REGULATION AND THE GEOGRAPHY OF INEQUALITY

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ABSTRACT

We live in an era of widening geographic inequality. Around the country, the spread between economically and culturally thriving places and those that are struggling has been increasing. "Superstar" cities like New York, San Francisco, Boston, and Atlanta continue to attract talent and grow, while the economies of other cities and rural areas are left behind. Troublingly, escalating geographic inequality in the United States has arrived hand in hand with serious economic, social, and political problems. Areas that are left behind have not only failed to keep up with their thriving peers; in many ways, they have stagnated and seen opportunities evaporate. At the same time, superstar cities are running up against extreme housing affordability problems, rendering middle-class life all but unsustainable. To make matters worse, the widening gulf between dynamic and stagnant places increasingly feeds into a democratic crisis of unrepresentative government at the federal level.

The dominant explanations for widening geographic inequality focus largely on inexorable economic trends. Forces like "agglomeration effects" and globalization have reshaped the economy, benefitting some areas and harming others. We think these explanations leave out a crucial factor: the effects of specific regulatory choices on economic geography. The Progressive Era and New Deal regulatory order in the United States promoted geographic dispersion of economic activity. The unraveling of this regulatory order around 1980 coincided with the reversal in geographic convergence and the beginning of an era of growing divergence. More specifically, regulatory policies in the areas of transportation, communications, trade, and antitrust helped construct an

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era of geographic convergence in the mid-twentieth century, and deregulation in those same areas contributed to the rise of geographic inequality over the last generation. Though the COVID-19 pandemic has produced unprecedented awareness of and interest in remote work—raising the possibility of greater economic dispersion—the extent to which this potential can be realized will likely also depend upon regulatory choices. To combat geographic inequality and its attendant downsides, we make the case for reincorporating geographic factors into federal regulatory policymaking in transportation, communications, trade, antitrust, and other domains.

TABLE OF CONTENTS

Introduction 1765
I. The Geographic Inequality Problem 1772
A. The Fall and Rise of Geographic Inequality 1772
B. Why Geographic Inequality Matters 1776
1. *Socioeconomic Consequences* 1777
2. *Political Challenges* 1781
3. *National Security and Resilience Concerns* 1784
II. Deregulation and Geographic Inequality 1785
A. Transportation Regulation 1786
B. Communications Law 1793
C. The Political Economy of Trade Policy 1798
D. Antitrust and Corporate Consolidation 1803
III. Consensus Policy Responses and Their Shortcomings 1810
A. Zoning and Deregulation 1811
1. *The Liberaltarian Consensus* 1811
2. *Critique of the Liberaltarian Consensus* 1815
B. Place-Based Economics 1825
1. *The Centrist Approach* 1825
2. *The Return of Industrial Policy* 1828
IV. Regulation and Revitalization 1830
A. Reviving Regulated Industries and Public Options 1830
B. Incorporating Geographic Considerations into Regulatory Policy 1834
Conclusion 1836

INTRODUCTION

We live in an era of widening geographic inequality. Around the country, the spread between economically and culturally thriving places and those that are struggling has been increasing. "Superstar" cities[1] like New York, San Francisco, Boston, and Atlanta continue to attract talent and grow, while the economies of other cities and rural areas are left behind. This phenomenon has captured popular imagination[2] and is borne out by the data.[3]

Troublingly, escalating geographic inequality in the United States has arrived hand in hand with serious economic, social, political, and national security problems. Areas that are left behind have not only failed to keep up with their thriving peers; in many ways, they have stagnated and seen opportunities evaporate. Health disparities closely track regional inequality,[4] and rates of opioid abuse are higher in communities with fewer economic opportunities.[5] Educational attainment also tracks geography. "Right now," as one researcher

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1. *See* Joseph Gyourko, Christopher Mayer & Todd Sinai, *Superstar Cities*, 5 AM. ECON. J.: ECON. POL'Y 167, 169 (2013) ("Locations that experience persistently high house price growth relative to housing unit growth are called 'superstars.'"). The term "superstar cities" has grown in popularity and now generally refers to thriving cities, mostly located on the coasts. *See, e.g.*, Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630 [https://perma.cc/P9LZ-WLB5] (adopting the term "superstar cities" to refer generally to thriving places).

2. *See* Ben Kenigsberg, *'Mortal Engines' Review: London Becomes a Death Star on Wheels*, N.Y. TIMES (Dec. 13, 2018), https://nyti.ms/2zYsrar [https://perma.cc/T47U-F5EB] ("'Mortal Engines' takes place . . . [in] the era of 'municipal Darwinism,' when 'predator cities' rove on wheels and 'ingest' smaller ones, assimilating their populations and looting the spoils. In the opening sequence, London devours a Bavarian mining town. The allegorical potential seems obvious. Do rural areas fear urban domination?").

3. *See infra* discussion Part I.

4. *See, e.g.*, Gopal K. Singh, Gem P. Daus, Michelle Allender, Christine T. Ramey, Elijah K. Martin, Jr., Chrisp Perry, Andrew A. De Los Reyes & Ivy P. Vedamuthu, *Social Determinants of Health in the United States: Addressing Major Health Inequality Trends for the Nation, 1935-2016*, 6 INT'L J. MCH & AIDS 139, 148 (2017) ("Geographic differences in all-cause and [cardiovascular disease ("CVD")] mortality show higher risks of CVD mortality in the Southeastern region of the US even though mortality rates have declined in all regions and states . . . .").

5. *See, e.g.*, ROBIN GHERTNER & LINCOLN GROVES, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE OPIOID CRISIS AND ECONOMIC OPPORTUNITY: GEOGRAPHIC AND ECONOMIC TRENDS 5 (2018), https://aspe.hhs.gov/system/files/pdf/259261/ASPEEconomicOpportunityOpioidCrisis.pdf [https://perma.cc/PL2T-3P5X] ("Counties with higher poverty and unemployment rates generally had higher rates of retail opioid sales and Medicare opioid prescriptions, as well as drug overdose deaths and opioid-related hospitalizations.").

describes, "there exists an almost ironclad link between a child's ZIP code and her chances of success."[6] At the same time, superstar cities are running up against extreme housing affordability problems, rendering middle-class life all but unsustainable.[7] Taken together, these trends suggest a startling imbalance or maldistribution of economic growth and opportunity.

These geographic trends also increasingly feed into our dysfunctional national politics. Thriving areas are now reliably Democratic—even Orange County, California, previously a Republican stronghold, went Democratic in the 2018 congressional midterms and remained Democratic in 2020[8]—while rural America votes Republican by increasing margins.[9] Importantly, because less populous states wield influence in the Senate and Electoral College that is disproportionate to their populations, partisan sorting contributes to a crisis of unrepresentative government.

Geographic inequality also poses a risk to national security, emergency preparedness, and resilience. When industries are

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6. *See* Corydon Ireland, *The Costs of Inequality: Education's the One Key That Rules Them All*, HARV. GAZETTE (Feb. 15, 2016) (quoting James E. Ryan, Dean of Harvard Graduate School of Education), https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-educations-the-one-key-that-rules-them-all [https://perma.cc/YEZ9-ZLP5]; Singh et al., *supra* note 4, at 142–43 ("Geographic patterns in educational attainment indicate that the population in the Southeastern region of the US has had the lowest percentage of adults with a college degree although education levels in all regions have improved over time . . . .").

7. *See* Conor Dougherty, *California is Booming. Why Are So Many Californians Unhappy?*, N.Y. TIMES (Dec. 29, 2019), https://nyti.ms/2tevpa6 [https://perma.cc/KL5W-NBMD] (noting that while California's economy "has grown more than previous generations had thought possible," the state "has mostly put higher-value jobs . . . in expensive coastal enclaves, while pushing lower-paid workers and lower-cost housing to inland areas like the Central Valley," and describing the "challenge of continuing to add jobs without affordable places for middle- and lower-income workers to live").

8. *See* Adam Nagourney & Robert Gebeloff, *In Orange County, a Republican Fortress Turns Democratic*, N.Y. TIMES (Dec. 31, 2018), https://nyti.ms/2RoBn2K [https://perma.cc/GTZ2-QK7Y]; Stephanie Lai, Luke Money & Joe Mozingo, *Orange County Backed Biden, but Republicans Poised for Dramatic Comeback After 'Blue Wave,'* L.A. TIMES (Nov. 7, 2020, 11:01 AM), https://www.latimes.com/california/story/2020-11-07/orange-county-went-for-biden-but-the-blue-wave-might-all-but-disappear [https://perma.cc/9KYN-B89X] ("Democrats have made inroads over the last 30 years and now have a 3.5% advantage in voter registration that is likely to continue to grow. But the GOP is still a potent force in Orange County . . . .").

9. *See* Shirsho Dasgupta, *See How Rural Voters Have Shifted To the GOP over the Last Three Presidential Elections*, MCCLATCHY DC BUREAU (Nov. 22, 2016, 5:16 PM), https://www.mcclatchydc.com/news/politics-government/election/article237003749.html [https://perma.cc/66N3-BV93] ("Donald Trump's massive victories in rural America in the 2016 election are part of a decade-long trend that has favored the GOP.").

concentrated in a small number of locations, they are more vulnerable to attack from foreign adversaries or to natural disasters and crises. Supply chains that rely on a single city or region might be disrupted in the event of a hurricane. An attack on the electric grid of a city or region could hamper entire sectors of the national—or even global—economy.

Why is geographic inequality growing? The dominant explanations from scholars and commentators are largely about inexorable economic trends. Forces like globalization have reshaped the economy, benefitting some areas and harming others.[10] Commentators also discuss the "inescapable reality of agglomeration"—the disproportionate benefit that comes from colocating in thriving areas.[11] When tech companies locate their headquarters in San Francisco, they find an available pool of talented workers—less so in St. Louis.[12] Given these economic pressures, many commentators believe that it might not be possible to reverse the trends in geographic inequality.[13]

We think these explanations, which focus on autonomous economic forces, leave out a crucial factor: the effects of specific regulatory choices on economic geography. In numerous ways, the Progressive Era and New Deal regulatory order in the United States promoted geographic dispersion in economic activity. The unraveling of this regulatory order around 1980 coincided with the reversal in geographic economic convergence and the beginning of an era of growing divergence.[14] More specifically, regulatory policies in the areas of transportation, communications, trade, and antitrust helped

10. *See, e.g.*, Eduardo Porter, *The Hard Truths of Trying to 'Save' the Rural Economy*, N.Y. TIMES (Dec. 14, 2018), https://nyti.ms/2upzklF [https://perma.cc/RRZ6-Q988] ("[F]actory jobs can no longer keep small-town America afloat . . . [in competition against r]obots and workers in China . . . .").

11. *Id.*; *see also* Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 467, 469 (2018) ("Human beings should live in places where they are most productive, and megacities, where information, innovation, and opportunities congregate, would be the optimal choice." (footnote omitted)).

12. *See generally* ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS (2012) (noting that regional inequality comes from the coexistence of innovative people and markets rewarding innovation).

13. *See, e.g.*, Paul Krugman, *The New Economy and the Trump Rump*, N.Y. TIMES (Nov. 19, 2018), https://nyti.ms/2zfOAjZ [https://perma.cc/QR6K-UBK3] ("[R]estoring these regions' dynamism is much harder, because it means swimming against a powerful economic tide."); Porter, *supra* note 10 (quoting various experts to similar effect).

14. *See* discussion *infra* Part I.A.

construct an era of geographic convergence in the mid-twentieth century and deregulation in those same areas contributed to the rise of geographic inequality over the last generation.

Our argument that regulatory design can powerfully influence economic geography has profound implications for current legal and policy debates. To the extent that the legal literature has addressed the problem of geographic inequality, it has largely been in the context of municipal land use and zoning. Leading scholars in this area have helped shape what has become an elite consensus in favor of loosening land-use controls to enable people in left-behind places to move to economically thriving cities.[15] We argue, however, that such solutions are likely to deepen geographic inequality and its negative consequences and may come with their own unexamined problems. Policymakers should not view land-use reform as a panacea, especially if it is not coupled with a broader package of policies that address the sources and consequences of geographic inequality. Outside the legal academy, some economists emphasize place-based tax policies to improve conditions in left-behind places, and others briefly note that deregulation in antitrust and transportation might contribute to geographic inequality.[16] But strikingly, these scholars and analysts do not call for re-regulation or even incorporating geographic considerations into regulatory policy. Indeed, one set of these commentators proposes *further* deregulation.[17] By contrast, we argue that policymakers need to take much more seriously the fact that specific forms of regulation can alleviate geographic inequality, and deregulation can exacerbate it.

These arguments go against the dominant strain of thinking about geographic inequality.[18] On one conventional economic story, regional

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15. *See* discussion *infra* Part III.

16. *See* discussion *infra* Part II.

17. *See* discussion *infra* Part II.

18. This is not to say that we are the first or only ones to identify this relationship. A number of journalists and activists have offered compelling, well-written, popular arguments along these lines. *See, e.g.*, Phillip Longman, *Bloom and Bust*, WASH. MONTHLY, Nov.–Dec. 2015 [hereinafter Longman, *Bloom and Bust*], https://washingtonmonthly.com/magazine/novdec-2015/bloom-and-bust [https://perma.cc/MZ6K-QC9F]; Phillip Longman, *Why the Economic Fates of America's Cities Diverged*, ATLANTIC (Nov. 28, 2015), https://www.theatlantic.com/business/archive/2015/11/cities-economic-fates-diverge/417372 [https://perma.cc/4L6T-U2E6]; Sarah Miller & Austin Frerick, *Democrats Can Win Back Rural America, But First They Need to Understand What Bled It Dry*, BUZZFEED NEWS (Nov. 28, 2018, 4:22 PM), https://www.buzzfeednews.com/article/sarahmiller1/democrats-win-rural-america-but-what-broke-it [https://perma.cc/3DYT-7N3U].

inequality should be transient, with labor and capital moving seamlessly across the country to reach an equilibrium over time. For much of the mid-twentieth century, the data seemed to confirm this theory as different parts of the country converged economically. But in the last generation, the trend has been toward geographic divergence and increased inequality, pushing scholars to point to agglomeration and other theories to explain this dynamic. We discuss the conventional economic theory, the recent history of geographic convergence and inequality, and the many negative consequences of geographic inequality—economic, social, political, and national security—in Part I.

In Part II, we make the case that regulatory policy choices helped drive the era of geographic convergence and that deregulation has exacerbated geographic inequality. Transportation regulation, in sectors like railroads, airlines, trucking, and intercity buses, contributed to geographic convergence and equality through a combination of service obligations and pricing that incorporated cross-subsidies to keep rates to far-flung places affordable. Communications infrastructure—particularly in the "Ma Bell" era of AT&T's monopoly—was designed in a similar way. Deregulation (or, in the case of communications infrastructure, the failure to apply New Deal–style economic regulation to new technologies) undermined these systems, with predictable, though too often unrecognized, effects. Trade policymaking also once gave geographic considerations a central role. For generations, the constitutional design of trade policymaking considered local effects through the messy process of Congress determining tariff rates for products. With the rise of presidential authority over trade policy during the twentieth century, this

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Some have noted that various areas of deregulation might be a cause, but offer less by way of regulatory policy solutions. *See, e.g.*, Clara Hendrickson, *Why Democrats Don't Have a Plan to Save 'Left-Behind' America*, POLITICO (Oct. 23, 2019), https://politi.co/33Y9WQa [https://perma.cc/ZNB9-CXV5]; *see also* CLARA HENDRICKSON, MARK MURO & WILLIAM A. GALSTON, COUNTERING THE GEOGRAPHY OF DISCONTENT: STRATEGIES FOR LEFT-BEHIND PLACES (2018) [hereinafter HENDRICKSON ET AL., GEOGRAPHY OF DISCONTENT], https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Report_Countering-geography-of-discontent_Hendrickson-Muro-Galston.pdf [https://perma.cc/2DN8-5E9W]; Richard Florida, *The Growing Inequality Between America's Superstar Cities, and the Rest*, BLOOMBERG CITYLAB (Nov. 19, 2018, 12:15 PM), https://www.citylab.com/equity/2018/11/worsening-inequality-urban-rural-major-cities/576175 [https://perma.cc/HAH3-K4PD] (noting that "public policies like deregulation and lax antitrust enforcement have contributed to the growing gaps between places"). We seek to offer a scholarly account of these phenomena through exploring regulatory impacts in greater depth and detail than journalistic accounts can, while, at the same time, uniting the literatures across zoning and regulatory policy.

mechanism lost its bite, and the geographic impacts of liberalized international trade no longer receive meaningful consideration in the trade policymaking process. Finally, antitrust laws and anticonsolidation laws once helped keep many industries fragmented, distributing wealth and power throughout the country. With the rise of the consumer welfare standard in antitrust came the current era of corporate consolidation—and with it, the hollowing out of many parts of the country.

Part III considers possible responses to the problem of geographic inequality. We first argue against the dominant approaches to the problems of geographic mobility and inequality. Liberals of a libertarian persuasion (sometimes called "liberaltarians") suggest that it is possible to help people who are in left-behind places through policies that enable them to move to other, more economically vibrant, geographies. The central liberaltarian policy is to deregulate zoning rules and promote urban development. Although we embrace the call for greater density in many places, we observe in Part III.A that these policies do not address—nor are they intended to address—geographic inequality per se, and there are reasons to believe these policies would make geographic inequality worse. In particular, commentators in this vein rarely mention that their proposals would have significant political consequences that would continue to make government less representative. They also do not sufficiently grapple with the fact that their approach will likely exacerbate the economic and social problems facing people and communities left behind, particularly racial minorities and people with lower education levels and incomes. In addition, on its own terms, zoning liberalization has a variety of downsides that are undervalued. Notably, diminished public land-use regulation may cause homeowners to adopt private regulation in the form of suburban homeowners' associations—regulations that can have problematic implications for racial and economic fairness.

The emerging alternative to the liberaltarian response, from the center, is to offer a package of place-based policies, which we examine in Part III.B.[19] While these move closer to addressing geographic inequality, many of their leading proponents focus primarily on tax policy and offer no account of how deregulatory policies have contributed to the problem. Oddly, some even go so far as to suggest further deregulation as a solution. Even those in this camp who do

19. *Cf.* Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 985–94 (2010) (describing the history of place-based housing policy).

consider deregulation as part of the cause are conspicuously silent on regulatory reforms that could revive left-behind communities. We also briefly discuss industrial policy, an approach that seems far more promising than the centrist approach to place-based policies.

Our argument in Part III is emphatically not that zoning reforms or tax policies should *never* be adopted. There are significant opportunities to improve municipal land-use controls and to increase density in many places. However, zoning and tax policy reforms have significant and underappreciated costs and limitations that must be taken into account. At the same time, federal regulatory policy has been shockingly absent from the discussion despite its role in creating the problem.

Part IV thus offers a number of suggestions for how federal regulatory policy could address the problems of geographic inequality. First, we reconsider deregulation in the transportation and communications sectors and suggest a partial revival of the Progressive Era and New Deal regulatory approaches, which consciously accounted for geography. An alternative is direct public provision of these goods and services through a public option. We also discuss how a revival of anticonsolidation policies—most specifically, an approach to antitrust that goes beyond consumer welfare—could help alleviate geographic inequality. Second, we suggest that regulatory agencies assess the geographic impacts of their decisions. In trade policy, this would take the form of an assessment of the geographic impact that a potential trade agreement would have (to accompany existing sectoral assessments). More broadly, the president could issue an executive order—or Congress could pass a law—requiring that agencies consider the geographic impacts of their actions, including during notice-and-comment rulemaking. These changes would also bring collateral consequences for oversight and mitigation efforts.

A couple of caveats are worth noting. First, throughout this Article, we distinguish between a few different kinds of geographic inequality. One is the gap between superstar cities, places like San Francisco and New York, and mid-sized cities like St. Louis or Memphis.[20] The second is the gap between cities and rural areas, and in particular, the economic and social erosion in rural areas.[21] A third is the gap between neighborhoods within cities. All three kinds of geographic inequality have emerged as serious topics of conversation

20. *See supra* note 1.

21. *See* discussion *infra* Part I(B)(1).

in recent years. Generally speaking, the regulatory forces we describe operate only at the first two levels, albeit to differing degrees, and our focus is primarily on the first. For purposes of this Article, then, we are less concerned with inequality between neighborhoods or between urban centers and their suburbs; sub-regional, inter-local inequality implicates different dynamics, which we address in passing when relevant.

Second, we acknowledge and embrace the inevitability of economic changes over time. The geography of opportunity has never been static, nor should it be. But though the particular geographic configuration of opportunity might change over time, policymakers should realize that these shifts are not automatic or inevitable. They have been—and will continue to be—shaped by an array of legal and regulatory choices, and those choices have feedback effects on economics, politics, and society. The tenor and substance of the debate over solutions have been far too narrow and overly focused on deregulatory land use and place-based tax policies. The responses to geographic inequality should consider the full range of the ways that law and policy caused and can remedy this problem.

I. THE GEOGRAPHIC INEQUALITY PROBLEM

In this Part, we discuss the problem of geographic inequality. Despite conventional economic theory positing that geographic inequality will work itself out through the operation of market forces, geographic inequality has decreased and then again increased over the last century. After discussing the changing geography of inequality, we outline its associated—and significant—economic, social, and political downsides. This Part thus sets the stage for considering legal and policy responses to the problem of geographic inequality.

