. ENVTL. L.J. 189, 196 (2002); Brenda W. Jahns, *Reforming Western Water Rights: Contemporary Vision or Stubborn Revisionism?* IN PROCEEDINGS OF ROCKY MTN. MIN. L. INST. 21-1, 21-3 (Rocky Mtn. Min. L. Inst., 1993).

Nevada, and California.<sup>46</sup> The natural resources and property laws of these states have always reflected this driving force, encouraging the privatization of many public resources and by necessity, restricting public access to them, which federal and state governments viewed as the fastest way to tame the vast wilderness west of the Mississippi.<sup>47</sup> A necessary piece of that puzzle was bringing the Wild West under the control of a distant federal government in Washington, D.C.<sup>48</sup>

Also unlike in Vermont, slavery was not a focus of western constitutions, as it was abolished while many of the western states were still territories.<sup>49</sup> However, the federal policies of removing indigenous nations and relocating them to reservations within many of the western states established an exclusionary, rather than unified, populace in many of the western territories and states.<sup>50</sup> The separation of indigenous and non-indigenous populations created an enclave mentality in both populations, threads of which remain in those states today.<sup>51</sup> Moreover, as a result of the reservation era, and treaties negotiated during that time, the tribal influence on western natural resources management and environmental regulation is extensive in some western states.<sup>52</sup> This adds a layer of political, regulatory, and social complexity that was almost completely absent from Vermont's post-constitutional history.<sup>53</sup>

The physical geography and scale of the western states is vast compared to a state like Vermont, as well.<sup>54</sup> The state of Vermont is roughly the size of one and a half counties in southern Utah, for instance.<sup>55</sup> And although the population demographics of western states is changing,

46. E.g. Hon. Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 4 (1997) (discussing the role of mineral development and water appropriation in the establishment of the State of Colorado).

47. *Id.*

48. Hobbs *supra* note 46; Ragsdale *supra* note 45, at 601; see generally Michelle Bryan Mudd, *Hitching Our Wagon to A Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L.J. 283, 300 (2013) (describing the development of water rights in the western states).

49. See, e.g., NORTHWEST ORDINANCE OF 1787, art. VI (stating that "There shall be neither slavery nor involuntary servitude in the said territory...").

50. See, e.g., PAUL SHEPARD, A POST-HISTORIC PRIMITIVISM, IN THE WILDERNESS CONDITION: ESSAYS ON ENVIRONMENT AND CIVILIZATION 40, 58 (Max Oelschlaeger ed., 1992).

51. *Id.*

52. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 69 (2014).

53. See *id.* (discussing general scope of tribal environmental authority and listing various tribal environmental regulatory efforts in western U.S.).

54. U.S. CENSUS BUREAU, GUIDE TO STATE AND LOCAL CENSUS GEOGRAPHY (2010), [http://www.census.gov/geo/reference/guidestloc/select\\_data.html](http://www.census.gov/geo/reference/guidestloc/select_data.html).

55. U.S. CENSUS BUREAU, 2010 CENSUS, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

their economies have until very recently been driven by extractive natural resources industries, such as timber harvesting, grazing, and mining.<sup>56</sup> These extractive industries are not only part of the economy but also still form part of the core of the western ethos.<sup>57</sup> Take livestock grazing, for example. This pursuit has never made many ranchers wealthy, and particularly not in the western states, where water and forage are scarce and drought plagues many ranchers.<sup>58</sup> Yet the acreage of public lands subject to federal grazing permits has not declined by any measurable degree since the mid-twentieth century.<sup>59</sup> Public lands ranching is still an honorable and esteemed way of life in the western states, by and large.<sup>60</sup> Moreover, the federal government manages grazing in a way that largely incorporates and reflects this ethos, regardless of the impacts of large-scale grazing on the public lands.<sup>61</sup> Even when the market, the permittee, and the allotment conditions indicate that the Bureau of Land Management (BLM) should phase grazing out, BLM continues to offer grazing permits and often refuses to reassess its manner of authorizing grazing use on public lands.<sup>62</sup>

In further contrast, and unlike Vermonters, Westerners tend to be extremely individualistic, coming together when necessary to defend their rights-based system against threats from outsiders, and then dispersing again to their individualist goals.<sup>63</sup> The saga of Cliven Bundy in southern Nevada exemplifies this.<sup>64</sup> Mr. Bundy was the patriarch of a large ranching family who held a grazing permit allowing him to pasture his cattle on the BLM-managed Bunkerville Allotment along the Virgin River, which he did for decades.<sup>65</sup> When BLM made some minor management changes to his permit to protect the habitat of species other than livestock, Bundy refused

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56. Headwaters Economics, WEST WIDE ECONOMIC ATLAS ((Nov. 2017), <https://headwaterseconomics.org/dataviz/west-wide-atlas/>).

57. Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?* 30 IDAHO L. REV. 555, 556-57 (1994).

58. Vickery Eckhoff, *The Real Price and Consequences of Livestock Grazing on America's Public Lands*, THE DAILY PITCHFORK (Feb. 12, 2015), <https://www.westernwatersheds.org/sustainable-cowboys-welfare-ranchers-american-west/>.

59. Feller, *supra* note 57, at 556-57.

60. Am. Historical Ass'n, *Are There Good Reasons for Being a Farmer?* [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-35-shall-i-take-up-farming-\(1945\)/are-there-good-reasons-for-being-a-farmer](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-35-shall-i-take-up-farming-(1945)/are-there-good-reasons-for-being-a-farmer), (last visited 11/14/18).

61. *Id.*

62. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 836-37 (6th ed. 2007).

63. Sarah Childress, *The Battle Over Bunkerville: The Bundys, the Federal Government, and the New Militia Movement*, FRONTLINE (May 16, 2017), <https://www.pbs.org/wgbh/frontline/article/the-battle-over-bunkerville/>.

64. Ragsdale *supra* note 45, at 599.

65. Childress, *supra* note 63.

to comply with them (holding the belief, then, as now, that his access to the public grazing allotment constituted a property right under the United States Constitution), and the BLM cancelled it.<sup>66</sup> Bundy continued to graze despite the cancelled permit, though.<sup>67</sup> BLM pursued formal trespass actions against him, and then attempted to remove and impound his cattle.<sup>68</sup> These actions seemed to stoke Bundy's ire, causing him to resist further, first through litigation and later by armed standoffs, for nearly two decades.<sup>69</sup> At one point, in 2014, Bundy summoned a militia to Bunkerville in response to the latest BLM effort to impound his cattle, resulting in days of tense impasse and ultimately forcing the BLM to leave Bunkerville, and leave Bundy alone.<sup>70</sup>

Lost in the chaos was any discussion of the state of the Bunkerville Allotment, containing fragile desert ecosystems, thousands of paleontological and archaeological resources, and rare desert species such as Joshua Trees and bighorn sheep.<sup>71</sup> With the exception of a few local environmental groups, no one discussed the state of these ecosystems, whether they were being stewarded well, and what the local residents of nearby towns wanted for these lands.<sup>72</sup> The discussion focused almost exclusively around whether Cliven Bundy had individual rights to graze them, and if so, what the nature of those rights were.<sup>73</sup> BLM did not seek, or otherwise consider, neighboring landowners, ranchers, or other users of the public lands to determine whether there was a public consensus about the path forward.<sup>74</sup>

The Bundy saga illustrates another contrast between the Northeast (Vermont in particular) and the West, which is that the western individualist ethos is also quite white, and sometimes even racist. The laws of these states, and judicial interpretations of those laws, often contain little acknowledgment of the deep and lengthy tribal relationship with certain places.<sup>75</sup> They are silent about the role of African American soldiers and

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66. Alyosha Goldstein, *By Force of Expectation: Colonization, Public Lands, and the Property Relation*, 65 UCLA L. REV. DISCOURSE 124, 138 (2018).

67. *Id.*

68. Childress, *supra* note 63.

69. *Id.*

70. *Id.*

71. [Friends of Nevada Wilderness, Gold Butte National Monument](https://www.nevadawilderness.org/goldbutte), <https://www.nevadawilderness.org/goldbutte> (last visited Nov. 14, 2018) (describing developments that led to President Obama declaring a National Monument out of the Bunkerville Allotment in December 2016).