A. The Fall and Rise of Geographic Inequality

Under conventional neoclassical economic theory, regional inequality should be a "transitory phenomenon."[22] Labor will move to higher-wage regions, but capital will move to less expensive places,

22. *See, e.g.*, Yehua Dennis Wei, *Spatiality of Regional Inequality*, 61 APPLIED GEOGRAPHY 1, 2 (2015) (describing the conventional account of neoclassical convergence theories); *see also* Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. ECON. 65, 90–91 (1956) (modeling a system in which labor supply responds to wage differentials).

reducing regional inequality.[23] Economic success in a place tends to attract workers seeking employment but also leads to higher land values and congestion costs. As the cost of locating in successful places increases, businesses and industry will—on the margin—favor relocating to take advantage of lower costs elsewhere. Simultaneously, unemployed workers will leave places that are struggling economically and that do not have enough jobs. Not only will those workers satisfy labor demands elsewhere, their departure from struggling places will improve unemployment rates in the places they leave behind—because there are fewer workers—which will put upward pressure on wages. Thriving places attract workers from struggling ones while simultaneously pushing capital out into new areas as congestion costs increase. This elegant theory therefore predicts a trend toward regional economic convergence.

For a long time, regional inequality in the United States appeared to be on the decline, conforming to this neoclassical model.[24] Indeed, from at least the 1930s to the early 1980s, poorer places outperformed wealthier ones, creating convergence instead of divergence in regional economic performance.[25] For example, in 1940, Mississippians earned 27 percent of what Massachusetts residents made.[26] By 1979, as convergence in regions worked to reduce inequality, they made 70

23. Wei, *supra* note 22, at 2 ("[W]hile labor tends to move to more developed regions with higher wages, capital tends to move to labor-intensive and more profitable sectors in less developed regions. This condition eventually equalizes wages and the price of capital and reduces regional income differentials.").

24. *See, e.g.*, Robert J. Barro & Xavier Sala-i-Martin, *Convergence*, 100 J. POL. ECON. 223, 224 (1992) (finding convergence as poorer regions outperformed richer regions).

25. *See, e.g.*, *id.* at 245 ("Our empirical results document the existence of convergence in the sense that economies tend to grow faster in per capita terms when they are further below the steady-state position . . . . Over long samples, poor states tend to grow faster in per capita terms than rich states . . . ."); Ryan Nunn, Jana Parsons & Jay Shambaugh, *The Geography of Prosperity*, *in* PLACE-BASED POLICIES FOR SHARED ECONOMIC GROWTH 11, 16 (Jay Shambaugh & Ryan Nunn eds., 2018) [hereinafter PLACE-BASED POLICIES], https://www.hamiltonproject.org/assets/files/ES_THP_PBP_book_20190425.pdf [https://perma.cc/SD6T-DE3N] (charting convergence trends starting in 1929).

26. *Compare Per Capita Personal Income in Mississippi (MSPCPI)*, FED. RSRV. BANK ST. LOUIS, https://fred.stlouisfed.org/series/MSPCPI [https://perma.cc/4FG9-PBZE] (last updated Sept. 24, 2020) (recording $212 per capita personal income in 1940), *with Per Capita Personal Income in Massachusetts (MAPCPI)*, FED. RSRV. BANK ST. LOUIS, https://fred.stlouisfed.org/series/MAPCPI [https://perma.cc/DZ7A-TKMK] (last updated Sept. 24, 2020) (recording $793 per capita of personal income in 1940).

percent of their East Coast counterparts' earnings.[27] In the 1960s, during the period of convergence, the twenty-five richest metropolitan areas included many that would seem surprising today, such as "Rockford, Illinois; Milwaukee, Wisconsin; Ann Arbor, Michigan; Des Moines, Iowa; and Cleveland, Ohio."[28] Movement of both capital and labor between regions meant that the gap between the richest and poorest regions consistently declined over time.[29]

That has changed. Cities with high concentrations of high-tech and other skilled workers, in particular, have far outperformed the rest of the country. For example, in 1980, the per capita income in Washington, D.C., was 29 percent higher than for the country as a whole.[30] In 2013, it was 68 percent higher.[31] San Francisco shows a similar trend, with per capita income rising from 50 percent above the national average to 88 percent above over the same period.[32] Real GDP per worker has also diverged by region. In 1980, GDP per worker in coastal states and in the "eastern . . . and the western heartland" were clustered together, but since then, the coastal states have pulled away.[33]

Another measure of this rising inequality is real estate values. According to Professor Richard Florida, out of the eleven thousand zip codes in America for which real estate data is readily available, only 160 have median home values over $1 million and 80 percent of those

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27. *Compare Per Capita Personal Income in Mississippi (MSPCPI)*, *supra* note 26 (recording $6,633 per capita personal income in 1979), *with Per Capita Personal Income in Massachusetts (MAPCPI)*, *supra* note 26 (recording $9,481 per capita personal income in 1979).

28. *See* Longman, *Bloom and Bust*, *supra* note 18.

29. *Cf.* Benjamin Austin, Edward Glaeser & Lawrence Summers, *Jobs for the Heartland: Place-Based Policies in 21st-Century America*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2018, at 151, 156 (noting that regional inequality has historically been tolerated in the United States due to the consistent corrective flow of labor to rich areas and the flow of capital to low-wage areas).

30. Longman, *Bloom and Bust*, *supra* note 18.

31. *Id.*

32. *See id.*

33. *See* Austin et al., *supra* note 29, at 170. Growth by region has also differed. *See* ECON. INNOVATION GRP., FROM GREAT RECESSION TO GREAT RESHUFFLING: CHARTING A DECADE OF CHANGE ACROSS AMERICAN COMMUNITIES 7 (2018) [hereinafter DISTRESSED COMMUNITIES INDEX], https://eig.org/wp-content/uploads/2018/10/2018-DCI-1-Column_101318_WEBV5.pdf [https://perma.cc/2WES-QHAK] ("Utah, however, stood out for both having the highest share of any state's population living in a prosperous zip code . . . . Louisiana, New Mexico, and West Virginia . . . joined Alabama, Arkansas, and Mississippi to bring the number of states with approximately one-third or more of residents living in distressed communities to six.").

were in and around New York, Los Angeles, and San Francisco.[34] In a particularly striking visualization, Florida shows how many houses one could buy in different markets for the median price of a SoHo apartment in New York City: twenty in Nashville, thirty in Cleveland, and thirty-eight in Memphis.[35]

In the face of rising spatial inequality, economists have pointed to economic forces that the neoclassical model ignored: agglomeration and globalization. The neoclassical model anticipates that congestion and higher land prices will eventually encourage capital to relocate to less expensive places. Agglomeration, however, creates an important countervailing force. Colocating businesses can lead to important synergies and other benefits.[36] Silicon Valley's specialization in technology is the most obvious example, but others—like fashion or banking in New York and health care in Boston—readily come to mind. The concentration of skilled workers in these places means that companies have a ready labor supply. Moreover, workers have options, allowing them to maximize the value of their skills. Importantly, in the current economy, the benefits of agglomeration appear to be much stronger for skilled than for unskilled jobs.[37] As a result, places with a skilled workforce—like New York or San Francisco—become stickier for capital investments. In other words, it is much more difficult for businesses and industries that rely on skilled labor to relocate elsewhere to take advantage of lower costs. Economies with a large percentage of highly skilled jobs therefore become more resistant to the traditional convergence theory because capital does not relocate as easily.

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34. Florida, *supra* note 1.

35. *Id.*

36. *See generally* EDWARD GLAESER, TRIUMPH OF THE CITY (2011) (describing synergies and other benefits); MORETTI, *supra* note 12 (same); Vicki Been, *City NIMBYS*, 33 J. LAND USE & ENV'T L. 217, 229–30 (2018) (describing agglomeration literature).

37. *See, e.g.*, Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 78 (2017) ("Through most of the twentieth century, the returns net of housing costs to migrating from a low-income place to a high-income place were similar for low- and high-skill workers. . . . For these low-skill workers, rising house prices have eroded the gains from migration."). This was not always the case. The agglomeration benefits of automobile manufacturing in Detroit appeared to generate benefits that were more widely shared for a significant part of the twentieth century. *See, e.g.*, Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223, 230 (2019) (describing agglomeration in the manufacturing sector prior to de-agglomeration in the 1970s).

A second explanation for why convergence has not continued apace is globalization.[38] Due to the globalization of supply chains, convergence now occurs internationally more than intranationally. Where capital investments do not require a skilled workforce, they will tend to locate in the developing world instead of the American heartland, which is still relatively expensive compared to places like the Philippines or Mexico.[39] That may produce some measure of global convergence, but it does little to address geographic inequality at the national level.

Since the COVID-19 pandemic began, some commentators have observed that accelerated adoption of videoconferencing and work-from-home policies might counter the agglomeration trend and facilitate convergence.[40] If people can work from home effectively, they need not live in superstar cities. They could move to suburbs, exurbs, or even rural areas anywhere in the country. Though it is too early to tell whether the pandemic will catalyze a sustained movement toward remote work that is sufficient to counteract the forces of agglomeration, the extent to which this potential can be realized may itself likely depend upon regulatory choices, as we describe below.

B. Why Geographic Inequality Matters

Why is geographic inequality important? From an abstract perspective, it is not obvious why it matters whether economic activity is increasingly clustered in a few areas. But there are a number of drawbacks to geographic inequality, particularly in an economic, social, and political system whose—at least recent—baseline was relative convergence and equality. Widening geographic inequality comes with economic costs to individuals, communities, and the country. It brings a variety of social consequences—most notably in personal and public health—related to the breakdown of communities that are left behind. It poses serious challenges for maintaining a

38. *See, e.g.*, Wei, *supra* note 22, at 3–5 (discussing globalization's impact on regional inequality); HENDRICKSON ET AL., GEOGRAPHY OF DISCONTENT, *supra* note 18, at 4 (identifying globalization as a cause of slowing convergence).

39. *See* BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., CHARTING INTERNATIONAL LABOR COMPARISONS 31 (2011), https://www.bls.gov/fls/chartbook/chartbook2011.pdf [https://perma.cc/ZH3Y-BGJK] (comparing the labor costs for manufacturing across a range of countries).

40. Sam Lessin, *The Long-Term Implications of Extended Work from Home*, INFORMATION (Apr. 30, 2020, 10:01 AM), https://www.theinformation.com/articles/the-long-term-implications-of-extended-work-from-home [https://perma.cc/JA2D-UUSQ].

representative government under our constitutional system. And it places the country at greater risk in the event of wars, emergencies, or crises.

1. *Socioeconomic Consequences*. Spatial inequality, and the increasing inaccessibility of thriving places to unskilled workers, has serious social and economic consequences across a variety of dimensions—from job availability to personal health. One recent comprehensive study calculates what it labels a "Vitality Index" for different counties.[41] Based on a combination of median household income, poverty rate, life expectancy, prime-age employment-to-population ratio, housing vacancy, and the unemployment rate, the measure is intended to provide a kind of longitudinal snapshot of the "economic and social well-being in a county."[42] Using data going back to 1980, the study finds that: "On critical measures such as median household income, poverty, unemployment rates, and life expectancy, there exists a yawning gap between the best- and worst-performing communities."[43] Moreover, in the aggregate across the United States, "recent years have seen no convergence between poorer and richer counties."[44]

A Brookings Institute report finds that "unemployment rates are twice as high in the worst-performing counties."[45] In the recovery from the Great Recession of 2007, new business formation has also been concentrated in relatively few places. According to one study, the top quintile of zip codes has had more gains than the bottom 80 percent combined.[46] The spatial mismatch between workers and jobs,

41. *See* Nunn et al., *supra* note 25, at 13.

42. *Id.* at 14.

43. Roger C. Altman & Robert E. Rubin, *Foreword*, *in* PLACE-BASED POLICIES, *supra* note 25, at 1.

44. Nunn et al., *supra* note 25, at 18. The report also notes that "it is newsworthy that struggling places have made unusually little headway in catching up with prospering places over the past few decades." *Id.* at 16.

45. *Id.* at 12.

46. *See* DISTRESSED COMMUNITIES INDEX, *supra* note 33, at 16–17. As the Economic Innovation Group emphasized in their 2018 Report:

> To underscore the geographic unevenness of new business formation over the recovery, consider that the country itself contained only 52,800 more business establishments in 2016 than it did in 2007, the product of the most dismal period of net business formation on record. Five counties alone surpassed that, with a combined 55,500 more businesses in 2016 than before the recession: Los Angeles, CA; Brooklyn, NY; Harris, TX (Houston); Queens, NY; and Miami-Dade, FL. Outside of those five

according to one recent study, has reduced GDP by $1.3 trillion, or over $8,000 per worker.[47] Other studies pin the economic cost of the misallocation of labor to 2 percent of GDP.[48]

Geographic inequality is also tied to racial inequality. Compared to the broader population, as Professors Bradley Hardy, Trevon Logan, and John Parman note, "Black households are far more likely to live in the South or in urban areas in the Midwest."[49] The geographic distribution of the Black population also remains linked to the pre-Civil War distribution of the Black population.[50] This geographic distribution has important consequences. First, because many racist policies—from slavery to Jim Crow and beyond—had a geographic nexus and significant economic consequences, geographic inequality and racial inequality have long been connected. Moreover, the fact that the Black population is disproportionately concentrated in specific geographies means that economic shocks to these regions will have a disproportionate impact on the Black population. Researchers have thus observed that the maps of the Black population, poverty, and intergenerational economic mobility overlap to a troubling degree.[51]

In principle, a spatial mismatch between workers and jobs can be remedied in two ways, which are not mutually exclusive: move workers to where the jobs are or move jobs to where the workers are. The liberaltarian consensus champions regulatory changes—in particular, loosening of land-use regulations—that would facilitate the former.[52]

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counties, the country still contained fewer active business establishments in 2016 than it did in 2007.

Id. at 18.

47. *See* Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1, 26 & n.28 (2019) ("[C]hanging the housing supply regulation only in New York, San Jose, and San Francisco to that in the median US City . . . . The net effect is that US GDP in 2009 would be 8.9% higher under this counterfactual . . . ."); *see also Urban Land: Space and the City*, ECONOMIST (Apr. 4, 2015), https://www.economist.com/leaders/2015/04/04/space-and-the-city [https://perma.cc/2W82-8SFR] ("Lifting all the barriers to urban growth in America could raise the country's GDP by between 6.5% and 13.5%, or by about $1 trillion-2 trillion.").

48. *See* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 25 (2018); *see also* Been, *supra* note 36, at 230–31 (summarizing studies).

49. Bradley L. Hardy, Trevon D. Logan & John Parman, *The Historical Role of Race and Policy for Regional Inequality*, *in* PLACE-BASED POLICIES, *supra* note 25, at 43–44.

50. *Id.*

51. *See id.* at 45.

52. *See, e.g.*, HENDRICKSON ET AL., GEOGRAPHY OF DISCONTENT, *supra* note 18, at 28 ("Policies that relax zoning restrictions will enable the construction of new housing units and bring down housing costs."); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 770

As we discuss in more detail below, these policies run the risk of exacerbating problems in left-behind places.

Classical theory predicts that wages in struggling areas will rise as workers migrate to booming areas.[53] However, the *composition* of those workers matters for regional prosperity. Thriving places are not equally open to everyone. A disproportionate number of highly skilled workers move to thriving places, which results in a "brain drain" from struggling places. According to a recent report of the Joint Economic Committee:

> [H]ighly-educated adults flowing to dynamic states with major metropolitan areas are, to a significant extent, leaving behind more rural and post-industrial states. This geographic sorting of the nation's most-educated citizens may be among the factors driving economic stagnation—and declining social capital—in certain areas of the country.[54]

This effect reinforces spatial inequality, because thriving places add to their educated workforce at the expense of struggling ones. The segregation by education is striking. As of 2018, nearly half of all residents in thriving places had at least a bachelor's degree; in struggling places that number is closer to 15 percent.[55] An educated population also produces positive externalities, whether in economic benefits or in social capital.[56]

Additionally, economic stagnation and brain drain contribute to an erosion of the tax base in struggling places. Public spending to address problems associated with poverty also tends to be higher. This goes beyond the typical unemployment, disability, and other social

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n.129 (collecting sources). *But see* Rodríguez-Pose & Storper, *supra* note 37, at 225 (recognizing the limits of a deregulatory agenda).

53. *See* discussion *supra* Part I.A.

54. JOINT ECON. COMM. – REPUBLICANS, 116TH CONG., LOSING OUR MINDS: BRAIN DRAIN ACROSS THE UNITED STATES 2–3 (2019), https://www.jec.senate.gov/public/_cache/files/ff4c34b7-c8b4-477f-887a-e95988e2a2d9/5-19-brain-drain-report.pdf [https://perma.cc/3QQ6-HDKX].

55. DISTRESSED COMMUNITIES INDEX, *supra* note 33, at 23. The index characterizes areas as prosperous, comfortable, mid-tier, at risk, and distressed, based on a variety of factors. *Id.* at 3. This data draws on the prosperous and distressed categories.

56. *See* Nunn et al., *supra* note 25, at 29 ("College attainment directly benefits graduates, but it also generates positive spillovers that likely improve county vitality."); Enrico Moretti, *Human Capital Externalities in Cities*, *in* 4 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 2243, 2244, 2256, 2287 (J. Vernon Henderson & Jacques-François Thisse eds., 2004) (observing that productivity and income increases with each extra year of education, and crime decreases as high school graduation rates go up).

programs, many of which are at least partly funded intergovernmentally. High-poverty cities spend much more per capita on public functions like schools, police, and health services.[57] The combination of a smaller tax base and higher expenses can result in dramatically higher property taxes, making it very expensive to live in a poor place.[58] Detroit, famously, has among the highest property tax rates in the country.[59]

These problems are self-reinforcing, and they have serious knock-on effects. As Professor Raj Chetty and his coauthors document, intergenerational mobility varies dramatically across areas within the United States.[60] Upward mobility is very high in San Jose and San Francisco, but very low in Milwaukee.[61] Measures of social capital and K–12 school quality, among other factors, are strongly associated with intergenerational mobility.[62] Because brain drain and tax base erosion impair social capital and school funding, they very likely hinder upward mobility for children who grow up in left-behind areas.[63]

As we have already noted, deteriorating conditions can lead to personal and health problems for those who live in left-behind places, including cardiovascular disease and opioid addiction. Professors Anne Case and Angus Deaton show that "mortality and morbidity among white non-Hispanic Americans in midlife" have been increasing in recent years.[64] They refer to drug overdoses, suicides, and alcohol-

57. *See, e.g.*, Janet Rothenberg Pack, *Poverty and Urban Public Expenditures*, 35 URB. STUD. 1995, 1997–98, 2004 (1998); *cf.* Austin et al., *supra* note 29, at 192 (listing externalities of joblessness).

58. *See* Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1831–32 (2017) (noting that, where schools are funded locally, people are discouraged from moving from rich to poor areas because they must then assume the burden of educating the poor).

59. *See, e.g.*, Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 266 (2018) ("Detroit residents endure the highest property tax rates in Michigan and some of the highest in the country.").

60. Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1556 (2014).

61. *See id.* at 1594 tbl.III.

62. *See id.* at 1557–58.

63. *Cf.* Michelle Wilde Anderson, *Losing the War of Attrition: Mobility, Chronic Decline, and Infrastructure*, 127 YALE L.J. F. 522, 524 (2017) ("[C]hronic decline itself inhibits mobility.").

64. Anne Case & Angus Deaton, *Mortality and Morbidity in the 21st Century*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2017, at 397, 397 [hereinafter Case & Deaton, *Mortality and Morbidity*]; Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. 15,078, 15,078 (2015).

related liver mortality as "deaths of despair."[65] The despair that leads to these deaths comes not only from economic challenges but from "how people perceive meaning and satisfaction in their lives," including factors like "distress, and the failure of life to turn out as expected."[66] Case and Deaton's mapping of the geography of mortality and morbidity suggests that superstar cities may be less affected by these dynamics than even their surrounding areas, and these cities show significant regional disparities when it comes to deaths of despair.[67]

2. *Political Challenges.* Geographic inequality also raises significant political challenges. In a representative democracy, government should be representative of the people. But given the design of the U.S. Constitution, increasing geographic inequality undermines the representativeness of the federal government. One obvious example is the Senate. The two senators from California, for example, represent some 40 million people; their counterparts from Wyoming, fewer than six hundred thousand.[68] According to projections based on Census data, by 2040, 50 percent of the U.S. population will live in eight states.[69] In other words, half the country will be represented by sixteen senators, and the other half by eighty-four. The Electoral College's design has a similar consequence. Democrats have won the popular vote in seven of the last eight elections, yet have only held the presidency for five out of eight terms.[70] These institutional biases filter through the Constitution's system of checks and balances as well. The combined effect, for example, of presidential nomination and senatorial confirmation of

65. Case & Deaton, *Mortality and Morbidity*, *supra* note 64, at 398.

66. *Id.* at 433–34.

67. *See id.* at 409; *see also* ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 85–86 (2020) (noting significant regional differences in the self-reporting of feelings of pain).

68. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019 (NST-EST2019-01)*, U.S. CENSUS BUREAU (Dec. 2019), https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx [https://perma.cc/W956-CR96].

69. Philip Bump, *In About 20 Years, Half the Population Will Live in Eight States*, WASH. POST (July 12, 2018, 5:17 PM), https://www.washingtonpost.com/news/politics/wp/2018/07/12/in-about-20-years-half-the-population-will-live-in-eight-states [https://perma.cc/9YHZ-YKYZ].

70. *See* Elaine Kamarck & John Hudak, *How To Get Rid of The Electoral College*, BROOKINGS: FIXGOV (Dec. 9, 2020), https://www.brookings.edu/blog/fixgov/2020/12/09/how-to-get-rid-of-the-electoral-college [https://perma.cc/7VHN-QCWD].

Supreme Court Justices means that five Justices in the Court's conservative majority were nominated by presidents who were first elected without a majority of public support, and four were confirmed by a Senate majority that represents a minority of the population.[71] In each of the branches of government, geographic concentration in superstar cities will distort the representativeness of the federal government even further.

Of course, from a purely theoretical perspective, the politics of geographic inequality create an anomaly. The structure of the Senate, tied to the states, overrepresents rural areas. In theory, these areas' disproportionate representation would give them an ability to promote policies that support rural communities. There are at least two explanations for why the theory has not borne out and why, instead, geographic inequality has widened despite the disproportionate power of representatives from these areas. The first is that representatives from rural areas got caught up in the fervor for deregulation in the 1970s and 1980s, accepted the claims of experts, and had their arms twisted by colleagues. There is some evidence for this explanation. In the 1970s, proponents of airline deregulation assured members of Congress from rural states that service to smaller communities would not deteriorate under deregulation.[72] Many rural-state members of Congress went on to vote for deregulation in 1978.[73] When service to smaller communities did in fact suffer, at least some of the lawmakers had second thoughts. In 1985, Senator Jim Sasser of Tennessee, who had voted for deregulation, noted airline deregulation's adverse economic impact on his state and suggested that deregulation had fallen out of favor "in the Congress as House members and Senators see the air service into their [s]tates declining precipitously."[74] The next year, Senator Robert Byrd of West Virginia made the point emphatically:

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71. Adam Cole, *The Supreme Court Is About to Hit an Undemocratic Milestone*, VOX (Sept. 28, 2020, 3:00 AM), https://www.vox.com/21456620/supreme-court-scotus-undemocratic-milestone-minority-rule [https://perma.cc/FUF5-KASR].

72. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 329–34 (1982) (documenting ways in which skeptical members of Congress were assured that introducing competition into the airline industry would not result in reduced service to smaller communities).

73. *See* 124 CONG. REC. 10,698 (Apr. 19, 1978) (Senate); 124 CONG. REC. 30,708 (Sept. 21, 1978) (House).

74. *The Economic Impact of Federal Airline Transportation Policies on East Tennessee: Hearing Before the S. Comm. on the Budget*, 99th Cong. 44 (1985) (statement of Sen. Jim Sasser).

> [T]his is one Senator who regrets that he voted for airline deregulation. It has penalized States like West Virginia, where many of the airlines pulled out quickly following deregulation and the prices zoomed into the stratosphere—doubled, tripled and, in some instances, quadrupled. So we have poorer air service and much more costly air service than we in West Virginia had prior to deregulation. I admit my error; I confess my unwisdom, and I am truly sorry for having voted for deregulation.
>
> I would welcome the opportunity to vote for reregulation because we people in the rural States are paying the bill . . . .
>
> . . . I hope I shall have the opportunity to cast that [vote] one day; if that opportunity comes, I shall do it with a vengeance . . . .
>
> . . . .
>
> . . . I am afraid I shall continue to suffer until I have the opportunity to cast that vote and, at last, ease my conscience.[75]

In other words, some members of Congress appear not to have fully appreciated the consequences of the actions they were taking.

The second explanation is that elected representatives in recent decades have done a poor job of representing the majority of their constituents. In one study after another, political scientists show that members of Congress are more responsive to corporate interest groups and the wealthy than they are to ordinary voters.[76] The wealthy vote and volunteer more often, and their interest groups lobby members of Congress more often.[77] The wealthy are also more likely to serve in elected office.[78] It is no surprise, then, that political scientists have shown that ordinary people have effectively no say over public policy outcomes.[79] On this explanation, capture explains how policies exacerbated geographic inequality, even in spite of the skewed

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75. 132 CONG. REC. 5107 (Mar. 18, 1986) (statement of Sen. Robert Byrd).

76. *See* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1455–66 (2016) (providing an overview of this literature).

77. *See, e.g.*, KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 6–7 (2012) ("[T]he average amount of political activity rises steeply across five quintiles of socio-economic status (SES).").

78. *See* NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 4–7 (2013).

79. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY 233–68 (2d ed. 2016) (showing that policy outcomes are responsive to the wealthy, rather than ordinary people); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA ch. 3 (2012) (same).

structure of the Senate. Of course, these two explanations are not mutually exclusive, and they both underscore the importance of seeing how policy choices shape geographic inequality.

3. *National Security and Resilience Concerns.* When military installations, industrial activity, or economic sectors are concentrated in a small number of locations, an attack by a foreign adversary or a natural disaster can have dire consequences. Geographic concentration has therefore long been understood to be a threat to national security and to domestic resilience. At the beginning of the Cold War, government officials described the "need for industrial dispersal," given the dangers of nuclear war.[80] Experts argued that cities and industry should be dispersed widely across geography to make it harder for an enemy to attack all of the major population centers and industrial areas,[81] and because "space" was the only "known defense against the atomic bomb."[82] Notably, they also observed that distributing industrial activity across the country would help low-income places develop economically.[83] This understanding was even codified into law: the Defense Production Act included a statement of policy—still on the books—that "the United States Government should encourage the geographic dispersal of industrial facilities in the United States to discourage the concentration of such productive facilities within limited geographic areas that are vulnerable to attack by an enemy of the United States."[84] Today, military strategists continue to emphasize the importance of "distributing" bases and aircraft around the country and adopting territorial fiber cables, given

80. STAFF OF JOINT COMM. ON THE ECON. REPORT, 82D CONG., THE NEED FOR INDUSTRIAL DISPERSAL 1 (Comm. Print 1951).

81. *See* Donald & Astrid Monson, *A Program for Urban Dispersal*, 7 BULL. ATOMIC SCIENTISTS 244, 244 (1951) ("[S]pace is our greatest protection in the danger which confronts us."); *see also* Tracy B. Augur, *The Dispersal of Cities as a Defense Measure*, 4 BULL. ATOMIC SCIENTISTS 131, 131–32 (1948) ("Our contemporary urban structure presents an inviting target for the machines of modern war because it is dominated by a few dozen key centers."); Ralph E. Lapp, *Industrial Dispersion in the United States*, 7 BULL. ATOMIC SCIENTISTS 256, 257 (1951) ("[O]ur industrial facilities are too strongly concentrated within about fifty prime target areas.").

82. STAFF OF JOINT COMM., *supra* note 80, at 1.

83. *Id.* at 5.

84. 50 U.S.C. § 4502(b)(6) (2018).

the dangers from long-range ballistic missile attacks and attacks on communication satellites.[85]

Geographic dispersal also has great benefits for resilience even outside of a full-on war. As one Congressional Research Service report puts it, "When infrastructure is physically concentrated in a limited geographic area it may be particularly vulnerable to geographic hazards such as natural disasters, epidemics, and certain kinds of terrorist attacks."[86] For example, an attack on the electrical grid or an extreme weather event hitting New York City could wreak havoc on the global financial system.[87] Concentration in the tech sector in and around San Francisco means that supply chains for critical technologies are vulnerable to similar threats.[88] To the extent that the future will be defined by climate shocks, pandemics, and cyberattacks,[89] geographic dispersal may help prevent entire sectors from disruption if a single city or region is hit by crisis.

II. DEREGULATION AND GEOGRAPHIC INEQUALITY

In this Part, we argue that deregulatory policies have been a cause of geographic inequality. Throughout American history, but particularly in the mid-twentieth century era of geographic convergence, a variety of regulatory policies helped mitigate problems of geographic inequality. Some areas, such as transportation regulation and communications law, were designed with spatial equality in mind. The regulatory systems for these network and infrastructure industries used cross-subsidies to ensure geographic coverage and access to important services. We consider them in Sections A and B. In other

85. MIRANDA PRIEBE, ALAN J. VICK, JACOB L. HEIM & MEAGAN L. SMITH, RAND CORP., DISTRIBUTED OPERATIONS IN A CONTESTED ENVIRONMENT 9, 15, 23–24, (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2900/RR2959/RAND_RR2959.pdf [https://perma.cc/4VTB-8ZRX].

86. PAUL W. PARFOMAK, CONG. RSCH. SERV., RL33206, VULNERABILITY OF CONCENTRATED CRITICAL INFRASTRUCTURE: BACKGROUND AND POLICY OPTIONS 1 (2008).

87. *See, e.g.*, IAN GOLDIN & MIKE MARIATHASAN, THE BUTTERFLY DEFECT: HOW GLOBALIZATION CREATES SYSTEMIC RISKS, AND WHAT TO DO ABOUT IT 213 (2014) ("A group of banks that are co-located in a major financial district, such as Wall Street or Canary Wharf in London, poses a systemic risk if they were to be collectively affected by a major risk event, even if no one institution alone would be systemically significant.").

88. *Geographic Concentration Risks in the High-Tech Supply Chain*, SUPPLYCHAINBRAIN (Mar. 12, 2012), https://www.supplychainbrain.com/articles/12709-geographic-concentration-risks-in-the-high-tech-supply-chain [https://perma.cc/B77Z-FYZW].

89. Ganesh Sitaraman, *A Grand Strategy of Resilience*, FOR. AFFS., Sept.–Oct. 2020, at 165, 165.

areas, like trade law and policy, the policymaking process enabled policymakers to account for geographic impacts. Over time, as Section C describes, reforms to those procedures left a policymaking process that is less attentive to geographic impacts. In still other areas, like antitrust law and corporate consolidation policies, regulatory choices were understood to have the effect of ensuring vibrant local communities spread across a wide geography. In Section D, we show how this sector prioritized the macroeconomic, community, and societal benefits of a more geographically equal society over greater corporate efficiency.

A. Transportation Regulation

The deregulation of U.S. transportation industries in the 1970s and 1980s is widely hailed as a major triumph of Chicago School economics.[90] Federal regulations governing rates and entry in the railroad, airline, and motor carrier—trucking and intercity bus—industries were largely swept away in the Carter and Reagan administrations.[91] In the Chicago view, such regulations were needless and counterproductive—poor substitutes for the disciplining power of competition.[92] Famed economist-*cum*-deregulator Alfred Kahn fought tirelessly to introduce competition into the U.S transportation industries in pursuit of marginal cost pricing.[93] Under standard economic theory, marginal cost pricing is consistent with efficient resource allocation.[94]

In long-distance transportation industries, marginal cost pricing means higher prices for more remote locations relative to more densely populated areas—almost by definition. Transportation providers can

90. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 222–23, 293–99 (1984) ("Even in 1970, few people realized that time and circumstance were now on the side of the Chicagoans. But over the next dozen years, the Chicago school came to exercise great influence on public policy in America and on regulatory policy in particular.").

91. *See* W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & DAVID E.M. SAPPINGTON, ECONOMICS OF REGULATION AND ANTITRUST 628–29 (surface transportation), 643–44 (airlines) (5th ed. 2018).

92. *See* MCCRAW, *supra* note 90, at 223 (listing the following as arguments that appealed to Chicagoans: "that regulation and competition are often at odds; that government officials often misunderstand the economic consequences of their decisions; and that market incentives are usually preferable to command and control regulations").

93. *E.g.*, ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 63–86 (1988); MCCRAW, *supra* note 90, at 224, 270–71, 293–99.

94. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 311–13 (7th ed. 2015).

exploit greater economies of scale along high-volume routes, resulting in lower unit cost structures on these routes. By contrast, in low-density areas that generate lower overall demand for transportation services, cost structures (and hence prices) are higher—if, indeed, service can be sustained at all by unregulated private providers. Consequently, marginal cost pricing in long-distance transportation services reinforces the agglomeration of economic activity, because those services are a key input into many types of investment-supported activities. For example, under marginal cost pricing, businesses located in more populous areas benefit from lower transportation costs in shipping goods to distant markets relative to their peers in less dense areas.[95]

Key aspects of federal transportation regulation—prior to its evisceration—had the purpose and effect of *reducing or eliminating* such pricing and service differentials. The basic design mechanism was internal cross-subsidization: using profits from high-volume routes to subsidize service elsewhere.[96] For such cross-subsidies to work, the law had to restrict entry into these industries in order to prevent "cream skimming" entry along lower-cost, high-volume routes.[97] With entry restriction in place, prices on these high-volume routes could be held above marginal cost, resulting in profits that could be redeployed—under regulatory supervision—to reduce prices on other routes.

Such cross-subsidies were a key feature of U.S. federal railroad, motor carrier, and airline regulation for much of the twentieth century. In 1906, Congress empowered the Interstate Commerce Commission ("ICC") to regulate railroad rates.[98] Congress augmented these powers in 1920 by giving the ICC control over entry into and exit from rail service.[99] The ICC used these powers to cross-subsidize rail service in more remote areas, resulting in prices below cost in those areas.[100]

95. Also, less dense places are not as able to sustain multiple competing carriers, making monopoly or oligopoly pricing more prevalent.

96. *See* W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 531 (4th ed. 2005).

97. *See id.* at 533.

98. Hepburn Act, ch. 3591, 34 Stat. 584, 589 (1906).

99. Transportation Act, 1920 (Esch-Cummins Act), ch. 91, sec. 402, § 1, 41 Stat. 456, 477–78.

100. *See* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 25 (1983) ("[C]arriers were often required to continue unprofitable services . . . ."); GEORGE W. HILTON, THE TRANSPORTATION ACT OF 1958: A DECADE OF EXPERIENCE 136 (1969) (describing rate averaging in passenger rail service). The Interstate Commerce Act of 1887, a milestone in the history of the U.S. administrative state, prohibited railroads from charging higher rates for shorter

Motor carrier regulation followed a similar model. With the enactment of the Motor Carrier Act of 1935, the trucking and intercity bus industries came under the ICC's regulatory purview.[101] The ICC regulated rates and entry in the motor carrier industry and required motor carriers to serve off-line points.[102] If a carrier failed to meet these service obligations, the ICC would suspend its authority to operate.[103] To implement cross-subsidies, the ICC awarded profitable routes to offset losses on money-losing routes.[104] As for air travel, the Civil Aeronautics Act of 1938 applied the same model to the nascent airline industry.[105] The Civil Aeronautics Board ("CAB") regulated entry and rates, and it implemented an "equal fares for equal miles" rate structure.[106] Regulators allocated routes with a view toward offsetting unprofitable routes with profitable ones.[107]

In a remarkable 1971 article analyzing this mode of regulation, then-Professor Richard Posner noted that "it would appear that the primary effect of such a program is . . . to extend the service to classes of customers and geographical areas that might not be served in a free market."[108] He went on to suggest that this regulatory model may be motivated in part by "concern with geographic concentration of population and economic activity. A program of internal subsidies that denies the cost advantages of proximity and density, as is often the case, encourages greater geographic dispersion."[109]

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distances than for longer ones over the same line, "the shorter being included within the longer distance." Interstate Commerce Act of 1887, ch. 104, § 4, 24 Stat. 379, 380. Though not involving cross-subsidies, this provision was designed to benefit intermediate points—typically smaller communities. *See* Comment, *The Interstate Commerce Commission and the Long-and-Short-Haul Problem*, 45 YALE L.J. 1426, 1428 (1936) ("On behalf of the intermediate points, which usually are smaller communities, the argument is made that long-and-short-haul discriminations give undue preference to the larger terminal points and tend to stifle economic activity at other points.").

101. Motor Carrier Act, 1935, ch. 498, § 204, 49 Stat. 543, 546.

102. *See* PAUL STEPHEN DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 28–29 (1989) [hereinafter DEMPSEY, SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION].

103. *See id.*

104. *See id.*

105. *See* Civil Aeronautics Act of 1938, ch. 601, §§ 401, 404(b), 52 Stat. 973, 987–91, 993.

106. BREYER, *supra* note 72, at 212.

107. *Id.* at 213.

108. Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 40 (1971).

109. *Id.*

To the extent that this regulatory model promotes geographic dispersion, its repeal should do the opposite—promote geographic concentration. Congress in 1958 relaxed exit restrictions in passenger, as opposed to freight, rail service, allowing railways greater discretion in discontinuing service along unprofitable routes.[110] The legislation also gave the ICC the power to overturn decisions of state public utility commissions ("PUCs"), if those commissions blocked rail companies' attempts to discontinue service.[111] In other words, Congress allowed the ICC to accelerate the elimination of passenger service over the objections of state PUCs. A flurry of additional legislation between 1973 and 1980 replicated for freight rail service what had already been done on the passenger side—namely, it made exit much easier.[112] Deregulation prompted railways to discontinue service along many routes and to altogether abandon many rail lines.[113] The results were devastating for many rural and smaller communities whose economic well-being depended on rail service.[114]

Deregulation of the motor carrier industry followed the same script and had the same effects. Congress enacted legislation in 1980 that sharply curtailed the ICC's authority to regulate entry, exit, and rates in the trucking industry.[115] Although continued state regulation of trucking blunted the impact of federal deregulation, there is some evidence that some small communities lost service as a result and that pricing differentials between small and large communities widened.[116]

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110. *See* Transportation Act of 1958, Pub. L. No. 85-625, sec. 5, § 13a(1), 72 Stat. 568, 571.

111. *Id.* at sec. 5, § 13a(2), 72 Stat. at 572.

112. *See, e.g.*, Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985; Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; FRANK J. DOOLEY & WILLIAM E. THOMS, RAILROAD LAW A DECADE AFTER DEREGULATION 18, 45–46 (1994) (describing how the legislation "eased the abandonment process").

113. *See* DOOLEY & THOMS, *supra* note 112, at 46 ("Under ICC review, the number of passenger trains fell by 60 percent between 1958 and 1970 . . . ."); *id.* at 18 ("From 1970 to 1988, the ICC granted certificates of abandonment for 39,993 miles of road . . . .").

114. *See* Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445, 451 (1987) [hereinafter Dempsey, *Dark Side of Deregulation*] ("The impact of a rail abandonment upon a community was, and is, devastating, for when the line is gone, it is usually gone forever. Many of the ghost towns of the West owe their demise to the decision of the railroads to terminate service.").

115. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

116. *See* Paul Stephen Dempsey, *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 TRANSP. L.J. 185, 229–36 (1992); James P. Rakowski, *Marketing Economies and the Results of Trucking Deregulation in the Less-Than-Truckload Sector*, TRANSP. J., Spring 1988, at 11, 11, 21.

As for the intercity bus industry, the Bus Regulatory Reform Act of 1982 practically eliminated regulatory restrictions on service discontinuance.[117] As it had done with railroads, Congress gave the ICC the authority to overrule state PUCs if they denied bus companies' applications to discontinue service.[118] In the run-up to bus deregulation, the president of Greyhound grimly noted that "the rural areas are going to have to suffer."[119] He was right. After deregulation, small towns lost intercity bus service by the thousands.[120] A former senator concluded in 1984 that "[b]us deregulation has had a devastating impact on rural America."[121] Even Alfred Kahn would later have second thoughts when it came to intercity busing: "I'm not sure I would ever have deregulated the buses because the bus is a lifeline of many small communities for people just to get to the doctor or to the Social Security office."[122]

Airline deregulation mirrored that of railways and motor carriers. Under the leadership of Kahn—whom President Jimmy Carter installed as its chairman in 1977—the CAB started deregulating airline entry and rates through administrative action.[123] The coup de grâce was administered the following year with the enactment of the Airline Deregulation Act of 1978, which put the CAB itself on a path to dissolution.[124] The end of economic regulation of airlines, combined with lax antitrust enforcement following deregulation,[125] led to sharp

117. *See* Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 16(a), 96 Stat. 1102, 1115–17; Dempsey, *Dark Side of Deregulation*, *supra* note 114, at 461 ("Since promulgation of the 1982 Bus Act, carrier abandonments have been little short of breathtaking . . . .").

118. Bus Regulatory Reform Act of 1982, § 16(a), 96 Stat. at 1115–17.

119. DEMPSEY, SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION, *supra* note 102, at 205 (quoting POL'Y & MGMT. ASSOCS., INC., INTERCITY BUS SERVICE IN SMALL COMMUNITIES 17 (Comm. Print 1978) (reporting to the Senate Committee on Commerce, Science, & Transportation of the 95th Congress)).

120. DEMPSEY, SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION, *supra* note 102, at 206.

121. Dempsey, *Dark Side of Deregulation*, *supra* note 114, at 462 (alteration in original) (quoting William Robbins, *Dependent on Buses, Midwestern Towns Fight Cuts in Service*, N.Y. TIMES, Oct. 14, 1986, at A14 (reporting the statements of Senator Larry Pressler)).