72. Childress, *supra* note 63.

73. *Id.*

74. *Id.*

75. *Baley v. United States*, 134 Fed. Cl. 619, 670 (2017) (referring to the system of western water rights, which relies on the prior appropriation system based on the "first in time" principle. Yet,

settlers who moved west to settle under the homestead laws and build the railroads that connected West to East.<sup>76</sup> They do not mention the Asian miners who worked in the western mines, enriching their owners under the General Mining Law and other disposal statutes of the nineteenth century.<sup>77</sup> Recognition of legal rights to those outside the white mainstream (such as same sex relationships and same sex marriage) came only recently to parts of the West, and still have not been clearly recognized in others.<sup>78</sup> These are just a few examples, as well, but they illustrate how far many of the western states have to go before fully incorporate the values of *all* western citizens into state laws.

These challenges, and others, make it more difficult to initiate and carry out landscape-level planning and ecosystem-based conservation initiatives in the West. They also make it challenging for the western states to embrace a legal framework that is holistic, rather than individualistic and rights-based.<sup>79</sup> And, while not everyone in the West is like Cliven Bundy, he does represent many of the traditions that make up the modern Western ethos, even if they are not so openly expressed by others.<sup>80</sup> Examples of successful landscape-level, cross-jurisdictional environmental planning efforts, such as the Northwest Forest Plan in the 1990s, are rare, while examples of failed attempts, such as the Greater Yellowstone Ecosystem planning effort or the Sage Grouse Conservation Initiative, abound.<sup>81</sup>

The recent national monument reductions in Utah also highlight some of the challenges facing the modern West. In December 2017, President Trump dramatically reduced two national monuments in central and southern Utah: the Bears Ears National Monument and the Grand Staircase-

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western water rights do not recognize tribal water appropriations as legal “firsts” in many instances. Tribes often hold junior water rights in water systems that they have used since time immemorial, while non-native descendants of foreign arrivals to the system in the late nineteenth century hold senior rights).

76. Library of Congress, *Rise of Industrial America, 1876-1900*, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseindwest/> (last visited Dec. 8, 2018)

77. See Mary Szto, *From Exclusion to Exclusivity: Chinese American Property Ownership and Discrimination in Historical Perspective*, 25 J. TRANSNAT'L L. & POL'Y 33, 46 (2016).

78. *Tribune Editorial: The Same-sex Marriage Battle is Over*, SALT LAKE TRIB. (Sept. 14, 2017) <https://www.sltrib.com/opinion/editorial/2017/09/14/tribune-editorial-the-same-sex-marriage-battle-is-over/>.

79. Childress, *supra* note 63.

80. COGGINS ET AL., *supra* note 62, at 753; George Ochenski, *Saving Sage Grouse: Another Collaborative Failure*, COUNTERPUNCH (May 18, 2018), <https://www.counterpunch.org/2018/05/18/saving-sage-grouse-another-collaborative-failure/>.

81. COGGINS ET AL., *supra* note 62, at 753.; George Ochenski, *Saving Sage Grouse: Another Collaborative Failure* (May 18, 2018), <https://www.counterpunch.org/2018/05/18/saving-sage-grouse-another-collaborative-failure/>.

Escalante National Monument.<sup>82</sup> President Clinton had originally created the Grand Staircase-Escalante Monument in 1996, setting aside 1.88 million acres of federal land in the redrock canyon country south of the small town of Escalante, Utah.<sup>83</sup> Clinton established this Monument because these lands contained a “spectacular array of scientific and historic resources,” including unique desert ecosystems, a trove of fossils and archaeological ruins and artifacts, rare desert animal species, and sites of historical importance.<sup>84</sup> President Obama later created the nearby Bears Ears National Monument, establishing a 1.35 million acre reserve south of the small town of Moab, Utah, and bordering the Navajo Nation and the San Juan River.<sup>85</sup>

The Bears Ears Monument was unique in that it was the first tribally proposed National Monument.<sup>86</sup> Dating back to the 1930s, area tribes had sought federal protection for the area around the Bears Ears buttes because of their shared cultural and religious importance to various tribes.<sup>87</sup> The Bears Ears region was the birthplace of Navajo leader Manuelito, who led the resistance against the federal government’s forced relocation of Navajos to Bosque Redondo, New Mexico on “the Long Walk,” as it is known to the Navajo.<sup>88</sup> Manuelito also helped negotiate the treaty securing the Navajo people’s right to remain on their ancestral lands in what is now formally recognized as the Navajo Nation.<sup>89</sup> Several other tribes “trace their ancestry to the ancient peoples who populated the region since time immemorial,”<sup>90</sup> such as the Mogollon, Fremont, and Anasazi, who constructed “ancient roads, shrines, pit houses, pueblos, great houses, kivas, and cliff dwellings” throughout the Bears Ears region.<sup>91</sup>

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82. Julie Turkowitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

83. BEARS EARS INTER-TRIBAL COAL., *Proposal Overview*, <http://bearscoalition.org/proposal-overview/> (last visited Nov. 15, 2018).