122. Paul Stephen Dempsey, *Running on Empty: Trucking Deregulation and Economic Theory*, 43 ADMIN. L. REV. 253, 295 (1991) (quoting Testimony of Alfred Kahn Before the California Public Utilities Commission on Cross Examination by Paul Stephen Dempsey at 6337 (Jan. 31, 1989)).

123. *See* 1977 C.A.B. REPORTS TO CONGRESS 1–5, 69.

124. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744–47.

125. Kahn even noted that the Reagan administration needed to step up antitrust enforcement, and worried about the creation of an oligopoly in airlines. *See* Alfred E. Kahn,

service reductions and price increases for flights to and from many small and midsize cities.[126] Such cities also offered fewer direct flights as the industry shifted rapidly from a point-to-point to a hub-and-spoke organizational model.[127] Flights in and out of inland cities like Memphis and Cincinnati, are now far more expensive per mile than those out of San Francisco or New York.[128] Such disparities were forbidden prior to deregulation. Because travel to and from such inland cities has become much more expensive and inconvenient, corporate headquarters have fled.[129] These cities have also lost annual conventions and the tourism dollars that came with them, and countless new businesses have declined to invest, slowing economic growth and development.[130] "Today," noted one 2012 study, "such major heartland cities as Cincinnati, St. Louis, Pittsburgh, and Memphis are increasingly cut off from each other and the global economy due to drastically curtailed airline service and monopolistic fares."[131]

Deregulation: Looking Backward and Looking Forward, 7 YALE J. ON REG. 325, 348 (1990) ("[T]he government clearly has neglected responsibilities of which it was never the intention of deregulation to relieve it. These include . . . vigorous enforcement of the antitrust laws . . . ."); Robert D. Hershey, Jr., *Airline Deregulation Debated*, N.Y. TIMES, Aug. 28, 1986, at D1 (describing Kahn's worry about the industry moving to "an uncomfortably tight oligopoly"). As this Article discusses below, however, antitrust was moving in the same deregulatory direction.

126. *See* Andrew R. Goetz & Timothy M. Vowles, *The Good, the Bad, and the Ugly: 30 Years of US Airline Deregulation*, 17 J. TRANSP. GEOGRAPHY 251, 251 (2009) (noting that deregulation resulted in "fewer flights and higher fares to smaller places"); Phillip Longman & Lina Khan, *Terminal Sickness*, WASH. MONTHLY (Mar.–Apr. 2012), https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness [https://perma.cc/E8M3-UYGS] (discussing "lost airline service and skyrocketing fares" in cities like Cincinnati, Pittsburgh, Memphis, St. Louis, and Minneapolis).

127. Severin Borenstein & Nancy L. Rose, *How Airline Markets Work . . . or Do They?: Regulatory Reform in the Airline Industry*, *in* ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? 63, 88 (Nancy L. Rose ed., 2014) (describing the industry's "almost immediate transformation" to the hub-and-spoke model).

128. Longman, *Bloom and Bust*, *supra* note 18.

129. *See id.* (noting that "a city's airline service is now an essential precondition for its success in retaining or attracting corporate headquarters"); *see also* Longman & Khan, *supra* note 126 (discussing companies moving headquarters and operations due to inadequate air service); Aditi Shrikant, *Why Air Service Is So Crucial for Small Cities*, VOX (Nov. 12, 2018, 7:01 AM), https://www.vox.com/the-goods/2018/11/12/18080806/air-service-small-cities-crucial [https://perma.cc/KV4A-Z42P] (discussing companies that moved headquarters for "better access to flights").

130. Longman & Khan, *supra* note 126.

131. MKTS., ENTER., & RESILIENCY INITIATIVE, NEW AM. FOUND., HARD LANDING: THE BREAKDOWN OF AMERICA'S AIR TRANSPORT SYSTEM AND THE ROLE OF DEREGULATION 5 (2012), https://d1y8sb8igg2f8e.cloudfront.net/documents/Hard_Landing.pdf [https://perma.cc/4TRL-QRP2].

In the freight rail and airline sectors, Congress sought to soften deregulation's blow to smaller communities by providing direct subsidies for service continuance.[132] Nonetheless, as described above, small communities lost service. In the airline sector, some small cities, like Cheyenne, Wyoming, and Columbia, Missouri, are now paying airlines to offer occasional service.[133] And federal funding for Local Rail Freight Assistance is no longer available.[134]

This shift toward (paltry) direct subsidies raises a subtle but crucial point about institutional design. Posner recognized that economic regulation can be interpreted as a method of public finance; he described internal cross-subsidies as a method for "delegation of minor taxing functions to regulatory agencies."[135] But Posner did not fully explore the ramifications of this delegation. One notable feature of internal cross-subsidies—not shared by direct subsidies—is that they sidestep the vagaries of annual legislative appropriations. Cross-subsidies are thus insulated to some degree from politics; infrastructure resources that are subject to this mode of regulation become self-contained *systems.* Because cross-subsidies bypass appropriations, they are likely to be more durable than direct subsidies. Hence, "taxation by regulation," to use Posner's phrase,[136] is a type of commitment device. To the extent that cross-subsidies are more durable than direct subsidies, they will better encourage ex ante investment in infrastructure-dependent business activities, thereby contributing to economic growth and development in remote locales. The demise of

132. These subsidies have been provided through the Local Rail Freight Assistance Program and the Essential Air Service Program. Congress established the Local Rail Freight Assistance program with the Regional Rail Reorganization Act of 1973, Pub. L. No. 93–236, § 401, 87 Stat. 985, 1010, and augmented it with the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 803, 90 Stat. 31, 130. The Airline Deregulation Act provided the "Essential Air Service (EAS) program . . . to guarantee that small communities that were served by certificated air carriers before airline deregulation maintain a minimal level of scheduled air service." *Essential Air Service*, U.S. DEP'T TRANSP., https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service [https://perma.cc/CEB3-VPC3] (Nov. 22, 2017).

133. *See* Shrikant, *supra* note 129.

134. *See Closed Grant Programs*, U.S. DEP'T TRANSP.: FED. R.R. ADMIN., https://railroads.dot.gov/grants-loans/closed-grant-programs [https://perma.cc/UZ4Q-CQ2A] (Oct. 21, 2019).

135. Posner, *supra* note 108, at 45.

136. *Id.* at 22.

this regulatory model should therefore be considered an important contributor to widening regional inequality.[137]

B. Communications Law

Transportation systems and communications systems have much in common. Both are typically spatially expansive and characterized by high fixed costs and low marginal costs. Both are network-type resources that promote connectivity. Both are "infrastructural," meaning they are crucial inputs into productive activity, and therefore key catalysts for business investment and economic growth and development.[138] It should not be surprising that, historically, the regulatory structures governing these two sectors have shared important features. Transportation and communications resources, together with certain energy resources, are the traditional "regulated industries" that have been subject—in the United States, anyway—to a distinctive regulatory apparatus governing rates, entry and exit, and service requirements.[139]

This special regulatory apparatus remains firmly entrenched at the *local* level in the United States, via public utility regulation. Regulators generally require electric and gas utilities to offer adequate service to everyone residing in their franchise area, even if this means that the utility must make money-losing investments in physical plants.[140] Utilities typically are not permitted to charge higher prices to consumers residing in sections of the franchise area that are more costly to reach.[141] This departure from marginal cost pricing is

137. The linkage between intercity transportation systems and geographic inequality is also evident in other countries. *See* Michael Kimmelman, *France's Yellow Vests Reveal a Crisis of Mobility in All Its Forms*, N.Y. TIMES (Dec. 20, 2018), https://nyti.ms/2GyFmFG [https://perma.cc/HN2C-8Z36] (documenting the decline of regional passenger rail service in France); Ceylan Yeginsu, *'This Is All We Can Afford': Shrinking Lives in the English Countryside*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/world/europe/cumbria-uk-austerity-cuts.html [https://perma.cc/M6AJ-P5QR] ("As bus lines are cut and services dry up under austerity, older people are feeling new constraints."). *See generally* Paul Stephen Dempsey, William E. Thoms & Sonja Clapp, *Canadian Transport Liberalization: Planes, Trains, Trucks & Buses Rolling Across the Great White North*, 19 TRANSP. L.J. 113 (1990) (documenting parallels between U.S. and Canadian transportation deregulation).

138. *See* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES xiv, 3–9 (2012).

139. *See generally* RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL (4th ed. 1999) (describing regulated industries); BREYER, *supra* note 72 (same).

140. *E.g.*, PIERCE & GELLHORN, *supra* note 139, at 217.

141. *See id.*

understood to be a term of the "regulatory compact" governing the utility.[142] State regulators treat providers of local telephone service similarly. Telephone companies must generally abide by uniform rate structures within their franchise areas; harder-to-reach customers may not be charged higher prices.[143] As shown above, this basic regulatory structure once governed U.S. transportation industries at the *federal* level, on a state-spanning basis. As described below, a similar model once applied to portions of the communications sector.

These systems were all patterned after a common prototype—the venerable, centuries-old communications network of the U.S. postal system. The Post Office Act of 1792[144] was designed to ensure broad geographic coverage. Legislators understood from the outset that many postal routes would be money-losers.[145] By design, thinly settled areas in the South and West received substantial cross-subsidies from the population centers.[146] The U.S. postal system still works this way, with internal cross-subsidies ensuring the provision of postal services to every community, no matter how remote.[147] Uniform domestic

142. *See, e.g.*, Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 313–14, 313 n.232 (2017) (quoting Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving State and Local Voices in the Green Energy Revolution*, 64 CASE W. RSRV. L. REV. 1619, 1628 (2014)).

143. PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 2.1.1 (2d ed. 1999 & Supp. 2011). As communications historian Richard John has shown, price and entry regulations were the norm from the start in municipal telephone regulation. *See, e.g.*, Richard R. John, *From Franklin to Facebook: The Civic Mandate for Communications*, *in* TO PROMOTE THE GENERAL WELFARE 156, 164–65 (Steven Conn ed., 2012).

144. An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, 1 Stat. 232 (1792).

145. RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 49 (1995).

146. *See* RICHARD R. JOHN, HISTORY OF UNIVERSAL SERVICE AND THE POSTAL MONOPOLY 21 (2008) [hereinafter, JOHN, HISTORY OF UNIVERSAL SERVICE], https://academiccommons.columbia.edu/doi/10.7916/D87H325K [https://perma.cc/2U48-2LM2], *in* POSTAL REGUL. COMM'N, REPORT ON UNIVERSAL POSTAL SERVICE AND THE POSTAL MONOPOLY app. D (2008), https://www.prc.gov/download/report/field_report_file-1668 [https://perma.cc/T8XQ-HHME]; George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & ECON. 33, 55–56 (1975).

147. *See* JOHN, HISTORY OF UNIVERSAL SERVICE, *supra* note 146, at 13; *see also* RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 22, 121–22, 379–80 (2010) [hereinafter JOHN, NETWORK NATION]; Richard R. John, *Private Enterprise, Public Good?: Communications Deregulation as a National Political Issue, 1839–1851*, *in* BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC 328, 349 (Jeffrey L. Pasley, Andrew W. Robertson & David Waldstreicher eds., 2004).

postal pricing has been in place since 1863.[148] Thus, mailing longer distances or to more far-flung locations cannot be up-charged.[149] Postal rates, in other words, are not keyed to marginal cost. These principles have been reaffirmed over the years by Congress[150] and by the U.S. Postal Service.[151] Further, federal statutes restrict entry into competing lines of business in order to limit cream-skimming, which would undermine the system's cross-subsidies.[152]

Congress fashioned telecommunications regulation after the postal system. In 1910, Congress designated telegraph and telephone companies to be "common carriers" and gave the ICC jurisdiction over them.[153] That same year, seeing the regulatory writing on the wall, AT&T voluntarily adopted the mantra of "universal service."[154] At the behest of state PUCs, statewide rate averaging followed soon thereafter, thereby delivering cross-subsidies to telephone customers in more remote regions within states.[155] Universal service became explicit federal policy with the Communications Act of 1934, which

148. U.S. POSTAL SERV., UNIVERSAL SERVICE AND THE POSTAL MONOPOLY: A BRIEF HISTORY 5 (2008), https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf [https://perma.cc/LE7Q-LES8].

149. *See id.*

150. *See* Postal Reorganization Act, Pub. L. No. 91-375, sec. 2, § 3623(d), 84 Stat. 719, 761 (1970) (repealed 2006) (providing for continuation of uniform nationwide rates); *id.* at sec. 2, § 101(a), 84 Stat. at 719 (codified at 39 U.S.C. § 101(a) (2018)) ("The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States . . . and shall render postal services to all communities."); *id.* at sec. 2, § 101(b), 84 Stat. at 719 (codified at 39 U.S.C. § 101(b) (2018)) (providing that the U.S. Postal Service "shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining," and that "[n]o small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities").

151. *See* U.S. POSTAL SERV., ANNUAL REPORT 2 (2007) ("[O]ur mission remains the same—providing trusted, affordable, universal service."); *id.* at 59 (defining "universal service" as providing "uniform and reasonable rates to everyone, everywhere"). *See generally* PRESIDENT'S COMM'N ON THE U.S. POSTAL SERV., EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE (2003) (reaffirming commitment to universal service and uniform rates).

152. *See* 18 U.S.C. §§ 1693–1696 (2018); 39 U.S.C. §§ 601–606 (2018).

153. *See* Mann-Elkins Act, ch. 309, sec. 7, § 1, 36 Stat. 539, 544–45 (1910).

154. *See* JOHN, NETWORK NATION, *supra* note 147, at 345.

155. *See* Richard H.K. Vietor, *AT&T and the Public Good: Regulation and Competition in Telecommunications, 1910–1987*, *in* FUTURE COMPETITION IN TELECOMMUNICATIONS 27, 35 (Stephen P. Bradley & Jerry A. Hausman eds., 1989).

created the Federal Communications Commission ("FCC").[156] The lead sentence of the Act states that its purpose is to regulate the communications industry "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[157] The FCC soon extended regulatory policies that had been spearheaded by state PUCs to the federal level. Just as the CAB had required equal fares for equal miles in the airline industry, the FCC in the 1940s imposed a policy of equal charges for equal services, resulting in nationwide average pricing.[158] Across the nation, rural and small-town telephone users benefited. Regulation thus promoted the build-out of landline networks to create a practically universal system—an achievement that survived the forced break-up of AT&T in 1984[159] and subsequent deregulatory telecommunications regulation.[160]

Over the past two decades, the action has shifted away from landline telephony and toward new communications services—specifically, cellular phone and broadband internet services. In these areas, the New Deal–era model of infrastructure regulation—which prioritized universal service through cross-subsidization—has not been brought to bear.[161] The results are predictable: profound regional disparities in service quality and availability. Many rural areas in the United States lack reliable cellular phone service, or any service at all.[162] The FCC expects to disburse "universal service" subsidies to

156. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064.

157. *Id.*

158. *See* Vietor, *supra* note 155, at 46.

159. *See* JOHN, NETWORK NATION, *supra* note 147, at 407–13.

160. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56.

161. *See* JODIE GRIFFIN & HAROLD FELD, FIVE FUNDAMENTALS FOR THE PHONE NETWORK TRANSITION, PUB. KNOWLEDGE 9 (2013), https://www.publicknowledge.org/blog/five-fundamentals-for-the-phone-network-transition [https://perma.cc/F6JG-JBQU] (noting that the FCC has not applied universal service mandates to new networks and services and questioning "whether we continue to believe in the same basic social contract between our society and our communications networks").

162. Terena Bell, *How Cellular Dead Zones Hurt Rural Towns*, AM. CONSERVATIVE (Mar. 17, 2017, 4:47 PM), https://www.theamericanconservative.com/urbs/how-cellular-dead-zones-hurt-rural-towns [https://perma.cc/53PE-3MKD]; Matt Dunne, *Rural America's Future Is Riding on a Cell Signal*, WIRED (June 28, 2017, 6:35 AM), https://www.wired.com/story/rural-americas-future-is-riding-on-a-cell-signal [https://perma.cc/7JH3-EGT4]; Brian Fung, *'These Maps Are Bogus': US Lawmakers Tear into Telecom Execs over Spotty Rural Coverage*, WASH. POST (Feb.

promote mobile services in rural areas over the next decade, but the impact of this program remains to be seen.[163] (If comparable approaches in the railroad and airline industries are any guide, the effects will be modest at best.[164]) As for high-speed broadband, over 30 percent of rural Americans do not have access to it at home.[165] When rural consumers do have access to broadband services, it is often expensive and low quality.[166] The situation persists notwithstanding federal government initiatives to promote rural broadband.[167] Lack of accessible, affordable broadband significantly decreases property values.[168]

Communications services, like transportation services, are crucial inputs into economic growth and development. There are good reasons to believe that better communications infrastructure would promote economic activity in rural communities and smaller cities. In this vein, the experience of Chattanooga, Tennessee, is illuminating. It began offering municipal broadband in 2010.[169] By 2016, the city was offering

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14, 2019, 6:00 AM), https://www.washingtonpost.com/technology/2019/02/14/rural-cell-coverage-stinks-say-us-lawmakers-they-have-had-it [https://perma.cc/NGY5-94EC].

163. *See* FCC, *5G Fund for Rural America*, fcc.gov/5g-fund [https://perma.cc/4MPG-XP38]. The FCC established the 5G Fund in October 2020 to replace its MF-II Fund, which has been suspended due to violations of mapping rules by major telecommunications carriers participating in the auction. FCC, *Mobility Fund Phase II (MF-II)*, https://www.fcc.gov/mobility-fund-phase-ii-mf-ii [https://perma.cc/NA8P-HJ8M] (last updated May 18, 2020).

164. *See supra* notes 132–34 and accompanying text.

165. *See* 2018 Broadband Deployment Report, 33 FCC Rcd. 1660, 1686 tbl.4 (2018); *Principles to Connect Rural America*, BROADBAND CONNECTS AM., http://www.broadbandconnectsamerica.com/wp-content/uploads/2020/02/PrinciplesEditsV5_FINAL.pdf [https://perma.cc/YP3H-KNF2] ("While 39 percent of rural Americans lack access to high-speed broadband, only 4 percent of urban Americans lack access.").

166. *See* Heather McDougal, *I Live 50 Miles from Silicon Valley and I Can't Get Broadband Access*, PUB. KNOWLEDGE (Sept. 6, 2018), https://www.publicknowledge.org/blog/i-live-50-miles-from-silicon-valley-and-i-cant-get-broadband-access [https://perma.cc/RBK6-Q2VG].

167. *See generally* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf [https://perma.cc/55NH-G6P7] (Obama administration); NAT'L TELECOMM. & INFO. ADMIN., AMERICAN BROADBAND INITIATIVE MILESTONES REPORT (2019), https://www.ntia.doc.gov/files/ntia/publications/american_broadband_initiative_milestones_report.pdf [https://perma.cc/JPN7-XJWG] (Trump administration).

168. *See generally* Steven Deller & Brian Whitacre, *Broadband's Relationship to Rural Housing Values*, 98 PAPERS REG'L SCI. 2135, 2136 (2019) ("As the Internet becomes pervasive in American life, rural households without broadband access might find the value of their property negatively impacted.").

169. Dave Flessner, *Chattanooga Boosts Citywide Broadband Capacity to 10 Gigabits*, CHATTANOOGA TIMES FREE PRESS (Oct. 15, 2015), https://www.timesfreepress.com/news/local/story/2015/oct/15/chattanooga-becomes-first-10-gigabit-city-world/330691 [https://perma.cc/TFP6-

its residents ultra-high-speed 1 gigabit internet service for $70 a month and blazing 10 gigabit service for $300 a month.[170] Small businesses and startups have flourished as a result.[171] According to the mayor who ushered in the program, municipal broadband "has restored our luster and given us a new lever to pull that has tied us to the next century, rather than the steam and smoke of the old century."[172]

When it comes to mobile phone and broadband internet services, the federal regulatory model that prevailed in U.S. transportation and communications industries during the mid-twentieth century points to a path not taken. Cross-subsidies within regulated infrastructural systems can be powerful tools to promote geographic dispersion of business investment and economic activity. By contrast, current approaches serve to reinforce the economics of agglomeration and feed into growing geographic inequality.

C. The Political Economy of Trade Policy

By the turn of the twenty-first century, economists had come to a four-part consensus about liberalizing trade regulations.[173] First, they believed that liberalizing trade was not a major factor contributing to declining employment levels in the United States or to rising economic inequality.[174] Second, workers displaced by increased global trade could easily relocate to other areas within the United States.[175] Third, to the extent trade harmed American workers, it would harm all low-wage workers, not simply those whose jobs were disproportionally tied

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DPJ5]; *see also* Zaid Jilani, *Killing Net Neutrality Has Brought On a New Call for Public Broadband*, INTERCEPT (Dec. 15, 2017, 5:17 PM), https://theintercept.com/2017/12/15/fcc-net-neutrality-public-broadband-seattle [https://perma.cc/9FDS-2YK3].

170. Flessner, *supra* note 169.

171. *See* Cameron Albert-Deitch, *How Gigabit Internet Is Turning Smaller U.S. Cities into Tech Hot Spots*, INC. (Feb. 2020), https://www.inc.com/magazine/202002/cameron-albert-deitch/superfast-internet-broadband-gigabit-chattanooga-smaller-city.html [https://perma.cc/8TAU-E7RE]; P.E. Moskowitz, *Chattanooga Was a Typical Postindustrial City. Then It Began Offering Municipal Broadband.*, NATION (June 3, 2016), https://www.thenation.com/article/archive/chattanooga-was-a-typical-post-industrial-city-then-it-began-offering-municipal-broadband [https://perma.cc/27M9-BXFW].

172. Jilani, *supra* note 169.

173. *See* David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 207–08 (2016) [hereinafter Autor et al., *The China Shock*].

174. *Id.* at 207.

175. *Id.* at 208.

to trade.[176] And finally, to the extent greater international trade had an effect on wages, the impacts would be national, not focused in particular locales.[177] Over the past decade, economists have increasingly questioned these assumptions—and research now shows that the policy choice to liberalize trade regulations has had significant geographic impacts.

Perhaps the most attention has gone to a series of important papers by Professors David Autor, David Dorn, and Gordon Hanson. Autor and his coauthors demonstrate that in areas that were affected by import-competition from China, unemployment increased, labor force participation decreased, wages declined, and people increased their reliance on disability and other welfare benefits.[178] Notably, wages and employment were impacted throughout these communities, rather than just in the manufacturing sector.[179] They also show that the communities that were hit by this "China Shock," which accelerated after that country's accession to the World Trade Organization in 2001, had a hard time bouncing back.[180] Wages and unemployment rates remained depressed "for at least a full decade after the China trade shock."[181] And these workers had lower lifetime income and rotated through jobs more often.[182]

In other words, trade liberalization exacerbated geographic inequality. This is not surprising. Economic sectors are not distributed evenly across geography, particularly in a large country like the United States.[183] As a result, trade-based changes in a particular sector will disproportionately impact certain geographic areas. Further, hard-hit areas will intuitively have a difficult time bouncing back from trade-related shocks. It is challenging for workers to retrain or relocate, and

176. *Id.*

177. *Id.*

178. David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2125 (2013).

179. *Id.* at 2147–48.

180. *See* Autor et al., *The China Shock*, *supra* note 173, at 213, 225 ("[T]he labor-market impacts of trade shocks are likely to be amplified by slow and incomplete adjustment[s] . . . .").

181. *Id.* at 205.

182. *Id.*

183. *See generally* SUSAN HELPER, TIMOTHY KRUEGER & HOWARD WIAL, BROOKINGS, LOCATING AMERICAN MANUFACTURING: TRENDS IN THE GEOGRAPHY OF PRODUCTION (2012), https://www.brookings.edu/wp-content/uploads/2016/06/0509_locating_american_manufacturing_report.pdf [https://perma.cc/836V-VGVJ] ("American manufacturing is highly differentiated geographically.").

there are powerful family-related and emotional reasons people stay in their communities. There can also be no assurance that new capital will replace departing employment. If anything, agglomeration theory might suggest the opposite; businesses might prefer to locate in areas that are largely successful and can draw talent.

Trade's impact on particular geographies and sectors has disproportionately affected specific communities, which can also contribute to racial inequality. "Some areas with disproportionately high Black populations—including northern Mississippi, western Tennessee, central regions of Virginia, and cities such as Gary, Indiana, and Youngstown, Ohio," Daniella Zessoules observes, "have suffered from job displacement due to . . . [the] 'China shock.'"[184] Black workers are also disproportionately represented in motor vehicle and tire manufacturing, comprising 16.7 and 17.4 percent of manufacturing workers in those sectors, compared to 12.3 percent of manufacturing workers overall.[185] Thus, when these geographically concentrated sectors get hit by offshoring, the impacts widen both geographic inequality and racial inequality.

And yet, though choices about trade policy undoubtedly affect geographic inequality, in recent years the trade policymaking process has been relatively inattentive to the geographic inequality problem. It was not always this way. The constitutional underpinnings of trade policymaking create a process that once took geographic consequences extremely seriously. Article I of the Constitution gives Congress the power to "regulate Commerce with foreign Nations," "lay and collect Taxes, Duties, Imposts and Excises," raise revenue, and make any laws "necessary and proper" for implementing the powers of the government.[186] Individually and together, these powers give Congress—rather than the president—the leading authority over trade issues. This distribution of constitutional powers is significant because Congress reflects the geographic diversity of the country far better than does the presidency.[187] Members of Congress represent specific constituencies, with their own distinct economic interests and needs,

184. DANIELLA ZESSOULES, CTR. FOR AM. PROGRESS, TRADE AND RACE 3 (2019) https://cdn.americanprogress.org/content/uploads/2019/07/17120916/Trade-and-Race.pdf [https://perma.cc/57T2-NA56].

185. *Id.* at 2.

186. U.S. CONST. art. I, § 8.

187. *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 632–38 (2019).

and because members of the House are elected with great frequency, they are tied more closely to the preferences of their constituents than is the president.[188] Indeed, James Madison thought that the local expertise and attachments of Congress made it the appropriate locus for trade policymaking: "How can foreign trade be properly regulated by uniform laws," he asked in *Federalist 53*, "without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States?"[189]

As a result of this initial constitutional design, Congress was the dominant force setting tariff rates across sectors for the first century of American history.[190] Local politics, protectionism, and horse-trading were central to the story during this era.[191] But while commentators today almost uniformly criticize this approach,[192] the constitutional design meant that policymaking accounted for the geographic consequences of trade policy.[193] This is partly why the ferocious tariff battles of the nineteenth century had cleavages along geographic fault lines, between the North, the South, and the West.[194] People knew that tariff policies would affect each sector differently and that this would have significant impacts on local economies.[195] These divides then played out in Congress, in the form of battles over tariff rates for different sectors.

Over time, and particularly in the mid-twentieth century, Congress increasingly delegated trade policymaking authority to the president.[196] The 1934 Reciprocal Trade Agreements Act gave the

188. THE FEDERALIST NO. 53, at 330–33 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 56, at 348 (James Madison) ("The representatives of each State will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts, but will probably in all cases have been members . . . of the State legislature, where all the local information and interests of the State are assembled . . . .").

189. THE FEDERALIST NO. 53, *supra* note 188, at 333 (James Madison).

190. *See* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 68–330 (2017) (describing this history).

191. *See* Meyer & Sitaraman, *supra* note 187, at 593–94.

192. *See, e.g.*, 1 CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL D. WATKINS, CASE STUDIES IN US TRADE NEGOTIATION 188 (2006) ("The president, whose constituency is the entire nation, is likely in the best position . . . to represent the overall national interest in open trade."), *quoted in* Meyer & Sitaraman, *supra* note 187, at 632 (describing this view as a "common trope").

193. *See* Meyer & Sitaraman, *supra* note 187, at 632–38.

194. *See* IRWIN, *supra* note 190, at 125–75.

195. *See id.*

196. For a detailed history, see Meyer & Sitaraman, *supra* note 187, at 599–600.

president considerable power to lower tariff rates in the midst of the Great Depression, and in the post-World War II era, Congress repeatedly refused to endorse the General Agreement on Tariffs and Trade while crafting policies that would rein in the delegated tariff powers.[197] With the Trade Act of 1974, however, this general approach changed. Congress granted the president power to negotiate "nontariff barriers"—regulatory and other policies that have an impact on trade—and adopted a "fast-track" process that functionally meant that Congress abandoned the field of trade policymaking.[198] Under this process, Congress takes an up-or-down, all-or-nothing vote on a trade agreement.[199] Fast-track includes no opportunity for renegotiating the agreement, addressing specific geographic concerns, or making other reforms to address dislocations.[200] It also undermines the negotiating posture of representatives whose constituents are on the losing side of trade agreements. Once the agreement is passed, members of Congress from districts that will be made worse off lose their leverage to gain concessions or win redistributive policies.[201]

At the same time, the shift to trade policymaking in the executive branch was not accompanied by a replacement for the process-based approach to taking account of geographic considerations. The U.S. International Trade Commission ("ITC"), for example, publishes studies on the sectoral impact of trade agreements.[202] These studies can run into the hundreds of pages, and they offer granular predictions on the impacts of a proposed agreement on a specific sector.[203] The ITC is also mandated by law to assess the impact on workers, employment, profits, and other economic factors from a national perspective.[204] But it is not required to consider the geographic impact that provisions in a

197. *Id.* at 601–06.

198. *See* Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 172 (2020) (citing Trade Act of 1974, Pub. L. No. 93-618, § 102, 88 Stat. 1978, 1982–84 (1975) (codified as amended at 19 U.S.C. § 2112) (2018)).

199. *See id.* (citing Trade Act of 1974, § 151, 88 Stat. at 2001–04 (codified as amended at 19 U.S.C. § 2191) (2018)).

200. *See id.*

201. Meyer & Sitaraman, *supra* note 187, at 635–36.

202. *See Commission Publications Library*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/commission_publications_library [https://perma.cc/45X9-JJFF] (archiving publications).

203. *See, e.g.*, U.S. INT'L TRADE COMM'N, INVESTIGATION NO. TPA-105-001, TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS (2016), https://www.usitc.gov/publications/332/pub4607.pdf [https://perma.cc/UD7S-QGD7].

204. Trade Act of 1974 § 131(b)–(d), 19 U.S.C. § 2151(b)–(d) (2018); 19 U.S.C. § 4204(c).

trade agreement might have. It is a policy choice not to consider this factor—and not to address the consequences of these agreements.

The argument here is not that trade policy should go back to the nineteenth-century approach of the House of Representatives log-rolling and micromanaging tariff rates. There are still powerful arguments based on expertise and managerial efficiency for having the executive branch take the lead in negotiating trade agreements. Rather, our argument is that trade has consequences for geographic inequality and that these are a function of legal and policy choices. Trade policymaking once took account of geographic consequences because Congress played the leading role in setting tariff rates. With the shift to greater presidential control in the 1970s, Congress did not incorporate this factor into the trade policymaking process, rendering it less able to account for the geographic consequences of trade liberalization.

D. Antitrust and Corporate Consolidation

In recent years, scholars and commentators across the political spectrum have come to accept that America has a concentration problem—in sector after sector of the economy, a small number of firms has a disproportionate share of market power.[205] As a result, there has been increased interest in more aggressive antitrust regulations and enforcement.[206] Commentators have argued that lax antitrust enforcement has been a problem for new business formation, wages, and inequality[207]—but there has been far less attention to its

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205. *See, e.g.*, William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy [https://perma.cc/J4E7-ZMDC] (noting market concentration); *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing [https://perma.cc/73B4-4U4U] (same). *See generally* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 168–204 (2018) (same); TIM WU, THE CURSE OF BIGNESS (2018) (same).

206. For proposals, see GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, TAKING ANTITRUST AWAY FROM THE COURTS 3 (2018), https://greatdemocracyinitiative.org/wp-content/uploads/2018/09/Taking-Antitrust-Away-from-the-Courts-Report-092018-3.pdf [https://perma.cc/8WW8-C3KF] and MARSHALL STEINBAUM & MAURICE E. STUCKE, ROOSEVELT INST., THE EFFECTIVE COMPETITION STANDARD: A NEW STANDARD FOR ANTITRUST 29 (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Effective-Competition-Standard-201809.pdf [https://perma.cc/2LP3-EY3F].

207. *See, e.g.*, IAN HATHAWAY & ROBERT E. LITAN, BROOKINGS, WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION 9 (2014), https://

impact on geographic inequality.[208] As with the other areas of regulatory policy, the shift toward a more permissive antitrust environment—and more broadly, deregulatory policies that facilitated mergers and corporate concentration and consolidation—has been one of the sources of geographic inequality. When markets are not concentrated, firms will be smaller in size and spread across the country, distributing wealth, employment, and a variety of important local economic and civic benefits in the process. Historically, a number of legal regimes from anti-chain store laws, to banking regulations, to antitrust law itself, promoted geographic dispersal in the economy.

In the 1920s, chain stores gained increased market share over American retail, with companies like A&P and J.C. Penney spreading in scope and dominance across communities.[209] The motley anti-chain store coalition was concerned about the decline of local shopkeepers and the economic, social, and political impact it would have on local communities.[210] "Chain groceries, chain dry-goods stores, chain clothing stores," then-Senator and future Supreme Court Justice Hugo Black said in 1930, "here today and merged tomorrow—grow in size and power."[211] He continued,

> We are rapidly becoming a nation of a few business masters and many clerks and servants. The local man and merchant is passing and his community loses his contribution to local affairs as an independent thinker and executive. A few of these useful citizens, thus supplanted, become clerks of the great chain machines, at inadequate salaries,

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www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf [https://perma.cc/G6BR-SDFE]; Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238 (2017); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24147, 2019), https://www.nber.org/system/files/working_papers/w24147/w24147.pdf [https://perma.cc/3HUB-3HT6].

208. For examples of the research on the effects of lax antitrust enforcement on geographic inequality, see Longman & Khan, *supra* note 126; HENDRICKSON ET AL., GEOGRAPHY OF DISCONTENT, *supra* note 18, at 11; Kenneth Rogoff, *What About Rochester?*, PROJECT SYNDICATE (Aug. 1, 2019), https://www.project-syndicate.org/commentary/downsides-of-rise-of-megacities-by-kenneth-rogoff-2019-08 [https://perma.cc/Z3C3-PWPK] (arguing in favor of "better enforcement of anti-trust policies" as a strategy to make "struggling cities more attractive, both to enhance growth and to relieve population pressure in the megacities").

209. Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1020 (2005).

210. *Id.* at 1013, 1028.

211. 72 CONG. REC. 1239 (1930) (statement of Sen. Hugo Black), *quoted in* Schragger, *supra* note 209, at 1025.

> while many enter the growing ranks of the unemployed. A wild craze for efficiency in production, sale and distribution has swept over the land, increasing the number of unemployed, building up a caste system, dangerous to any government.[212]

By the time of Black's remarks, the movement had grown in power and soon found surprising success at both the state and federal levels. Indiana passed a tax on chain stores in 1929, and after the Supreme Court upheld it,[213] other states followed. Between 1931 and 1937, twenty-six more states passed anti-chain store laws.[214] Congress also took action to reform the antitrust laws in response to pressure from the anti-chain store movement. Congress directed the FTC to conduct investigations, with reports trickling out over a six-year period.[215] Hearings began in 1935, ultimately leading to the Robinson-Patman Act of 1936, which revised the Clayton Antitrust Act.[216] The purpose, advocates argued, was to ensure that manufacturers and suppliers couldn't give unfair discounts to chain stores that were unavailable to independent retailers.[217] This would, they argued, preserve local businesses from the spread of chains with distant headquarters and owners.[218]

That same year, Congress also passed the Miller-Tydings Act,[219] which was designed to overturn the Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[220] In that case, the Supreme Court interpreted the Sherman Act to prohibit resale price maintenance—the practice of a manufacturer setting a price floor, below which retailers could not sell.[221] Manufacturers were concerned with brand value; small independent retailers were concerned about being undercut on price.[222] Large chains could offer loss-leaders and

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212. *Id.* at 1239–40.

213. State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 542–43 (1931).

214. Schragger, *supra* note 209, at 1014.

215. *Id.* at 1061.

216. *Id.* at 1062 (citing Robinson-Patman Act of 1936, ch. 592, 49 Stat. 1526 (codified as amended at 15 U.S.C. §§ 13–13b) (2018)).

217. *Id.* at 1063.

218. *Id.*

219. Miller-Tydings Fair Trade Act, ch. 690, tit. VIII, 50 Stat. 673, 693–94 (1937) (codified as amended at 15 U.S.C. § 1 (2018)).

220. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

221. *Id.* at 405.

222. Schragger, *supra* note 209, at 1064.

predatory prices in ways that the small retailers could not.[223] Over the course of the 1930s, forty-two states passed laws allowing resale price maintenance.[224] Miller-Tydings was an attempt to ensure that the federal antitrust laws would not be a barrier to regulating what advocates said was unfair competition against small retailers.[225] It would be forty years before Congress repealed Miller-Tydings in 1975, ostensibly to help consumers.[226]

As a second example, consider the geographic consequences of the structure of banking regulations in the middle of the twentieth century. In 1864, the National Bank Act gave rise to a system in which banks were chartered at either the state or federal level, and federally chartered banks were not allowed to have branches.[227] After states started allowing state-chartered banks to create intrastate branches in the early twentieth century, Congress passed the 1927 McFadden Act and subsequent amendments, permitting federally chartered banks to engage in intra-state branch banking on equal terms as states offered their banks.[228] In this era, banking was geographically constrained—in some cases, to an extreme degree because of state rules regarding branch banking. The Illinois Constitution of 1870, for example, banned branch banking intrastate, and this prohibition held for a century.[229] The state began to water down the limitation in 1976, and it was not until 1993 that Illinois permitted unlimited branch banking.[230] When banks began to circumvent branching rules in the mid-twentieth century by creating bank holding companies, Congress intervened and largely closed this loophole with the Bank Holding Company Act of

223. *Id.*

224. *Id.* at 1065.

225. *Id.*

226. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801, 801. The law also repealed the McGuire Act, an amendment to Miller-Tydings passed in 1952 as a response to a Supreme Court case narrowing the application of the original law. *Id.* § 3.

227. *See* National Bank Act, ch. 106, § 8, 13 Stat. 99, 102 (1864) (codified as amended in scattered sections of 12 U.S.C. (2018)) (requiring that the "usual business" of each federally chartered bank "be transacted at an office or banking house located in the place specified in its organization certificate").

228. *See* McFadden Act, ch. 191, sec. 7, § 5155, 44 Stat. 1224, 1228–29 (1927) (codified as amended at 12 U.S.C. § 36 (2018)).

229. *Illinois Bank Branching History*, ILL. DEP'T FIN. & PRO. REGUL., https://www.idfpr.com/Banks/cbt/STATS/BR-HIST.ASP [https://perma.cc/WHH4-YQME].

230. *Id.*

1956.[231] It was not until the 1994 Riegle-Neal Interstate Banking and Branching Efficiency Act, which deregulated this geographically restrictive system, that limitations on branch banking came to an end.[232]

In the regulated system, rather than a few "too big to fail" nationwide banks, there were many small- and medium-sized banks throughout the country. The existence of smaller financial institutions meant a variety of benefits for local communities. Consider a hypothetical Bank of Middle Tennessee ("BMT") headquartered in Nashville, Tennessee. BMT would have a president and senior managers who get paid very well for their region. But after deregulation, if Chase Bank can buy up BMT and consolidate all executive functions at its New York City headquarters, those jobs go away. What is left are lower-paid, less-skilled branch managers and tellers. The consequences of this simple headquarters consolidation—usually justified as creating economic efficiencies—are significant for a local community and for national trends on inequality. The president of the local bank might have been rich by community standards, but the CEO of Chase takes home far more than a local banker would ever have seen. The profits of BMT shift from the greater Nashville area to Chase Bank's shareholders.[233] Economic spillovers dry up—higher-income local executives no longer contribute to local consumption and the local tax base because those jobs are gone. The business's local contractors and consultants no longer have as much work. Small businesses in the area find it harder to get loans.[234] The region also loses civic and community leaders and the philanthropy of those individuals

231. *See* Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(d), 70 Stat. 133, 135 (repealed 1994). For a thorough account of the origins and subsequent development of the Bank Holding Company Act, see Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 117 (2011) ("As originally enacted, the [Bank Holding Company Act] was designed primarily to restrict geographic expansion of large banking groups and to prevent excessive concentration in the commercial banking industry.").

232. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, sec. 101, § 3(d), 108 Stat. 2338, 2349–53 (codified as amended at 12 U.S.C. § 1842(d) (2018)).

233. In addition to the exodus of high-wage jobs, "managers are conditioned and pressured to run the business to advance the interests of their wealthiest constituents: shareholders." Khan & Vaheesan, *supra* note 207, at 238, 242–44.

234. Indeed, studies during and after the era of bank consolidation found that as banks grow in size and complexity—and expand in branches, including interstate—they reduce their small-business lending. Arthur E. Wilmarth, Jr., *Too Good to Be True? The Unfulfilled Promises Behind Big Bank Mergers*, 2 STAN. J.L. BUS. & FIN. 1, 36–41 (1995).

and the local bank itself.[235] And the worst thing is that each of these dynamics reinforces the others, creating a downward spiral in which other companies do not want to locate in the area because it no longer has a vibrant economy with a diversity of skill-based jobs.

These local effects were, at one point, an important motivating factor for American antitrust laws and anti-consolidation laws. In the antitrust context, for example, the 1950 Celler-Kefauver Amendments to § 7 of the Clayton Antitrust Act—also known as the Anti-Merger Act—were partly motivated by these local concerns.[236] During the legislative debates on the bill, Representative Joseph Bryson of South Carolina noted that "under local management the legitimate profits of industry tend to remain at home and promote the well-being of the hometown. In contrast, under the new outside ownership, the profits are siphoned off to distant areas . . . ."[237] He also commented that "[u]nder local ownership, there are strong social and civic ties that bind the community together."[238] Celler-Kefauver thus placed restrictions on corporate acquisitions.[239]

In this earlier era, Supreme Court Justices from a range of ideological viewpoints also recognized the value of local ownership. In *United States v. Falstaff Brewing Corp.*,[240] for example, Justice William O. Douglas argued that "the acquisition of local business units by out-of-state companies" could lead "local employment . . . to suffer, local payrolls . . . to drop off, and responsible entrepreneurs in counties and States [to be] replaced by clerks."[241] Justice Lewis Powell offered, in a 1982 concurrence, that when corporations merge and consolidate

235. For an extensive discussion of these downsides, see generally Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" as a Factor in Merger Policy*, 85 N.C. L. REV. 149 (2006). Studies have shown that corporate philanthropic contributions tend to go to local charities, see, for example, Katherine Maddox McElroy & John J. Siegfried, *The Community Influence on Corporate Contributions*, 14 PUB. FIN. Q. 394, 404–07 (1986).