84. Turkowitz, *supra* note 82; See Proclamation No. 6920, 61 Fed. Reg. 50, 223 (Sept. 24, 1996), <https://www.gpo.gov/fdsys/pkg/WCPD-1996-09-23/pdf/WCPD-1996-09-23-Pg1788.pdf> (establishing the Grand Staircase-Escalante National Monument).

85. Turkowitz, *supra* note 82.

86. Bears Ears Inter-Tribal Coal., *Native American Connections*, <http://bearscoalition.org/proposal-overview/ancestral-and-modern-day-land-users/>, (last visited Nov. 14, 2018).

87. Bears Ears Inter-Tribal Coal., *Proposal Overview*, *supra* note 83, (showcasing other tribes with a cultural connection to the Bears Ears region including the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, Sandia, San Felipe, San Ildelfonso, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Ysleta del Sur, and Zia, the Hualapai Tribe, and the White Mountain and Jicarilla Apache).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

When both Monuments were established, there was some local opposition, antipathy, and fear about what the designation would mean for nearby, non-Indian communities.<sup>92</sup> Yet there was also a great deal of support, particularly around the Bears Ears proposal.<sup>93</sup> It was an open question after each Proclamation, though—would the Monuments bring tourists to replace the lost opportunities for mining jobs or would the region suffer economically?<sup>94</sup> The answer is still somewhat unclear, and depends on whom you ask. Some locals claim that the Monuments hamstring local economies because they preclude mining, grazing, and restrict some off-road vehicle use (outside of designated areas).<sup>95</sup> However, many local business owners in the small towns surrounding the Monuments, including Escalante (population 787), Boulder (population 225), and Kanab (population 4,526), have claimed that the Monument brought a notable financial boost.<sup>96</sup> Economic studies support the latter view, showing that monument designations boost the economies of nearby small towns, bringing tourists, creating jobs, and luring new residents with the promise of a protected outdoor “playground” at their backdoor.<sup>97</sup>

Environmental and conservation advocates were thrilled with the Bears Ears and Grand Staircase Monument designations, as they restricted development and protected fragile desert ecosystems that were at risk of irrevocable harm from mining and nearly unfettered off-road vehicle use.<sup>98</sup> But once the political tides shifted in Washington in the fall of 2016, the Monument opposition’s voices grew stronger, and eventually, carried the day.<sup>99</sup> In January 2017, when President Trump took office and Secretary of

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92. David DeMille, *Culture War Plays Out at Grand Staircase Monument*, USA TODAY, (May 10, 2017), <https://www.usatoday.com/story/news/nation-now/2017/05/11/clear-clash-cultures-play-wednesday-two-sides-20-year-old-debate-over-grand-staircase-escalante-national-monument-tried-make-their-case-visiting-interior-secretary-ryan-zinke/317253001/>.

93. Stephanie Mencimer, *National Monuments in Utah are Far More Popular Than Trump Thinks*, MOTHER JONES, (Dec. 4, 2017), <https://www.motherjones.com/politics/2017/12/national-monuments-in-utah-are-far-more-popular-than-trump-thinks/>.

94. Brian Maffly, *Oil and Coal Drove Trump’s Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order*, SALT LAKE TRIB. (Mar. 2, 2013), <https://www.sltrib.com/news/environment/2018/03/02/interior-department-emails-show-oil-and-coal-played-a-big-role-in-bears-ears-grand-staircase-monument-redraws/>, (mining was prohibited after the 1996 Proclamation and Grand Staircase contained vast coal and other mineral deposits, while Bears Ears contained oil and gas, and uranium reserves).

95. Phil Lyman, *Awaiting the Fate of Bears Ears*, SALT LAKE TRIB. (Sept. 9, 2017), <https://www.sltrib.com/opinion/commentary/2017/09/19/phil-lyman-awaiting-the-fate-of-bears-ears/>.

96. Lyman, *supra* note 95; Heidi McIntosh, *Utah May be Trading a Dinosaur Wonder for a Coal Mine*, SALT LAKE TRIB. (Aug. 23, 2017), <https://www.sltrib.com/opinion/commentary/2017/08/24/commentary-utah-may-be-trading-a-dinosaur-wonder-for-a-coal-mine/>.