236. Brunell, *supra* note 235, at 185–86.

237. *Id.* at 189 (quoting 95 CONG. REC. 11,495 (1949) (statement of Rep. Joseph Bryson)). Brunell offers a variety of other portions of the legislative debate to make clear the local motivations for this provision. *See id.* at 186–89. The "buy local" movement is a consumer-based response to precisely these dynamics. *See, e.g.*, Lizzy Alfs, *Buy Local Movement: Why It Really Does Make a Difference*, ANN ARBOR NEWS (Nov. 24, 2012, 5:59 AM), http://www.annarbor.com/business-review/buy-local-movement-why-it-really-does-make-a-difference [https://perma.cc/CG3C-TGWV].

238. Brunell, *supra* note 235, at 189 (quoting 95 CONG. REC. 11,495).

239. *See* Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (2018)).

240. United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

241. *Id.* at 543 (Douglas, J., concurring in part).

headquarters, "[M]anagement personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters."[242]

Despite the widespread understanding of the link between antitrust, consolidation, and geographic inequality, starting in the 1970s, the Chicago School in antitrust law and economics pushed aside local considerations—among other things—in favor of efficiency as the sole goal of the antitrust laws. Then-Professor Robert Bork argued in *The Antitrust Paradox* that the very idea of local control as a factor in antitrust analysis was part of an "ancient and disreputable 'social purpose' theory of antitrust."[243] As antitrust law became focused solely on consumer welfare, as measured by prices and output, the impact of mergers on geographic inequality fell by the wayside, even though a simple analysis that measured the total costs and total benefits of a merger would include geographic considerations. After all, as antitrust expert Richard Brunell notes, "The costs of the negative externalities borne by a community losing a corporate headquarters through merger may well exceed the benefits of a merger, including any benefits that accrue to the headquarters city of the acquiring firm and any gains in operating efficiency."[244] But the Chicago School's new approach to antitrust excluded even these purely economic factors.

Indeed, antitrust law today considers geography only in the narrowest possible way. Prior to a court assessing whether a business practice has anticompetitive effects, it must determine the relevant market. Defining the market involves both determining what products are competitive with the product at issue and identifying the geographic market in which competition occurs. Over the last forty years, the antitrust agencies and the courts have taken different economic approaches to defining the geographic market,[245] often with

242. Edgar v. MITE Corp., 457 U.S. 624, 646 n.* (1982) (Powell, J., concurring in part).

243. ROBERT H. BORK, THE ANTITRUST PARADOX 203 (1978).

244. Brunell, *supra* note 235, at 158.

245. *See generally* Kenneth G. Elzinga & Vandy M. Howell, *Geographic Market Definition in the Merger Guidelines: A Retrospective Analysis*, 53 REV. IND. ORG. 453 (2018) (chronicling the Department of Justice and the Federal Trade Commission's development of the geographic market definition on merger enforcement); Maryan M. Chirayath, *Oh Canada!: Antitrust Geographic Market Definition and the Reimportation of Prescription Drugs*, 46 B.C. L. REV. 1027

criticism from distinguished practitioners and jurists that they are unworkable and unreliable.[246] But beyond the technical challenges of determining the geographic market, it is worth underscoring that the market definition exercise does not consider the geographic *effects* of mergers or anticompetitive policies—only the geographic scope in which the policies will be considered. From a geographic inequality perspective, this misses the problem: corporate consolidation and mergers can create geographic inequality, and antitrust law can help redress it.

III. CONSENSUS POLICY RESPONSES AND THEIR SHORTCOMINGS

So what can be done about geographic inequality? Distinguished commentators, including Nobel Prize–winning economist Paul Krugman, express skepticism that anything can be done. "There are powerful forces behind the . . . decline of rural America," Krugman says, "and the truth is that nobody knows how to reverse those forces."[247] Indeed, Krugman has gone so far as to state that "[r]egional divergence is an invisible-hand phenomenon, caused by market forces rather than any deliberate policy."[248] Other scholars and policymakers, however, offer solutions to address the problem. In this Part, we first consider two of the most prominent policy suggestions: zoning reforms and place-based economic policies. We argue that the elite liberaltarian consensus on zoning deregulation cannot address the full scope of the problem of geographic inequality, will make some aspects of the problem worse, and may even have perverse consequences in some areas. We then argue that place-based economic policies offered by center-left and center-right economists are also unlikely to address

(2005) (discussing different theoretical approaches to the geographic market definition in antitrust law).

246. *See, e.g.*, Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 825 (1987) ("[T]he measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement."); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) ("The Court's invitation to consider the existence of 'market power' . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.").

247. Paul Krugman, Opinion, *Getting Real About Rural America*, N.Y. TIMES (Mar. 18, 2019), https://nyti.ms/2TKMDbJ [https://perma.cc/AY66-UCJU].

248. Paul Krugman, *Regional Economics: Understanding the Third Great Transition*, CUNY GRADUATE CTR. 8 (Sept. 2019), https://www.gc.cuny.edu/CUNY_GC/media/LISCenter/pkrugman/REGIONAL-ECONOMICS-3rd-transition.pdf [https://perma.cc/QPY6-D6TW].

the full scope of the problem, and that their technical solutions have a variety of downsides. Both of these approaches notably fail to fully account for regulatory policies that impact geographic inequality. Recent calls for a revival of industrial policy fare better, as they have the potential to jumpstart economies outside of superstar cities.

A. Zoning and Deregulation

1. *The Liberaltarian Consensus.* Geographic inequality has led to a nearly constant drumbeat for land-use reform.[249] It is quickly becoming conventional wisdom among elite policymakers that the inaccessibility of superstar cities because of out-of-control housing prices is a critical public policy challenge.[250] The problem, on this framing, is not geographic inequality per se, but rather a lack of mobility resulting largely—though not completely—from high housing costs in thriving places.[251] Implicitly, in other words, the solution is giving everyone the opportunity to participate in the economies that are doing well.

In a competitive housing market, this problem should not exist. If workers are willing to pay some marginally higher price to relocate to successful high-wage places, then developers should increase housing supply to satisfy that demand and, in the process, keep housing costs low. Traditionally, local economic booms have been accompanied by significant housing development.[252] In today's superstar cities, that has not happened, and housing starts have actually declined year over

249. *See, e.g.*, Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES: UPSHOT (June 18, 2019), https://nyti.ms/37QtS8Z [https://perma.cc/283G-K9L3]; Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, BLOOMBERG CITYLAB (May 21, 2019, 4:00 AM), https://www.citylab.com/equity/2019/05/residential-zoning-affordable-housing-upzoning-real-estate/588310 [https://perma.cc/RSU6-N6JG]; Benjamin Schneider, *Liberal America's Single-Family Hypocrisy*, NATION (May 8, 2019), https://www.thenation.com/article/zoning-housing-homeless-segregation [https://perma.cc/P3YW-SUD2]; Haisten Willis, *As Cities Rethink Single-Family Zoning, Traditional Ideas of the American Dream Are Challenged*, WASH. POST. (June 27, 2019, 6:30 AM), https://www.washingtonpost.com/realestate/as-cities-rethink-single-family-zoning-traditional-ideas-of-the-american-dream-are-challenged/2019/06/25/8312a512-4ca3-11e9-93d0-64dbcf38ba41_story.html [https://perma.cc/MH6Q-SKE3].

250. *See supra* note 52 and accompanying text; *see also, e.g.*, Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence From Greater Boston*, 65 J. URB. ECON. 265, 267 (2009) (discussing costs of zoning).

251. *See, e.g.*, David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 137 (2017).

252. Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), https://www.brookings.edu/research/reforming-land-use-regulations [https://perma.cc/2YL7-CR96].

year.[253] In an influential paper, economists Peter Ganong and Daniel Shoag blame zoning, arguing that the widespread proliferation of restrictive zoning and land-use regulations have prevented developers from meeting demand.[254] The result is underproduction of housing relative to demand, increased housing costs, and reduced access to thriving places. When supply is constrained, developers will not compete away the value to housing consumers of living in a successful area. In economic terms, land-use regulations restricting housing supply mean that the marginal economic benefits of living in a place are capitalized into housing costs.[255]

The prescription to this formulation of the problem is clear—increase housing supply in successful cities and decrease other regulatory barriers to entry.[256] For this reason, land-use regulations have become a leading target to create more mobility and more opportunities for workers to move to thriving places. This attack on restrictive zoning crosses political boundaries and has become a rallying cry on both the right and the left.[257]

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253. *See id.* ("Between 1880 and 1910, bustling Chicago's population grew by an average of 56,000 each year. Today, San Francisco is one of the great capitals of the information age, yet from 1980 to 2010, that city's population grew by only 4200 people per year.").

254. *See* Ganong & Shoag, *supra* note 37, at 86–88; Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Policy From the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 72–74 (2019) (attributing principal supply constraints in select California cities to zoning as opposed to state environmental review).

255. *See* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1678 (2013). Elsewhere, one of us provides the following illustration:

> [I]f living near mass transit allows residents to avoid owning a car, this may save them upwards of $7500 per year. Housing advocates have long argued for more transit-oriented development precisely on grounds that such housing will be more affordable, all things considered, because people living near mass transit will have lower transportation costs. However, if that financial benefit is fully capitalized into local property values, so that buyers or renters will have to pay an additional $7500 per year (or more) to live near mass transit, then those cost savings disappear.

Christopher Serkin, *Capitalization and Exclusionary Zoning*, *in* MEASURING THE EFFECTIVENESS OF REAL ESTATE REGULATION 15, 16 (Ronit Levine-Schnur ed. 2020) (citation omitted).

256. *See* Serkin, *supra* note 52, at 769 n.128 (collecting sources calling for relaxation of zoning regulations).

257. *See, e.g.*, Ilya Somin, Opinion, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST: VOLOKH CONSPIRACY (Dec. 5, 2015, 4:59 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning [https://perma.cc/WRS5-MJ5W]; *see also* Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 13 (2017) (describing the shrinking political divide).

Conservative opposition to zoning and land-use regulation is neither surprising nor new. It follows decades of broad conservative opposition to land-use regulations and is consistent with skepticism about regulatory interventions into private market transactions.[258] What is considerably more surprising is the extent to which the progressive left is increasingly on board with loosening zoning. The left has taken aim at "Not in My Back Yard" ("NIMBY") opposition to new development in order to increase housing supply and to promote affordability, especially in the urban core. They label exclusionary zoning "opportunity hoarding" and challenge density restrictions and antigrowth measures of all sorts.[259] In a recent comprehensive treatment, Professor Vicki Been observes that NIMBYism is no longer the exclusive domain of exclusionary suburbs but has invaded the

258. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 263–82 (1985) ("[Under l]and use regulation . . . [i]ll-defined rights replace well-defined ones, and transaction cost barriers are likely to exceed the gains that otherwise are obtainable from any shift in land use or ownership. Another negative-sum game."); Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 605–06 (1996) (describing conservative reliance on property to oppose regulations); John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 365–67 (1997) (characterizing the conservative perspective); Serkin, *supra* note 257, at 2–4. *See generally* BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972) (arguing that zoning fails to meet its own goals, and highlighting the nonzoning approach exemplified in Houston). Some iconoclastic conservative and libertarian voices have embraced regulatory reforms in the service of affordability. Professors Roderick Hills and David Schleicher, alone and together, have advocated for significantly liberalizing zoning laws, precisely to unlock development potential. *See* Schleicher, *supra* note 251, at 84–86; Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RSRV. L. REV. 81, 119–20 (2011) (proposing fair-share requirements to unlock development potential); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 129–33 (2015) (proposing tools for loosening zoning through planning). Professor Ilya Somin has also called for increased judicial oversight of local zoning through the Takings Clause. *See* Ilya Somin, *Expanding Housing and Job Opportunities by Cutting Back on Zoning*, WASH. POST: VOLOKH CONSPIRACY (June 20, 2017, 3:15 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/20/expanding-housing-and-job-opportunities-by-cutting-back-on-zoning [https://perma.cc/V4F2-ZPUL].

259. *See, e.g.*, RICHARD V. REEVES, DREAM HOARDERS 102–106 (2017) ("For the upper middle class, zoning and wealth reinforce each other in a virtuous cycle."); Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1655 (2016) (quoting Thomas Sugrue, *Diversity, Toleration, and Space in Metropolitan America*, SOC. SCI. RSCH. COUNCIL: CITIES PAPERS (July 23, 2014), http://citiespapers.ssrc.org/diversity-toleration-and-space-in-metropolitan-america [https://perma.cc/B8GV-VUQ3]). For an 8-bit cartoon demonstration of the phenomenon, see Carrie Engel, *Play the Dream Hoarders Game*, BROOKINGS (July 13, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game [https://perma.cc/SW86-G4QZ].

urban core, and she argues forcefully against it.[260] It is quickly becoming liberal orthodoxy, at least among academics and elite policymakers, to promote density by removing zoning restrictions.[261]

The attack on the density limits in traditional zoning has spread beyond academics and has taken root in policy circles,[262] as well as in the press.[263] It has also translated recently into some real changes in municipal zoning on the ground. The most striking examples to date are the efforts by Minneapolis and by the entire state of Oregon to eliminate single-family residential zones.[264] This is an extraordinary move. It builds upon the "Yes in My Backyard" ("YIMBY") movement in California, which has supported various reforms of density requirements throughout the state.[265] A California bill, SB 50, all but eliminates single-family zoning near mass transit and job centers.[266] San Francisco recently eliminated parking requirements for

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260. *See* Been, *supra* note 36, at 217–18, 229–30 (exploring increasing NIMBYism in cities and its resulting effect on urban housing costs).

261. *See, e.g.*, Anderson, *supra* note 63 ("Reducing the cost of housing in thriving regions, especially by removing density controls, is a critical step towards correcting the jobs-housing imbalance and allowing newcomers to these regions to capture and create economic growth."); *see also* Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 27–28 (2019) (reviewing economic literature and advocating for increasing housing supply).

262. *See* Jason Furman, Chairman, Council of Econ. Advisers, Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents 1 (Nov. 20, 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf [https://perma.cc/2VVX-JR4B] ("[E]xcessive or unnecessary land use or zoning regulations have consequences that go beyond the housing market to impede mobility and thus contribute to rising inequality and declining productivity growth.").

263. *See, e.g.*, Florida, *supra* note 1; Paul Krugman, Opinion, *Inequality and the City*, N.Y. TIMES (Nov. 30, 2015), https://nyti.ms/1Hzlkp8 [https://perma.cc/XS3R-CBMK] ("Yes, [zoning] is an issue on which you don't have to be a conservative to believe that we have too much regulation."); Matthew Yglesias, *You Can't Talk Housing Costs Without Talking About Zoning*, SLATE (Dec. 10, 2013, 8:50 AM), https://slate.com/business/2013/12/housing-costs-it-s-the-zoning-stupid.html [https://perma.cc/L2TB-7C4B].

264. *See, e.g.*, Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018, 4:48 PM), https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html [https://perma.cc/2N6P-GHMQ] (describing zoning change); Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning [https://perma.cc/TH4R-BGME].

265. *See* Benjamin Schneider, *YIMBYs Defeated as California's Transit Density Bill Stalls*, BLOOMBERG CITYLAB (Apr. 18, 2018, 12:55 PM), https://www.citylab.com/equity/2018/04/californias-transit-density-bill-stalls/558341 [https://perma.cc/LPQ5-UPBP].

266. *See, e.g.*, Liam Dillon, *California Could Bring Radical Change to Single-Family-Home Neighborhoods*, L.A. TIMES (May 13, 2019, 5:00 AM), https://www.latimes.com/politics/la-pol-ca-

some new development, significantly increasing permissible density.[267] Before that, the administration of New York City Mayor Bill de Blasio spearheaded a zoning change to remove mandatory parking spots for certain kinds of new development in order to increase density.[268] Though these examples individually represent relatively modest changes to a land-use regulatory landscape that continues to impose significant development restrictions, the trend toward relaxing density limits appears to be gaining steam.

2. *Critique of the Liberaltarian Consensus.* Stepping back, the focus of these efforts to combat geographic inequality has been on lowering barriers to enter the relatively small number of thriving and dynamic urban centers. These include primarily limiting or eliminating traditional density restrictions, but also dismantling occupational licensing and other regulations that interfere with geographic mobility.[269] The fix is focused on people, not places.[270] Providing more people with access to economic success is an admirable goal, but it essentially gives up on the notion of a more evenly distributed geography of opportunity, writing off struggling places by making it easier to escape from them.

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single-family-zoning-changes-senate-bill-50-legislation-20190513-story.html [https://perma.cc/XY3Q-RHKL] (describing the efforts).

267. *See* Joshua Sabatini, *Minimum Parking Requirements on Their Way Out in SF*, S.F. EXAMINER (Dec. 4, 2018, 12:00 AM), http://www.sfexaminer.com/minimum-parking-requirements-way-sf [https://perma.cc/7JDS-AYW6].

268. *See Zoning for Quality and Affordability*, NYC PLANNING, https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page [https://perma.cc/Y4YX-BPUB] (last updated June 22, 2016) (highlighting changes).

269. Other barriers include the lack of portability of benefits. *See* Schleicher, *supra* note 251, at 127 n.220; Robert C. Ellickson, *The Mediocrity of Government Subsidies to Mixed-Income Housing Projects*, *in* PROPERTY RIGHTS AND LAND POLICIES 418, 425–34 (Gregory K. Ingram & Yu-Hung Hong eds., 2009) (arguing for housing vouchers instead of public housing in part because of portability of benefits). Another target is professional licensing. *See* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1570 (2017) ("That occupational licensing goes too far, at the expense of consumers and entrepreneurs, has been a source of frequent and high-profile criticism from economists and policymakers for decades.").

270. Some people focus on both. *See* Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1, 6 (2009) ("Every policy that seeks to respond to the spatial concentration of poverty works through individuals.").

A recent report from the Brookings Institution is a stark example.[271] The authors divide their specific prescriptions into two sections: people-based and place-based.[272] As with other liberaltarian efforts, people-based proposals focus primarily on lowering barriers to exit or, as they put it, "restoring more geographical mobility to the labor market."[273] The goal is to provide economic opportunity to those who find themselves in "left-behind places."[274] The authors call for identifying "10 or so medium-sized metropolitan areas [that] would compete for major federal investment and designation as a Rising Tech Hub or federal 'tech pole.'"[275] Those ten places are then supposed to throw off benefits for their respective regions. But this still relegates most of the country—both mid-sized cities and rural areas—to the unfortunate category of perennially left behind.[276]

Indeed, mobility-focused, people-based strategies all suffer from a core set of problems. Fundamentally, they do not solve—but rather exacerbate—almost all of the pernicious consequences of geographic inequality described in Part I. Economists have shown that the deregulation of land-use controls in New York and California would shift people, jobs, and economic growth to superstar cities in those states and away from the Midwest, South, and Southwest.[277] The data also show that national deregulation would have the same effect.[278] Reviewing this work, Florida comments:

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271. *See* HENDRICKSON ET AL., GEOGRAPHY OF DISCONTENT, *supra* note 18, at 28 ("Policies that relax zoning restrictions will enable the construction of new housing units and bring down housing costs.").

272. *Id.* at 26–27 (labeling sections "A place-based approach: Connect opportunity to workers," and "A people-based approach: Connect workers to opportunity").

273. *Id.* at 27.

274. *See id.* at 27–29 (describing proposal).

275. *Id.* at 27.

276. At the very least, this goal of geographic mobility that encourages moving to a few superstar cities is in tension with the policies seeking to support the places that are left behind. *See, e.g.*, Nunn et al., *supra* note 25, at 38 (concluding that the problem of "disconnected economies with vastly different opportunities for economic advancement" within the United States is compounded by "a federal system that makes very different investments in local public goods depending on the resources of particular state and local governments").

277. *See* Kyle F. Herkenhoff, Lee E. Ohanian & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89, 103, 108 (2018).

278. *See id.* (evaluating nationwide distortions from land-use regulation and modeling how deregulation would result in more people moving to New York and California).