97. McIntosh *supra* note 96; Headwaters Economics, *supra* note 56.

98. McIntosh *supra* note 96.

99. *Id.*

Interior Ryan Zinke (literally) rode into his first day on the job in Washington, D.C. on an Irish Sport Horse named Tonto,<sup>100</sup> the plans to unravel Monument protections began. The two met with various Republicans and unveiled a series of initiatives designed to replace various protective measures of previous Administrations, which they viewed as the overbearing reach of distant Washington bureaucrats, with more industry-friendly solutions.<sup>101</sup> Utah politicians like Sen. Orrin Hatch, Governor Gary Hebert, and local county commissioners mounted a campaign to convince Trump and Zinke that the Bears Ears and Grand Staircase Monuments were an affront to the values of Utah citizens.<sup>102</sup> Their objections gained traction with Secretary Zinke and eventually, in December 2017, Trump signed two Proclamations reducing the Grand-Staircase Escalante National Monument by almost half, and the Bears Ears National Monument by nearly eighty percent.<sup>103</sup>

After their shock wore off, supporters of the Monuments were left to wonder whether Trump's actions actually did fulfill the wishes of Utahns. In other words, had Sen. Orrin Hatch spoken Utah's truth to Washington's power? A majority of the individual comments submitted to the Department of Interior related to Secretary Zinke's proposal to reduce the Monuments opposed any reductions,<sup>104</sup> but polls conducted by Utah news organizations reflected nearly an even split, with half opposed and half supporting.<sup>105</sup> Nationally, there was overwhelming support for the National Monuments at the size that Presidents Clinton and Obama had established them, while locally it was a different story.<sup>106</sup> This begs the larger question of whether it is possible to speak local truth to national power when there is no one local

100. Matthew Haag, *The Interior Secretary, and the Horse He Rode in On*, N.Y. TIMES, Mar. 3, 2017, <https://www.nytimes.com/2017/03/02/us/politics/secretary-ryan-zinke-horse-interior.html>.

101. Thomas Burr, *Effort to Shrink Bears Ears National Monument Started Before Donald Trump Was Elected President*, SALT LAKE TRIB. (Dec. 3, 2017), <https://www.sltrib.com/news/politics/2017/12/03/effort-to-shrink-bears-ears-national-monument-started-before-donald-trump-was-elected-president/>.

102. *Id.*

103. Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NAT'L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/>.

104. Juliet Eilperin & Darryl Fears, *Interior Secretary Recommends Trump Alter at Least Three National Monuments, Including Bears Ears*, WASH. POST (Aug. 24, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/08/24/interior-secretary-recommends-trump-alter-a-handful-of-national-monuments-but-declines-to-reveal-which-ones/?noredirect=on&utm\\_term=.196b191b44cf](https://www.washingtonpost.com/news/energy-environment/wp/2017/08/24/interior-secretary-recommends-trump-alter-a-handful-of-national-monuments-but-declines-to-reveal-which-ones/?noredirect=on&utm_term=.196b191b44cf).

105. Brian Maffly, *A Majority of Utahns Favors Trimming Bears Ears, but Most Oppose Breaking Up Grand Staircase*, SALT LAKE TRIB. (Oct. 24, 2017), <https://www.sltrib.com/news/environment/2017/10/24/majority-of-utahns-favor-trimming-bears-ears-but-most-oppose-breaking-up-grand-staircase-poll-says/>.

106. Eilperin & Fears, *supra* note 104.

truth. If Utah residents could not agree on whether they supported the Monuments, it seems fruitless to examine how Utah residents would go about resurrecting them after President Trump's December 2017 Proclamations.

Yet, there is also more at stake in this Monument battle than just local values. There is also the Antiquities Act, congressional will, and the conservation legacies of multiple presidential administrations to consider, all of which are national, rather than local values.<sup>107</sup> The Antiquities Act authorizes presidents to proclaim national monuments to protect and preserve "objects of historic and scientific interest," including battle sites, dinosaur fossils, and sometimes, entire ecosystems.<sup>108</sup> The Monuments as originally established reflected the majoritarian values of the American citizenry, at least in the sense that they were implemented by two duly elected Presidents. Yet, the same could be said for President Trump's reductions.

So where does this leave us in determining whether Brooks' Principle applies in the west? The rights-based legal systems of the various western states reflect the western values of individualism and extraction of natural resources. Yet, these states also contain vast quantities of federal public land, which gives all Americans a voice in how they are used and managed. While potentially complicating matters further, perhaps that jurisdictional mixture actually simplifies some parts of the analysis.

For one, federalism is a powerful driving force in the west, as it is in Vermont. The Constitution allocates power over federal lands and federal property to the Congress, which has delegated some of this authority to the states.<sup>109</sup> However, for federalism to work, much of the authority must be reserved to the federal government, as it is under the Property Clause, which is reflected in the delegation to the executive in the Antiquities Act.

Brooks doesn't directly tackle the role of federalism in his Williams Lecture, but many of the frameworks he discusses arose out of the federalist structure governing environmental regulation in the United States.<sup>110</sup> In a separate piece, Brooks discussed the origins of federalism and its role in American society.<sup>111</sup> Describing the work of the medieval political theorist, Johannes Althusius, who was "reputed to have invented" the notion of federalism, Brooks determined that Althusius's principle of consociation

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107. See 54 U.S.C. § 320301(a) (2012) (enacting the Antiquities Act).

108. *Id.*

109. U.S. CONST. art. IV, § 3, cl. 2.

110. *Speaking Truth to Power*, *supra* note 1, at 888 (discussing litigation brought by two Vermont attorneys under the Clean Water Act, to enforce the state's water quality standards).

111. Richard O. Brooks, *Vermont Law School's Program for the Study of Global Civil Society*, 23 VT. L. REV. 699, 703-4 (1999).

was potentially a useful means of evaluating American and Canadian federalism.<sup>112</sup> Consociation allows for the simultaneous existence of different legal systems or different groups under a unified government structure, but with the latitude to maintain their separate identities, values, and principles or laws.<sup>113</sup>

Federalism, and particularly, the consociation of Althusius, may provide a source of resolving controversies like the ones arising from the Bears Ears proclamation and reduction, and for the west more generally. It is unlikely that there ever will be one type of westerner, with a consistent value set, or at least, not to the degree that exists in Vermont. Out west, there will always be progressives and conservatives, ranchers, environmentalists, skiers and mountain bikers, coal miners, power plant operators, anglers, wilderness fans, and fossil hunters. There will always be tribal governments and sovereign tribal nations, as varied as the cultures they represent, and controlling vast amounts of land and playing a role in the management of large public resources like rivers and lakes. There will always be county governments, state governments, and large federal landholdings managed by federal government officials. And the need for all of these factions to make decisions about environmental and natural resources issues will never abate. A system based on consociation would recognize the differing legal authority and value systems of each of the governments mentioned above, and perhaps allow for more mutually satisfactory environmental decisionmaking.

For one particularly controversy, that of the Utah Monument reductions, it is still an open question of whether Brooks' principle applies. As the litigation over Trump's Monument reductions marches on, the federal courts will decide whether his actions were constitutional, possibly considering whether they reflect the values of the American public and maybe even the tribal proponents of the Bears Ears Monument in particular.<sup>114</sup> For the sake of both Monuments' ecosystems, historic resources and for American environmental protection more generally, hopefully the courts will answer the constitutional question in the negative. The same goes for the sacred cultural values that the Hopi, Navajo, Ute, and Zuni hold in the lands surrounding the Bears Ears buttes. For now, though as Brooks concludes in his Williams Lecture, perhaps the simple act of

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112. *Id.* at 703.

113. *Id.*

114. Hillary M. Hoffmann, *Grand Staircase-Escalante and Bears Ears National Monuments Litigation*, ENVIRONMENTAL LAW PROFS BLOG (Dec. 5, 2017), [http://lawprofessors.typepad.com/environmental\\_law/2017/12/grand-staircase-escalante-and-bears-ears-national-monuments-litigation.html](http://lawprofessors.typepad.com/environmental_law/2017/12/grand-staircase-escalante-and-bears-ears-national-monuments-litigation.html).

bringing the litigation is, itself, speaking truth to power, regardless of the outcome.<sup>115</sup>

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115. *Id.* (stating that the lawsuits challenging Trump's Monument reductions were filed by various groups, including a consortium of tribes, represented by the Native American Rights Fund, regional and national environmental groups, and scientific organizations).