> Deregulating land use would make the most productive metros and states even more productive . . . . California and New York would be much better off, and have many more people and a greater share of economic output. But the gap between these few places and the rest of the country would be even wider than it already is.[279]

The proposed liberaltarian solutions may make it easier for people to leave low-performing areas, but there are limits to the number of people a city can accommodate, even in the absence of zoning. Regulations, after all, are not the only source of restrictions on housing supply. There are physical limits as well. Whereas buildings can (almost[280]) always grow taller, infrastructure limits impose meaningful constraints on density.[281] Cities typically develop with surplus capacity in infrastructure like roads, water, wastewater, parks, and so forth. But that surplus is not infinite, and density can outstrip what a city is able to handle.[282] Roads can only grow so big and are difficult to widen after they have been built; mass transit is difficult to retrofit in a developed city and can even be difficult to upgrade and repair.[283] Most American cities still have considerable room to grow—at least in most neighborhoods—but there are limits to increasing supply. In the end, there will always be people living in "left-behind" places. This means that economic and social costs will still manifest in those areas, in addition to the significant—and with the liberaltarian solution, increasing—distortions to representative democracy. By framing the problem narrowly in terms of mobility and the attendant solution of land-use reform, the liberaltarian approach does not address the full scope of and problems with geographic inequality.

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279. Richard Florida, *The Flip Side of NIMBY Zoning*, BLOOMBERG CITYLAB (Oct. 26, 2017, 8:54 AM), https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930 [https://perma.cc/K9U4-7559].

280. One hard limit on building height comes from the limits of elevators and the area that they consume in buildings. For a discussion of the relationship between elevators and building heights, see Nate Berg, *Is There a Limit to How Tall Buildings Can Get?*, BLOOMBERG CITYLAB (Aug. 16, 2012, 8:50 AM), https://www.citylab.com/design/2012/08/there-limit-how-tall-buildings-can-get/2963 [https://perma.cc/YNZ9-E7XF].

281. *See* Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 66–70 (2011); A. Dan Tarlock, *Toward a Revised Theory of Zoning*, *in* LAND USE CONTROLS ANNUAL 141, 150 n.26 (Frank S. Bangs, Jr. ed., 1972).

282. *See* Foster, *supra* note 281, at 58–61.

283. *See, e.g.*, Adam Pearce, *How 2 M.T.A. Decisions Pushed the Subway into Crisis*, N.Y. TIMES (May 9, 2018), https://nyti.ms/33coKeH [https://perma.cc/5HL7-3MXQ].

In addition to exacerbating geographic inequality, the liberaltarian approach is likely to disproportionately benefit—as well as harm—specific groups. Unsurprisingly, not all people are likely to move at the same rate. Data from the Federal Reserve on internal migration show that white people are more likely to move than Black people, those with greater educational attainment are more likely to move than those with less, and higher-income people are more likely to move than lower-income people.[284] Disproportionate effects tied to socioeconomic status appear in other ways as well. In opposite-sex couples, Professor Naomi Schoenbaum argues, "mobility brings lower levels of employment and income growth for wives" because husbands tend to be the drivers behind moving and women tend to be "trailing spouse[s]."[285] Schoenbaum also points out that families who rely on nonmarket caregivers for childcare, like grandparents, are less likely to move.[286] As a result, "[m]obility most jeopardizes this type of . . . support for precisely those low-wage persons . . . [that proponents of mobility think] should be moving more."[287]

The result is that the liberaltarian approach is likely to benefit white people of a higher socioeconomic status than other groups. Black people and people of a lower socioeconomic status are more likely to remain in left-behind places, along with all the attendant, negative consequences for their economic, social, and medical well-being. Zoning, of course, has pernicious distributive consequences of its own. The history of zoning is bound up with issues of race-based exclusion and the maintenance of de jure and de facto housing segregation.[288] There is no doubt that zoning and land-use regulations continue to promote segregated housing patterns.[289] But the pernicious

284. Raven Molloy, Christopher L. Smith & Abigail Wozniak, *Internal Migration in the United States*, 25 J. ECON. PERSPS. 173, 183 tbl.2 (2011).

285. Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J. F. 458, 471 (2017).

286. *Id.* at 469.

287. *Id.*

288. *See generally* Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910–1913*, 35 J. URB. HIST. 236 (2009) (describing "the first American effort to separate black and white neighborhoods by law"); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983) (same).

289. *See, e.g.*, Grabar, *supra* note 264 ("Single-family home zoning was devised as a legal way to keep black Americans and other minorities from moving into certain neighborhoods, and it still functions as an effective barrier today."); Elliot Kaufman, Opinion, *Housing Deregulation in*

distributional effects of increased mobility suggest complicated tradeoffs; deregulating land use is not necessarily the cure-all it is sometimes painted to be.

Even on its own terms, the liberaltarians' deregulatory solution raises challenges and produces costs that must also factor into any evaluation of the approach. Local governments use zoning and density limits to regulate the pace of community change.[290] Deregulating—or significantly relaxing zoning restrictions—would blunt that tool.[291] When people choose where to live, they are choosing not only a house or apartment but also a bundle of community characteristics that can include public services like schools, aesthetic qualities, social capital, and so forth.[292] Sudden or dramatic changes in community character

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Progressive Clothes, WALL ST. J. (Dec. 21, 2018, 6:34 PM), https://www.wsj.com/articles/housing-deregulation-in-progressive-clothes-11545435296 [https://perma.cc/ME9V-JT82] (same); Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 443 ("[E]ven facially race-neutral land use policies have contributed to racial segregation."); Robert C. Ellickson, Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin 9 (Jan. 14, 2020) (unpublished manuscript), https://ssrn.com/abstract=3472145 [https://perma.cc/P22S-MGBV] ("Exclusionary zoning, although hardly the exclusive cause of residential segregation by social class, certainly aggravates it.").

290. *See* Serkin, *supra* note 52, at 771–82; Eric H. Steele, *Participation and Rules—The Functioning of Zoning*, 11 AM. BAR FOUND. RES. J. 709, 710 (1986) ("[Z]oning has evolved into a mechanism that conserves and protects existing residential communities by moderating the pace of development and change.").

291. Traditional justifications for zoning focus on separating incompatible uses of land. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). Zoning reformers tend to focus on density limits and not on use restrictions, although contemporary rhetoric is often framed more broadly as an opposition to zoning itself (and the two can be difficult to disentangle). *See, e.g.*, Dan Bertolet, *Exclusionary Zoning Robs Our Cities of Their Best Qualities*, SIGHTLINE INST. (Apr. 20, 2016, 11:30 AM), https://www.sightline.org/2016/04/20/how-exclusionary-zoning-robs-our-cities-of-their-best-qualities [https://perma.cc/CMY6-F8B7] ("The height and density limits we impose on apartment buildings can also cause exclusion if they reduce the number of units that otherwise would have been built. In cities where lots of people want to live, less new housing means more upward pressure on prices."); Gillian B. White, *How Zoning Laws Exacerbate Inequality*, ATLANTIC (Nov. 23, 2015), https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360 [https://perma.cc/B83Y-RXRW] ("[Zoning] laws aren't only a nuisance to developers, they're also making inequality worse."); SEATTLE HOUS. AFFORDABILITY & LIVABILITY AGENDA, FINAL ADVISORY COMMITTEE RECOMMENDATIONS TO MAYOR EDWARD B. MURRAY AND THE SEATTLE CITY COUNCIL 25 (2015), http://murray.seattle.gov/wp-content/uploads/2015/07/HALA_Report_2015.pdf [https://perma.cc/9U36-M923] ("Seattle's zoning has roots in racial and class exclusion and remains among the largest obstacles to realizing the City's goals for equity and affordability." (footnote omitted)).

292. *See* LEE ANNE FENNELL, THE UNBOUNDED HOME 25 (2009) ("Buying a home means . . . buying a set of near neighbors, a neighborhood living environment, a particular degree

threaten to undermine those choices; the characteristics people thought they were selecting may rapidly disappear. In-place residents must then decide whether to live in a community that no longer satisfies their preferences or incur the costs of moving—in some cases, again.[293] Both responses are potentially burdensome. And pressures of community change on in-place residents are not limited to these relatively abstract welfarist concerns. Gentrification of low-income communities can displace long-term residents.[294] Zoning reduces all of those costs by limiting the pace and extent of community change over time.[295]

It is worth noting that dramatically unlocking density and its attendant changes to the community also raises problems for one of the fundamental theories of local political accountability. In his pioneering work, economist Charles Tiebout hypothesized that local governments will provide efficient levels of public services even in the absence of price signals because housing consumers vote with their feet.[296] According to his account—refined over decades in others' work[297]—people choose where to live based on the combination of property taxes and local "services," broadly defined, and will sort into places

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of proximity to points of interest such as one's workplace, a bundle of services and amenities provided by the local jurisdiction . . . and a political and social address.").

293. *See* Serkin, *supra* note 52, at 773 ("When people . . . remain in a place[] because of a certain set of characteristics, they will experience some disutility if those characteristics change. Of course, they could move to a place that is again more consistent with their preferences, but that imposes its own costs.").

294. *See, e.g.*, John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1285 (2020) (identifying "two key concerns expressed by residents of lower income urban neighborhoods facing new development: fear of displacement . . . and fear of significant change to neighborhood character").

295. *See* FENNELL, *supra* note 292, at 39 ("Land use controls . . . work as 'product stabilizers,' reducing the uncertainty associated with lengthy time horizons and fragmented, interdependent influences."). *See generally* Serkin, *supra* note 52 (focusing on the pace of change).

296. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–20 (1956).

297. *See generally* Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969) (evaluating Tiebout's model); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975) (developing a model "very much in the spirit of the well-known Tiebout Hypothesis" and responding to Oates, *supra*); James C. Dyer IV & Michael D. Maher, *Capitalization of Intrajurisdictional Differences in Local Tax Prices: Comment*, 69 AM. ECON REV. 481 (1979) (responding to Hamilton's modelling); Levon Barseghyan & Stephen Coate, *Property Taxation, Zoning, and Efficiency in a Dynamic Tiebout Model*, 8 AM. ECON. J.: ECON. POL'Y 1 (2016) (proposing a new "Tiebout model").

that best satisfy their individual preferences.[298] But this assumes relatively stable communities or costless movement between them. Instability in community character coupled with high costs of moving makes sorting more difficult and undermines the central feedback mechanism of foot-voting.[299]

Additionally, deregulating zoning density limits might not actually result in less land-use regulation because property owners often have a kind of substitute for public zoning regulations: suburban homeowners' associations ("HOAs"). If governments cannot satisfy housing consumers' land-use preferences for relative stability, homeowners may find an alternative in the private governance of HOAs. Housing consumers want the ability to control neighboring property. As journalist Richard Babcock put it decades ago, "No one is enthusiastic about zoning except the people."[300]

For most homeowners, a house or an apartment represents their single largest asset, and they demand protection for the value of that investment, as well as protection for the use value of their home.[301] Significant changes to the character of a community or neighborhood—including dramatically increased density—can interfere with those expectations, so people look for ways to control neighboring uses of property. If zoning cannot provide that stability, then homeowners may seek out *private* land-use controls, and they will often have to look to the suburbs to find them. The choice facing policymakers in the future, therefore, might not be between restrictive

298. *See, e.g.*, Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1073–74 (1983) (describing the sorting function in the Tiebout Hypothesis).

299. Though the Tiebout model, as extended by Oates and others, allows for heterogeneity of housing stock, it still requires stability over time. *See* Wallace E. Oates, *The Many Faces of the Tiebout Model*, *in* THE TIEBOUT MODEL AT FIFTY 21, 28 (William A. Fischel ed., 2006) ("So long as the distribution of types of housing is stable over time, the differentials in tax bills become capitalized into property values so that the basic Tiebout outcome is preserved.").

300. Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 227 (2014) (quoting RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 17 (1966)); *see also* Kevin Drum, *Zoning and Sprawl*, MOTHER JONES (Mar. 18, 2010), https://www.motherjones.com/kevin-drum/2010/03/zoning-and-sprawl [https://perma.cc/T8L5-4CZ7] ("[T]hese regulations aren't something that's been imposed by 'government.' They exist because people really, really, *really* want them.").

301. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 75 (2001) ("As a result of this enormous concentration of wealth in one asset, people who buy houses are more careful about it than almost any other episodic transaction . . . .").

and relaxed zoning in the urban core; it might end up being between public zoning regulations and private suburban ones.

Consider Houston, Texas—the most famous example of an American city without zoning.[302] Houston's lack of zoning is something of a canard, however. While it has no central, government-based comprehensive zoning, most development occurs in subdivisions that are governed by private HOA rules, rules that are often more restrictive than in any zoning ordinance.[303] This should not come as a surprise. People willingly give up some measure of freedom over their own property in exchange for the ability to regulate their neighbors' property.[304] This tradeoff is at the core of every HOA. If local governments cannot satisfy regulatory preferences for control over property, Houston is strong evidence that people will turn instead to private agreements like HOAs to create the community stability they want.

Some of the promise of deregulation is indeed on display in Texas's most populous city.[305] Housing prices have not increased in Houston at anywhere near the same pace as in other megacities, while population has grown dramatically.[306] But the effect of reliance on

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302. *See generally* Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970) (describing the Houston land-use regime).

303. Professor Bernard Siegan explains the scale of the patchwork of private rules:

> Officials in Houston estimate that there are 7,000 to 8,000 (perhaps as many as 10,000) individual subdivisions and separate sections of subdivisions each of which may be subject to restrictive covenants of varying kinds. There is general agreement that at one time or another the vast majority were probably subject to restrictive covenants and that most of these covenants are still in force.

Id. at 79; *see also* ALEXIUS MARCANO, MATTHEW FESTA & KYLE SHELTON, RICE UNIV. KINDER INST. FOR URBAN RSCH., DEVELOPING HOUSTON: LAND-USE REGULATION IN THE "UN-ZONED" CITY AND ITS OUTCOMES 3 (2017), https://kinder.rice.edu/sites/default/files/documents/UnzonedCity_0.pdf [https://perma.cc/A8P4-MPEK] ("Instead of a formal zoning code, though, Houston has created its own land development approach—one that mixes private and public mechanisms to control the form and function of buildings in specific areas."); John Mixon, *Four Land Use Vignettes from Unzoned(?) Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 166 (2010) (describing examples of private deed restrictions).

304. Though no one likes to be told what they can and cannot do on their own property, everyone wants to be able to tell their neighbors what they can and cannot do on their own property. *See* Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1078 (2019).

305. *See About Houston*, CITY OF HOUS., https://www.houstontx.gov/abouthouston/houstonfacts.html [https://perma.cc/MZP3-HJRZ] (last visited Mar. 9, 2021).

306. In a letter to then-Secretary of Housing and Urban Development Ben Carson, Policy Researcher Emily Hamilton lauded Houston's housing prices:

private land-use controls is also on prominent display: Houston has markedly less density and more sprawl than other places. According to the last census, Houston's population density is 266.1 housing units per square mile.[307] Compared with Miami at 437.9, Philadelphia at 531.2, Boston at 681.4, or New York at 3,223.8, Houston is much less dense.[308] More impressionistically, "As the nation's fourth most populous city, Houston is clearly an urban center, and yet, the lifestyle it provides is largely suburban."[309] By one measure, Houston has become less affordable than New York City, when factoring in transportation costs.[310]

Of course, the form of development in Houston is not replicable in many places, and while we cannot be certain how other locales will adapt, development pressure could push out toward the suburbs or otherwise result in more private land-use innovations as substitutes for the lack of zoning. It is an empirical question how much elasticity there is in demand for less regulated urban property as opposed to more regulated suburban property, and it is undoubtedly location specific. Significant changes in the density of many Manhattan neighborhoods might not push people out to New Jersey or Connecticut. But changes in Nashville might well push people out to its suburbs, like Franklin, which are already much nearer substitutes. At the very least, for people who advocate loosening zoning restrictions to increase density, Houston is a cautionary tale.

The resurgence of the suburbs and suburban HOAs would preserve all of the problems of regional inequality while creating

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> [I]n Houston, housing supply elasticity was 0.42 percent for the period of 1996 to 2016, well above the national average of 0.17 percent. During this period, the city's population increased by half a million people, but today the median Houston home price is $235,000. Households across a broad range of incomes can find housing that's affordable.

Letter from Emily Hamilton, Pol'y Rsch. Manager, State & Loc. Pol'y Project, Mercatus Ctr. at George Mason Univ., to Ben Carson, Sec'y, U.S. Dep't of Hous. & Urban Dev. (n.d.), https://www.mercatus.org/system/files/hamilton_-_pic_-_hud_housing_affordability_cover_letter_-_v1.pdf [https://perma.cc/UA52-HBNV].

307. *Metropolitan Area Census Data: Population and Housing Density*, CENSUS-CHARTS.COM, https://www.census-charts.com/Metropolitan/Density.html [https://perma.cc/NJS9-5VQ5].

308. *Id.*

309. Hilary Ybarra, *How Urban or Suburban Is Sprawling Houston?*, RICE UNIV. KINDER INST. FOR URB. RSCH. (Sept. 21, 2017), https://kinder.rice.edu/2017/09/21/how-urban-or-suburban-is-sprawling-houston [https://perma.cc/6MJ8-CTSM].

310. *Rent and Ride: Affordability Is About Both*, CITIZENS BUDGET COMM'N (Jan. 13, 2020), https://cbcny.org/research/rent-and-ride [https://perma.cc/A8SJ-VQDT].

additional ones as well. Conventional accounts suggest that HOAs "intensify social segregation, racism, and exclusionary land use practices."[311] The history of HOAs is inextricably bound up with whites-only communities seeking to exclude Black residents.[312] HOAs still tend to be more racially homogenous than the municipalities in which they are located.[313] Worse, there is some empirical evidence that the presence of HOAs exacerbates segregation in the rest of the municipality.[314] They also produce all of the problems that zoning opponents decry—restricting density, constraining supply, separating single-family residential building from other uses—while simultaneously being even less flexible than zoning.[315] If greatly reduced zoning in cities means that HOAs gain a new advantage in the competition for housing consumers, that could come with significant costs.

Ultimately, land-use deregulation may be an important part of the response to the affordability crisis in many cities, but it is not a complete response to geographic inequality more broadly. In fairness, most of its advocates do not intend it to be. But increasing access to superstar urban areas could result in a new equilibrium that

311. SETHA LOW, BEHIND THE GATES 11 (2003) (discussing gated residential communities). *See generally* EVAN MCKENZIE, PRIVATOPIA (1996) (analyzing HOAs).

312. *See, e.g.*, Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 74 (2010) ("The neighborhood homeowners' association formed the key centerpiece of White efforts to organize residential segregation.").

313. *See, e.g.*, TRACY M. GORDON, PLANNED DEVELOPMENTS IN CALIFORNIA: PRIVATE COMMUNITIES AND PUBLIC LIFE vii (2004), https://www.ppic.org/content/pubs/report/R_304TGR.pdf [https://perma.cc/UB87-GX26] ("Planned developments are less diverse with respect to race and ethnicity than other neighborhoods."); Elena Vesselinov, Matthew Cazessus & William Falk, *Gated Communities and Spatial Inequality*, 29 J. URB. AFFS. 109, 114 (2007) (citing literature supporting claim that gated communities, in particular, "remain largely homogeneous enclaves").

314. *See* Rachel Meltzer, *Do Homeowners Associations Affect Citywide Segregation? Evidence from Florida Municipalities*, 23 HOUS. POL'Y DEBATE 688, 705 (2013). Professor Rachel Meltzer explained:

> Results suggest that changes in the presence of HOAs do influence racial/ethnic segregation. Specifically, a 10% increase in the number of HOA units (approximately 240, based on the sample mean) can cause up to a 2% increase in the indexed level of black–white segregation and a 1% increase in the indexed level of Hispanic–white segregation (depending on the measure).

Id.

315. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1395 (1994) (describing covenants as providing "a stabilizing precommitment device against changing preferences"); *see also* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 768 (2010).

exacerbates the underlying problems of regional divergence. Moreover, it could create its own costs, reducing cities' ability to compete as effectively with nearby suburbs.

We are not opposed to zoning and land-use reforms. Indeed, we think there are opportunities to increase density and agree that NIMBYism can be socially oppressive. But we do intend to sound a cautionary note.

B. Place-Based Economics

Unlike liberaltarians, who seek to relocate individuals, some policymakers and economists have proposed adopting "place-based policies," which could help improve economic conditions in long-suffering areas. These policies come in two flavors—a narrow, centrist approach and a broader approach focused on reviving industrial policy.

1. *The Centrist Approach.* One of the more notable recent papers in the centrist vein comes from economists Benjamin Austin, Edward Glaeser, and Lawrence Summers.[316] Recognizing the link between geography and social problems, Austin, Glaeser, and Summers assess three possible reasons for place-based policies. The first is agglomeration economics—that colocating economic development might lead to further growth.[317] They note, however, that this does not justify "spatially heterogeneous" policies because "it is impossible to know whether a relocation of capital and labor from Los Angeles to Kentucky will lead to benefits in Kentucky that are large enough to offset the losses in Los Angeles."[318] Second, they consider "insuring against local shocks" as a justification.[319] But they dismiss this argument partly because it would distort migration and capitalization.[320] They conclude that the best argument for place-based policies is that market failures are better addressed at the local level, given both the diversity of economies across the country and the bang for the buck achieved in having a more focused approach.[321]

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316. *See* Austin et al., *supra* note 29, at 151.

317. *Id.* at 212.

318. *Id.* at 212–13.

319. *Id.* at 179.

320. *Id.* at 179–80.

321. *Id.* at 180; *see also id.* at 153 ("The most compelling case for place-based policies is that one-size-fits-all interventions are woefully inappropriate for regional economies as diverse as Appalachia and Silicon Valley.").

Austin, Glaeser, and Summers also offer a "taxonomy of place-based policies" that includes direct public investment, tax benefits for businesses and individuals, and deregulation.[322] They are lukewarm at best on public investment, including infrastructure spending because they worry that returns to contemporary infrastructure projects will be lower than the transformative infrastructure projects of the mid-twentieth century.[323] They also identify "regulatory relief"—but not affirmative regulatory policy—as a possible place-based policy.[324] This is surprising because, as we have shown, a wide variety of affirmative regulatory policies, such as antitrust, transportation, and communications, all have significant spatial consequences. Instead, the centrist position largely focuses on providing tax benefits to address employment. For example, Austin, Glaeser, and Summers suggest, among other things, "implicit taxes on housing vouchers and food stamps could be reduced for low-income workers from 30 percent to 20 percent in areas where employment is particularly responsive to the returns to working."[325]

Though we are not categorically opposed to using the tax code for achieving public policy goals, we are skeptical of the claim that targeted tax benefits, whether to corporations or individuals, should be the sole or even primary focus for place-based policies. First, it is not clear that giving corporations tax benefits is a good use of money, particularly when that money could instead be spent directly on improving the economy in those areas. Second, companies often value places that have social, physical, and economic infrastructure to support their operations—even if they don't offer the biggest tax benefits.[326] That Amazon initially chose to locate its new headquarters in New York and metropolitan Washington, D.C., over Memphis or Omaha is self-explanatory.[327] Third, at the individual level, making policy through the

322. *Id.* at 209.

323. *See id.* at 218–20.

324. *Id.* at 217.

325. *Id.* at 154.

326. For example, a number of "losing" cities offered Amazon more money than the "winning" areas for the company's new headquarters. Aaron Mak, *Here Are the Outrageous Incentives That Losing Cities Offered Amazon for HQ2*, SLATE (Nov. 14, 2018, 5:31 PM), https://slate.com/technology/2018/11/amazon-hq2-incredible-incentives-losing-cities-offered.html [https://perma.cc/GK6X-L5UQ].

327. *See* Jeffrey Dastin & David Shepardson, *Amazon Picks New York City, Washington D.C. Area for New Offices*, REUTERS (Nov. 13, 2018, 9:59 AM), https://reut.rs/2zPwLrM [https://perma.cc/N4PH-TKFK]; Alison Griswold, *A Nearly Complete List of the 238 Places that Bid for*

tax code is not ideal. Depending on how it is designed, individuals may have to figure out how to get the benefit—and remember to do so—at tax time.[328] If the tax benefit is a shift in rates, then it is unlikely to be salient to individuals and may have less of a stimulative effect.[329]

Fourth, the tax policy approach does not have the same political benefits that more direct forms of policy action might have. One of the great benefits of the New Deal–era place-based policies, like the Tennessee Valley Authority ("TVA"), the Works Progress Administration's programs, and Rural Electrification, was to show the general public that government was on their side, working for them and delivering important benefits to their region.[330] As Professor Suzanne Mettler argues in her book *The Submerged State*, hidden programs undermine democracy because they "obscure the role of the government and exaggerate that of the market, leaving citizens unaware of how power operates."[331] The Obama administration's tax cuts in the stimulus bill of 2009 are a good example of this phenomenon. They lowered taxes for some 95 percent of working Americans—but a year later, only 12 percent of Americans believed the Obama administration had lowered their taxes.[332] Place-based policies should be salient in order to maintain support for those policies.

More broadly, while they recognize the need for place-based policies, Austin, Glaeser, and Summers do not argue that geographic equality and inequality are a function of law and public policy. Even though they recognize that there is no longer regional convergence in incomes,[333] they do not provide an account of why regional inequality is growing beyond suggesting the possible influence of agglomeration

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Amazon's Next Headquarters, QUARTZ (Nov. 4, 2017), https://qz.com/1119945 [https://perma.cc/C6PJ-JY3K].

328. For a sharp critique, see Jack Meserve, *Keep It Simple and Take Credit*, DEMOCRACY: J. IDEAS (Feb. 3, 2017, 5:42 PM), https://democracyjournal.org/arguments/keep-it-simple-and-take-credit [https://perma.cc/BW5Z-5VJ2].

329. *See, e.g.*, MARK M. ZANDI, ASSESSING THE MACRO ECONOMIC IMPACT OF FISCAL STIMULUS 2008, at 3 tbl.1 (2008), https://www.economy.com/mark-zandi/documents/Stimulus-Impact-2008.pdf [https://perma.cc/79X5-MW8J] (comparing the fiscal stimulus effect on GDP of various policies and showing that tax benefits are consistently below infrastructure spending and social safety net spending).

330. *See* Meserve, *supra* note 328.

331. SUZANNE METTLER, THE SUBMERGED STATE 6 (2011).

332. *Id.* at 92.

333. *See* Austin et al., *supra* note 29, at 152.

economies. The problem is that the sites of economic growth are themselves partly dependent on public policy. To be fair, they do note the geographic effect of the creation of the TVA on the Tennessee economy and of land-grant colleges throughout the country.[334] But despite this admission, Austin, Glaeser, and Summers do not make the further generalization that deliberate public policies with targeted spatial effects were an important part of the era of economic convergence, even if not the sole factor driving convergence.

2. *The Return of Industrial Policy*. The admission that policy choices like land-grant colleges and the TVA have an impact on the economy suggests a second type of place-based economics—industrial policy. The idea of a geographically focused industrial policy is not a new one. During the New Deal, for example, the federal government sponsored public works projects and investments all across the country.[335] Economic studies show that these projects "increased consumption activity, attracted internal migration, reduced crime rates, and lowered several types of mortality."[336]

In recent years, policymakers on the right and left have proposed reviving a more deliberate, conscious industrial policy in America. Industrial policy involves government investment in sectors of the economy to boost growth, jobs, and the success of those sectors. In a 2019 report, Republican Senator Marco Rubio observed that industrial policy is always inevitable for a country: "The critical policy consideration, then, is not whether states should organize their economies, but how they should be organized."[337] He then argues that American economic policy should seek to "benefit working Americans and the[ir] families" recognizing that this view has geographic

334. Austin et al., *supra* note 29, at 209–10.

335. *See, e.g.*, *Map*, LIVING NEW DEAL, https://livingnewdeal.org/map [https://perma.cc/T8WC-GNFR] (mapping New Deal projects across the country).

336. Price V. Fishback, *How Successful Was the New Deal? The Microeconomic Impact of New Deal Spending and Lending Policies in the 1930s* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21925, 2016), https://www.nber.org/system/files/working_papers/w21925/w21925.pdf [https://perma.cc/68W8-4SH7] (providing an overview of the literature).

337. *See* U.S. S. COMM. ON SMALL BUS. & ENTREPRENEURSHIP, 116th Cong., MADE IN CHINA: 2025 AND THE FUTURE OF AMERICAN INDUSTRY 6 (2019), https://www.rubio.senate.gov/public/_cache/files/d1c6db46-1a68-481a-b96e-356c8100f1b7/3EDECA923DB439A8E884C6229A4C6003.02.12.19-final-sbc-project-mic2025-report.pdf [https://perma.cc/5YL7-UBF2].

implications.[338] "[M]anufacturing generally provides more stable employment than services," he writes, "and geographic proximity to large production facilities encourages small business dynamism."[339]

On the other side of the aisle, Democratic Senator Elizabeth Warren has proposed a plan for "economic patriotism" that includes heavy investment in research and development ("R&D") throughout the country.[340] "R&D investments must be spread across every region of the country, not focused on only a few coastal cities," she says.[341] "There are talented Americans in every part of the country, but too often cities and towns experience brain drain and shrink because corporations move jobs and opportunities overseas or to a small handful of American cities."[342] Economists Simon Johnson and Jonathan Gruber have identified 102 urban communities outside of the superstar cities that could be hubs for their "Jump-Starting America" plan.[343] Under their plan, the federal government would invest heavily in science, R&D, and commercialization of inventions in these areas that cumulatively represent 80 million Americans across thirty-six states and every region.[344]

The revival of a geographically mindful industrial policy is a far more promising approach to place-based economics than the centrist focus on tax policy for the reasons stated above; we spend less time on it because our focus in this Article is on policies that are generally considered regulatory in nature.

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The liberaltarian and the centrist approaches are both limited in their ability to address geographic inequality. They also largely ignore how deregulation contributed to the widening of geographic inequality in America. Given that regulatory choices invariably shape the distribution of wealth, what has been missing in the debate over

338. *See id.*

339. *Id.*

340. *See* Elizabeth Warren, *A Plan for Economic Patriotism*, MEDIUM (June 4, 2019), https://link.medium.com/ARrZ2Csc0cb [https://perma.cc/2YGT-RG43].

341. *Id.*

342. *Id.*

343. JONATHAN GRUBER & SIMON JOHNSON, JUMP-STARTING AMERICA app., at 231–42 (2019), *appendix available at 102 Places for Jump-Starting America*, JUMP-STARTING AM., https://www.jump-startingamerica.com/102-places-for-jumpstarting-america [https://perma.cc/ND8K-2ZQW].

344. *See id.* at 113–36.

geographic inequality is how regulatory policy could mitigate these growing divides. Part IV takes up this discussion.

IV. REGULATION AND REVITALIZATION

Part II documented numerous ways in which the Progressive Era and New Deal regulatory order in the United States promoted dispersion of economic activity and thereby encouraged geographic convergence in economic outcomes. The unraveling of this regulatory order around 1980 coincided with the end of convergence and the beginning of the era of widening geographic inequality. Federal regulatory policy, we contend, can profoundly affect the geography of economic growth and opportunity.

This Part sketches a preliminary path forward, describing several ways in which regulatory policy can respond to geographic inequality. These include reviving regulated industries and public options as well as incorporating geographic considerations into regulatory policymaking.

A. Reviving Regulated Industries and Public Options

Transportation and communications resources are part of the infrastructural foundation of economic growth and development. As we have seen, under the currently prevailing regulatory model, smaller communities and rural states must pay comparatively high prices to access these resources, if they have access at all. This is the logic of marginal-cost pricing, and it rewards concentration rather than dispersion of economic activity and business investment.

History shows that another regulatory model is theoretically available—the one that dominated federal regulation of long-distance transportation and communications industries for much of the twentieth century. The broad contours of this regulatory approach are clear. Its basic design components are rate regulation, service mandates, and entry restriction. Rate regulation allows internal cross-subsidies to be generated and allocated to less-dense regions. Service mandates, such as universal service requirements,[345] direct regulated firms to provide adequate service throughout their designated service areas. And entry restriction rules prevent opportunistic "cream

345. *See, e.g.*, Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 955–57 (1997).

skimming" in denser areas or routes, where prices are held above marginal cost. In essence, as Posner observed, the effect is to impose a tax on users in denser areas to subsidize users in sparser regions.[346]

As noted above, Senator Byrd in 1986 said he "would welcome the opportunity to vote for reregulation" of the airlines.[347] Even so, resurrecting and modernizing this mode of regulation would not be perfect or without tradeoffs. Specifically, rate regulation is cumbersome to administer and generates well-understood incentive problems for regulated firms, including incentives to engage in non-price competition and incentives to overinvest.[348] Entry restriction might hamper innovation,[349] and this regulatory model tends to suppress competition in favor of system integration and service mandates. These drawbacks are real.

But the current era of geographic inequality sheds new light on the countervailing benefits of this regulatory model—benefits that could be enormous but have been insufficiently appreciated or understood. Traditional infrastructure regulation can serve as a crucial counterweight to the economics of agglomeration by promoting dispersion of business investment and economic activity. This would benefit rural states and smaller communities by supporting economic growth and opportunity. It would also alleviate the affordability crisis in superstar cities because fewer people would be seeking to cram in. In short, regulatory tools could lessen our current, severe maldistribution of economic growth and opportunity.

True, similar results might theoretically be achievable through standard tax-and-transfer machinery. For example, the federal government could subsidize private infrastructure providers to offer reasonable-cost service in more remote areas. But in reality, such subsidies have a variety of downsides. They implicate many of the same informational and incentive problems that arise in traditional infrastructure regulation, and all taxation methods affect incentives and have implementation costs. As noted above, financing through cross-subsidies rather than through general revenues also removes these decisions from the ordinary appropriations and political process,

346. Posner, *supra* note 108, at 39–40.

347. 132 CONG. REC. 5107 (1986) (statement of Sen. Robert Byrd).

348. *See, e.g.*, Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1449, 1454–55 (Richard Schmalensee & Robert Willig eds., 1989).

349. *See* PAUL L. JOSKOW, DEREGULATION: WHERE DO WE GO FROM HERE? 6 (2009) (asserting that deregulation has resulted in "enhanced rates of product and process innovation").

sealing off infrastructure resources into self-sustaining *systems* with dedicated revenue streams. To the extent that dedicated cross-subsidies are more reliable than annual appropriations and less subject to political capture, they can promote efficient ex ante reliance on infrastructure resources. In particular, infrastructure-reliant businesses will invest more readily if they have more assurance that infrastructural systems will have staying power. Indeed, as one example of the challenge, compare subsidies to private providers of internet service with Chattanooga's public provision of broadband. Chattanooga wanted to offer its successful high-speed internet to surrounding areas,[350] only to have the state preempt local expansion of the service.[351] The state then chose to offer $45 million in subsidies to Comcast and AT&T to provide 10 Mbps download speed internet, which is 1,000 times slower than what Chattanooga could have provided without subsidies.[352]

Instead of subsidizing private providers, the direct public provision of goods and services, particularly infrastructural goods and services, can provide considerable benefits to underserved areas. The postal system adopted free delivery for rural customers in the Populist Era and Parcel Post in the Progressive Era.[353] The New Dealers pursued rural electrification and the TVA. Creating the interstate highway system was a major public-sector initiative of the mid-twentieth century.[354] Each of these policies involved public action to expand access geographically to a basic good of modern life. Today, the closest analogy is to high-speed internet. As the Chattanooga example shows, access to high-speed internet can be a boon to a mid-

350. *See supra* notes 170–72 and accompanying text.

351. Lauren C. Williams, *Rural Tennesseans Could Have Gotten Free Internet but Their Legislators Shut It Down*, THINKPROGRESS (Apr. 17, 2017, 5:57 PM), https://archive.thinkprogress.org/rural-tennesseans-internet-government-5853341d3c0c/ [https://perma.cc/UWK7-EWQM].

352. *Id.*

353. *See* WINIFRED GALLAGHER, HOW THE POST OFFICE CREATED AMERICA 207 (2016). Journalist Winifred Gallagher noted that, with the advent of Parcel Post in 1913,

> Sears's orders quintupled during the first year. Suddenly, rural Americans who needed a new bed or table, dress or shirt, didn't have to overpay or make it themselves; moreover, they could have the same model as residents of Boston or Chicago . . . . [T]he post had become the greatest distributing organization on earth.

Id.

354. Celebrating 50 Years: The Eisenhower Interstate Highway System: Hearing Before the H. Subcomm. on Highways, Transit, & Pipelines of the H. Comm. on Transp. & Infrastructure, 109th Cong. 29–33 (2006) (statement of J. Richard Capka, Administrator, Federal Highway Administration).

sized community and its surrounding region—and, unsurprisingly, is extremely popular across the political spectrum.[355]

A public option for high-speed internet, and public options for other goods and services, can serve as an alternative to sectoral economic regulation.[356] Direct government provision that coexists with the marketplace expands access to important social goods, particularly infrastructural goods. But it does so without regulating private sector rates and entry. Instead, the public option offers an alternative to a private option—and, for some populations, may offer the only affordable option. In any case, public provision can help address geographic inequality between rural and urban areas and between superstar cities and mid-sized cities. And, at the very least, the federal government could preempt states from blocking local efforts to experiment with the provision of public options like municipal broadband.[357]

Finally, as Professor K. Sabeel Rahman demonstrates, the provision of infrastructural goods plays an important role in guaranteeing equality and opportunity across racial lines because it minimizes bureaucratic barriers, privatization, and fragmentation of these goods.[358] Bureaucratic barriers make it harder for people to access public goods.[359] Privatization, Rahman argues, "transfers the financing and control of these goods from public hands to private operators and financial investors, introducing problematic revenue-

355. For a discussion of the popularity of expanding internet access across the political spectrum, see Sean McElwee, Ganesh Sitaraman & Jon Green, *Why Democrats Should Embrace 'Internet for All,'* NATION (Aug. 1, 2018), https://www.thenation.com/article/archive/democrats-embrace-internet [https://perma.cc/6UJ4-Z9CU].

356. *See* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 3 (2019) ("[T]he public option is often attractive because it offers a high-quality service for a reasonable price. But it is an option, competing directly with other options provided by the private market—a form of competition that can be beneficial to both the public and the private realm.").

357. *See, e.g.*, Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1172 (2018) (describing the problem of preemption in the context of broadband services). *See generally* RICHARD BRIFFAULT, NESTOR DAVIDSON, PAUL A. DILLER, OLATUNDE JOHNSON & RICHARD C. SCHRAGGER, THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND (2017), https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf [https://perma.cc/3D2U-4C4Q] (describing state preemption of local initiatives).

358. *See* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2447, 2468 (2018).

359. *Id.* at 2452.

generating incentives and shrouding the goods from greater public accountability."[360] Meanwhile, fragmentation "limits putative equal access regimes through decentralization," which ultimately denies access to some communities.[361] A revival of the regulated industries and public option models could therefore help advance racial equality in addition to geographic equality.

B. Incorporating Geographic Considerations into Regulatory Policy

In antitrust, trade, and regulatory policy more broadly, both ideological and technical reforms could be helpful. The Chicago School approach that has dominated antitrust since the late 1970s has the effect of exacerbating geographic inequality. The go-go liberalization approach to trade policy has been similar. Though the obvious solution is to jettison or temper the ideologies undergirding the approach to these sectors, in the meantime, an additional, narrower option would be to incorporate geographic inequality into the analysis in these and other areas of policy.

First, in trade policy, Congress could amend the law to require the ITC to assess the geographic impact of proposed trade agreements. The ITC already conducts studies of proposed agreements' economic impacts across sectors.[362] Adding a geographic component would help Congress understand the full consequences of the agreement. The resulting data would also create political pressure to adopt more effective mitigation measures for the areas hardest hit by trade agreements.

Second, and more broadly, the president could issue an executive order requiring all agencies to consider the geographic impact of their regulatory choices. Currently, executive branch agencies consider a variety of impacts when explaining their regulatory choices as part of the notice-and-comment rulemaking process. For example, they are required to consider the impact on federalism,[363] and some are even required to consult a panel of small businesses to evaluate the impact

360. *Id.*

361. *Id.*

362. *See supra* notes 202–04 and accompanying text.

363. *See* Federalism, Exec. Order No. 13,132, 3 C.F.R. at 206, 207 (2000), *reprinted in* 5 U.S.C. § 601 note at 828 (2018).

on those entities.[364] President Barack Obama issued an executive order asking agencies to consider actions they could take to promote competitive markets, though the order did not require doing so in rulemakings.[365] Congress could pass a law, or a president could issue an executive order, requiring agencies to take into account the geographic impact of their regulatory actions, including during rulemaking.

An executive order to this effect would have two consequences. First, agencies would have to consider the geographic consequences of their actions ex ante and make the determination that its actions are beneficial, even in spite of geographic costs. This process might lead to agencies making different policy choices. Second, the agency's analysis and decision would create various ex post consequences. Regulated entities could challenge the agency's analysis and conclusions as arbitrary and capricious. Members of Congress would have a foothold for agency oversight on the issue. And both members of Congress and other agencies could look for ways to mitigate the negative consequences of regulatory actions with significant geographic impacts.

Lastly, and most aspirationally, shining light on the policy drivers of regional inequality should open a debate about potential policy responses more broadly. This requires, first and foremost, jettisoning the casual and false assumption that regional inequality is the result of exogenous economic forces that land-use regulations must accommodate. Policy choices have helped drive the concentration of economic opportunity, and yet policymakers have been largely let off the hook. There is little political pressure on government to respond, and the pressure has been almost entirely directed—or misdirected—at local governments for their protectionist land-use policies. The fact is, currently left-behind places have the political power in Congress to champion policies that will spread economic opportunity more broadly. Elevating the effects of federal policies on geographic inequality should increase the political temperature for members of Congress who fail to account for these consequences.

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364. *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, sec. 222, § 30(c), 110 Stat. 857, 861 (codified as 15 U.S.C. § 657(c) (2018)).

365. Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, Exec. Order No. 13,725, 3 C.F.R. 452, 452–53 (2017), *reprinted in* 5 U.S.C. § 601 note at 842–43.

CONCLUSION

Geographic inequality is widely understood as one of the central economic, social, and political challenges of our time. But the debate around its causes and remedies has largely left out the role that regulatory policy has played. Geographic inequality, like economic inequality more broadly, is a function of public policy choices. As we have shown, many areas of federal regulatory policy—transportation, communications, trade, and antitrust among them—once accounted for the geographic distribution of economic opportunities through their design, procedures, or effects. The turn to deregulation in these areas has, unsurprisingly, been accompanied by geographic divergence. Recognizing the central role of law and policy in shaping geographic inequality is the first step to addressing it.